The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority

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Keywords

WTO, judicial review, national autonomy, sovereignty, constitutional change, supranationalism, legitimacy, economic integration, risk regulation, law, political science

Abstract

Dispute settlement in the WTO is a sensitive issue and subject to a lively debate among trade scholars and engaged citizens. It is the purpose of this paper to focus on one particular aspect of judicial review within the WTO: the standard of review. This legal concept determines how much deference international adjudicators should give to the national fact-finding and to legal determinations. In other words, it reflects the relationship between supranational adjudication and national sovereignty. The paper will, firstly, analyse the standard of review's legal basis and the relevant case law. Next, a broad contextual discussion will explore the full significance of the standard of review within the global trading regime: it will be argued that the standard of review is an important "constitutional" feature of WTO law, framing and limiting the exercise of national sovereignty as well as judicial power. Furthermore, the standard of review plays a crucial role in resolving disputes involving sensitive non-economic (national) policies within the WTO system. Ultimately, this paper is concerned with the important issue of strengthening the legitimacy of the dispute settlement system, and a possible role for the standard of review herein. For this purpose, the author argues for a strong proceduralist bias for the standard of review, which could include a so-called "deliberation test".

Kurzfassung

Streitbeilegung innerhalb der WTO ist ein sensibles Thema und Gegenstand einer intensiven Debatte in Wissenschaft und Öffentlichkeit. Die vorliegende Arbeit konzentriert sich auf einen Aspekt der richterlichen Kontrolle innerhalb der WTO: den "Standard of review". Dieses rechtliche Instrument bestimmt, wie stark internationale Richter an nationalstaatliche Tatsachenfeststellungen und rechtliche Beurteilungen gebunden sind. Anders ausgedrückt, der Standard of review widerspiegelt das Verhältnis von supranationaler Gerichtsbarkeit und nationaler Souveränität. Die vorliegende Arbeit beginnt mit einer Darstellung der rechtlichen Grundlagen sowie der relevanten Rechtsprechung zum Standard of review. Anschließend wird die gesamtheitliche Bedeutung des Standard of review im Kontext des Welthandelsregimes erörtert: Eine Kernaussage ist, dass der Standard of review ein wichtiges Element der "Verfassungsstruktur" der WTO darstellt, indem er der Ausübung nationaler Souveränität sowie richterlicher Gewalt Schranken setzt. Darüber hinaus nimmt der Standard of review auch eine Schlüsselstellung ein, wenn es gilt jene Konflikte zu lösen, die sensible, nicht-ökonomische Politiken auf nationalstaatlicher Ebene betreffen. Letztlich wird erörtert, inwieweit die Legitimation des Streitbeilegungssystems gestärkt werden kann, und ob der Standard of review hierzu einen Beitrag zu leisten vermag. Vor diesem Hintergrund vertritt der Autor der vorliegenden Arbeit eine starke prozedurale Ausrichtung des Standard of Review, was auch die Einführung eines sogenannten "deliberation test" beinhaltet.

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1 Introduction

The standard of review is often regarded as a key feature in the law (and policy) of the World Trade Organization (WTO). It appears to be a rather "technical" procedural legal concept. In fact, the standard of review raises many significant questions involving the relationship between the WTO and its sovereign member states. In attempting to clarify some of these issues, the scope of this work is twofold: first, to introduce – de lege lata – the concept of standard of review in WTO law, analysing the relevant case law (Part 2). Second, to place this concept of judicial review in a broader context, giving a fuller account of the overall importance of the standard of review (Part 3). For this purpose, I will explore the impact on national sovereignty and the division of power (Part 3.1), on the highly controversial judicial trade-offs between free trade and other societal values (Part 3.2) and, finally, on the legitimacy of supranational adjudication (Part 3.3). These three far-reaching topics are closely related to and in constant interaction with the standard of review. Since the case law remains very vague on this concept, the full significance of the standard of review in WTO law will be explored through a broad contextual analysis. It is by the elaboration of a conceptual framework that this case law can be best developed.

In this paper I will suggest a strong proceduralist bias for the standard of review. It should be

particularly concerned with promoting due process rights, transparency and public deliberation. For this purpose, I will propose a so-called *deliberation test* underlying the concept of standard of review. This test may lead to a more deferential treatment of well-founded, rational policy choices and less deference in the absence of suitable public deliberation. By offering a new understanding of the standard of review, my solution may contribute to an overall strengthening of the dispute settlement system's legitimacy.

Having indicated what I intend to do, I should briefly mention what will not be the subject of this work: a different set of questions relates to the standard of review applicable within the dispute settlement system of the WTO. This *internal* standard of review is the Appellate Body's review of questions of law and legal interpretation developed by the panels.(1) It concerns the internal distribution of competences between the two judicial bodies. This is opposed to the *external* standard of review that relates to the distribution of power between the supranational dispute settlement system and member states. I will not deal with this other concept of internal review for the present purpose of discussing the external standard of review.

2 A Legal Analysis of the Standard of Review in WTO Law

2.1 Introductory Remarks and Definitions

Determining the standard of review is a live issue in various national and international legal systems. Given its extensive use, it is necessary to provide a preliminary delineation and to look at the main concepts underlying the standard of review. Two trade scholars offer a comprehensive and concise introduction to this paper's *problématique* which reads as follows:

> "The issue of standard of review arises where a panel is examining the domestic law of a Member as interpreted by domestic authorities and tribunals to determine whether the law, or the actions of those authorities and tribunals (including fact-finding), or both are in compliance with provisions of the covered agreements."(2)

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Another group of authors offers a similar perspective:

> "The issue arises when the panel must review a national statute or administrative action where the issue is whether a specified standard contained in the GATT rules has been met."(3)

A third view, this time from the American perspective of judicial review of national administrative acts, is provided by Thomas Merrill, who describes the possible scope for the standard of review as ranging between two extremes:

> "At one pole, courts ignore the administrative view. … At the other pole, courts frame the inquiry in terms of whether the administrative interpretation is one that a reasonable interpreter might embrace. In this 'deference' mode, a court implicitly acknowledges that the statute is susceptible to multiple readings."(4)

Anticipating the more detailed discussion below, these three statements outline the law and facts dichotomy contained in the concept of standard of review. Whenever national measures are subject to judicial review, WTO panels scrutinize both the factual findings and the legal interpretation of these facts by member states' authorities. As far as case law and scholarly discussion are concerned,

there is sometimes a lack of a systematic approach towards, or a clear-cut borderline between, these two separate areas.

A brief example helps to illustrate these different aspects of the standard of review. National authorities frequently decide to ban products from the markets because they allegedly endanger human health. A different country could subsequently initiate judicial review of this ban before an international tribunal by arguing that the measure is protectionist, violates international agreements or intends to favour national products. The tribunal's investigation will then give rise to the question of the appropriate standard of review applied to the case, i.e. how much deference the adjudicating body should give to the national fact-finding and legal interpretation. Judges could be completely free to conduct their own investigation (in particular as regards the factual basis of the case) and come to other conclusions than the national authorities. Alternatively, they could be obliged to rely on the determinations made by the national authorities and simply review the conformity to procedural requirements.

These alternatives not only highlight the technical nature of the standard of review, but also raise some fundamental legal and political issues. Are international courts competent, and should they be allowed, to "second-guess" determinations made by national governments? Furthermore, who is the ultimate arbiter in trade disputes between sovereign states? The standard of review generally deals with the allocation of power between the national and international level and the scope (or limits) of national sovereignty imposed by international regimes.(5) These questions will be considered throughout this work and, in particular, in Part 3 below.

2.2 The Evolution of the Standard of Review in WTO Law

2.2.1 Historical Perspective

As the GATT system has become increasingly legalized,(6) the concept of standard of review has attracted more attention as a touchstone for balancing the relationship between (national) sovereignty concepts and the GATT/WTO rules based system.(7) The GATT contained no express provision related to the standard of review, and only a few panel decisions dealt with this issue.(8) This was to change. During the Uruguay Round negotiations, the appropriate standard of review in WTO law was hotly disputed, and its political implications and additional national economic considerations became apparent. Different concepts of standard of review were suggested: the most explicit, favoured by some states (notably the US)(9), was an approach imposing constraints on panels whenever they investigate the determinations made by national governments.(10) This so-called *reasonableness standard* should provide for deference to governmental decisions as long as they reasonably interpret (and act in accordance with) the agreements.(11) Many nations opposed the reasonable standard. It would, in their view, impose too many constraints on the panels and undermine the consistency of GATT/WTO law by granting the national administrations a very wide margin of discretion to develop their particular approach *vis-à-vis* international obligations.(12) The dispute was not resolved during the negotiation process.

As a result of this political failure, the WTO Agreements remain silent on the proper standard of review – the only exception is Art. 17.6 Anti-Dumping Agreement (ADA)(13) which explicitly provides for a particular (deferential) standard of review to be applied in anti-dumping procedures.(14) In 1996, Professor Jackson argued that Art. 3.2 DSU(15) could eventually serve as a legal basis for a general standard of review in WTO law.(16) However, the Appellate Body, when construing such a standard of review in the *Hormones* case, referred to Art. 11 DSU rather than Art. 3.2 DSU.(17) This example indicates the vagueness of WTO provisions – a leading scholar in the field and the

Appellate Body argue for different bases of the proper standard of review. Since the task of defining the standard of review in WTO law was left to the process of judicial lawmaking, the next part discusses the Appellate Body's first landmark decision and a few other subsequent cases.

2.2.2 The Hormones Case

The *Hormones* case(18) provided an opportunity for the Appellate Body to interpret the WTO Agreements and to define a specific standard of review. The European Communities had prohibited its beef being treated with growth hormones since the 1980s. The dispute arose because the EC had also banned the import of hormone-fed beef (mainly originating from the US and Canada) on its territory. The ban was based on concerns about the meat's negative effects on consumer health. The US and Canada challenged the import ban on the grounds that the EU provided no scientific evidence for the danger resulting from the consumption of hormone-fed beef, which was allegedly a violation of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Subsequently, two WTO panels were established and both reports, being very similar, found a violation of the SPS Agreement by the EC.(19) The Appellate Body, in general, upheld the panels' conclusions.

On appeal, the EC submitted that the panels had "erred in law by not according *deference* to … [certain] aspects of the EC measures"(20), in particular to apply a higher level of sanitary protection and to invoke the precautionary principle. According to the EC, the panels should have adopted a "deferential 'reasonableness' standard"(21) instead of imposing its own judgement of the scientific evidence in question ("*de novo* review").(22) Especially in highly complex factual situations (e.g. relating to a risk for human health), the EC argued, panels need to defer to the decision of a member state's relevant authorities and not to second-guess their scientific justifications.

In its submissions the US rejected the EC arguments for their lack of a proper basis in the DSU or the SPS Agreement. Panels should, according to the US, rather investigate whether a measure is "based on"(23) risk assessment. This approach does not require panels to conduct their own risk assessment but to evaluate whether the evidence submitted constitutes a satisfactory basis for the measure. However, the US agreed with the EC that panels are not allowed to conduct a *de novo* review, although nothing requires panels to simply defer to member states' determinations.(24)

The Appellate Body rejected the view of the EC. In its analysis the Appellate Body pointed out that the SPS Agreement remains silent on the concept of standard of review.(25) Subsequently, the Appellate Body discussed the two potential alternatives for an appropriate standard of review in WTO proceedings. First, a *de novo* review that would give the panel the complete freedom to come to different conclusions than the authorities in a member state. Second, a *deference standard,* according to which panels should not undertake afresh the member state's investigations and should be limited only to examining whether the procedural rules laid down in the WTO Agreements had been followed.(26) In a cautionary manner, mainly basing the reasoning on the principle of treaty interpretation in customary international law(27), but with important implications, the Appellate Body stated as follows:

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> "The standard of review … must reflect the *balance* established in that [SPS] Agreement between the jurisdictional competences *conceded* by the Members to the WTO and the jurisdictional competences *retained* by the Members for themselves. To adopt a standard of review not clearly rooted in the text of the SPS Agreement itself, may well amount to changing that finely drawn balance; and neither a panel not the Appellate Body is authorized to do that."(28)

Interestingly, the Appellate Body referred to one provision in the WTO Agreements that defines the appropriate standard of review: Art. 11 DSU. This article, drafted "with great succinctness but with sufficient clarity"(29), is relevant in respect of both the factual determinations(30) and legal interpretations(31) adopted by national authorities. Applying Art. 11 DSU, the Appellate Body dismissed a *de novo* review as well as "total deference".(32) It declared the proper standard of review to be the "objective assessment" of Art. 11 DSU. The relevant words of this provision read as follows:

> "[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."(33)

In its reasoning, the Appellate Body closely followed the *Underwear* panel report(34) (1997), that had – for the first time – identified Art. 11 DSU as legal basis for the standard of review. The case deals with a dispute under the Agreement on Textiles and Clothing (ATC). The ATC – like the SPS Agreement – does not establish a standard of review. Concluding that Art. 11 DSU provides for an appropriate standard of review, the panel pronounced that its review should neither completely substitute the national determinations (*de novo* review), nor totally defer to the member states' findings.(35) Applying an "objective assessment test", the *Underwear* panel provided a more precise meaning for Art. 11 DSU. The panel asked whether the national authorities (1) had examined all the relevant facts before it, (2) had given an adequate explanation of how the facts supported the determinations and (3) whether the determination made was consistent with the international obligations of the member state.(36)

What are the implications derived from the interpretation of Art. 11 DSU in the *Hormones* case? Initially, the judges were well aware of the difficulties concerning the formulation of a general standard of review. Having the nature of WTO rules as international agreements in mind, the Appellate Body decided not to engage in judicial activism that would impose more onerous constraints on member states than these had foreseen in their agreements.(37) The carefully negotiated balance of power between the WTO and its member states should not be altered and a different standard of review could have resulted in such a shift to either side. The "objective assessment" criterion provides only vague guidance as to what degree panels are allowed to examine national determinations. Robert Howse, for example, has argued that the standard of review will strongly rely on the institutional sensitivity exercised by the panels. Depending on the national institution's credibility and competence, panels will have to evaluate their determinations on a case-by-case basis.(38) Compared to the context of EU law, this appears to be of particular relevance: Natalie McNelis, contrasting the standards of review within the EU and the WTO, suggests that different actors before the ECJ enjoy varying "degrees" of credibility in the eyes of the judges.(39) Whereas the ECJ, generally, seems to "trust" the European Commission as a guardian of the Common market, member states' actions (especially those restricting the internal market freedoms) are regarded with much more suspicion. This attitude towards member states is likely to be rooted in the latter's inclination sometimes to favour trade restrictions over market freedom. A parallel for the relationship between the WTO panels and the Appellate Body *vis-à-vis* member states could therefore be drawn from the ECJ judging the EU member states rather than judging the Commission. Such a comparison is, however, to be treated carefully, due to substantial differences between the two international organisations.(40)

The *Hormones* judgment reveals that the Appellate Body rejected the panel's activism in relation to its fact-finding powers. Panels are, according to the Appellate Body, not allowed to substitute their own judgement of the facts for that of the national authorities. Reading the *Hormones* report literally,

(41) it is obvious that the Appellate Body rejected a "*de novo* review" as well as "*total* deference" to the findings of the national authorities. Regardless of some uncertainty about the judgment's precise meaning, it might be argued that (simple) *deference* is not excluded.(42) This means whenever doubts about the correctness of the national fact-finding arise, the panel may, if necessary, undertake its own investigation and is not simply bound to a procedural review. On the other hand, a panel shall not "second-guess" the outcome of the national determinations, i.e. substitute them with its own judgement.(43)

In a broader context, far-reaching political consequences are derived from the Hormones case. It led to a subtle change in the institutional (and, as will be argued below, constitutional) structure and the balance of power within the WTO. Member states are now always (potentially) subject to scrutiny by international judges. In general, national authorities cannot, without credible factual basis, legally sustain their decisions on trade regulation.(44)

2.3 Subsequent Case Law

This part briefly discusses two recent cases in which the Appellate Body affirmed the standard of review as developed in the Hormones case. Looking at the criteria in *Footwear* (2000)(45) and *Wheat Gluten* (2001)(46), we will gain a more precise insight into the concept of standard of review in WTO law.

In *Footwear* the Appellate Body overruled the panel in clarifying that Art. 11 DSU is the only standard of review for all WTO Agreements, apart from the particular provision in Art. 17.6 ADA. (47) Nonetheless, both the panel and the Appellate Body concluded that it is inappropriate for panels to engage in a *de novo* review and to substitute their judgement for that of the national authorities – panels are required to make an "objective assessment" according to Art. 11 DSU. (48) The Appellate Body, repeating its reasoning in the *Hormones* case, directly referred to the criteria developed in the *Underwear* panel report,(49) mentioned above. By clarifying the *Hormones* jurisprudence through the incorporation of the *Underwear* three-step test (consideration of the relevant facts, adequate explanation and consistency of the measure with international agreements), the Appellate Body gave more precise guidance as to the application of Art. 11 DSU in concrete cases.

In addition, *Wheat Gluten* illustrates how the Appellate Body applied Art. 11 DSU to complex factual determinations. The US had imposed safeguard measures on imports of wheat gluten, which were subsequently contested by the EU. The panel, pursuant to its duty under Art. 11 DSU, examined whether the US authorities (in accordance with the Agreement on Safeguards) had considered all relevant facts, had established the existence of a causal link and had given a reasoned and reasonable explanation of how the facts supported the safeguard measures.(50) Appealing the panel's conclusions concerning Art. 11 DSU, the EC claimed, *inter alia*, that the US had failed to explain how certain facts supported the determinations made by the US authorities. Furthermore, the EC argued that the panel had violated its duty under Art. 11 DSU because the evidence (in this case the US authority's report) provided no objective basis for the panel's conclusion that there was sufficient explanation.(51)

The panel found that the US report provided adequate explanation but this finding was only possible after the US had clarified some of the report's reasoning during the panel procedure. Therefore, agreeing with the appellant, the Appellate Body concluded that

> "by reaching a conclusion regarding the USITC [US International Trade Commission] Report, which relied so heavily on supplementary information provided by the United States during the Panel proceedings – information not contained in the USITC Report – the Panel applied a standard of review which falls short of what is required by Article 11 of the DSU."(52)

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This harsh judgement, namely that the panel had violated Art. 11 DSU, indicates the Appellate Body's determination to apply a strict standard when panels review highly complex economic determinations of national authorities. Contrary to the panel, which was satisfied with *ex post* clarifications by the US during the panel proceedings, the Appellate Body required the determinations to be based on adequate and sufficient explanations in the original document. Concluding, one notes the Appellate Body's attempt to compensate for the absence of a full *de novo* review with a strict procedural framework imposed on national authorities – in *Wheat Gluten* the duty to provide a comprehensive *ex ante* reasoning within the original USITC report.

2.4 An Exceptional Provision: Art. 17.6 Anti-Dumping Agreement

Art. 17.6 ADA contains a specific standard of review applicable in anti-dumping proceedings. I will therefore briefly contrast Art. 17.6 ADA, the only precise guideline in WTO law, with the vague, general standard of review contained in Art. 11 DSU.

During the negotiations leading to the ADA, Art. 17.6 was heavily disputed and the final version could only be reached during the last night of negotiations.(53) The member states then took a Ministerial Decision which declared that Art. 17.6 ADA should be reviewed after three years, in particular to evaluate whether it is capable of a general application in all dispute settlement proceedings.(54) To date, no review procedure has taken place, which means that Art. 17.6 ADA is still to be applied solely in anti-dumping proceedings.

Art. 17.6 ADA deals with two different aspects of judicial review: the review of factual determinations made by national authorities and the interpretation of the relevant international agreement. With respect to the *factual* analysis, Art. 17.6 (i)(55) requires a panel to defer to the conclusions of national authorities(56) as long as the facts were (1) established properly and (2) their evaluation was unbiased and objective. In this case the panel is prohibited from overturning the national authorities even though it may have reached a different conclusion. This restrictive approach – panels have to rely on national factual determinations and their evaluation – follows former GATT practice under the Anti-Dumping Code where panels did not substitute their factual conclusions for those of national authorities.(57) Insofar as the question arises whether an anti-dumping measure is *legally* consistent with the ADA, the examination under Art. 17.6 (ii)(58) proceeds on a two-step basis: first, the panel is required to determine whether the relevant provision admits different possible interpretations. Second, the measure will be uphold if the member state acted in accordance with "one of those permissible interpretations."(59)

The more restrictive approach in Art. 17.6 ADA (compared to Art. 11 DSU) is due to the negotiation history during the Uruguay round, where negotiators wanted to clarify, and as far as possible restrain, the role of panels in anti-dumping proceedings.(60) Whatever the merits of this treaty-based distinction between the two different standards of review ultimately are,(61) Art. 17.6 ADA exemplifies that panels acting in accordance with Art. 11 DSU are less bound by procedural rules and constraints. Hence, they enjoy much more discretion as to the way in which they conduct an "objective assessment of the matter."

3 Law and Policy of Dispute Settlement: The Standard of Review in a Broader Perspective

The discussion of case law has illustrated some major shortcomings in a formal legal analysis: the law on the standard of review is not clear. Art. 11 DSU leaves the panels and the Appellate Body

broad discretionary power as to the precise application of this provision to concrete cases. This will certainly be subject to further development in the future. Second, the standard of review as *prima facie* procedural provision stands for a wider dimension of WTO law and policy. The following parts on legalization, constitutionalization, the "trade and" debate and legitimacy will each discuss the standard of review against a broader background. Analysing this judicial concept in wider contexts may serve the purpose of developing a more comprehensive understanding of the various functions, shortcomings and potential future developments of the standard of review.

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3.1 Legalization and Constitutionalization of the Global Trading Regime

3.1.1 Legalization

As a starting-point, I will draw some attention to the tendency of increasing legalization of intergovernmental relations and – in particular – the world trading regime. This brief overview, providing a theoretical framework for processes of legalization, aims at illustrating the growing role for supranational adjudication in the WTO. Moreover, the "inevitability" of judicial proceedings (in the sense of "compulsory jurisdiction"(62)), to which states are subordinated in fully legalized system, stresses the importance of procedural rules governing the adjudication process. Such rules – of which the standard of review is a prominent example – can have a substantive impact on the outcome of a case. Tracing back the legalization of GATT/WTO law, I will illustrate the changing *perception* and *role* of the standard of review within that legal framework.

Over the last few years, scholars have begun to analyse the various types of legalization within the international system and to provide a theoretical framework measuring the degree of legalization of a particular legal order. A recent article by a group of distinguished scholars discusses the "concept of legalization"(63) and gives a preliminary definition of that phenomenon:

> "Highly legalized institutions are those in which rules are *obligatory* on parties through links to the established rules and principles of international law, in which rules are *precise* (or can be made precise through the exercise of delegated authority), and in which authority to interpret and apply the rules has been *delegated* to third parties acting under the constraint of rules."(64)

Yet there is no clear-cut borderline between legalized and non-legalized institutions, but instead a rather multidimensional continuum from hard law to various types of soft law.(65) Based on the abovementioned definition, three criteria facilitate assessment of a regime's degree of legalization: obligation, precision and delegation.(66) *Obligation* stands for legally enforceable commitments, whereby states can be made responsible for breaches of law. *Precise rules* specify in a clear and unambiguous manner the behaviour that is expected on behalf of the actors. Finally, *delegation* refers to the fact that authority (to implement the agreement) is assigned to third parties – mostly adjudicators and administrative bodies.

Applying this framework, I will now trace the GATT/WTO legal system's evolution into its current state showing a high degree of legalization. Many trade scholars have extensively described this shift in GATT/WTO history. I will only focus on some points related to the dispute settlement. During the first three decades of its existence, the GATT was governed under a strong diplomatic influence and anti-legalistic attitudes of the international trade elite.(67) This homogenous, like-minded group of trade policy officials shared a common sense about the architecture of the world trading system ("club model"(68)). Hence, whenever a trade dispute arose, the diplomatic climate led to vaguely drafted panel rulings that – by their nature – left much room for political negotiations.(69) The major

transformation of the dispute settlement system (which had already evolved from the early, informal "working parties" to *ad hoc* panels) occurred in the 1970/80s when the GATT underwent a process of formal legalization and judicialization. "Triadic dispute resolution"(70), to use social science terms, was more and more accepted within the trade regime, and panel proceedings became court-like, powerful instruments to enforce GATT obligations.(71)

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The success of legalized GATT dispute resolution had important institutional consequences, which at this time outweighed the major shortcomings (most prominently, the fact that proceedings remained voluntary during all the stages – states could not be obliged to participate in the proceedings and to accept the ruling).(72) Judicialization changed the way in which states perceived the international trade regime: they felt legally, rather than politically, bound to comply with their treaty obligations as being defined through adjudication. Consequently, states were obliged to pursue a more legalistic – as opposed to a power-oriented – approach in their trade relations.(73) This idea supports the assumption that legalization shifts the discourse among actors from interests and power towards the "rhetoric of law"(74).

The WTO Agreements, in particular their provisions governing the dispute settlement system, reinforced the legalization which had occurred during the old GATT system. It strengthened many but not all of the characteristics of a "rule-oriented" (as opposed to a "power-oriented")(75) trade regime:(76) member states now have a (quasi-) right to initiate a panel proceeding which can no longer be blocked by the defendant (cf. Art. 6.1 DSU). Panel reports are automatically adopted unless there exists unanimity among all member states not to adopt the report ("negative consensus"; cf. Art. 16.4 DSU). This amounts to a compulsory jurisdiction. Finally, parties have a right to judicial review by the standing Appellate Body (cf. Art. 17 DSU) that, in its capacity as centralized and final arbiter, is presumed to bring coherence and consistency in a unified dispute settlement system. The future is likely to bring about even more "jurisprudential issues"(77) (e.g. standing or justiciability), which in the past have often played an important role in other national and European legal systems.(78)

The above description, which accounts for the evolution of the GATT/WTO towards a "rule-based nature of the trading system"(79), draws our attention to the criteria for measuring legalization – obligation, precision and delegation. Applying these three criteria to the GATT/WTO system, its legalization can be examined from a different perspective. During the early days of the GATT, the Contracting Parties(80) felt little *obligation* and their behaviour was instead based on a common understanding and agreed values of international trade relations ("club model", diplomatic approach, anti-legalism). Due to the evolving dispute settlement system, obligations became more intense and, finally, paved the way towards binding "supranational adjudication"(81) under the DSU. The obligatory (inevitable) nature of dispute resolution increased the demand for special provisions, e.g. the standard of review, governing and structuring this process. *Precision* was enhanced (1) when panels and the Appellate Body rendered judgments which narrowed the scope of ambiguous provisions and provided guidance for future behaviour and (2) the states themselves agreed on more detailed (procedural) rules covering their trade relations.(82) Both developments led to decreased scope for diplomatic manoeuvres as well as diverging national policy decisions. Finally, states promoted *delegation* by the use of triadic dispute settlement (as opposed to diplomacy) and legal authority, which they conferred upon the adjudicating body. The standard of review has decisive impact in regard to delegation – the distribution of ultimate interpretative power between the principal (member states) and its agents (panels, Appellate Body) is, to a great extent, allocated through the particular content of the standard of review.

To sum up, there are strong indicators for a high degree of legalization in the WTO insofar as the

trading regime contains both binding and detailed rules and is equipped with an effective dispute settlement authority to monitor the lawfulness of member states' behaviour.(83) It is the evolution of the GATT/WTO law towards a rules-bound system with compulsory jurisdiction which highlights the importance of procedural, jurisprudential issues for the dispute settlement system. The legalization of international trade relations has not only changed the perception of the standard of review as a decisive tool for adjudication. It has also laid the foundation for further developments that will be discussed in the following parts.

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3.1.2 Constitutionalization

The process of legalization is closely related to another characteristic of international trade law – its so-called *constitutionalization*. The far-reaching debate on constitutionalization is certainly beyond the scope of this work. Nevertheless, some of the major issues raised in constitutional debate have an essential impact on this work's *problématique*, the standard of review. This applies to the subtle relationship between the trade regime and national sovereignty; the distribution of power between the national and international level of governance; and finally, the balance of (antagonistic) values and policy goals within one centralised trading framework (the last subject will be dealt with separately in Part 3.2 below). In the subsequent discussion I will suggest that the standard of review should be read in the light of its "constitutional" meanings (and implications) and that it has, consequently, been elevated to a different *niveau* of legal reasoning.

The term "constitutionalization" is used with different meanings in the current debate.(84) In a very broad sense it refers to "the practice as well as to documents that define the structure of a particular system of governing rules."(85) According to a different view, prevalent among classic liberal scholars, the "constitutional functions"(86) of the GATT/WTO are primarily designed to "protect freedom and non-discrimination across frontiers"(87) and, in particular, to guarantee the individual freedom of trade as a human right.(88) In a more modest sense, constitutionalism is intended to guarantee a framework for "balancing and weighing different, equally legitimate and democratically defined basic values and policy goals of a polity dedicated to promote liberty and welfare."(89) authors suggest that the process of constitutionalism in the WTO is only possible (and desirable) if, in the long term, human rights and environment are incorporated in the WTO as higher norms, to shape and limit the principle of free trade.(90) Finally, constitutionalization is regarded as "judicial norm-generation"(91), whereby the Appellate Body elaborates norms and values within the WTO system that are usually found in national constitutional law ("constitutional features" of WTO law). (92)

Yet each of these different constitutional readings of WTO law relates, to a great extent, to a particular framework governing (or restricting) the autonomous conduct of nation states and the division of power between the two layers of governance. Standard of review plays a significant role herein, insofar as one could describe this concept of judicial review as a "touchstone regarding the relationship of 'sovereignty' concepts to the GATT/WTO rule system."(93) Bearing this in mind, the standard of review can be re-thought as an important *constitutional* feature of WTO law.(94)

In a constitutional sense, the concept of sovereignty(95) involves the relationship between international institutions and national governments and the appropriate allocation of power.(96) These days, the scholarly discussion on sovereignty focuses mainly on the content of international rules and whether the constraints, imposed by such rules, leave enough discretion for domestic institutions to pursue legitimate policy goals.(97) It is evident that each international agreement, to which states adhere, poses some threat – in the sense of restriction – to national sovereignty. However, the process of legalization and constitutionalization in WTO law is qualitatively and

quantitatively distinct from similar processes occurring in the sphere of general international law. (98) The differentiation from international law has come about with the ongoing legalization of the WTO regime, imposing higher constraints on member states than other international agreements do. As a matter of law, the WTO Agreements prescribe precise "individual rights and public obligations"(99) which, subsequently, shape and limit policy choices in fields like environment, public health or state intervention on behalf of national enterprises.(100) Furthermore, the "constitutional" architecture of WTO law shows greater resemblance with national constitutional law (and principles) than does the general international law.(101)

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At the very heart of the debate on the impact of WTO law on national sovereignty is the supranational dispute resolution, conferred on judges sitting in panels and the Appellate Body. A recent study highlights how the jurisprudence has introduced various "constitutional features"(102) in WTO law, which shape the distribution of power and strengthen the (supranational judicial) control over member states' behaviour. As a result of this judicially-driven constitutionalization, WTO law creates constitution-like boundaries for the exercise of public power, including, *inter alia*, legislative competence and rules on the standard of review.(103) Additionally, constitutionalization incorporates techniques borrowed from (national) constitutional judicial review, for example requirements like "rational relationship", "proportionality", "less restrictive means" and the principle of substantive non-discrimination.(104) This transformation of the WTO's legal order, occurring through the processes of legalization and constitutionalization, has altered the institutional role of the WTO within of the global trade regime: member states are exposed to a "quasi-constitutional structure"(105) and supranational judicial supervision. This constantly requires them to justify their policy-making as being consistent with constitutional prerequisites.

As far as the standard of review is concerned, the discourse on the constitutional dimension of WTO law sheds new light on the meaning of this judicial concept. Within the constitutional framework, the standard of review (re-) defines the degree of review power exercised by WTO adjudicators over national governments and their policy determinations.(106) The standard of review has a decisive impact on the hierarchy (regarding factual and legal determinations) between two separate polities. (107) As a result of the incorporation of constitutional features as well as new subject areas in WTO law, supranational judges – through an instrument like the standard of review – shape and control "the scope and manner … of decision-making"(108) in areas such as environment, health or subsidies.

It is against this background that rules governing the standard of review are capable of altering the subtle balance of power and jurisdictional competences shared between the WTO and its member states.(109) "[O]ne stroke of the pen"(110) – be it judicial or legislative – modifying the content of the standard of review is enough to re-distribute (constitutional) review power. In conclusion, the standard of review and its implications not only support the argument that WTO law is constitutionalising. This process also enables us to view the proper role of the standard of review in a new constitutional dimension.

3.2 'Trade And' Issues

These days the WTO faces many challenges. One of the most urgent and, certainly, politically sensitive is the so-called "trade and"(111) debate. Over the last few years new policy areas (including environment, health or safety), formerly falling outside the trading regime, have been incorporated into the WTO framework.(112) These areas, which often constitute "barriers" to free trade, have begun to challenge conventional perceptions about the nature of the trade regime. The GATT/WTO dispute settlement system has been particularly affected by this evolution and has become confronted

with a difficult balancing act between economic and non-economic values.(113) Additionally, the fact that many social values are now substantially comprised by one unified WTO umbrella (and therefore subject to WTO obligations and judicial review), seriously constrains member states in their regulation of non-economic policy areas interfering with the international trade regime.

This is the context within which the standard of review will be discussed in the following paragraphs. Using health regulation as an example, I will raise the many issues involving the standard of review – in particular the underlying question of who should ultimately decide on questions of (scientific) evidence and legal consequences derived from that facts. Moreover, I will argue that the standard of review is a critical tool for the resolution of key issues in "trade and" controversies and I will show how the standard of review may be designed to respond in a sensitive manner to national regulatory choices.

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In contrast to their former responsibilities as adjudicators in technical conflicts on trade regulation, the judicial bodies of the WTO have grown into ultimate umpires ruling on the legality of national environment, health or safety measures. These have a huge economic and social impact on citizens' living. It is not only the inherent tension of conflicting values within a single world trading system which makes judicial review so difficult, but in particular the highly *contested nature* of "trade and" measures.(114) This contestedness shifts the debate on environmental or health protection away from the legal sphere towards a primarily political one. Assuming that this has really happened in WTO law, then it becomes increasingly difficult to adjudicate on the basis of traditional legal reasoning and, instead, not to engage in a value-based, political trade-offs. (115) This situation, by potentially generating unpopular and politicised judgments, could have a detrimental effect on the institutional authority and legitimacy of the WTO, in particular its dispute settlement system.(116) Member states may react by promoting non-compliance, threatening the integrity of a liberal trading system.(117) It is submitted that the World *Trade* Organization – due to its mission – is ill-equipped to settle and, more importantly, to resolve fundamental conflicts at the interface of law, policy and science.(118) Accordingly, as will be shown below, these circumstances necessitate special attention for the standard of review to be applied in conflicts where scientific evidence plays a decisive role.

Given the fundamental concerns raised in the "trade and" debate, we face the challenge as to how much regulatory authority in environmental, health or safety matters should be (or has already been) ceded from the national to the WTO level.(119) WTO members themselves have, in some areas, already begun to provide treaty-based guidance as to the legality of non-economic policies and adjudication arising in that context – the SPS Agreement is one prominent example. I will now focus on a case study of health regulation (a subject area covered by the SPS Agreement), which will highlight the complexities in the application of a balancing test between free trade versus other legitimate social goals. Discussing such a test, which is far from being a simple legal one, draws our attention to the standard of review. This concept plays a crucial role, insofar as it determines to what extent international judicial bodies, applying a balancing test, can overthrow ("second-guess") national determinations on facts, science or risk.(120) The case study illustrates not only the standard of review's role in adjudicating science-based disputes but also its importance in relation to the "trade and" challenge.

The SPS Agreement, which was negotiated during the Uruguay Round, covers national measures aiming at the protection of "human, animal or plant life or health"(121) and (directly or indirectly) having an effect on international trade.(122) Since they are controversial by their nature and, additionally, have a great impact on the domestic policy process, health-related SPS measures are very difficult to adjudicate within the WTO system.(123) By providing some guidance on this issue, the SPS Agreement sets out a framework within which trade-restrictive, health-protective measures

can legitimately be uphold. Firstly, a measure that conforms to harmonised international standards issued by standardizing bodies(124) will be presumed to be valid. Secondly, whenever member states unilaterally determine levels of protection stricter than international standards (or in the absence of such), the measure can only be justified on scientific grounds.(125) Particularly concerned with higher levels of protection, the SPS Agreement establishes criteria to evaluate the lawfulness of such science-based regulation: generally, member states have the explicit right to enact protective measures (Art. 2.1). In exercising this right states must not impose "a disguised restriction on international trade" (Art. 2.3), apply it "only to the extent necessary" and justify it according to scientific principles and evidence (Art. 2.2).

One important difficulty addressed by the SPS Agreement and subsequent litigation is the way in which trade adjudicators handle underlying scientific disputes. Should judicial bodies either be able to impose their personal opinion on the validity of scientific principles and evidence – which would amount to a *de novo* standard of review allowing to overturn national determinations – or should they instead simply consider whether national regulators obviously took into account and based their conclusion on scientific evidence? The latter deferential standard of review strongly focuses on procedural requirements to be observed by national authorities. Generally, this debate on the standard of review is about the appropriate role of judges in science-related disputes and the degree of deference shown to the national authorities.

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Whenever national health regulation is stricter than international standards, science is the basis for assessing the legality of these measures.(126) However, dispute settlement organs face a very difficult task when they are required to evaluate scientific evidence submitted in a particular trade dispute. In addition, it is important to carry out the evaluation in such a way as to prevent member states from invoking any sort of "science", which would easily allow them to deviate from burdensome treaty obligations under the free trade regime. It is nonetheless acknowledged that every state has the sovereign right to exercise a fundamental policy choice in selecting the "appropriate level of [health] protection"(127) for its citizens.(128) Whereas the level of protection is a democratic regulatory choice, the measure itself – to be WTO consistent – needs to satisfy scientific requirements. In this respect, every state must perform a *risk assessment* to evaluate "the adverse effects on human health that can be caused by exposure to a toxic agent, and to determine the potential for such exposure and adverse effects to occur."(129) In the course of subsequent *risk management*, regulatory authorities take the decision how identified risks should be dealt with.(130) The initial risk assessment often depends on uncertain scientific evidence which may be highly contested within the scientific community. In that case, member states, as a matter of science-policy, may follow one scientific opinion (as will be shown below, not necessarily supported by the majority among scientists). Such a decision not only has far-reaching impacts on the lives of many citizens, but also on the outcome of a dispute settlement proceeding.

It is not the role of WTO panels to issue a substantive judgement on the correctness of *one* particular scientific view.(131) Panellists are laypersons trained as lawyers or economists, and as such logically ill-equipped to assess the correctness or truth of competing scientific material. Judicial determinations on this matter would amount to adjudication '"by choice' rather than by 'reason"'(132) and, therefore, illegitimately elevate one scientific opinion above the others. How should panels then decide disputes at the intersection of law, science and policy, where each party invokes complex scientific evidence as being *the* truth? In this context, a well-defined standard of review can play an decisive role in mitigating concerns about encroaching judicial intervention in science-related regulation.

At first, one should bear in mind the danger that "wrong" judgements on sensitive issues could

significantly delegitimise the institutional position and credibility of the WTO and its dispute settlement system.(133) Moreover, panels, in the course of judicial review, are not allowed to conduct their own risk assessment and, consequently, to impose their opinion about the validity (or truth) of contested scientific opinions on the member states.(134) This would amount to a *de novo* review. Instead, it is the proper role for panels (supported, if necessary, by independent experts(135)) to pursue an "objective assessment" as required by Art. 11 DSU. This leads panels to examine whether the scientific evidence submitted by the parties "possesses the minimum attributes of scientific inquiry … [and therefore] is a *scientifically plausible alternative.*"(136) The Appellate Body made clear that member states, in cases involving scientific uncertainty, are not required to follow the mainstream view among scientists. They may also, acting in good faith, rely on "a divergent opinion coming from qualified and respected sources."(137) Having reached this conclusion, the Appellate Body clarified that as long as there exist plausible scientific opinions (supported at least by a minority among respected scientists), panels must refrain from judging the merits of competing scientific views. Such a judicial technique enables panels – in accordance with the standard of review of Art. 11 DSU – to effectively adjudicate science-related disputes without imposing one "correct" scientific preference on member states.

In an additional step panels examine whether national measures are "based upon" risk assessment. For this requirement to be fulfilled, the Appellate Body requires "a *rational relationship* between the measure and the risk assessment."(138) Accordingly, member states can only lawfully enact a particular measure when "the results of the risk assessment … *reasonably* support"(139) the claim that the measure would reduce or eliminate the identified risks.(140) The main arguments presented here lead to the conclusion that a measure, which is supported by scientific evidence, will be held to be WTO conform.(141) Thus, even in situations of scientific uncertainty, national governments (responding to public opinion) keep their discretion (1) to democratically adopt one particular science policy and (2) to enact, upon that basis, adequate protection against identified risks.(142) I have also shown how the standard of review supports – even maintains – this approach towards risk regulation. The proper role for panels is not to "second-guess" but, instead, to defer to plausible national determinations. Yet, there is no complete (procedural) deference which bars judges from reviewing scientific evidence. In accordance with Art. 11 DSU and case law, the standard of review is therefore neither *de novo* nor (complete) deference, but an "objective assessment of the matter", which allows panels to respond flexibly to the challenge of scientific evidence.

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Moreover, besides the factual aspect, the standard of review also affects the *legal* evaluation of established facts – at issue is judicial review of national measures for their conformity with the relevant agreements.(143) In this context, it makes a difference whether regulatory measures have to be either "correct" or "not unreasonable" for the aim of achieving legitimate policy objectives on the basis of scientific evidence. A *correctness standard* would require a member state to prove (1) that its measures are necessary to achieve a legitimate objective and (2) that the measure is the least trade restrictive means.(144) Such a standard of review allows panels to challenge domestic measures on the grounds that they do not correspond to a strict "*de novo* cost-benefit analysis"(145), the latter being ultimately controlled by the panels. The second option, an *unreasonableness standard*, is more deferential and restricts panels in their capacity to overturn national measures. It allows member states – on the basis of plausible scientific facts – to pursue policy goals as long as they are reasonably related to legitimate aims, for example health protection.(146) This standard would not allow panels to strike down national regulatory choices simply because the adjudicators would have favoured a different approach; measures remain lawful when they are enacted in a reasonable and proportionate manner. This concept of standard of review gives evidence for a greater respect *vis-à-vis* policy choices formulated by democratic governments,(147) even in cases where they interfere with the free trade regime.

The Appellate Body notably defined the standard of review as the obligation for a panel to make an "objective assessment of the facts … and the applicability of and conformity with the relevant covered agreements."(148) The second part of this definition confers wide interpretative flexibility on judicial bodies and the precise standard of review is still subject to some confusion among scholars. Some commentators have suggested that the standard of review elaborated in the *Hormones* case comes close to a "reasonableness standard"(149), a development which is clearly favoured by some other scholars.(150) Still others argue that "objective assessment" is "not a 'reasonableness test' or a 'complete deference test' nor a *de novo* review."(151)

This part was intended to elucidate the role of the standard of review in imposing certain obligations (e.g. to provide solid scientific justifications) upon member states when they want to lawfully enact trade-restrictive measures. Whenever disputes in sensitive areas such as science-based risk regulation come before WTO dispute settlement organs, it is the application of the standard of review which provides a powerful tool to significantly control the substantive outcomes of these disputes. Consequently, slight modifications in the content of the standard of review are decisive as to what extent judges can accept or reject national measures (compare the different criteria contained in a "correctness" as opposed to an "unreasonableness" standard or the different approaches in Art. 11 DSU and Art. 17.6 ADA).

3.3 The Legitimacy Crisis

When thousands of peaceful protesters as well as violent riots surrounded the WTO ministerial meeting Seattle in 1999, a worldwide audience suddenly became aware of the fundamental legitimacy crisis which the WTO has to face in the eyes of so many citizens, intellectuals and trade scholars.(152) We should take Seattle seriously and try to re-think the WTO's underlying democratic legitimacy in a broader theoretical and practical context. Moreover, I will argue for a modified understanding of the standard of review in the context of the legitimacy debate, intending to mitigate some of the most pressing concerns raised against the WTO system.

It is commonly recognized that every form of democratic governance depends on legitimacy in order to exercise justifiable and stable power *vis-à-vis* the governed and, consequently, to be voluntarily supported by the latter in the long term.(153) The discussion on legitimate justifications for democratic governance is far-reaching (as well as centuries-old), and for the scope of this work it will be sufficient to focus on the basic insights derived from this debate.(154) Generally, one can distinguish four main categories of legitimacy: *normative* (or *formal*) and *social* legitimacy, along with *input*- and *output*-legitimacy.(155) I will now focus on one particular aspect of (social) legitimacy, namely the "fact that people voluntarily accept domination *on the grounds that they believe in its normative rightfulness*."(156) For the present purpose we should draw particular attention to the legitimacy of international regimes and ask the question: "why do states support international governance?"(157) Extending this topic, we could further query why not only states, but also citizens tend to accept – or, in the case of the WTO, mistrust – international organisations.

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Democratic legitimisation is an essential feature for international governance, a system that lacks coercive (i.e. police-like) measures and mainly relies both on voluntary cooperation and subsequent compliance of sovereign states. Accordingly, due to the absence of common founding myths, symbols or a unifying *demos*, governance above the nation state is even more dependent on justifications through the rational "power of legitimacy"(158) than it would be in the national context.(159)

As already mentioned above, the GATT/WTO system has continuously advanced towards

legalization and constitution-like features, especially in regard to supranational dispute settlement. This evolution has significantly constrained the autonomous exercise of sovereignty and it shapes – even dominates – the national policy-making process. Furthermore, since new (contested) societal values have found their way into the dispute settlement, adjudicators are often stuck in a difficult balancing manoeuvre between free trade as opposed to trade-restrictive social regulation. As a consequence, many stakeholders who are affected by, and involved in, the world trading system contest its *normative* rightfulness. Particular concern is raised against the role conferred upon the WTO's judicial branch (the famous "three faceless bureaucrats in Geneva"(160)) since it engages – or is sometimes required to engage – in far-reaching interpretative and law-making tasks in highly sensitive areas of WTO law and policy.(161) Citizens and scholars, by challenging the current framework of international trade relations, call for more democratic legitimisation(162) and control over the WTO. They argue for various (institutional) reforms that are all intended to overcome the democratic shortcomings and to fill the legitimacy gap.(163)

Compared to the mostly far-reaching proposals for fundamental WTO reform, the aim of this part is more modest – it intends to indicate one possible way for a gradual increase in the WTO's social legitimacy. It is suggested that the dispute settlement system, to a certain extent, stands for the WTO as a whole. Consequently, a strengthening of the former's legitimacy might also have a large impact on the latter.(164) The question to be explored is (1) how greater democratic legitimisation of WTO adjudication through increasing confidence in the normative correctness of its outcomes could be achieved, and (2) whether the standard of review is of any use for this purpose. Among the many theoretical models on legitimate governance, I will focus on a particularly proceduralist aspect which, in the current situation (far away from the radical reforms already advocated by many scholars(165)), seems to be a promising one.

The procedural approach is mainly based on the political theory of Jürgen Habermas who focuses on the rationalisation of the decision- and rule-making process through *public deliberation*. According to Habermas it is this democratic discourse, which – by means of communicative power – ultimately legitimises the exercise of political and administrative power.(166) Moreover, the fact that it is possible for citizens to participate with equal voices in a rational public discourse generates, on normative grounds,(167) their belief in the fairness of the outcome. As a consequence, the legitimacy (and integrative function) of a legal order rests on the discursive rationalisation of the decision-making process, by means of legal institutionalisation of communication. It will then be considered to produce reasonable results.(168) It is the role of constitutional courts within this concept to act as guardians of deliberative democracy(169) and to promote – through the rational nature of legal proceedings – the "realisation of deliberative conditions."(170) One of the main instruments for the judges to assess the existence of such conditions is the so-called "reasoned analysis requirement."(171) Courts look at the deliberative character of the legislative or regulatory process with the purpose of determining whether decisions were effectively based upon a public discourse.

Applied to the WTO context, these thoughts indicate the need for a stronger institutionalised inclusion of stakeholders in the deliberative process, taking place both on the national and international level. Thus, WTO adjudication should promote the conditions for deliberative and rational decision-making, as a result of which all interested participants can raise their voices in public *fora*.(172) More legalistically, this relates to formal procedural preconditions during the decision-making and adjudication process – notably general principles such as equality, fairness or transparency; more specifically, the opportunity for individuals to be heard, the obligation upon authorities not to disregard important evidence and to give reasons for their decisions.(173) Procedural legitimacy must find its expression in concrete legal provisions and the standard of review, being a prominent tool of (constitutional) judicial review, is at the heart of such concerns.

Additionally, the standard of review seems to be potentially capable of promoting deliberative processes within the WTO, a challenge that I will try to face in the next few paragraphs.

It has already been mentioned that democratic deliberation takes place at national as well as international levels. Thoughts on the deliberative function of the standard of review should therefore not be restricted solely to proceedings before panels, but be extended to public debates taking place prior to actual panel proceedings. Insofar as it is desirable to stimulate a public debate involving important stakeholders at the national level, the aim of the standard of review must be to promote national regulation or legislation enacted under suitable deliberative conditions. Such a participatory style is opposed to the diplomatic, secretive corporatism ("club atmosphere") prevalent under the old GATT regime, and to a lesser extent, the current WTO.(174)

Important preconditions for the legal institutionalisation of a well-functioning public discourse are "due process rights" and fully transparent conditions throughout the decision-making process. It seems essential that procedural transparency is incorporated in domestic law whenever national authorities engage in interest-balancing involving trade-restrictive measures.(175) The requirement of transparency gives foreign and national stakeholders the right to be informed about proposed governmental measures and to discuss the latter with the authorities in an appropriate way. *Public* interest-balancing serves different important functions. First, it is the participation in a rational discourse which, in line with Habermas' theory on deliberative legitimacy, creates the belief among the governed in the normatively binding force of this process. Consequently, it induces compliance.(176) Second, whenever national governments undertake a public interest-balancing, they establish direct links with various stakeholders that would otherwise have no access to the remote WTO dispute settlement.(177) This situation enables panels in a subsequent trade dispute to acknowledge the many divergent voices and interests already raised in the course of the national process. Ultimately, transparency tends to reveal undue inference in the democratic process (e.g. through political capture by powerful protectionist lobbies or, even worse, through corruption), as well as to deter governments from non-compliance with their international obligations.(178) As far as the standard of review is concerned, one needs to be aware these issues.

In addition, I suggest a so-called *deliberation test* underlying the standard of review. This may prove to be a useful tool in increasing deliberative legitimacy within WTO. I will outline some basic thoughts in this respect, without, however, pretending to set up a comprehensive theoretical framework.(179) The deliberation test is intended to shed some new light on the functions of the standard of review and the appropriate degree of supranational scrutiny (or deference) towards member states' actions.(180)

Using case law as a starting-point, it may be noted that national authorities are – by law – obliged to engage in public deliberation for their actions to be held lawful under the WTO rules. Interpreting the standard of review contained in Art. 11 DSU, both the panel in *Underwear*(181) and, subsequently, the Appellate Body in *Footwear*(182) required national authorities to consider all relevant factors during their investigations and to provide an adequate explanation as to how facts support the determinations made. Similar requirements, although without reference to Art. 11 DSU, were put forth in the *Shrimp Turtle* case.(183) Member states, before they can lawfully enact unilateral measures aimed at the global protection of environment, must follow minimum standards such as "basic fairness and due process"(184) or "transparency and procedural fairness in the administration of trade regulations."(185) Summing up, whenever national authorities engage in a balancing act between competing interests, they are required to take into account the interests of (foreign and domestic) stakeholders in a transparent, deliberative manner.(186)

A deliberation test being part of the standard of review would highlight the procedural criteria already developed in the recent WTO jurisprudence. Following such a test, panels should look into the evidence provided by the member states in order to determine whether a proper deliberative process had taken place prior to the enactment of the national measure. This strict procedural provision(187) could entail an important *ex ante* inclusion of stakeholders during the national decision-making process which is, generally, far more accessible than WTO dispute settlement proceedings.

One part of my paper was concerned about the incorporation of "trade and" issues in the WTO system and I have outlined a case study on health regulation. Robert Howse convincingly argued that the SPS Agreement should be understood against a background of "enhancing the quality of rational democratic deliberation about risk and its control."(188) As a consequence, national regulators should, whenever performing the balancing-test for SPS measures, base their conclusions on democratic and public deliberation among citizens, politicians and scientists. Experts play a particular role herein, insofar as they provide rational scientific data and help structure the deliberative process.(189) Not only do experts make scientific knowledge accessible for the general public in the national regulatory process, but they also provide panellists of subsequent WTO proceedings with broad scientific views raised during the previous national discourse. The more information is exchanged at the preliminary national stage, the easier it is for international tribunals to assess – and not to impose their remote views on – domestic regulatory determinations. Lacking such (public) information, panels must rely on their own perceptions and, for instance, make greater use of expert witness hearings during the proceedings.(190)

Accordingly, it is submitted that in cases where a rational discourse was absent throughout the national decision-making process, the theory of deliberative democracy questions the legitimacy of trade-restrictive measures. Applying the deliberation test (and exercising "institutional sensitivity"), panels should be more unwilling to defer to national authorities and, by making use of the standard of review, insist on a strict scrutiny of the authorities' determinations. Too much deference to measures enacted without sufficient deliberation might namely lead to a situation where narrowly defined, protectionist and non-transparent interests prevail over broader stakeholder concerns. Alternatively, each time that a national public discourse takes place in a transparent and deliberative environment, stakeholders are able to raise their voice and authorities must engage in a careful interest-balancing between different values.(191) The dispute settlement system is subsequently better equipped to assess national regulatory determinations and to make, on a supranational level, important trade-offs deeply affecting national constituencies. Bearing the theory of deliberative democracy in mind, it is arguable that in situations where stakeholders can present their views through a rational discourse, international adjudication is less likely to be regarded as impinging on democratic and sovereign policy choices and deliberately to disregard important societal values.

In conclusion, the application of a deliberation test as an important element of the standard of review would give rise to a more deferential review of well-founded, rational policy choices than it would do in the absence of deliberative conditions.(192) It is submitted that this jurisprudential technique could promote reasoned decision-making at the national level as well as attribute more legitimacy – based on the belief in the normative rightfulness of judicial decisions – to the dispute settlement system. An overall strengthening of the WTO's institutional position should follow.

4 Conclusion: Taking The Standard of Review Seriously?

In this paper I have tried to demonstrate what the standard of review involves: it reflects the relationship between supranational adjudicators and member states. Moreover, it limits and legitimises the review power exercised by these adjudicators. I have also argued that a formal legal analysis is not enough to give a full account of the standard of review's function in the WTO system. The standard of review touches upon broader issues. It is to be seen as part of the wider process of legalization and constitutionalization of international trade law. This sheds new light on the standard

of review's decisive role in allocating legal and political competences. Additionally, the incorporation of non-economic policy areas in the WTO system is a great challenge for the standard of review. The case study on health regulation has shown that the standard of review was applied in a sensitive manner. Panels, reviewing complex scientific evidence, do not impose their opinion on the validity of this evidence on the national authorities (no *de novo* review). Instead, they require member states to provide a plausible scientific basis, reasonably related to the regulatory measure.

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The growing role of the WTO dispute settlement system governs and shapes many national policy areas, having far-reaching implications on national constituencies. As a result, the WTO faces a legitimacy challenge in the eyes of many stakeholders and scholars. I have tried to suggest how panels could use the standard of review as a remedy to mitigate these concerns. In essence, the standard of review should adopt a strong proceduralist bias.

I have argued that a so-called deliberation test may serve this purpose best. Case law already requires national authorities to guarantee due process rights, transparency and a fair interest-balancing. A procedural deliberation test may even go further by promoting deliberative conditions and public participation throughout the decision-making and adjudication process. Furthermore, it would show greater deference to measures enacted under suitable deliberative conditions and apply a stricter assessment in the absence of such conditions. Political theory tells us that this may confer greater legitimacy on the outcome of decision-making and adjudication, especially in sensitive areas such as environmental or health protection. The WTO system on the whole would benefit from this development.

Applying strict procedural criteria, the standard of review may, however, leave enough policy discretion to the member states. It will depend on further judicial law-making how the "objective assessment" in relation to legal interpretations of established facts will be understood. On the basis of Art. 11 DSU, the panels and the Appellate Body could move in two directions, adopting either a strict "correctness" standard or a more deferential "reasonableness"-type standard.

In this paper I have suggested a proceduralist approach. I have tried to show how the concept of standard of review may reflect and, at the same time, play a decisive role in the future development of the world trading system.

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Endnotes

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(1) See Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Art. 17.6.

(2) M. J. Trebilcock and R. Howse, *The Regulation of International Trade*, 2nd ed. (London-New York: Routledge, 1999) 69.

(3) J. H. Jackson, W. J. Davey, and A. O. Sykes, *Legal problems of international economic relations: cases, materials and text on the national and international regulation of transnational economic relations*, 3rd ed., American casebook series (St. Paul, Minn.: West Pub. Co., 1995) 364.

(4) T. W. Merrill, "Judicial Deference to Executive Precedent", *Yale Law Journal* 101 (1992) 971.

(5) See e.g. J. H. Jackson, "WTO dispute procedures, standard of review and deference to national governments", in *The Jurisprudence of GATT and the WTO. Insights on treaty law and economic relations*, ed. J. H. Jackson (Cambridge: Cambridge University Press, 2000) 134-35.

(6) For details see Part 3.1 below. My understanding of "legalization" of intergovernmental relations is based on K. W. Abbott, R. O. Keohane, A. Moravcsik, A.-M. Slaughter, and D. Snidal, "The Concept of Legalization", *International Organization* 54 (2000) 401.

(7) Jackson, above note 5, at 135.

(8) Ibid., at 137-39. Jackson refers to some cases (mostly anti-dumping procedures) which do not shed a clear light upon the existence of one particular standard of review. Its notion in GATT law was imprecise and depended on the different legal provisions before the panel.

(9) G. N. Horlick and P. A. Clarke, "Standards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO", in *International Trade Law and the GATT/WTO Dispute Settlement System*, ed. E.-U. Petersmann (The Hague: Kluwer, 1997) 318.

(10) Jackson, above note 5, at 141.

(11) Ibid. This view substantially relies on the famous US *"Chevron doctrine*", the standard of review applied in the judicial review of agency decisions. For comparative purposes, I will briefly introduce this doctrine – yet we should keep in mind that this standard of review is restricted to the national context and the very particular field of administrative agencies. (A similar situation arises within the European Communities, when the European Court of Justice (ECJ) reviews acts of the European Commission. See, below note 39). In its 1984 *Chevron* decision, the US Supreme Court pronounced a new standard of review setting forth a *two-step test* for the judicial review of an agency's interpretation of statutes. First, the judges interpret the statute in question to see whether it remains "silent or ambiguous" on a certain issue. Should this (rare) case happen, then the second step can be invoked. Here, the court determines whether the agency interpreted the (silent or ambiguous) statute in a reasonable or permissible way. As long as this condition is met, the court is required to defer to the agency's determinations, *even* if the judges had adopted a different interpretation. The rationale behind this judgment was the fact that agencies, rather than judges, should make policy decisions in cases where the Congress did not resolve a particular issue. See for example Jackson, above note 5, at 145-58; J. A. Restani and I. Bloom, "Interpreting International Trade Statutes: Is the Charming Betsy Sinking?", *Fordham International Law Journal* 24 (2001) 1533.

(12) Jackson, above note 5, at 141-42.

(13) Agreement on Implementation of Article VI of the of the General Agreement on Tariffs and Trade 1994.

(14) For a detailed analysis of Art. 17.6 ADA see Part 2.4 below.

(15) The relevant part of Art. 3.2 DSU reads as follows: "Recommendations and rulings of the DSB [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements." This provision defines the panel's interpretative competence.

(16) Jackson, above note 5, at 142. This chapter of Professor Jackson's book was originally published as an article in the *American Journal of International Law* 90 (1996) 193.

(17) See Part 2.2.2. below.

(18) Appellate Body, *European Communities - Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26/AB/R (adopted 13 February 1998).

(19) See Panel, *European Communities - Measures Affecting Meat and Meat Products, Complaint by Canada*, WTO/DS48/R/CAN (adopted 13 February 1998); Panel, *European Communities - Measures Affecting Meat and Meat Products, Complaint by the United States*, WTO/DS26/R/USA (adopted 13 February 1998).

(20) Appellate Body, *Hormones*, above note 18, para 13 (emphasis added).

(21) Ibid., para 14. A *deferential reasonableness standard* means that as long as the panel concludes that a member state properly established the facts and evaluated them "objectively and unbiased", the panel cannot overturn the measure even though it might have come to a different conclusion. Compare Art. 17.6 (i) ADA and the similar approach in the Chevron-doctrine. See e.g. Jackson, above note 5, at 146-48, 54-55.

(22) Appellate Body, *Hormones*, above note 18, paras 13-15.

(23) SPS Agreement, Art. 5.1. For further details on this provision see Part 3.2. below.

(24) Ibid., paras 41-42.

(25) Contrary to the arguments of the EC – the principle of deference (cf. Art. 17.6 ADA) should be capable of a general application – the Appellate Body concluded that Art. 17.6 is specific only to the ADA and does not apply to other WTO Agreements. See Ibid., para 114.

(26) Ibid., para 111.

(27) Ibid., para 118. In paragraph 165 the Appellate Body expressly dealt with the question of treaty interpretation and the principle "*in dubio mitius*": "We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations". On this and other principles of public international law in the WTO dispute settlement system see J. Cameron and K. R. Gray, "Principles of International Law in the WTO Dispute Settlement Body", *International and Comparative Law Quarterly* 50 (2001) 248.

(28) Appellate Body, *Hormones*, above note 18, para 115 (emphasis added).

(29) Ibid., para 116.

(30) Ibid., para 117.

(31) Ibid., para 118.

(32) The first standard was rejected mainly because of practical grounds – panels are in general simply unable to conduct a *de novo* review. The second was rejected because too much deference would undermine an "objective assessment of the facts" as required by Art. 11 DSU. See Ibid., para 117.

(33) DSU, Art. 11.

(34) See Panel, *United States – Underwear (Underwear)*, WT/DS24/R (adopted 25.2.1997).

(35) Ibid., paras 7.9 - 7.12.

(36) Ibid., para 7.13.

(37) See the Appellate Body's own words, above note 28.

(38) R. Howse, "Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence", in *The EU, the WTO and the NAFTA. Towards a Common Law of International Trade*, ed. J. H. H. Weiler (Oxford: Oxford University Press, 2000) 64.

(39) See N. McNelis, "The Role of the Judge in the EU and WTO. Lessons from the BSE and Hormones Cases", *Journal of International Economic Law* 4 (2001) 200-04.

(40) Ibid., at 206-07.

(41) See in particular Appellate Body, *Hormones*, above note 18, para 117.

(42) A. G. Desmedt, "Hormones: 'Objective Assessment' and (or as) Standard of Review", *Journal of International Economic Law* 1 (1998) 698.

(43) Natalie McNelis argues that the Appellate Body in the Hormones case came very close to a "reasonableness standard". The judges had looked into the evidence (risk assessment) and found no "reasonable support" for the ban. McNelis, above note 39, at 198.

(44) D. Z. Cass, "The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade", *European Journal of International Law* 12 (2001) 57.

(45) Appellate Body, *Argentina - Safeguard Measure on Imports of Footwear (Footwear)*, WT/DS121/AB/R (adopted 12 January 2000).

(46) Appellate Body, *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (Wheat Gluten)*, WT/DS166/AB/R (adopted 19 January 2001).

(47) Appellate Body, *Footwear*, above note 45, para 118. The panel had based its approach on various cases, some of which examine anti-dumping measures. The Appellate Body was "surprised" that the panel did not follow the reasoning in the *Hormones* case and instead referred to the ADA. See Ibid., para 117.

(48) Ibid., para 121.

(49) Ibid., paras 121-22.

(50) Panel, United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/R (adopted 19 January 2001), para 8.5.

(51) Appellate Body, *Wheat Gluten*, above note 46, paras 156-59.

(52) Ibid., para 162.

(53) For a good overview over the Uruguay Round negotiations with respect to the dispute settlement in the ADA, in particular the various proposals suggested by the US, see Horlick and Clarke, above note 9, at 317-19.

(54) See the "Ministerial Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994" (15 April 1994).

(55) *Art. 17.6 (i)* reads as follows: "[I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was *proper* and whether their evaluation of those facts was *unbiased and objective*. If the establishment of the facts was proper and the evaluation was unbiased and objective, *even* though the panel might have reached a different conclusion, the evaluation shall not be overturned;" (emphasis added).

(56) D. Palmeter and P. Mavroidis, *Dispute Settlement in the World Trade Organization. Practice and Procedure* (The Hague: Kluwer, 1999) 197.

(57) See Horlick and Clarke, above note 9, at 316; Jackson, above note 5, at 137-39. Professor Jackson cites the relevant panel cases.

(58) *Art. 17.6 (ii)* reads as follows: "[T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

(59) ADA, Art. 17.6 (ii). For an extensive discussion of this provision see Jackson, above note 5, at 142-44.

(60) Ibid., at 137, 41-42.

(61) Joost Pauwelyn has recently criticised this distinction on the grounds that there are no good reasons for being more deferential to anti-dumping measures than, for example, health-related measures. See J. Pauwelyn, "The Use of Experts in WTO Dispute Settlement", *International and Comparative Law Quarterly* 51 (2002) 361 (note 92).

(62) Cameron and Gray, above note 27, at 248.

(63) Abbott *et al*., above note 6, at 401.

(64) Ibid., at 418 (emphasis added).

(65) Ibid.

(66) Ibid., at 401. For a detailed analysis of these criteria see Ibid., at 408-418.

(67) See for example R. E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem (NH): Butterworths, 1993) 11-15, 29-31.

(68) R. O. Keohane and J. S. Nye, "The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy," *Visions of Governance for the 21st Century, Working Paper No. 4* (John F. Kennedy School of Government, 2000). The authors, discussing the GATT/WTO organizational structure, mention the exclusion of outsiders (e.g. governmental officials from other ministries) from the negotiations among the members of the trade elite, the lack of transparency and the predominance of the richest countries' representatives as the major patterns of the "club model".

(69) Hudec, above note 67, at 12; R. E. Hudec, "The New WTO Dispute Settlement Procedure: An Overview of the First Three Years", *Minnesota Journal of Global Trade* 8 (1999) 4-6.

(70) A. Stone Sweet, "Judicialization and the Construction of Governance", *Comparative Political Studies* 32 (1999) 149. This term is used to describe delegated and authoritative adjudication of conflicts between two parties by a third person.

(71) For a detailed discussion of the policy background and the various reasons that led to the changes in the GATT system see e.g. R. E. Hudec, "The Judicialization of GATT Dispute System", in *In Whose Interest? Due Process and Transparency in International Trade*, ed. M. M. Hart and D. P. Steger (Ottawa: Center for Trade Policy and Law, 1992) 9; Hudec, above note 67. From a political science perspective see also A. Stone Sweet, "The New GATT: Dispute Resolution and the Judicialization of the Trade Regime", in *Law Above Nations. Supranational Courts and the Legalization of Politics*, ed. M. L. Volcansek (Gainesville: University Press of Florida, 1997) 118; and Stone Sweet, above note 70.

(72) See Hudec, above note 69, at 9.

(73) Stone Sweet, above note 70, at 171. The legalization of the dispute settlement system did not prevent it from being factually ineffective throughout the 1980s. See also Trebilcock and Howse, above note 2, at 56-58.

(74) Abbott *et al*., above note 6, at 409.

(75) Professor Jackson famously highlighted the dichotomy between the "power-oriented" versus "rule-oriented" approach of dispute settlement. See recently J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed. (Cambridge (MA)-London: MIT Press, 1997) 109-11.

(76) For the following see e.g. the overview in Ibid., at 124-27.

(77) J. H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (London: Royal Institute of International Affairs, 1998) 99.

(78) Ibid.

(79) Jackson, above note 75, at133.

(80) The GATT formally was no international organization but simply an international treaty. Multilateral decisions were therefore not taken by member states but by the "CONTRACTING PARTIES" acting jointly. For the beginnings of the GATT see Ibid., at 36-43.

(81) L. R. Helfer and A.-M. Slaughter, "Toward a Theory of Effective Supranational Adjudication", *Yale Law Journal* 107 (1997) 273. Supranational adjudication refers to a "particular type of international organization that is empowered to exercise directly some of the *functions otherwise reserved to states*. The distinguishing feature in this regard between supranational and international organizations is the greater *transfer of or limitation on state sovereignty* involved in the establishment of a supranational organization." Ibid., at 287 (emphasis added).

(82) Codes and Agreements were concluded in areas such as dispute settlement, subsidies and countervailing duties, trade in services etc. For the exhaustive list of all agreements see Annex 1-4 to the WTO Agreement.

(83) Abbott *et al*., above note 6, at 405.

(84) See e.g. Cass, above note 44, at 40-41; R. Howse and K. Nicolaidis, "*Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*", Paper presented at the

Conference on Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium (Kennedy School of Government, Harvard University, 2000), at <http://www.ksg.harvard.edu>.

(85) Jackson, above note 77, at 101 (note 1).

(86) E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law: International and Domestic Foreign Trade Law and Foreign Trade Policy in the United States, the European Community and Switzerland* (Fribourg: University Press Fribourg, 1991) 219.

(87) E.-U. Petersmann, "The WTO Constitution and Human Rights", *Journal of International Economic Law* 4 (2000) 20. For a more detailed, liberal study on the need to "constitutionalise" government power see Petersmann, above note 86.

(88) See e.g. Petersmann, above note 87.

(89) T. Cottier, "Limits to International Trade: The Constitutional Challenge", *ASIL Proceedings of the Annual Meeting* (2000) 221.

(90) Howse and Nicolaidis, above note 84.

(91) Cass, above note 44, at 42.

(92) See Ibid., at 40-75. In the traditional sense, a national constitution is generally made up of the following elements: it claims priority over the rest of the other laws and can only be changed according to stricter procedural requirements than these laws. It limits and distributes the power of political actors (*vis-à-vis* each other as well as the citizen) and, at the same time, legitimises the exercise of governance, whereas the latter is based on fundamental societal goals and values contained in the constitution (For the sake of brevity I deliberately disregard the subtle discourse among constitutional scholars and legal philosophers on content and functions of constitutions). See e.g. M. Krajewski, "Democratic Legitimacy and Constitutional Perspectives of WTO Law", *Journal of World Trade* 35 (2001) 175.

(93) Jackson, above note 5, at 135.

(94) See Cass, above note 44, at 57-60.

(95) Sovereignty in this context shall be understood in a technical manner, devoid of any political connotation or, even more far-reaching, nationalistic romanticism.

(96) Jackson, above note 5, at 134, 58-59.

(97) Jackson, above note 77, at 33-35.

(98) Cass, above note 44, at 43.

(99) Krajewski, above note 92, at 170.

(100) Ibid.

(101) Cass, above note 44, at 43, 50.

(102) Ibid., at 54.

(103) Ibid., at 54-66.

(104) Ibid., at 66-71. At this stage a reference should be made to the jurisprudence of the ECJ, having developed a much more far-reaching constitutionalization of the EC treaty. See for example the seminal study of E. Stein, "Lawyers, Judges, and the Making of a Transnational Constitution", *American Journal of International Law* 75 (1981) 1. More recently R. Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (London: Macmillan, 1998).

(105) Cass, above note 44, at 49.

(106) Jackson, above note 5, at 158-59.

(107) Cass, above note 44, at 58.

(108) Ibid., at 59 (note 72).

(109) This concern was expressed by the Appellate Body in the *Hormones* report. See, above note 28.

(110) Dehousse, above note 104, at 43. Professor Dehousse uses this term in relation to the transformation of the EC treaty as a consequence of a few path-breaking judgments of the ECJ.

(111) J. L. Dunoff, "The Death of the Trade Regime", *European Journal of International Law* 10 (1999) 733.

(112) Trebilcock and Howse, above note 2, at 135-36. In constitutionalist terms, this development is described as "subject matter incorporation" of formerly (national) constitutional competences into the WTO regime. See Cass, above note 44, at 52.

(113) On this issue see particularly Dunoff, above note 111, at 745-57.

(114) Ibid., at 755-56.The following analysis closely builds on Dunoff's arguments.

(115) It is submitted that values – as opposed to norms – establish the preference of some good over others. Consequently, courts can only realize these values through a teleological balancing act. On the contrary, norms are either valid or invalid ("binary validity claim"). The danger of irrational judgments seems to be more likely in situations where judgments are rendered on the basis of value-relationships and not simply normative hierarchies. See J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge (MA): MIT Press, 1996) 254-55.

(116) Robert Howse emphasizes the importance of "coherence and integrity in legal interpretation" as a condition for legitimacy of dispute resolution. See Howse, above note 38, at 51.

(117) Dunoff, above note 111, at 757. From a political science perspective see D. R. Kelemen, "The Limits of Judicial Power: Trade-Environment Disputes in the GATT/WTO and the EU", *Comparative Political Studies* 34 (2001) 622. The absence of effective judicial review could have the opposite effect of allowing member states to "cheat". The *Regime Management Model* emphasises the role of dispute settlement for the effective functioning of the trade regime. For a good discussion see G. R. Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization", *Duke Law Journal* 44 (1995) 858-77.

(118) Dunoff, above note 111, at 754-56, 60.

(119) V. R. Walker, "Keeping the WTO from Becoming the 'World Trans-science Organization': Scientific Uncertainty, Science Policy, and Factfinding in the Growth Hormones Dispute", *Cornell International Law Journal* 31 (1998) 253, 55.

(120) See Ibid., at 277-78 (note 124).

(121) SPS Agreement, Preamble.

(122) Ibid., Art. 1.

(123) Trebilcock and Howse, above note 2, at 145.

(124) On standard setting bodies see Ibid., at 150-52.

(125) R. Howse, "Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization", *Michigan Law Review* 98 (2000) 2329.

(126) Ibid., at 2333.

(127) SPS Agreement, Preamble and Annex A.5.

(128) Trebilcock and Howse, above note 2, at147. See also Walker, above note 119, at 268.

(129) Walker, above note 119, at 255.

(130) Vern Walker provides a good discussion of risk management, see Ibid., at 267-77.

(131) Most recently see T. Christoforou, "Settlement of Science-Based Trade Disputes in the WTO: A Critical Review of the Developing Case Law in the Face of Scientific Uncertainty", *NYU Environmental Law Journal* 8 (2000) 635, 48; Pauwelyn, above note 61, at 358.

(132) Christoforou, above note 131, at 635.

(133) For this argument in a broader context see Dunoff, above note 111, at 755.

(134) Christoforou, above note 131, at 635 and Walker, above note 119, at 279.

(135) On the role of experts during the dispute settlement procedure see recently Christoforou, above note 131; and Pauwelyn, above note 61.

(136) Christoforou, above note 131, at 635-36. Similarly Walker, above note 119, at 309.

(137) Appellate Body, *Hormones*, above note 18, para 194.

(138) Ibid., para 193 (emphasis added).

(139) Ibid. (emphasis added).

(140) See Howse, above note 125, at 2341.

(141) Pauwelyn, above note 61, at 359.

(142) Ibid., at 357-59; Trebilcock and Howse, above note 2, at 147.

(143) See DSU, Art. 11.

(144) Trebilcock and Howse, above note 2, at 164-65.

(145) Ibid., at 165.

(146) Ibid.; see also Walker, above note 119, at 281-82.

(147) Trebilcock and Howse, above note 2, at 165.

(148) DSU, Art. 11. For more details see Part 2.2.2. above.

(149) McNelis, above note 39, at 198.

(150) Trebilcock and Howse, above note 2, at 165; Walker, above note 119, at 286.

(151) Pauwelyn, above note 61, at 361.

(152) See e.g. J. Atik, "Democratizing the WTO", *The George Washington International Law Review* 33 (2001) 451-53.

(153) J. Steffek, "The Power of Rational Discourse and the Legitimacy of International Governance," *EUI Working Papers RSC 2000/46* (Florence: European University Institute, 2000) 7.

(154) Jens Steffek (above note 153) has recently provided an interesting discussion of some of the main ideas, especially on international legitimacy. At this stage the caveat seems appropriate that legitimacy of democratic systems is not simply based on a crude majoritarian rule-making but on various additional factors, some of which will be mentioned in the following discussion.

(155) On these groups see for example Howse, above note 38, at 37; Krajewski, above note 92, at168-69.

(156) Steffek, above note 153, at 6.

(157) Ibid., at 3.

(158) Helfer and Slaughter, above note 81, at 284.

(159) Steffek, above note 153, at 9-10, 28. Yet, as Steffek rightly points out, there are further criteria which induce national governments to accept international governance: most prominently, self-interest and fear.

(160) Howse, above note 38, at 43.

(161) See for example Ibid., at 37-39.

(162) The idea of increasing demand for democratisation is supported by Professor Eric Stein's broad comparative study on democracy and international organizations. It describes the correlation between the level of integration in international organizations and the subsequent discourse on the organization's democratic and legitimacy deficit. See E. Stein, "International Integration and Democracy: No Love at First Sight", *American Journal of International Law* 95 (2001) 530.

(163) Among the vast literature on reform proposals see for example Atik, above note 152; D. C. Esty, "We the People: Civil Society and the World Trade Organization", in *New Directions in International Economic Law. Essays in Honour of John H. Jackson*, ed. M. Bronckers and R. Quick (The Hague: Kluwer, 2000) 87; J. H. Jackson, "The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited", *Journal of International Economic Law* 4 (2001) 67; Krajewski, above note 92; J. Ladefoged Mortensen, "The Institutional Requirements of the WTO in an Era of Globalisation: Imperfections in the Global Economic Polity", *European Law Journal* 6 (2000) 176; Shell, above note 117.

(164) Howse, above note 38, at 68.

(165) See above the references at note 163.

(166) Habermas, above note 115, at 147-57.

(167) This is opposed to other motivations for acceptance, e.g. due to personal incentives.

(168) Habermas, above note 115, at 273-76 and more generally ch. 7. On this aspect see also Howse, above note 38, at 42-43.

(169) Habermas, above note 115, at 274-76.

(170) C. U. Schmid, "A Theoretical Reconstruction of WTO Constitutionalism and its Implications for the Relationship with the EU", *EUI Working Paper Law, 01/05* (Florence: European University Institute, 2001) 12.

(171) Habermas, above note 115, at 276. Habermas borrows this expression from Cass Sunstein's work.

(172) Schmid, above note 170, at 10-14.

(173) See Howse, above note 38, at 42-51. Interesting parallels can (and should be) be drawn from the US-European debate on the legitimacy of regulatory authorities and their procedural obligations. See for example G. Majone, "Regulatory legitimacy", in *Regulating Europe*, ed. G. Majone (London/New York: Routledge, 1996) 291-94.

(174) On the "club model" see Keohane and Nye, above note 68.

(175) P. I. Hansen, "Transparency, Standards of Review, and the Use of Trade Measures to Protect the Global Environment", *Virginia Journal of International Law* 39 (1999) 1058.

(176) See Habermas, above note 168.

(177) Hansen, above note 175, at 1063.

(178) Ibid., at 1060-64.

(179) I am fully aware of the fact that an ideal deliberative process only takes place when many conditions are fulfilled. My attempt of adjusting our understanding for the standard of review by introducing the *deliberation test* is only one attempt to gradually increase rational deliberative conditions in the WTO, and to promote its acceptance – or acceptability – among stakeholders.

(180) It should be stressed that the aim of this test is not to invite panels and the Appellate Body to

engage in further judicial law-making. This would raise serious issues of judicial competence and, in addition, support critics of the current dispute settlement system. Rather than creating a new standard of review, the deliberation test should be understood as clarifying the "objective assessment" standard incorporated in Art. 11 DSU. Similar to Robert Howse's concept of "institutional sensitivity" (see above note 38, at 62-66), the main ideas of a deliberation test are as follows: to be sensitive to institutional strengths and weaknesses of other actors and to determine how much weight (or credibility) should be accorded to the determinations of these actors. As will be shown below, such a judicial technique would ultimately generate more democratic legitimacy of the WTO's dispute settlement system.

(181) See above at note 36.

(182) See above at note 49.

(183) Appellate Body, *United States - Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp Turtle)*, WT/DS58/AB/R (adopted 8 November 1998).

(184) Ibid., para 181.

(185) Ibid., para 183.

(186) Hansen, above note 175, at 1053-58.

(187) Christoph Schmid similarly argues for the strict control of formal requirements by a "deliberative adjudicator". See Schmid, above note 170, at 18.

(188) Howse, above note 125, at 2330.

(189) Ibid., at 2335. On this approach see in greater detail C. R. Sunstein and R. Pildes, "Experts, Economists, and Democrats", in *Free Markets and Social Justice*, ed. C. R. Sunstein (New York-Oxford: OUP, 1997) 128-48.

(190) On expert advice during panel proceedings see Pauwelyn, above note 61.

(191) See for example Hansen, above note 175, at 1061-63.

(192) This relates to Habermas' concept of constitutional judicial review: courts, guarding the conditions for deliberative democracy, shall keep the decision-making process open for public participation and, in this respect, review the "communicative presuppositions and procedural conditions of the legislative process." Habermas, above note 115, at 264.
