

Contents

<i>Foreword</i>	v
<i>General Editor's Preface</i>	vii
<i>Acknowledgements</i>	ix
<i>Abbreviations</i>	xi

INTRODUCTION

I. The Quest for Appropriate Standards of Review	3
II. 'Power-Oriented' GATT 1947 Dispute Resolution	4
III. 'Rule-Oriented' WTO Dispute Resolution	5
A. The Dispute Settlement Understanding (DSU)	5
B. The Lack of Generally Applicable Rules on Standards of Review	6
IV. Stocktaking	7
A. The Irrelevance of Domestic Standard-of-Review Concepts	7
B. Contents	8
1. Foundations	8
2. The Case Law	8

I. FOUNDATIONS

1 The Definition of Standards of Review	13
I. A Conceptual Definition	13
II. The Extremes: <i>De Novo</i> Review and 'Total Deference'	15
III. The Distinction between Facts and Law	16
A. The Categorization of Facts and WTO Law	17
1. Facts	18
2. WTO Law	18
B. The Categorization of Domestic and International Law	19
1. Domestic Law	20
2. International Law	21
IV. Appellate Body Review of Panel Reports	21
2 The Functions of Standards of Review	23
I. The Allocation of Power	23
A. The Embodiment of a Finely Drawn Balance	23
B. Other Techniques	24
II. The Relationship between Panels and the Members	25
A. International Interdependence	25

B.	National Sovereignty	26
C.	The <i>Vertical</i> Allocation of Power	28
D.	National Sovereignty as a Rationale for Panel Deference	29
1.	A Contractual Perspective	29
2.	A Policy Perspective	30
a.	Panel Deference in Certain Circumstances	30
b.	The Principle of Subsidiarity	31
3.	In Conclusion	32
III.	The Relationship between Panels and Other Bodies within the WTO	33
A.	The Role of the Judiciary in Domestic Constitutional Settings	33
B.	The Role of the Judiciary in the WTO	34
1.	No Tradition of Separation and Balance of Powers	34
2.	The Branches of Government	35
C.	The Special Bodies Within the WTO	36
1.	The Special Bodies With a 'Quasi-Judicial' Function	36
2.	Their Relationship to the Dispute Settlement Body	37
3.	The <i>Horizontal</i> Allocation of Power	38
a.	Panel Deference...	38
b.	...or No Particular Treatment?	39
4.	In Conclusion	40
3	The Rationales for Judicial Restraint	41
I.	Judicial Restraint towards Legal Issues	41
A.	Methods of Treaty Interpretation	41
1.	The Reference in Article 3.2 of the DSU	42
a.	Articles 31 and 32 of the VCLT	42
b.	The Structure and Meaning	43
c.	The Inflexible and Functionalist Character	44
2.	<i>De Novo</i> Standard of Review of Legal Interpretations	46
3.	Deference Through Interpretation	47
B.	Greater Expertise in Legal Matters	48
1.	Domestic Authority or WTO Adjudicating Body?	49
2.	The Principle of <i>Iura Novit Curia</i>	50
C.	Excursus: The ECtHR and the Doctrine of <i>Margin of Appreciation</i>	51
1.	The Doctrine of <i>Margin of Appreciation</i>	51
2.	Different Structure and Function	52
3.	Contextual Constellations	53
4.	Different Intentions of the Drafters	54
II.	Judicial Restraint towards Factual Issues	55
A.	Fact-Finding Methods and Resource Capabilities	55
1.	The Methods of Fact-Finding	55

2.	Expertize and Experience in Fact-Finding	56
3.	Institutional Advantages	57
B.	The Principle of Judicial Efficiency	58
C.	The Interplay Between Fact-Finding and Standards of Review	59
4	GATT 1947 and the <i>Uruguay Round</i> Negotiations	60
I.	Standards of Review under the GATT 1947	60
A.	The GATT 1947 Legal Texts	60
B.	Standards of Review of Facts	62
1.	In General	62
2.	In Anti-Dumping and Countervailing Matters	64
C.	Standards of Review of GATT 1947 Law	66
D.	Standards of Review of Domestic Law	67
1.	Panel Jurisdiction	67
2.	Domestic Law As a <i>Question of Facts</i> ?	68
E.	Standards of Review of International Law	69
F.	GATT 1947 Panel Reports and Their Value as Precedents	71
II.	The <i>Uruguay Round</i> Negotiations	72
A.	The Perception of Too Activist GATT 1947 Panels	72
B.	Proposals for a Deferential Standard of Review	73
1.	Applicable to Trade Remedy Cases	74
2.	Applicable to All Panel Proceedings	75
C.	The Issue of Standard of Review as a ‘Deal-Breaker’	76
1.	The Compromise	77
2.	In Conclusion	77
D.	The Value of the Negotiation History	78
III.	Subsequent Developments	80
5	Standards of Review in the WTO Legal Texts	82
I.	Article 3.2 of the DSU	82
II.	Article 11 of the DSU	83
A.	The Case Law Before <i>EC—Hormones</i>	84
B.	‘Article 11 of the DSU Bears Directly on This Matter’	85
C.	The Meaning of Article 11 of the DSU	86
1.	No Promotion of Judicial Restraint	87
2.	No Equation of Questions of Facts with Questions of Law	87
3.	Consistency With GATT 1947 Panel Practice	88
III.	Article 17.6 of the AD Agreement	88
A.	Questions of Facts	89
1.	The Exclusion of <i>De Novo</i> Panel Review	89
2.	Was the Establishment of the Facts ‘Proper’?	90
3.	Was the Evaluation of the Facts ‘Unbiased and Objective’?	91

B.	Questions of Law	93
1.	Incompatible Relationship of Tension Between the Two Sentences	93
2.	Is the Second Sentence Redundant or Inutile?	94
3.	Panel Deference in Exceptional Circumstances	95
4.	Excursus: Analogy with the <i>U.S. Chevron</i> Doctrine?	96
IV.	The Relationship between Article 11 of the DSU and Article 17.6 of the AD Agreement	97
A.	Less Deference Under Article 11 of the DSU?	97
B.	Application of Article 17.6 of the AD Agreement <i>Mutatis Mutandis</i> ?	98
C.	Article 17.6 of the AD Agreement as <i>Lex Specialis</i> ?	99
II. STANDARDS OF REVIEW RELATING TO QUESTIONS OF <i>FACTS</i>		
6	The General Framework and the Method of Fact-Finding	105
I.	The General Framework	105
A.	The Spectrum Between <i>De Novo</i> Review and 'Total Deference'	105
B.	The Two Stages of an 'Objective Assessment of the Facts'	106
1.	The <i>Formal</i> and the <i>Substantive</i> Aspect	106
2.	The Key Elements	107
II.	The Inquisitorial Character of Panel Proceedings	108
A.	From a Cautious and Deferential Language...	109
B.	...to the Principle of 'Ample and Extensive Authority'	110
C.	The Crucial Role of Article 13 of the DSU	111
1.	No Limitations on the Exercise of Article 13 of the DSU	111
2.	In Cases Involving Scientific Evidence	112
3.	The Right to Consider <i>Amicus Curiae</i> Briefs	113
4.	The Right to Draw Adverse Inferences	114
D.	No Significant Limitations	115
1.	Purely Practical Obstacles	115
2.	Prior Establishment of a <i>Prima Facie</i> Case?	116
7	'Raw' Evidence and Factual Conclusions	117
I.	Panel Review of the 'Raw' Evidence	117
A.	The Requirement to 'Examine All Relevant Facts'	117
B.	A Thorough Standard of Review	119
1.	In General	119
2.	In Cases Turning on Economic Data	120
3.	In Cases Turning on Scientific Evidence	121
a.	Risk Assessments under the SPS Agreement	122
b.	Other Risk Assessments	124
4.	In Traditional GATT 1994 Cases	124

C.	Limitations to a Comprehensive Standard of Review	126
1.	Evidence Which Was Not Before the National Authority	126
a.	Cautious Approach Towards Non-Record Evidence...	126
b.	...or Examination of Any Evidence?	127
2.	Purely Practical Obstacles	128
D.	Article 17.6(i) of the AD Agreement	129
1.	The Limitation to the Facts Before the National Authority	129
2.	The Requirement of 'Positive Evidence' and 'Objective Examination'	131
3.	'An Active Review or Examination of the Pertinent Facts'	131
4.	No Implied Obligations	133
II.	Panel Review of Factual Conclusions	133
A.	The Relationship Between 'Raw' Evidence and Factual Conclusions	134
1.	The Requirement of an 'Adequate Explanation'	134
2.	The Requirement of a 'Justifiable' Factual Conclusion	135
3.	The Requirement of a 'Plausible' Factual Conclusion	135
B.	No Panel Substitution of an Own Factual Conclusion	137
1.	In General	137
2.	In Cases Turning on Economic Data	137
3.	In Cases Turning on Scientific Evidence	139
a.	Factual Conclusions Drawn in the Course of a Risk Assessment	139
b.	Excursus: No Panel Review of a Risk Management Determination	141
C.	Article 17.6(i) of the AD Agreement	142
1.	Reference to Panel Reports Outside Anti-Dumping Matters	143
2.	The Requirement to Issue a 'Reasoned and Reasonable Explanation'	144
3.	The Initiation of an Anti-Dumping Investigation	146
D.	Excursus: Implied Procedural Requirements	147
1.	Implied Procedural Requirements in <i>EC—Hormones</i>	147
2.	Inconsistent Panel and Appellate Body Practice	148
8	Miscellaneous Matters	150
I.	The Characteristics of the Lower Instance	150
A.	Domestic Authorities	151
1.	In General	151
2.	In Trade Remedy Cases	152

B.	Special Bodies within the WTO	152
1.	Factual Findings by the Textiles Monitoring Body	153
a.	Panel Approval of Judicial Restraint?	153
b.	No Panel Deference in Practice	154
2.	Factual Findings by the Committee on Balance-of-Payments Restrictions	154
a.	Panel Rejection of Judicial Restraint	154
b.	Appellate Body Confirmation	155
3.	In Conclusion	156
II.	The Appellate Body and Questions of Facts	157
A.	Article 17.6 of the DSU	157
B.	'An Egregious Error Calling Into Question a Panel's Good Faith'	158
1.	The Criteria Pursuant to <i>EC—Hormones</i>	158
2.	Too Stringent a Scope of Appellate Review	159
3.	No Further Clarification of the Proper Standard of Review	161
C.	The Boundaries of the Panels' 'Wide Discretionary Power'	162
D.	An Unreasoned or Inadequate Explanation	163
1.	The Criteria Pursuant to <i>US—Lamb Meat</i>	163
2.	Definitive Departure From the Criteria Established in <i>EC—Hormones</i>	164
E.	In Conclusion	165
III.	Excursus: The Issue of Burden of Proof	166
A.	A Conceptual Definition	166
1.	The Concept of a Prima Facie Case of Inconsistency	167
2.	The Notion of Standard of Proof	167
B.	The Delimitation From Standards of Review	169

III. STANDARDS OF REVIEW RELATING TO QUESTIONS OF LAW

9	WTO Law	173
I.	Article 11 of the DSU	173
A.	'The Correct Interpretation'	174
B.	The Policy of Full <i>De Novo</i> Review	174
1.	Towards Members' Authorities	174
2.	Towards Special Bodies within the WTO	175
a.	Equivocal Theoretical Statements	175
b.	The Clarification by the Actual Approach	176
C.	No Appellate Body Deference Towards Panel Reports	177
II.	Article 17.6(ii) of the AD Agreement	178
A.	The Reluctance to Clarify the Meaning	178
B.	The Determination of Permissible Interpretations	180

C. No Case of Two Permissible Interpretations	181
III. Deference through Interpretation	182
IV. Excursus: Sources of Informed Interpretation	184
A. The Significance	184
B. The Sources	185
1. Arguments of the Parties	185
2. Academic Writings	185
3. Article 13 of the DSU and <i>Amicus Curiae</i> Briefs	186
 10 Domestic Law	 188
I. Introduction: Jurisdiction to Review Domestic Law	188
A. The WTO Legal Texts	188
B. Panel and Appellate Body Practice	189
C. The Distinction Between Mandatory and Discretionary Legislation	190
II. The Case Law Concerning Standards of Review	191
A. <i>India—Patent</i> : ‘A Detailed Examination of Domestic Law’	191
1. Panel Report	191
2. Appellate Body Report	192
B. <i>US—Sections 301–310</i> : ‘Factual Elements’	194
C. The Confirmation of Deference	196
1. <i>Canada—Pharmaceutical Products</i>	196
2. <i>US—Anti-Dumping Act of 1916</i>	197
D. <i>US—Omnibus Appropriations Act</i> : ‘Evidence of Compliance’	199
III. Concluding Summary	200
A. The Qualification of Domestic Law	200
1. As a Question of Facts	200
2. As Evidence of Compliance	202
a. Appellate Body Jurisdiction	202
b. As a Question of Law?	203
B. Panel Deference	204
1. A Thorough Review of the ‘Raw’ Evidence	204
2. No <i>De Novo</i> Standard of Review	205
C. In Conclusion	205
 11 International Law	 207
I. Introduction: Jurisdiction to Review International Law	207
A. The WTO Legal Texts	207
B. Panel and Appellate Body Practice	209
C. The Categorization of International Law	209
II. International Law Referred to in the WTO Legal Texts	210
A. The Status in the WTO Legal System	210
B. The Case Law Concerning Standards of Review	211

1.	International Intellectual Property Conventions	211
a.	Factual Information from the WIPO	211
b.	The Relevance of Articles 31 and 32 of the VCLT	212
c.	Seeking the 'Correct Interpretation'	213
2.	Articles 31 and 32 of the VCLT	213
3.	The <i>Fourth Lomé Convention</i>	214
III.	General Principles and Customary International Law	216
A.	The Status in the WTO Legal System	216
B.	The Case Law Concerning Standards of Review	217
IV.	Other International Agreements	218
A.	The Status in the WTO Legal System	218
B.	The Case Law Concerning Standards of Review	220
1.	The <i>Oilseeds Agreement</i>	220
2.	The <i>Harmonized Commodity and Coding System</i>	221
V.	Concluding Summary	222
A.	A Generally Comprehensive Standard of Review	222
1.	No Deference Towards the Parties	222
2.	The Relevance of the Legal Practice	222
3.	The Irrelevance of the Nature of the Legal Instrument	223
a.	Explicit Reference in the WTO Legal Texts or Not	223
b.	Limited in Terms of Membership and Systemic Significance or Not	224
B.	The Qualification of International Law	224
1.	The Criteria	225
2.	Systemically Irrelevant Bilateral Treaties	226
a.	As a Question of Facts	226
b.	Panel Deference	227
3.	General International Law and Systemically Significant Multilateral Treaties	227
a.	As a Question of Law	228
b.	<i>De Novo</i> Standard of Review	228
C.	In Conclusion	229

CONCLUDING SUMMARY

I.	Summary of Results	233
II.	Epilogue	239

<i>Bibliography</i>	245
---------------------	-----

<i>Table of WTO Reports</i>	263
-----------------------------	-----

<i>Table of GATT 1947 Reports</i>	267
-----------------------------------	-----

<i>Index</i>	269
--------------	-----