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Between Intensive Care and the Crematorium: Using the Standard of Review to Restore Balance to the WTO

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Between Intensive Care and the Crematorium: Using the Standard of Review to Restore Balance to the WTO

Phoenix X.F. Cai*

This Article explores the issue of the appropriate standard of review in the WTO dispute settlement process. The standard of review, whether de novo review, total deference, or somewhere in between, is incredibly important in international adjudication because it is an expression of the balance of power between sovereign nations and the WTO. In recent years, the standard of review has received unprecedented political attention, particularly in the area of health and safety regulations and dumping (selling goods below fair market value), both of which are discussed in detail in this Article. This Article synthesizes three areas of law—U.S. administrative law, constitutional law, and WTO jurisprudence—to argue that the total deference model borrowed from the U.S. Chevron Doctrine can not work in the WTO for a number of structural and policy reasons. This Article first describes the WTO's dispute settlement framework and situates Chevron within that framework. Next, it highlights why some of the strongest justifications for Chevron, such as efficiency, coordination and democracy fail in the WTO context. The Article then relies on recent case law to demonstrate that the WTO is ignoring Chevron, despite the fact that it is required by one of the WTO agreements. The Article concludes by offering some explanations for why this is happening and suggests a framework, based on dormant commerce clause analysis, in which it would be appropriate, if the domestic decision body had undertaken a least restrictive means analysis, for the WTO to give more deference than it currently does.

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* Assistant Professor of Law, University of Denver Sturm College of Law. B.A., Washington University; J.D., U.C. Berkeley (Boalt Hall). I dedicate this Article to my parents, Jian Bin Cai and Yu Lan Huang, for all that they have taught me. I would also like to thank my colleagues at the University of Denver Sturm College of Law who provided helpful comments and suggestions. Tamara Qureshi and Emily Robbins provided valuable research assistance. Any errors in the Article are my responsibility.

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I. INTRODUCTION

The creation of the World Trade Organization (WTO) in 1995 at the end of the Uruguay Round of international trade negotiations represented a beacon of optimism for those who believed in the betterment of humanity through world-wide economic growth. While some voices decried globalization, and international trade as its most easily vilified manifestation, most heralded the WTO as a victory and a “win-win” situation.

Now, eleven years later, the optimism seems to be flagging. On July 24, 2006, the Doha Round of trade talks¹ came to a screeching halt. After months of straggling on, Pascal Lamy, the general director of the WTO, formally suspended the negotiations when it became obvious that “gaps [were still] too wide” among the six principal negotiating countries (Australia, Brazil, the European Union, India, Japan, and the United States).² Mr. Lamy characterized the suspension of negotiations, without

1. *In the Twilight of Doha*, THE ECONOMIST, July 29, 2006, at 63-64. As another demonstration of optimism, the Doha Round of Trade Negotiations were launched in 2001, soon after the attacks of September 11, 2001. The self-styled “development round” was to be an ambitious effort to extend the reach of globalization to help the world’s poor gain access to global markets for agricultural products. In order for the Doha Round to succeed, more developed economies had to agree to lower tariffs for foreign farm products and slash import barriers and subsidies in farming domestically. *Id.*

2. World Trade Org., *Talks Suspended. ‘Today There Are Only Losers.’* (July 24, 2006), http://www.wto.org/english/news_e/news06_e/mod06_summary_24july_e.htm.

a date for their resumption, as a loss for everyone.³ In the words of Kamal Nath, India's trade minister, the Doha Round now lies "between intensive care and the crematorium."⁴ The Doha Round may or may not be moribund, as it is not uncommon for trade talks to come to a standstill. As a matter of fact, the Uruguay Round stalled in 1990 due to an impasse between the United States and the European Union over farming subsidies.⁵ One should not be overly pessimistic.

Whether the current standstill turns out to be a hiatus or a halt, it weakens the multilateral trade system in a variety of ways. First, the momentum behind the accomplishments of the first decade of the WTO and its expansion into new sectors and nations will be lost. There is a fear that the momentum may be permanently lost if the Doha talks are not concluded prior to July 2007, when the U.S. president's authority to get an up-or-down vote, via the so-called fast-track process in Congress for any trade agreement expires. These fears are not unfounded, as other WTO members may not support a trade agreement that Congress has bickered over, cannibalized, or watered down. Many observers believed that the creation of the WTO under the Uruguay Agreement passed thanks to the up-or-down vote. If the Doha Round is not concluded by July 2007, delays are likely to extend to after the next U.S. presidential election in 2008.

The breakdown in negotiations may signal an erosion of faith in the multilateral trading system. The impasse between least developed countries and the group of six developed economies in Doha may be symptomatic of a lack of political will among such economies to maintain and expand the WTO. If Doha fails, one of the predictable results will be an even greater proliferation of bilateral and regional trade agreements, which have mushroomed in the last ten years. The European Union has made no secret of its plan to seek closer ties with China through bilateral agreements if the Doha Round fails to yield an agreement. Chile recently joined the Southern Cone Common Market, known as Mercosur, the largest trade bloc in South America.⁶ The Bush

3. *Id.* ("The feeling of frustration, regret and impatience was unanimously expressed by developing countries this afternoon. . . . Today there are only losers."). As the talks continue to stall, Mr. Lamy observed, on October 10, 2006, that "it is now obvious that the cost of failure, and the missed opportunity to rebalance the trading system, would hurt developing countries more than others." World Trade Org., *Lamy: Round Failure Would Hurt Developing Countries More Than Others* (Oct. 10, 2006), http://www.wto.org/english/news_e/news06_e/tnc_chair_report_10oct06_e.htm.

4. *In the Twilight of Doha*, *supra* note 1, at 63.

5. *Id.*

6. Calvin Sims, *Chile Will Enter a Big South American Free-Trade Bloc*, N.Y. TIMES, June 26, 1996, at D2.

administration has signed fourteen free-trade deals and is negotiating more.⁷ While bilateral and regional arrangements have their benefits, they can also pose a threat to the WTO because of overlapping competencies, conflicting substantive and procedural standards, and the risk of forum shopping. As more move to bilateral and plurilateral regional trade arrangements, the power and legitimacy of the WTO may wane.

Finally, if the farming subsidies and barriers to trade issues are not resolved in the Doha rounds, there will be a proliferation of trade disputes concerning agricultural products and policies. Many of these disputes will likely be brought by less-developed countries against the United States and the European Union, both of which molly-coddle their farming sectors, albeit to varying degrees. The next time the WTO rules against the United States or the European Union, patience will wear thin. This will, in turn, erode political will further, as traditionally protected actors, such as farmers, complain of being victims of globalization. An increase in disputes will obviously strain the WTO's dispute settlement system, but it will also push the dispute settlement bodies, described in greater detail in Part II below, into the limelight.

How the WTO resolves disputes will be closely watched. In a climate of doubt, not only final outcomes, but also technical aspects of the dispute settlement process will be scrutinized. The standard of review, the subject of this Article, is one of the technical aspects that will gain greater importance. Because the standard of review, at its core, grapples with the problem of balance of power between the WTO and its constituent member nations, it is potentially the keystone that holds the whole system together. Any discussion about the legitimacy of the WTO, sovereignty, and political will to advance the WTO cannot be meaningful without a proper understanding of the standard of review.

This Article addresses the problem of the proper amount of deference the WTO dispute settlement bodies should accord to national determinations in cases arising under two major WTO agreements, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)⁸ and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping

7. *In the Twilight of Doha*, *supra* note 1, at 64.

8. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

Agreement).⁹ I will argue that *Chevron*¹⁰-type deference is inapplicable and problematic in the WTO for a number of compelling structural and policy reasons. As a result, WTO dispute settlement bodies are ignoring *Chevron*, even when *Chevron* deference is arguably required by a WTO agreement. Even though I argue that this is the only viable result due to the structural differences between the WTO and the U.S. administrative law framework, I acknowledge that ignoring *Chevron* comes with a cost—it potentially weakens the political will of large economies like the United States and the European Union to support and advance the WTO. Therefore, this Article concludes by suggesting a framework that gives *Chevron* deference a limited place in WTO jurisprudence.

Part II provides a basic layout of WTO dispute settlement procedures and pinpoints some of the difficulties international adjudicative panels face in determining the appropriate standard of review. Next, this Article explores some theoretical justifications for deference and concludes they do not apply with similar force in the WTO. Part III.B examines and critiques the Anti-dumping Agreement's¹¹ reliance on an U.S. administrative law (*Chevron*) model as a suitable analytical framework or comparative model for the WTO. Part III.C takes a detour to examine U.S. dormant commerce clause jurisprudence to determine if it might yield any comparative lessons for the WTO. Part IV traces the development of the standard of review from the seminal beef hormones controversy to recent cases in the antidumping area. Such cases suggest that WTO panels and the Appellate Body have shown an increasing willingness to reject *Chevron*'s highly deferential standards. Part V offers a number of explanations for why WTO dispute settlement bodies seem to have rejected the *Chevron* standard. The explanations suggest that, in addition to finding *Chevron* hard to apply, WTO dispute settlement bodies are uneasy with the structural problems inherent in *Chevron*. This Article concludes by suggesting a framework that resolves some of the structural tensions and addresses the problem of political will to support the WTO by giving *Chevron* a limited place in WTO jurisprudence.

9. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, Legal Instruments—Results of the Uruguay Round, 1868 U.N.T.S. 201 (1994) [hereinafter *Anti-Dumping Agreement*].

10. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (establishing a two-tiered process generally resulting in great deference to administrative findings).

11. *Anti-Dumping Agreement*, *supra* note 9.

II. A BRIEF HISTORY OF THE WTO

The creation of the WTO was arguably the most significant development in international trade law since the implementation of the General Agreement on Tariffs and Trade (GATT) of 1947.¹² The WTO, essentially a unitary charter of trade rules and agreements,¹³ brought

12. In the aftermath of World War II, fifty countries convened at the Bretton Woods Conference to create, among other things, the International Trade Organization (ITO), a specialized agency of the United Nations. JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS* 211 (4th ed. 2002). Those at the conference hoped that the creation and development of an ancillary institution dealing solely with trade would decrease obstacles to international trade and give effect to multilateral nondiscriminatory trade principles. *See id.* at 211-12. Along with the ITO, the countries created the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the World Bank). *Id.* at 200. The countries designed the three organizations with three purposes in mind: the IMF would repair the disintegration of the world economy; the World Bank would stimulate and support foreign investment; and the ITO would reverse the protectionist and discriminatory trade practices believed by many to have in part caused the two World Wars. *Id.* at 200-01. In the fall of 1947, twenty-two of the countries present at the Bretton Woods Conference formed a provisional agreement, the General Agreement on Tariffs and Trade. *Id.* at 212-13. These countries (the Contracting Parties) ratified the GATT in 1948 as a permanent treaty. *Id.* at 213. The original GATT agreement is often referred to as the 1947 GATT. It remains largely in place today even though many revisions and additions have been made to it. In 1948, when it came time for the formal ratification of the ITO, the United States refused to sign the charter and the ITO was aborted. *Id.*

The GATT remained in place from 1947 to 1995. What began as an agreement regarding principally tariffs on goods gradually expanded to encompass other areas, including new agreements dealing with nontariff barriers to trade, subsidies, financial services, intellectual property, environmental and health standards, etc. For the first decade of GATT, dispute settlement relied primarily on diplomatic means to stop violations of the substantive agreements. *See id.* at 257. In the 1950s, it became the practice to use panels for dispute settlements. *Id.* At the end of a dispute settlement, a GATT panel would issue a report, which had to be adopted by a positive consensus among all GATT members. *Id.* Effectively, this meant the losing party could always block adoption of a panel report by voting against it. During the Tokyo Round of trade negotiations (1973-1979), the GATT established codes of conduct for panels as well as discussed nontariff barriers and accorded preferential treatment for developing countries. *Id.*

The next round of trade talks, the so-called Uruguay Round (1986-1994), aimed at the further development of trade law, led to the idea of creating an umbrella World Trade Organization similar to the failed ITO. *See generally* World Trade Org., *Understanding the WTO Basics: The Uruguay Round*, http://www.wto.org/English/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Jan. 13, 2007). The round saw the need for a more adjudicative process for dispute settlement, a reformation of trade in textiles and agriculture, and an expansion of the trade agreements to include intellectual property and trade in services. On April 15, 1994, 123 participating countries signed the agreement for the formation of the WTO. *Id.* Under the WTO, the GATT still serves as the WTO's "umbrella treaty for trade in goods." *Id.*

13. The WTO Charter is a single charter composed of several agreements that govern multiple areas of international trade: agriculture, health and safety, developing countries, textiles, technical barriers, antidumping, custom valuation, shipping, subsidies, licensing, services, intellectual property, and dispute resolution. JACKSON ET AL., *supra* note 12, at 219-20. To join in these agreements, a country must approach the WTO with the intention of joining. The country wanting to join must inform the WTO and its member countries about the details concerning their

together the GATT, the preexisting institutions of GATT, and all subsequent trade agreements negotiated under the aegis of GATT. The creation of a unified dispute settlement process within the WTO, designed to enforce WTO rules, also underscored the increasing judicialization of international trade law.

The WTO had a gestation period of fifty years. The idea of an international organization aimed at the prevention of trade barriers began to take embryonic form in the minds of many in the days after World War II.¹⁴ Even prior to the end of World War II, allied leaders envisioned a new postwar world that would not be characterized by the economic isolationism that had taken root prior to the war. Political leaders and scholars alike attributed, in no small measure, the Great Depression, galloping inflation and rising nationalism in Germany, and the onset of war itself to isolationism.¹⁵ A 1941 speech by Sumner Welles, then the United States Undersecretary of State, is representative of this view:

Nations have more often than not undertaken economic discriminations and raised up trade barriers with complete disregard for the damaging effects on trade and livelihood of other peoples, and, ironically enough, with similar disregard for the harmful resultant effects upon their own export trade. . . .

The resultant misery, bewilderment, and resentment, together with other equally pernicious contributing causes, paved the way for the rise of those very dictatorships which have plunged almost the entire world into war.¹⁶

In response to these concerns, finance ministers and representatives from fifty nations met in July 1944 at Bretton Woods, New Hampshire, and formed the International Bank for Reconstruction and Development (commonly known as the World Bank) and the International Monetary Fund (IMF).¹⁷ The attendees at the Bretton Woods conference were

foreign trade regime and conduct bilateral negotiations with member countries. *Id.* at 234. The results of these negotiations are contained in the Schedule of Concessions and Commitments to GATT 1994 and the Schedule of Specific Commitments to the GATS. *Id.* If there is a two-thirds majority vote of the member nations, the country is accepted and bound to the WTO obligations. *Id.* at 234-35.

14. JACKSON ET AL., *supra* note 12, at 212.

15. See, e.g., Richard N. Cooper, *Trade Policy as Foreign Policy*, in U.S. TRADE POLICIES IN A CHANGING WORLD ECONOMY 291-92 (Robert M. Stern ed., 1987).

16. U.S. Dep't of State, Pub. 1660, Commercial Policy Series 71 (1941), *quoted in* JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT (A LEGAL ANALYSIS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE)* 38 (1969); DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* 1 (2d ed. 2004).

17. JACKSON ET AL., *supra* note 12, at 200.

sensitive to the need to rebuild war-ravaged Europe, while at the same time avoiding the disastrous consequences of heavy reparations imposed on Germany after World War II.¹⁸ Reconstruction and sustainable monetary policy were key points at the Bretton Woods conference.¹⁹ The member nations, however, did not specifically negotiate trade at this time, even though both the World Bank and the IMF would play key roles in international trade, albeit indirectly.

Instead, member nations focused on trade when, in early December of 1945, the United States proposed an International Trade Organization (ITO).²⁰ Member nations negotiated the ITO in a series of conferences from 1946-1948 in London, New York, Geneva, and Havana, which culminated in the Havana Charter for an International Trade Organization, negotiated at a United Nations Conference on Trade and Employment (Havana Charter).²¹ The Havana Charter dealt not only with trade, but also labor, economic development, restrictive business practices, and commodities agreements. All of this was for naught. In December of 1950, Congress voted down membership by the United States, the most economically stable and developed economy at the time, effectively killing the ITO in its infancy.²² However, one part of the ITO did survive—the GATT.

During negotiations for the various ambitious parts of the Havana Charter, governments were eager to push forward trade liberalization. A drafting committee produced a full first draft of the GATT in January and February of 1947 under the auspices of the preparatory committee, which was charged with drafting the full ITO charter. Trade negotiations that followed produced the first set of tariff schedules among twenty-three participating member nations²³ later in the year. The text of the

18. *See id.* at 211.

19. *Id.* at 200.

20. *Id.* at 211-12.

21. *Id.* at 212-13.

22. *Id.* For an excellent description of the history and foundations of the world trade system, including a thorough discussion of the doomed ITO, see RICHARD N. GARDNER, *STERLING-DOLLAR DIPLOMACY IN CURRENT PERSPECTIVE: THE ORIGINS AND THE PROSPECTS OF OUR INTERNATIONAL ECONOMIC ORDER* (1980); JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1997).

23. The GATT was initially signed by twenty-three countries: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, the Czechoslovak Republic, France, India, Lebanon, Luxembourg, the Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, the United Kingdom, and the United States. General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

GATT and this first set of tariff commitments were adopted as a final act, which also included a Protocol of Provisional Application (PPA).²⁴

The PPA was established to immediately implement the GATT and tariff schedules because the proposed ITO, with its sweeping scope, could not become effective until it had been approved by the legislatures of the participating members.²⁵ This would take time. In the meanwhile, some governments wanted to put the GATT and its accompanying tariff schedule into immediate effect without waiting for the ITO approval process to be completed. Accordingly, in October of 1947, eight governments²⁶ agreed under the PPA to apply parts I and III of the GATT fully and to apply part II "to the fullest extent not inconsistent with existing legislation."²⁷

This was a substantial undertaking. Part I of the GATT consisted of two provisions: nondiscrimination towards foreign suppliers and just-negotiated schedules of tariff rates.²⁸ Part III of GATT primarily contained administrative provisions.²⁹ The heart of the GATT lay in part II, which contains twenty articles (articles III through XXIII) dealing with national treatment, antidumping and countervailing duties, valuation of imports by customs, restrictions on imports for balance of payments purposes, marks of origin, import and export quotas, exchange arrangements, subsidies, state trading enterprises, governmental assistance for economic development, emergency actions on imports of particular products, and exceptions to GATT obligations.³⁰

A. *Dispute Settlement Understanding*

The Dispute Settlement Understanding (DSU) is a watershed in the gradual shift from a diplomatic, power-based approach to international dispute settlement in the international trade arena to a more legalistic, law-based approach.³¹ Indeed, some international trade scholars view the

24. United Nations Conference on Trade and Employment, Nov. 21, 1947-Mar. 24, 1948, *Havana Charter for an International Trade Organization*, U.N. Doc. E/CONF.2/78 (Mar. 24, 1948).

25. JACKSON ET AL., *supra* note 12, at 213.

26. The eight nations were Australia, Belgium, Canada, France, Luxembourg, the Netherlands, the United Kingdom, and the United States. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, T.I.A.S. 1700, 55 U.N.T.S. 308.

27. *Id.*

28. GATT, *supra* note 23, arts. I-II.

29. *Id.* arts. XXIV-XXXV.

30. *Id.* arts. III-XXIII.

31. See Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, 29 INT'L LAW 389, 399, 405-06 (1995). See generally ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW*,

DSU as a major advancement for the emergence of the rule of law not only in the world trade arena³² but also in the larger context of public international law.³³ The dispute settlement procedures are a centerpiece in the WTO's array of mechanisms designed to ensure both the reduction of tariffs and nontariff trade barriers as well as the elimination of discriminatory treatment in trade relations.

However, in order to advance fully the substantive norms of the WTO through a rule-based international trade system, the dispute settlement system must achieve and maintain a degree of transparency, consistency, and predictability,³⁴ the same traits that are prerequisites for any legal system based on the rule of law. While the WTO has made great strides in the direction of a legalistic model through the DSU,³⁵ this progress may be hampered by uncertainties in the application of the new DSU, especially vis-à-vis the standard of review utilized by panels.

B. *History of Trade Dispute Settlement Procedures*

In order to understand fully both the workings and the significance of the DSU, a brief explanation of the dispute resolution procedures under the GATT in place since 1947 is necessary. While the GATT contains numerous provisions dealing with dispute resolution in some form,³⁶ the principal settlement forum within the GATT prior to the

INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT 66-70 (1997) (discussing the usage and justifications of power-oriented versus rule-oriented approaches for international trade dispute settlement); John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J.W.T.L. 93, 98-101 (1978) (detailing the distinction between power-based and rule-based diplomacy in trade).

32. See PETERSMANN, *supra* note 31, at 25, 66.

33. See Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, in LEGALIZATION AND WORLD POLITICS 73, 84-104 (Judith Goldstein et al. eds., 2001) (arguing that formal international dispute resolution not only reflects existing international relationships but can also strengthen them). *But see* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005) (debunking the conventional wisdom that the most successful tribunals are independent and expressing skepticism about the International Criminal Court as well as the WTO dispute settlement process).

34. Proponents of the legalistic model "argue that the necessity for certainty and predictability in the management of international business transactions calls for a more rule-oriented system." Miquel Montaña I Mora, *A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 129, 137-41 (1993) (discussing the "Improvements of 1989" as a harbinger for the eventual development of a more rule-oriented approach); *see also* Young, *supra* note 31, at 389-91 (surveying dispute resolution advances made in the Uruguay Round).

35. See G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 833-37, 911-22 (1995) (describing the new WTO system as a "stunning victory" for international trade legalists and arguing in favor of granting standing to private and other nongovernmental parties in the WTO).

36. See JACKSON ET AL., *supra* note 12, at 256.

adoption of the DSU evolved from the application of articles XXII³⁷ and XXIII.³⁸ These articles do not explicitly mention the term “dispute settlement.” Rather, application of the two articles by early GATT working parties³⁹ and panels⁴⁰ eventually evolved into an accepted GATT practice. Subsequently, member nations codified that existing dispute settlement practice in a series of decisions and understandings.⁴¹ This rather informal network remained in force until the Uruguay Round established the WTO and promulgated the unified DSU.⁴²

Article XXII provides for bilateral consultations “with respect to any matter affecting the operation of [the] Agreement” and subsequently for multilateral consultations at the request of the parties if the former fails.⁴³ Article XXII thus represents a diplomatic or negotiation-oriented approach to dispute resolution. In contrast, article XXIII offers a more adjudicative alternative to parties who allege nullification or impairment of benefits arising under the General Agreement. The complainant may take a dispute to the member nations, who must hear the allegations, investigate, and make recommendations or give a ruling.⁴⁴ Under some circumstances, the member nations could mandate a suspension of obligations or concessions⁴⁵ by the aggrieved party against the offending

37. GATT, *supra* note 23, art. XXII.

38. *Id.* art. XXIII.

39. Article XXIII of the GATT is the principal provision for dispute settlement. JACKSON ET AL., *supra* note 12, at 257. Because there is little procedural detail in article XXIII, the Contracting Parties initially improvised and developed a system of working parties. *Id.* Working parties in the GATT context consists of a body whose members are “nations,” and each nation can send a representative of their choice to act on their behalf. *Id.* Under the influence of Director-General Eric Wyndham-White in the 1950s, it became the practice to use panels instead. *Id.*

40. It became the practice in the 1950s to use panels to adjudicate disputes. *Id.* Panels usually consists of three persons, often national representatives (and more recently, nongovernmental officials who are experts on international trade law), acting independently in their individual capacities. *Id.*

41. See generally PETERSMANN, *supra* note 31, at 71 (listing the most significant decisions and understandings GATT Member nations adopted since the Kennedy and Tokyo Rounds of multilateral negotiations).

42. *Id.*

43. GATT, *supra* note 23, art. XXII.

44. *Id.* art. XXIII.

45. Members maintain the balance of the WTO by adhering to the trade concessions in the GATT. Countries make trade concessions to gain more open market access from another nation. Trade concessions include tariff reductions and access to different products. For example, after having opened the European market to U.S. oilseeds, the European Community instituted production subsidies for European growers. The panel found that a tariff concession generates a reasonable expectation that its commercial benefit will not be undermined by a subsequent production subsidy on the same product. The placing of subsidies on the oilseeds created an imbalance that entitled the United States to suspend trade concessions or seek compensation in return. ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 245-49 (1993).

party.⁴⁶ However, as article XXIII provides scant procedural guidelines for this process, member nations improvised and developed much of what was to become GATT practice⁴⁷ on an ad hoc, case-by-case basis. In the early years, the GATT member nations formed working parties, which were ad hoc committees of member nations, to consider disputes.⁴⁸ Members of the working parties sat in their capacities as member-nations rather than independent adjudicators.⁴⁹ The disputants participated in the working parties, which operated on the basis of consensus, thereby making the proceeding heavily negotiation-based, power-based, and susceptible to political considerations.⁵⁰ Later, a practice of relying on adjudicative panels composed of independent experts emerged.⁵¹

While the GATT dispute settlement system was successful to the extent that it was widely invoked by member nations with grievances to air,⁵² it was plagued by a number of procedural deficiencies. Foremost among these inadequacies was the procedure for adoption of panel reports. Panel decisions were not official until formally adopted by a consensus vote of all the member nations. While this had democratic appeal, in practice it meant that any one member-nation, typically the losing party, could block the adoption of a panel report and thereby forestall implementation of the ruling or recommendation. The powerful blocking mechanism eroded the credibility of the entire dispute settlement system, because it was not uncommon for panel reports to remain unadopted for years due either to the recalcitrance of the losing party or to another member's disagreement with panel recommendations.⁵³ Delays in the adoption of panel reports and incomplete or conditional implementation of panel findings fostered uncertainty, unpredictability, and lack of finality.⁵⁴

Other problems abound. Initially, there were delays in the establishment of panels.⁵⁵ The composition of the panels often became

46. GATT, *supra* note 23, art. XXIII(2).

47. JACKSON ET AL., *supra* note 12, at 257.

48. *Id.*

49. *Id.*

50. See PETERSMANN, *supra* note 31, at 71, 84.

51. *Id.* at 71.

52. See generally HUDEC, *supra* note 45, at 375-83 (providing a comprehensive study of 207 complaints and listing the disputes resolved by adoption of a panel report); JACKSON, *supra* note 22, at 98-99 (1st ed. 1989) (noting that the cases considered by panels numbered approximately 233 as of 1988); PETERSMANN, *supra* note 31, at 89-90 (detailing the frequent use and speedy implementation of GATT dispute settlement procedures).

53. Young, *supra* note 31, at 402.

54. See PETERSMANN, *supra* note 31, at 90.

55. See Jared R. Silverman, *Multilateral Resolution over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO*, 17 U. PA. J. INT'L ECON. L. 233, 258 (1996).

an object of heated contention.⁵⁶ Member nations increasingly engaged in forum shopping, choosing from among the different dispute settlement procedures available under the General Agreement and the Tokyo Round agreements.⁵⁷ Panel shopping was motivated in large part by norm shopping. Different substantive legal provisions pertinent to the outcome of the dispute emphasized different norms.⁵⁸ Furthermore, economically powerful parties, notably the United States, the European Union, and Canada, frequently refused to comply with panel decisions.⁵⁹ A concurrent increase in recourse to unilateral trade sanctions further exacerbated the problem of noncompliance.⁶⁰ The list of grievances in antidumping⁶¹ and countervailing duties⁶² (AD/CVD) disputes was also quite long. The number and severity of these failures grew precipitously in the 1980s, which saw a dramatic increase in the number of AD/CDV

56. *Id.*

57. See PETERSMANN, *supra* note 31, at 90. The Tokyo Round of Agreements refer to the group of agreements negotiated at the Tokyo Ministerial Conference which took place from 1976 to 1984, including the Anti-Dumping Agreement, Agreement on Agricultural Subsidies, and Trade-Related Aspects of Intellectual Property.

58. See HUDEC, *supra* note 45, at 353-54.

59. *Id.* at 354.

60. See PETERSMANN, *supra* note 31, at 91. For an excellent overview of section 301 of the Trade Act of 1974, which authorizes the U.S. Executive Branch to unilaterally retaliate against unfair trade practices, see JACKSON ET AL., *supra* note 12, at 317-19. For a comparison between section 301 and European retaliatory measures, see generally Wolfgang W. Leirer, *Retaliatory Action in the United States and European Union Trade Law: A Comparison of Section 301 of the Trade Act of 1974 and Council Regulation 2641/84*, 20 N.C. J. INT'L L. & COM. REG. 41 (1994).

61. Dumping refers to the practice of selling products abroad at a lower cost than the comparable products are sold domestically. When dumping occurs, the importing nation has recourse both to the WTO's antidumping complaint procedures as well as domestic trade actions. Nations generally choose the latter, which can lead to the imposition of higher duties on the dumped goods, as a remedy of first resort. For example, suppose that Japan exports motorcycles to the United States and sells them at a lower price than the same motorcycles being sold in Japan. Not only can the United States bring a complaint under the dispute settlement procedures of the WTO, it (or more likely, a U.S. manufacturer of motorcycles) can also bring a trade action under 19 U.S.C. § 1673 (2000) (Trade Act of 1974), in which the Department of Commerce will investigate whether the motorcycles are being sold more cheaply in the United States than in Japan. Assume the motorcycles are sold for \$1000 in Japan (normal value) but only \$800 in the United States (export price). The dumping margin is \$200 or twenty percent. If the Department of Commerce finds that dumping has taken place, the remedy is a trade action, or an imposition of a twenty percent duty on the Japanese motorcycles. Such a duty is supposed to level the playing field between the United States and Japanese motorcycle industries. These so-called trade action or trade remedy duties are a WTO-consistent means of protecting a domestic industry.

62. Countervailing duties are duties imposed to counteract the competitive effect of a country's direct or indirect subsidization of the production or exportation of goods within a specific industry. See generally Warren F. Schwartz & Eugene W. Harper, Jr., *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831 (1972) (assessing the prospects for effective international regulation of subsidies); JACKSON, *supra* note 22, at 282.

cases⁶³ that were characterized by a "high percentage of legal failures,"⁶⁴ such as the "persistent blockage of [panel decisions]," curbed participation of GATT's legal division, and attempts by the United States to circumscribe the standard of review in antidumping cases.⁶⁵ Something had to give.

Negotiations during the Uruguay Round reflected GATT members' dissatisfaction with the state of affairs. Fueled by resentment against unilateral retaliation, including U.S.-imposed trade sanctions under section 301,⁶⁶ GATT member nations recognized the desirability of a more stable and stronger dispute settlement system. Larger nations believed that a more juristic approach would not only serve their trade interests but also curtail the application of unilateral retaliation.⁶⁷ Smaller and developing nations hoped that a more rule-based dispute settlement system would level "the playing field of international trade between states"⁶⁸ and afford them greater negotiating leverage. With the political will present, the groundwork was laid for the emergence of the WTO and the adoption of the new DSU in 1995.

C. *The Dispute Settlement Understanding: Mending the Leaky Roof*

The DSU marks a profound departure from the fragmented, ad hoc, and heavily politicized GATT dispute settlement procedures in four fundamental ways. First, the DSU eliminates the possibility of forum

63. David Palmeter & Gregory J. Spak, *Resolving Anti-Dumping and Countervailing Duties Disputes: Defining GATT's Role in an Era of Increasing Conflict*, 24 LAW & POL'Y INT'L BUS. 1145, 1145 (1993).

64. HUDEC, *supra* note 45, at 355.

65. See PETERSMANN, *supra* note 31, at 90-91. See generally Philip A. Akakwam, *The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations*, 5 MINN. J. GLOBAL TRADE 277 (1996) (arguing that more self-restrained or deferential panels are not only more workable, but will enhance member nations' will to accept antidumping decisions).

66. Trade Act of 1974, 19 U.S.C. § 2411 (2000). Section 301 allows the U.S. Trade Representative (USTR) to threaten or "to take retaliatory action against foreign trade practices that the United States deems 'unfair.'" JACKSON ET AL., *supra* note 12, at 318. It was considered a self-help measure justified under a weak GATT. During the Uruguay Round, the United States used section 301 of the Trade Act of 1974 as a bargaining chip in gaining implementation of the TRIPs Agreement. *Id.* The European Community claimed in the *U.S.-Section 301* case that section 304(a)(2)(A) violated article 23 of the DSU. The WTO panel disagreed, holding that section 301 was a discretionary measure that allowed the USTR to determine *whether* U.S. rights were being denied, but did not require the USTR to determine *that* U.S. rights were being denied. See Yoshiko Naiki, *The Mandatory/Discretionary Doctrine in WTO Law: The US-Section 301 Case and Its Aftermath*, 7 J. INT'L ECON. L. 23, 37-39 (2004). A brief explanation of section 301's provisions may be found online. Jean Heilman Grier, Section 301 of the 1974 Trade Act, <http://www.osec.doc.gov/ogc/occic/301.html> (last visited Jan. 14, 2007).

67. See Shell, *supra* note 35, at 847.

68. *Id.* at 835-36.

shopping by creating an integrated dispute settlement system applicable to all disputes brought pursuant to the WTO and accompanying agreements.⁶⁹ Thus, a single dispute resolution mechanism, based primarily on the DSU and GATT article XXIII, now applies to all disputes arising under all Uruguay Round agreements.⁷⁰ This exclusivity rule prohibits member nations from unilaterally declaring a violation without recourse to the WTO's dispute settlement process, which was an option prior to the adoption of the DSU.⁷¹ Nations also may not retaliate unilaterally.⁷² Instead, complainants must seek redress of nullification or impairment of benefits under the auspices of the Dispute Settlement Body.⁷³ In extreme circumstances where compensation and/or suspension of trade concessions⁷⁴ may be appropriate, disputants must also abide by panel determinations of the level of compensation and/or suspension of trade concessions allowed.⁷⁵ Nations thereby abdicate a substantial amount of independence (and arguably sovereignty⁷⁶) under the newly established, integrated, and exclusive dispute settlement system.

Second, the DSU addresses the problem of delays rampant under the old procedures by imposing strict time limits for the resolution of disputes. Disputants are still required to try to settle their differences through negotiations.⁷⁷ However, this consultation phrase now lasts only

69. See Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 COMMON MKT. L. REV. 1157, 1205-24 (1994) (providing a succinct but exhaustive description and analysis of the functioning of the DSU).

70. See *id.*

71. See *id.* at 1206, 1214-15.

72. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 23, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

73. *Id.* art. 23, ¶ 1 (“When Members seek the redress of a violation . . . they shall have recourse to, and abide by, the rules and procedures of this Understanding.”).

74. For an overview and analysis of remedies and sanctions available under the WTO, see JACKSON ET AL., *supra* note 12, at 305-13.

75. DSU, *supra* note 72, art. 23(2)(c).

76. See S. 2467 GATT Implementing Legislation: *Hearings Before the S. Comm. on Commerce, Science, and Transportation*, 103d Cong. 350-81 (1994) (statement of Ralph Nader, Consumer Advocate); see also William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 FORDHAM INT'L L.J. 427, 469 (1995) (arguing that claims that the Uruguay Round Agreements affect U.S. sovereignty are partially correct); William R. Sprance, *The World Trade Organization and United States' Sovereignty: The Political and Procedural Realities of the System*, 13 AM. U. INT'L L. REV. 1225, 1231 (1998) (acknowledging the antisovereignty argument and stating that the United States has made an illusory “surrender” of sovereignty).

77. DSU, *supra* note 72, art. 4(2)-(6).

sixty days, after which either party may request the establishment of a panel.⁷⁸ Blockage of panel establishment is no longer possible as disputants must now agree upon panelists within twenty days.⁷⁹ In the event that the parties deadlock on panel composition, the Director-General, in consultation with the Chairman of the Dispute Settlement Body and the Chairman of the relevant council or committee, appoints the panelists unless there is a consensus among members not to establish a panel.⁸⁰ Lastly, parties are also bound to observe the reasonable time period, generally fifteen months, given to the offending party for the implementation of panel decisions, usually by bringing its actions into conformity with its WTO obligations.⁸¹

Time limits apply to the actual decision-making process as well. Panels must request information, receive submissions, hear oral arguments, and deliver a final report to the parties within six months "as a general rule."⁸² Panels are also supposed to circulate a final report to all WTO member nations within nine months of establishing a panel.⁸³ That timeframe is extended to twelve months if a case is appealed.⁸⁴ Empirical data has shown that in practice, both periods are often extended. For instance, between 1995 and 2002, the average number of days between panel composition and the issuance of a panel report to the parties was 274 days, and on average, 361 days transpired before member nations receive the final panel report.⁸⁵ More recently, Mexico compiled statistics suggesting that the average time for report adoption has been fifteen to sixteen months.⁸⁶ Despite these delays, imposing time limits for the adjudicative process where none previously existed not only has

78. *Id.* art. 4(7). It should be noted that alternatives to the formal dispute resolution by a panel are available. Article 5 of the DSU specifically provides that good offices, conciliation, and mediation are available in lieu of, or in addition to the formal procedure. *Id.* art. 5. Consultations and these informal alternatives preserve the possibility of amicable resolution and reflect the negotiating GATT members' desire to balance consensual and adjudicative settlement methods. See JACKSON ET AL., *supra* note 12, at 269-71; see also ASIF H. QURESHI, *THE WORLD TRADE ORGANIZATION: IMPLEMENTING INTERNATIONAL TRADE NORMS* 99-100 (1996).

79. DSU, *supra* note 72, art. 8(7).

80. *Id.*

81. *Id.* art. 21(4).

82. *Id.* art. 12(8). In extraordinary circumstances, panels may take more time, not to exceed nine months. *Id.* art. 12(9).

83. *Id.* art. 12(9), art. 20.

84. *Id.* art. 20.

85. Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995-2002: A Statistical Analysis*, 6 J. INT'L ECON. L. 251, 255 (2003).

86. William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 49 (2005) (citing a paper JOB (03)208, 10 Nov. 2003, submitted by Mexico to the DSU which has not been circulated as a TN/DS document).

enhanced efficiency but also has contributed to the predictability and certainty of the entire dispute settlement system.

The third organic change marks an about-face in the adoption of panel reports. The General Council⁸⁷ of the WTO now adopts reports automatically unless there is a unanimous vote not to do so.⁸⁸ This negative consensus rule has had two consequences. Most importantly, it removes the oft-realized threat in the past of the losing party blocking adoption. Under the new system, legitimization of panels' decisions does not depend upon the whim of a single nation. Rather, decisions are effectively valid upon issuance and take on the force of law unless all member-nations affirmatively act to reject adoption, which is unlikely and, at any rate, difficult. Secondly, reverse consensus eliminates many of the delays in adoption and subsequent noncompliance that plagued the old dispute resolution process.

The fourth and final fundamental change lies in the creation of an appellate body to review the legal findings and conclusions of law made by panels. Seven recognized experts in the field of international trade law form the Appellate Body.⁸⁹ The Dispute Settlement Body appoints the members for four-year terms, with one possible reinstatement term.⁹⁰ Three members, selected by rotation,⁹¹ hear appealed cases⁹² in closed, confidential proceedings.⁹³ Appellate proceedings are not to exceed sixty

87. The General Council is the WTO's highest-level decision-making body in Geneva, meeting regularly to carry out the functions of the WTO. It has representatives (usually ambassadors or equivalent) from all member governments and has the authority to act on behalf of the ministerial conference which only meets about every two years. The current chairman is Ambassador Muhammad Noor (Malaysia). The General Council also meets, under different rules, as the Dispute Settlement Body and as the Trade Policy Review Body. JACKSON ET AL., *supra* note 12, at 221.

88. DSU, *supra* note 72, art. 16(4).

89. *Id.* art. 17(1), (3). The members of the Appellate Body serve in their individual capacities. They are independent in that they may not be affiliated with any government. The WTO strives for a standing Appellate Body of seven that is representative of the WTO membership. Members have consisted of former diplomats, legal scholars, bank executives, high-level civil servants, attorneys, judges, legislators, and trade negotiators from diverse backgrounds. The current members hail from the United States, Japan, South Africa, India, Brazil, Italy, and Egypt. For detailed information and a list of current members along with their detailed biographies and terms of appointment, see World Trade Org., Dispute Settlement: Biography: Appellate Body Members, http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm (last visited Jan. 14, 2007).

90. DSU, *supra* note 72, art. 17(2).

91. *Id.* art. 17(1).

92. Only the parties to the dispute have the right to appeal a case. *Id.* art. 17(4). However, the Appellate Body may hear the views of substantially interested third parties at its discretion. *See id.*

93. *Id.* art. 17(10)-(11).

days.⁹⁴ The strict deadlines lessen the risk of unduly delaying the implementation of well-founded panel decisions. The negative consensus rule also applies to the adoption of appellate reports. The Dispute Settlement Body must adopt appellate decisions within thirty days, absent consensus among all member nations to the contrary.⁹⁵ Thus, while the reverse consensus rule does provide a mechanism for members to reject legally unconvincing reports, for the most part, appellate decisions go into effect automatically and unconditionally.⁹⁶ As is the case with the adoption of panel reports, negative consensus contributes to a marked increase in the legalization of the dispute settlement process. In sum, the DSU confers panel decisions greater meaning and impact. It enhances the integrity of panels and invokes a system of codes, time limits, and strict enforcement. The result is a more efficient, streamlined system designed to be dependable and consistent in order to promote greater compliance with and confidence in GATT rules. The new process underscores the rule of law by placing a high value on the finality of panel decisions.

The changes discussed above are the most important institutional reforms effected by the new DSU. Many of the changes reflect the trend towards greater judicialization of WTO law. They are designed to ensure efficiency, consistency, and predictability in the application and enforcement of WTO substantive norms. Whether the WTO and its DSU will successfully and fully overcome the legal and procedural fragmentation and politicization of the old "GATT à la carte"⁹⁷ system remains a topic of debate.⁹⁸ While the DSU's integrated dispute settlement model contributes to a stronger WTO legal infrastructure, the precise meaning of many of its provisions remains unclear, even after a decade of WTO case law.

94. In no case may the proceeding exceed ninety days. *Id.* art. 17(5).

95. *Id.* art. 16(4).

96. *Id.* art. 17(14).

97. John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157, 166 (1998).

98. Commentators who have given a generally positive assessment of the DSU include: Davey, *supra* note 86; Thomas A. Zimmermann, *WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation*, 60 AUSSENWIRTSCHAFT 27 (2005); John H. Jackson, *The Changing Fundamentals of International Law and Ten Years of the WTO*, 8 J. INT'L ECON. L. 3 (2005). For an economic assessment that presents mixed findings, see Monika Büttler, *The WTO Dispute Settlement System: A First Assessment from an Economic Perspective*, 16 J.L. ECON. & ORG. 503 (2000). Other commentators who give a mixed to negative review of the first decade of the DSU include: Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POL'Y INT'L BUS. 109 (2002) and John Ragosta et al., *WTO Dispute Settlement: The System Is Flawed and Must Be Fixed*, 37 INT'L L. 697 (2003).

The next Part will examine one of the most important and controversial of these issues—namely the appropriate standard of review given to national determinations of compliance with specific substantive WTO agreements. Part III.B focuses on the difficulty of isolating a meaningful comparative model or analogy to analyze the problem of standard of review within the WTO. That Part critiques attempts to explain why the *Chevron* doctrine does not transplant well into the WTO context.

III. STANDARDS OF REVIEW

A. *Standards of Review Codified in the GATT/WTO*

The question of a proper standard of review comes into play in two ways under the WTO. First, it arises at the panel level, when a panel must review a domestic administrative determination (such as a Department of Commerce ruling) or court decision (such as a federal appellate ruling or a United States Court of International Trade decision) and determine if such a domestic determination or ruling is in compliance with WTO rules.⁹⁹ Phrased differently, the question deals with “the degree to which, in a GATT (and now WTO) dispute settlement procedure, an international body should ‘second-guess’ a decision of a national government agency concerning economic regulations that are allegedly inconsistent with an international rule.”¹⁰⁰ The question arises when a panel must decide how much deference to give to a national agency or court’s finding that a certain set of actions by a foreign firm resulted in material injury to a domestic industry in the context of an antidumping investigation. Suppose that Sony Corporation of Japan sells a digital camera in the European Union at a price that is 75 Euros lower than the normal price the same model is sold in Japan. After fact finding and submissions of information both by European camera manufacturers and Sony, the European Union’s antidumping authority finds that Sony has engaged in dumping. It imposes a prospective tariff on the digital cameras in an amount equal to the margin of dumping, which we can assume for the sake of simplicity to also be 75 Euros. Japan then files a WTO complaint on behalf of Sony, arguing that the European Union’s investigative methods violate the Anti-Dumping Agreement. The

99. Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT’L L. 193, 194 (1996).

100. *Id.* See generally Matthias Oesch, *Standards of Review in WTO Dispute Resolution*, 6 J. INT’L ECON. L. 635 (2003) (providing an overview of standards of review in the WTO and arguing in favor of deferential methods of interpretation).

standard of review determines whether the WTO panel will accord the European Union's fact finding and legal conclusions de novo review, total deference, or something that lies in between the two extremes.

The second context in which standard of review arises is appellate review of panel decisions. There, the question becomes how much deference the Appellate Body should give to panel findings and interpretations of law, as opposed to facts. Interesting questions arise in this second context of appellate-to-panel review but will not be discussed in this Article.¹⁰¹

The amount of deference given to national determinations in antidumping disputes is a critical, and often dispositive, question. Antidumping cases are characteristically highly fact intensive. Since dumping is selling below normal market value, WTO disputants must present a great deal of market evidence and complex economic analysis regarding prevailing market prices, costs of manufacturing, acceptable margin of profit, and decline in sales or other material harm due to the alleged dumping.¹⁰² The following are generally the key issues: (1) how the normal value of the dumped product in the exporting nation is established, (2) how the export prices are calculated, (3) what adjustments are necessary to reconcile the normal value and export prices, and (4) how to establish injury to a domestic industry. Often the initial finding that dumping has occurred requires speculating or extrapolating what the nondistorted price within a given market would be if dumping had not occurred. These predictions and extrapolations are based on available statistical data. Because of the complexity of economic and factual findings involved, it is extremely difficult for an international body to subsequently undertake independent analysis of most factual evidence. How these facts are assessed in turn affects the legal conclusions, such as whether a domestic industry has suffered material injury due to dumping. Therefore, the standard of review with respect to fact and law are even more intertwined than usual.

Due to the complexity of antidumping investigations, international bodies are justifiably hesitant to challenge the economic calculations of antidumping authorities. The approach of the European Court of Justice (E.C.J.) is illustrative. The E.C.J. has consistently avoided challenging

101. Even though the deference the Appellate Body accords to panel decisions is not the subject of this Article, it is impossible to ignore it completely because most cases discussed are Appellate Body reports. However, except where specifically noted, this Article discusses only how the Appellate Body views the panel's deference or lack thereof to national authorities.

102. See generally Peggy A. Clarke & John D. Greenwald, *An Overview of Trade Remedy Law*, reprinted in *TRADE REMEDIES FOR GLOBAL COMPANIES* (Timothy C. Brightbill et al. eds., 2006).

factual conclusions of the European Commission on antidumping cases and has explicitly eschewed doing so, focusing instead on procedural violations in antidumping proceedings as grounds for overturning European Commission rulings.¹⁰³ This Article will examine the WTO's approach carefully in Part IV. Because the legal question of what constitutes dumping hinges on the sum of factual determinations and economic evidence, it is extremely difficult to second-guess the decision of the antidumping authority of first instance.

With respect to panel reviews of national determinations, a specific standard of review is laid out only in the 1994 Anti-Dumping Agreement, which seems to textually provide for great deference to both the factual and legal findings of national authorities.¹⁰⁴ With respect to disputes arising under all other WTO agreements, article 11 of the DSU applies.¹⁰⁵ As the specific language of article 17.6 of the Anti-Dumping Agreement is important, it is quoted in its entirety:

- (i) in its assessment of the facts of the matter, the panel shall determine whether the [national antidumping] 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;
- (ii) the panel shall interpret the relevant provisions of the [Anti-Dumping] 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.¹⁰⁶

Part VI will discuss in greater detail the interpretation of these provisions in the recent cases. However, at first glance, subsection (i) of article 17.6 seems fairly clear. It admonishes panels to defer to factual determinations as long as they are procedurally proper, unbiased, and

103. Case 191/82, EEC Seed Crushers' & Oil Processors' Fed'n v. Comm'n, 1983 E.C.R. 2913; see also GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 1022-35 (1993).

104. See Anti-Dumping Agreement, *supra* note 9, arts. 1-4, 11.

105. Article 11 of the DSU provides rules which apply to a panel's examination of "matters" arising under any of the WTO agreements. It reads in part: "[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." DSU, *supra* note 72, art. 11 (emphasis added).

106. Anti-Dumping Agreement, *supra* note 9, art. 17.6.

objective.¹⁰⁷ The provision is similar to the abuse of discretion standard in U.S. jurisprudence¹⁰⁸ and the manifest error doctrine in European administrative law.¹⁰⁹

Such a standard seems workable and sensible in the WTO context because panels have few fact-finding resources, such that extensive fact-gathering would be impractical. Moreover, panels are arguably ill-equipped to undertake the sort of complex economic analysis and fact finding required in antidumping cases, as outlined above. Thus, panels are constrained to give deference to legitimate and unbiased national determinations of facts even though panels might have reached a different conclusion.¹¹⁰

Subsection (ii) of article 17.6 admits more ambiguity. At least facially, it dictates a two-step approach for the interpretation of questions of law.¹¹¹ First, the panel must determine if the specific WTO provision permits more than one interpretation. If only one reading is possible, the inquiry ends and the panel must uphold the only permissible interpretation. If, however, the panel finds that multiple interpretations are permissible, it proceeds to step two. Here, it must decide if the national interpretation lies within a set of permissible interpretations. If so, the panel must defer to the national authority's interpretation.¹¹²

A reading of article 17.6 immediately suggests a number of questions. Its bifurcated structure purports to establish a clear dichotomy between fact and law. In practice, however, questions of fact and law are vexingly difficult to separate. For example, in antidumping cases, where the outcome often depends on whether the facts presented are sufficient to demonstrate material injury to a domestic industry, the problem becomes even more intractable because the conclusion of law depends inextricably on the level of deference afforded factual determinations. Article 17.6 also leaves open the treatment of mixed questions of fact and law. It is hard to predict if subsection (i) prevents panels from second-guessing a national authority's factual finding or if, on the other hand, it overly constrains panels from overturning determinations of dispositive facts.

107. *Id.*

108. 5 U.S.C. § 706(2)(a) (2000); *see also* *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971).

109. *See, e.g.*, Case T-198/01, *Technische Glaswerke Ilmenau GmbH v. Comm'n*, 2004 ECJ CELEX LEXIS 224, ¶ 97 (July 8, 2004).

110. Croley & Jackson, *supra* note 99, at 208.

111. *Id.* at 200.

112. *Id.*

Subsection (ii) of article 17.6 admits other interpretative ambiguities. The first part requires panels to interpret provisions of the Anti-Dumping Agreement “in accordance with customary rules of interpretation of public international law.”¹¹³ This appears to be an explicit invocation¹¹⁴ of articles 31 and 32 of the Vienna Convention on the Law of Treaties,¹¹⁵ which set forth the basic rules of interpretation for international treaties and agreements. Article 31, entitled “General Rule of Interpretation,” mandates that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹¹⁶ In applying article 31, GATT panels have developed a tripartite interpretative template. Initial textual interpretation looks to the use of the words under scrutiny and gives those words their natural, normal, or generally understood meaning.¹¹⁷ Second, the context in which those words appear in the General Agreement is taken into account. Third, panels take into account the purpose of the General Agreement, as gleaned from the recitals and the intent of the drafters.

If the application of article 31 results in an ambiguous or absurd meaning, WTO panels may resort to article 32’s supplementary means of interpretation.¹¹⁸ At this stage, panels may look to the preparatory work and negotiating history of the treaty. As Professors Croley and Jackson pointed out, it is not clear how resorting to the Vienna Convention could

113. Anti-Dumping Agreement, *supra* note 9, art. 17.6(ii).

114. Croley & Jackson, *supra* note 99, at 200 (stating that Uruguay Round negotiators intended to refer to the Vienna Convention). The Appellate Body confirmed explicitly that article 3(2) of the DSU references the rules of treaty interpretation set out in the Vienna Convention, in Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, III.B, WT/DS2/AB/R (Apr. 29, 1996). *But see* Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT’L L. 379, 422-24 (1995) (noting problems with the incorporation theory, including that the Vienna Convention predates GATT, that the United States is not party to the Vienna Convention, and that the Vienna Convention may not be a codification of general international law).

115. The U.N. International Law Commission Convention on the Law of Treaties was negotiated in Vienna on May 23, 1969, and came into force on January 27, 1980. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The text of the treaty is available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

116. *Id.* art. 31.

117. *See* Panel Report, *Panel on Value—Added Tax and Threshold*, GPR/21 (June 26, 1984), GATT B.I.S.D. (31st Supp.) at 254-55 (1985) (natural meaning); Panel Report, *United States—Customs User Fee*, L/6264 (Feb. 2, 1988), GATT B.I.S.D. (35th Supp.) at 275 (1988) (generally understood meaning) [hereinafter *United States—Customs User Fee*]; Panel Report, *United States—Restrictions on Imports of Sugar*, L/6514 (June 22, 1989), GATT B.I.S.D. (36th Supp.) at 342 (1990) (ordinary meaning).

118. Croley & Jackson, *supra* note 99, at 201.

ever yield more than one interpretation of an international treaty.¹¹⁹ On the contrary, it seems that articles 31 and 32 work together in order to arrive at only one interpretation. Article 32 suggests, in other words, that the application of article 31 should in many cases resolve ambiguities, and that where the application of article 31 does not do so, article 32's "own rule . . . will resolve any lingering ambiguities."¹²⁰ Thus, it is unclear how article 17.6(ii) contemplates that a panel, relying on the Vienna Convention, might arrive at the conclusion that multiple permissible interpretations are possible. If "permissible" is understood as not manifestly absurd or unreasonable, then it seems that panels may never resort to the second sentence of article 17.6(ii). If on the other hand, the term "permissible" has a looser meaning, akin to reasonable, then the provision would come into play, thereby making it harder for panels to overturn national interpretations of WTO law. Some commentators, including ones present during the Uruguay Round negotiations, argue convincingly that "permissible" was not understood as equivalent to "reasonable" due to the fact that U.S. trade negotiators insisted on including "reasonable" in article 17.6(ii), which they understood as tracking U.S. *Chevron* language.¹²¹ At the last minute, to the disappointment of the United States, drafters finally compromised on "permissible" instead.¹²²

Moreover, WTO panels and the Appellate Body have recourse to a plethora of additional interpretative aids that should assist in dispelling any ambiguity. Virtually every article of the GATT is accompanied by an ad article or *chapeau* which provides interpretative instructions.¹²³ GATT case law has engendered the principle that provisions should not be interpreted in such a way as to render other provisions superfluous,

119. *Id.* But see Donald M. McRae, *The Emerging Appellate Jurisdiction in International Trade Law*, in DISPUTE RESOLUTION IN THE WORLD TRADE ORGANISATION 107-08 (James Cameron & Karen Campbell eds., 1998); Gary N. Horlick & Peggy Clarke, *Standards for Panels Reviewing Anti-Dumping Determinations Under the GATT and WTO*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 313, 320 (Ernst-Ulrich Petersmann ed., 1997).

120. Croley & Jackson, *supra* note 99, at 201. But see SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 153 (2d ed. 1984) (noting that application of the Vienna Convention does not always result in uniformity of application as the rules are expressed in very general terms, leaving much discretion to the interpreting body).

121. Croley & Jackson, *supra* note 99, at 199-204.

122. See Petersmann, *supra* note 69, at 1204; see also JOHN CROOME, *RESHAPING THE WORLD TRADE SYSTEM* 326 (2d ed. 1999).

123. GATT, *supra* note 23, annex I, arts. I-XXXXVII. Take ad article I, paragraph 4, as an example. It states the definition for the term "margin of preference," illustrates how it can be calculated, and also gives examples of actions that would not violate the General Agreement. *Id.* annex I, art. I, para. 4.

redundant, conflicting, or unpredictable.¹²⁴ In parsing specific words within the GATT, panels have used various analytical tools, such as analogy, the rule that each word within a provision should be made meaningful,¹²⁵ and looking to the placement of words within an article.¹²⁶

The arsenal of extrinsic interpretative methods is likewise well-stocked. Panels may look to the drafting history of the sections of the General Agreement, and regularly do so even in the absence of ambiguity.¹²⁷ Some have also resorted to the legislative history of the Havana Charter, portions of which were incorporated by reference into the General Agreement under article XXIX.¹²⁸ Other panels have turned to the preparatory work of the various rounds of multilateral trade negotiations.¹²⁹ Finally, panels may resort to not only the purpose and principle of specific articles, but also the purpose and principle of the Protocol of Provisional Application.¹³⁰

In conclusion, article 17.6 raises more questions than it answers. To the extent that it is intelligible, it seems to call for complete deference to national determinations of fact and substantial deference to determinations of law as well. By its own terms, article 17.6 tracks the *Chevron* doctrine. As such, it is premised on the assumption that

124. See Panel Report, *United States—Customs User Fee*, L/46264 (Feb. 2, 1988), GATT B.I.S.D. (35th Supp.) at 266 (1988) (“Provisions of an Agreement such as GATT should not be interpreted so as to be superfluous or unnecessary.”).

125. See Panel Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 81, WT/DS98/AB/R (Dec. 14, 1999) (“In light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to ‘read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.’”) [hereinafter *Korea—Dairy Products*].

126. See, e.g., Panel Report, *Panel on Korea—Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, ADP/92 (Apr. 29, 1993), GATT B.I.S.D. (40th Supp.) at 279-80 (1995) (scrutinizing whether the placement of the word “or” in Korean law corresponded with the meaning of the language in the Anti-Dumping Code).

127. See, e.g., Panel Report, *United States—Measures Affecting Alcoholic and Malt Beverages*, DS23/R (June 19, 1992), GATT B.I.S.D. (39th Supp.) at 296 (1993); Panel Report, *Canada—Administration of the Foreign Investment Review Act*, L/5504 (Feb. 7, 1984), GATT B.I.S.D. (30th Supp.) at 150, 152, 162-63 (1984); Panel Report, *EEC—Measures on Animal Feed Proteins*, L/4599 (Mar. 14, 1978), GATT B.I.S.D. (25th Supp.) at 66 (1979).

128. See Panel Report, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) at 222 (1991) [hereinafter *Thailand—Cigarettes*].

129. See Panel Report, *Canada—Import Restrictions on Ice Cream and Yoghurt*, L/6568 (Dec. 5, 1989), GATT B.I.S.D. (36th Supp.) at 86 (1990); Panel Report, *Japan—Restrictions on Imports of Certain Agricultural Products*, L/6253 (Mar. 22, 1998), GATT B.I.S.D. (35th Supp.) at 223 (1989).

130. See Panel Report, *United States—Restrictions on Imports of Tuna*, ¶ 13.8, DS29/R (June 16, 1994) (not adopted); Panel Report, *United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, DS7/R (July 11, 1991), GATT B.I.S.D. (38th Supp.) at 44 (1992); Panel Report, *United States—Manufacturing Clause*, L/5609 (May 15, 1984), GATT B.I.S.D. (31st Supp.) at 90 (1985).

Chevron is suitable in the WTO context. The next Part examines the basis of that assumption.

B. Why a Chevron Model Is Inappropriate in the WTO Context

It is tempting for American lawyers to compare and contrast international adjudication systems with that of the United States because U.S. law is not only familiar, but it is also well developed and mature.¹³¹ One can only speculate that U.S. trade negotiators must have engaged in such comparisons during the Uruguay Round. Yielding to this temptation, however, does not always lead to fruitful analogies. Transplanting a legal standard wholesale from one legal system to another is a delicate business and one that rarely leads to immediate success.¹³² Such is the case here with the importation of a U.S. *Chevron* standard into WTO antidumping law.

Before considering how common justifications underlying the *Chevron* doctrine fare in the WTO context, it is important to note an important structural difference between U.S. administrative law and GATT jurisprudence. One of the strongest arguments in favor of *Chevron* is that it advances the goals of administrative efficiency and coordination by ensuring that an agency interpretation of a statute will be upheld as long as it is reasonable.¹³³ Uniform agency interpretation and implementation lessen the problem of uncertainty and judicial divergence across different circuits, which in turn leads to greater certainty in administrative law and judicial economy. Thus, *Chevron* serves regulatory coordination by shifting power from courts to agencies. No similar structural benefit accrues under the WTO. In fact, if panels were completely deferential to national authorities, the result would be a proliferation of divergent and conflicting interpretations of GATT. Each member state, knowing that its interpretation would likely be upheld by a deferential panel, would have an incentive to interpret GATT law in a self-serving, beggar-thy-neighbor fashion.¹³⁴ The result would be a

131. In addition to the familiarity argument, proponents of the *Chevron* model also point to how U.S. negotiators sought to incorporate explicitly the *Chevron* standard into the DSU, as well as real political arguments about why nations would not accept WTO obligations otherwise.

132. See generally ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 10-30 (1974) (describing the perils and virtues of comparative law and introducing a methodology for the study of legal transplants).

133. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984).

134. The counterargument is that repeat players who frequently avail themselves of WTO dispute proceedings, both as the injured party and as defendant, do not have similar incentives to act in a self-serving manner. Such an argument certainly has merit. However, there must nevertheless be a strong incentive in each case to push the envelope as far as one can in the

fragmentation that runs counter to the purpose of the WTO. If WTO panels were to uphold all defensible, reasonable interpretations, they would not be fulfilling their obligation to ascertain the meaning and application of GATT law in a meaningful way. Insofar as the judicialization of international trade law is aimed at advancing such a goal, such fragmentation vitiates one of the purposes of creating the WTO. *Chevron* deference, by shifting interpretative power to nations with little stake in uniformity of application,¹³⁵ would lead to multiple, incompatible interpretations of GATT law. It would not shift power from multiple interpretative bodies to a single institution, but quite the opposite.

Chevron requires courts to defer to agency interpretations of law as long as the statute at issue is ambiguous and the agency's interpretation is reasonable.¹³⁶ If the agency interpretation is reasonable, the reviewing court may not substitute its own judgment even if it disagrees with the agency's interpretation.¹³⁷ Beyond that, *Chevron* offers little guidance with respect to two issues which also arise in the application of article 17.6 of the Anti-Dumping Agreement. First, how much statutory ambiguity is necessary to trigger an assessment of interpretative reasonableness?¹³⁸ Ambiguity is an open-ended concept, one over which reasonable minds could certainly differ. Courts have not followed any consistent or principled means of determining ambiguity.¹³⁹ Second,

present case to gain an advantage, and then seek to distinguish in later cases when the tables are turned, on highly technical grounds. Larger countries that use the dispute settlement process more frequently would have more chances to engage in such opportunism. This, in turn, would lead to undesirable fragmentation and uncertainty in the dispute settlement process. Also, keep in mind that should a position later become untenable, a country can resort to the political process of negotiating for amendments to the relevant substantive agreement. To be sure, this is a long and cumbersome process, and not one guaranteed of success, because any amendment requires a two-thirds majority among the WTO membership, but it is a possibility, particularly for large countries with strong negotiation positions.

135. This applies with less force if a member nation makes frequent resort to the dispute settlement process. However, even repeat players will have little incentive to be consistent if they know the default position is that their interpretation will receive great deference.

136. *Chevron*, 467 U.S. at 843.

137. *Id.* at 844.

138. *Chevron*'s two-step framework has received a plethora of academic and judicial attention. See, e.g., Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255 (1988); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986); John H. Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103 (2005).

139. See, e.g., Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994); see also *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *McKart v. United*

Chevron instructs courts to rely on “traditional tools of statutory construction” to determine whether a statute is ambiguous in the first place.¹⁴⁰ The question of what are traditional rules of statutory or, in the WTO context, treaty interpretation, is fraught with confusion and contradictions.¹⁴¹ The rule gives as little guidance as article 17.6’s admonition for panels to employ “customary rules of interpretation of public international law.”¹⁴² Thus, even if *Chevron* were a good model for the WTO, it still would not resolve two of the most intractable problems underlying the standard of review dilemma.¹⁴³

A look at some of the major policy justifications offered for *Chevron* deference shows that it is not a good model for the WTO.¹⁴⁴ One of the most powerful justifications of the *Chevron* doctrine in U.S. administrative law is the “agency expertise” argument.¹⁴⁵ Agencies, by focusing on a narrow regulatory field, ostensibly possess, and continue to accumulate, substantial technical expertise in their area of specialty. They are deemed best equipped to implement the policy judgments of legislators. The task of implementation sometimes implicates statutory

States, 395 U.S. 185, 205-06 (1969); Note, “How Clear Is Clear” in *Chevron’s Step One?*, 118 HARV. L. REV. 1687, 1701 (2005).

140. *Chevron*, 467 U.S. at 843 n.9.

141. See generally Merrill, *supra* note 139.

142. Anti-Dumping Agreement, *supra* note 9, art. 17.6.

143. In the U.S. administrative law context, one of the most vexing problems that has emerged since *Chevron* is whether the *Chevron* framework applies at all. See generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) (arguing that where possible, courts should apply the *Chevron* framework).

144. The policy justifications discussed in this section, expertise, efficiency and accountability, are by no means the only arguments offered in support of *Chevron*, but they are the most commonly proffered.

145. The United States Supreme Court recently elaborated on this issue in *United States v. Mead Corp.* See 533 U.S. 218, 229 (2001) (holding that if it is apparent from the agency’s conferred authority or other statutory circumstances that the agency is able to speak with the force of law when it addresses ambiguity in statutes, then a reviewing court may not reject an agency’s interpretation); see also Cooley R. Howarth, Jr., *United States v. Mead Corp.: More Pieces for the Chevron/Skidmore Deference Puzzle*, 54 ADMIN. L. REV. 699-717 (2002) (discussing the new questions in the wake of *Mead* and their possible ramifications for *Chevron*); Michael P. Healy, *Spurious Interpretation Redux: Mead and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673, 680 (2002) (arguing that “the *Mead* rule fundamentally shifts the [*Chevron*] default rule from one in which congressional silence related to an implied delegation yielded *Chevron* deference to the agency to one in which congressional silence results in a delegation of [interpretive] primacy to the courts, which are to give an agency interpretation only as much deference as it has power to persuade the court,” thereby reviving the so-called *Skidmore* standard). *Skidmore v. Swift & Co.*, an important case decided almost forty years before *Chevron*, involved an agency interpretation lacking the force of law in which the United States Supreme Court made clear that such interpretation would have only persuasive authority. 323 U.S. 134 (1944). The case suggested that courts would merely consult agency interpretations, taking into account factors such as if they were longstanding, consistent, and well-reasoned. See *id.* *Chevron* threw the *Skidmore* holding into doubt.

interpretation, which is, in effect, also delegated to agencies when special technical expertise is relevant to such interpretation, or when the agency's particularized experience privileges its understanding of a statute. Transplanted to the WTO context, however, the expertise argument is not persuasive.¹⁴⁶

Member nations can claim no special expertise on WTO law, either relative to panels or to other members. It is not tenable to argue that WTO members would have special insight into the aims and meaning of substantive WTO provisions. On the contrary, the interpretations of disputants should be looked upon with skepticism and, more likely than not, as jaundiced.

A deferential posture is inappropriate not only because of the potential for self-interest, but also because, unlike an agency, a WTO member is not mandated to implement WTO agreements in the same way an agency must implement legislative mandates. Rather, each member nation is free to choose its own implementation methods within certain broad limits and a prenegotiated timeline. Of course, one can and should expect WTO members to have special expertise on which method of implementation best suits its needs. The WTO affords such flexibility to WTO members by giving them very broad discretion on the means of complying with substantive WTO norms. Because the system incorporates so much flexibility already, it is even more critical that panels make a meaningful determination when members deviate from WTO norms. Thus, the expertise argument wholly fails to justify accepting plausible member interpretations of GATT law as authoritative.¹⁴⁷

Other common justifications for *Chevron*, such as administrative coordination/efficiency and democracy, also do not apply with the same force, if at all, to the WTO. The "administrative coordination and efficiency" argument, which suggests that deference to a unitary agency interpretation leads to greater coordination and efficient decision-making among different field offices, is turned on its head in the WTO context because application of *Chevron* would shift interpretative power away from one institution, the Dispute Settlement Body which adopts and

146. On the other hand, the greater resources argument does hold sway in the WTO context, in particular in antidumping cases because of the level of fact-finding required, which an agency is better-equipped to undertake because of its investigative resources. Panels, in contrast, are constrained by a small legal department and lack of administrative personnel. While panels may consult independent experts, in reality, panels rely on the pleadings of litigants for the majority of evidence. Nonetheless, the resources argument still only cuts in favor of granting greater deference to factual determinations, which is quite significant in antidumping cases.

147. Croley & Jackson, *supra* note 99, at 208-09.

recommends the implementation of all panel and Appellate Body decisions, to multiple national bodies. The democracy argument, which holds that agencies, as part of an executive branch subject to reelection, are more politically accountable than courts, is not a strong one because WTO members are not accountable to or even representative of the overall WTO membership. In conclusion, the policy justifications most often proffered in favor of *Chevron*, expertise, efficiency, and democracy, do not apply with equal (or sometimes any) force in the WTO. As a result, if WTO bodies do apply the *Chevron* doctrine, if at all, they would have to rely on justifications other than expertise, efficiency, and democracy. We shall see if they do so in Part IV, after a short, but fruitful, digression into a different field of U.S. law.

C. The Search for a New Comparative Model: Dormant Commerce Clause Analysis

In the previous Part, this Article examined how a lack of sensitivity to differences in the structural underpinnings of U.S. administrative agency and WTO jurisprudence can lead to awkward analogies. This is not to suggest that a comparativist study of American and WTO practice can never be fruitful. Quite the opposite is true. Such a study must take into account the structural differences between the two systems and how the individual components within the overall structure interact with one another. For instance, agencies within the American system exist in order to carry out legislative mandates or to enforce substantive rules within a specialized area. WTO members, on the other hand, were neither created for the purpose of carrying out, nor mandated to carry out, WTO rules. Rather, members are preexisting, fully functional, and sovereign nations that have voluntarily elected to take on the “yoke” of WTO obligations, including the WTO’s dispute settlement procedures.¹⁴⁸ WTO rules do not extend, but may in fact severely limit, the power of individual states to act independently. Instead of forming a basis of power, in the way that agencies derive their authority from statutes and directives from the executive, WTO rules impose limitations on member states’ power and freedom to act. That this distinction is so basic and banal does not rob it of significance. When one keeps such critical distinctions in mind, the comparative method can yield powerful results.

148. Keep in mind that even in assuming the “yoke,” WTO member-states retain substantial flexibility and discretion in determining how they shall comply with WTO norms and rules.

U.S. law does provide a strong analogy for the WTO, but it does not lie in *Chevron*. Rather, it lies in dormant commerce clause jurisprudence.

The United States Constitution gave Congress the power to regulate commerce, but did not expressly negate the power of the states over interstate and foreign commerce. Does the mere grant of power to Congress prevent a state from enacting regulation that affects interstate commerce or do states retain some concurrent power? States can regulate some aspects of interstate commerce within their jurisdiction, but there is no easily applicable, bright-line test to determine when such regulation runs afoul of the dormant commerce clause.¹⁴⁹

The first major case to consider the implications of federal commerce clause authority on state power, *Gibbons v. Ogden*, discussed but did not dispositively decide whether the constitutional grant to Congress implicitly excluded all state regulation.¹⁵⁰ Rather, Justice Marshall took the opportunity to advance a broad definition of commerce and invalidated the state law at issue on the grounds of actual conflict with a federal licensing law.¹⁵¹ By resting the holding on supremacy clause grounds, the Supreme Court avoided adjudication on the effects of the explicit constitutional grant of power to Congress and congressional silence on the states' regulatory powers.¹⁵² Indeed, Justice Marshall seemed to assume, without so deciding, that congressional silence gave the states warrant to regulate commerce, especially in traditional spheres of state power such as health inspection, as long as there was no actual conflict with any federal legislation.¹⁵³ Later cases turned on the distinction between local and national action and on direct and indirect effects, so that state regulation which principally governed interstate commerce was not allowed, while regulation incidental to a state's exercise of its police power (health and safety) was upheld.¹⁵⁴

149. There is a vast literature about the dormant commerce clause. Some of the most important include Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Noel T. Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COLUM. L. REV. 547 (1947).

150. 26 U.S. (9 Wheat.) 1 (1824) (distinguishing a state's exercise of its police power and a state exercising the federal power over commerce).

151. *Id.* at 19-20, 41, 239-40.

152. *Id.* at 30-31, 60, 240.

153. *Id.* at 41.

154. See *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829); *City of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837) (upholding state regulation over an instrumentality of interstate commerce that was motivated by health concerns); *Cooley v. Bd. of Wardens of the Port of Phila.*, 53 U.S. (12 How.) 299 (1851) (upholding a state law that required ships entering a city port to hire a local pilot because the subject matter of the regulation is appropriate for local regulation).

The modern approach embraces a balancing test that weighs the state interest in regulating local affairs against the federal interest in uniformity and an integrated national economy.¹⁵⁵ This balancing test echoes the tensions of federalism. States need freedom to pursue different and innovative solutions to local problems.¹⁵⁶ On the other hand, the discretion cannot be unfettered. Otherwise, each state would pursue economic policies that reflect the interests of its own constituents at the expense of citizens of other states. This problem was particularly acute because the post-War of Independence Articles of Confederation had failed largely due to deleterious trade wars waged by the separate states.¹⁵⁷ By advocating a federal form of government, the Founding Fathers hoped to avoid future economic balkanization and to foster an integrated national market.¹⁵⁸

The modern balancing approach has three components. The state must show that the regulation serves a legitimate state purpose, that it is rationally related to achieving that legitimate end, and that the regulatory burden imposed on interstate commerce is outweighed by the state's benefit or interest in enforcing its regulation.¹⁵⁹ The Supreme Court articulated the modern standard in *Pike v. Bruce Church, Inc.* as follows: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."¹⁶⁰

However, *Pike's* seemingly clear statement is anything but clear. Vagueness is inherent in the application of the standard, and is further heightened by the fact that the courts tend to decide dormant commerce clause cases on a case-by-case basis, sometimes not applying the

155. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 408 (2d ed. 1988).

156. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that a critical benefit of the federal system is that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

157. TRIBE, *supra* note 155, at 404; see also Carlos Manuel Vásquez, *Judicial Review in the United States and in the WTO: Some Similarities and Differences*, 36 *GEO. WASH. INT'L L. REV.* 587, 587 (2004) (noting that both the U.S. and WTO systems of judicial review were born of flawed treaty systems and that both succeed in large part due to the public's support for meaningful judicial review).

158. TRIBE, *supra* note 155, at 404-05.

159. *Id.* at 408.

160. 397 U.S. 137, 142 (1970) (citing *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960)).

balancing test at all.¹⁶¹ Nonetheless, one can attempt to draw a rough sketch of the standard.

First, a valid health, safety or welfare objective will probably meet the legitimate state end requirement.¹⁶² Thus, a regulation related to the state's exercise of its traditional police powers will be looked upon more favorably than regulation that gives state constituents an economic advantage. The second element of the test, a rational means to achieve the end, seems facially easy to satisfy as long as the means chosen are not wholly unrelated to the putative end.¹⁶³ The standard of review is very low, as courts will generally defer to legislative fact finding regarding the requisite rational relationship. Application of the third prong, the balancing of putative state benefits against the burden on commerce, is more controversial but has interesting comparative ramifications for WTO dispute settlement.

It is unclear whether *Pike* mandates that a state must adopt only the least restrictive means of effectuating its objective. The relevant language in *Pike* seems to leave the issue up to judicial discretion on a case-by-case basis.

If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate [commerce].¹⁶⁴

This suggests that whether a less restrictive alternative exists is just one of the factors that courts may take into account to determine if the burden on interstate commerce is tolerable. If a less burdensome alternative is

161. *Pike*, in fact, did not actually apply its own articulated standard. The *Pike* Court did not engage in any serious balancing, but rather seemed to rely on the fact that the motive of the state statute requiring economic activity to be performed in-state was clearly to benefit in-state businesses at the expense of out-of-state competitors. *Id.* at 145. Likewise, later cases, such as *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), have struck down state regulation motivated by discrimination or protectionism as almost per se invalid without conducting any balancing. In *Wyoming v. Oklahoma*, the Court formulated the rule of per se invalidity. 502 U.S. 437, 454-55 (1992) ("When a state statute clearly discriminates against interstate commerce, it will be struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. Indeed, when the state statute amounts to simple economic protectionism, a 'virtually per se rule of invalidity' has applied." (internal citation omitted)).

162. See, e.g., *Maine v. Taylor*, 477 U.S. 131, 151 (1986) ("Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives."). But see *Hughes v. Oklahoma*, 441 U.S. 322, 337-38 (1979) (declaring unconstitutional a law that attempted to restrict the use of a resource, here minnows, to in-staters as facially discriminatory).

163. See, e.g., *Hughes*, 441 U.S. at 337-38.

164. *Pike*, 397 U.S. at 142.

readily available, then presumably the court will be more likely to find that the national interest outweighs the state interest.¹⁶⁵

The Supreme Court undertook such an inquiry into the necessity of the means chosen in *Dean Milk Co. v. Madison*. *Dean Milk Co.*, an out-of-state firm, challenged a city ordinance that prohibited the sale of milk not processed at approved and regularly inspected pasteurization plants within a five-mile radius of Madison, Wisconsin's town square.¹⁶⁶ The Court recognized that Madison had a significant public interest in safeguarding public health through rigorous sanitation inspection.¹⁶⁷ Thus, the objective of protecting Madison residents against adulterated milk was permissible, and the means chosen—allowing only regularly-inspected processors to import milk into Madison—were rationally related to the objective. Nevertheless, the Court struck down the ordinance.¹⁶⁸ It noted the existence of reasonable alternatives that would adequately achieve the same purpose, such as sending Madison inspectors to conduct quality checks in out-of-state plants and charging the costs to the importing producers and processors or excluding from the city all milk that does not conform to Madison standards, irrespective of geographical origin.¹⁶⁹ *Dean Milk* thus stands for the proposition that even if a state regulation is based on a legitimate public interest (a health concern) it will be overruled if there are reasonable alternatives¹⁷⁰ with nondiscriminatory effects.¹⁷¹

D. *Workability of the Least Restrictive Means Test in the WTO*

Currently, dispute settlement panels do not inquire into the existence of less restrictive means for a member state to regulate international trade while complying with WTO rules. Such an inquiry

165. *TRIBE*, *supra* note 155, at 426-27.

166. *Dean Milk Co. v. Madison*, 340 U.S. 349, 350 (1951).

167. *Id.* at 353.

168. "Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available." *Id.* at 354.

169. *Id.* at 354-55.

170. However, the less burdensome alternative must be real, not hypothetical or "an abstract possibility." Thus, the state is not required to actively discover a less restrictive means if one is not already feasible or available. *Maine v. Taylor*, 477 U.S. 131, 147 (1986) ("[S]tate must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost.").

171. *Contra* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 440 (3d ed. 2006) (pointing out that the Supreme Court "never has invalidated a nondiscriminatory state law on the ground that the goal could be achieved through a means that is less burdensome on interstate commerce").

would not be unreasonable in certain contexts. In fact, article XX of the GATT, which allows an enumerated list of general exceptions to GATT and WTO obligations, sets up an analytical framework that closely parallels U.S. dormant commerce clause jurisprudence. For example article XX(d) reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (d) *necessary* to secure compliance with laws or regulations which are *not inconsistent with the provisions of this Agreement, including* those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices.¹⁷² (emphasis added)

As a threshold matter, the requirement is that a regulation must serve a legitimate purpose (as enumerated in article XX(a) to (j)).¹⁷³ This parallels the legitimate state objective requirement under dormant commerce clause analysis. Moreover, article XX(a) (“necessary to protect public morals”) and (b) (“necessary to protect human, animal or plant life or health”) mirror the sphere of traditional state police powers.¹⁷⁴

To claim an article XX(d) exception noted above, the nation claiming the exception must meet three additional requirements. First, the law or regulatory scheme with which compliance is being secured must not be inconsistent with obligations under the General Agreement.¹⁷⁵ This is straightforward. The underlying law must not violate WTO rules. It is similar to saying that the state regulation would be stillborn if it conflicts with existing federal legislation that would preempt it.

Second, drawn from the preamble to article XX, the measure must not be applied in a manner that evinces arbitrary or unjustifiable discrimination (between countries with the same conditions) or which suggests the measure is merely a subterfuge for protectionism.¹⁷⁶ This

172. GATT, *supra* note 23, art. XX(d).

173. *Id.* art. XX.

174. *Id.* art. XX(a)-(b).

175. *Id.* art. XX(d).

176. *Id.* art. XX.

requirement is a loose reformulation of both the Most Favored Nation¹⁷⁷ and National Treatment¹⁷⁸ obligations.¹⁷⁹ The reminder underscores the point that members should not abuse exceptions as a means to circumvent their obligations. It is also reminiscent of the U.S. per se rule of invalidity invoked when a state regulation seems clearly motivated by discriminatory impulses or results in a substantial economic disadvantage for out-of-staters.¹⁸⁰

The third requirement is that the measures must be “necessary to secure compliance with [the underlying] laws or regulations.”¹⁸¹ The term “necessary” can be interpreted as the least restrictive means available. Assume that the underlying law serves a valid national interest and that it does not violate any WTO provision. Assume, however, that another WTO member nonetheless challenges the measures on the grounds of necessity, an essential element for the successful evocation of article XX(d). The complainant is likely to argue that the measures are not necessary because less trade-restrictive alternatives were available. The complainant might allege that WTO members assume an affirmative duty to implement potential measures in a manner least inconsistent with WTO obligations. The argument invokes the well-acknowledged duty of “*pacta sunt servanda*” or the obligation to comply with international law

177. At its most basic level, most-favored-nation treatment means non-discrimination between countries. See generally Martin Domke & John N. Hazard, *State Trading and the Most-Favored-Nation Clause*, 52 AM. J. INT'L L. 55 (1958); WTO Web site, http://www.wto.org/english/thewto_e/minist_e/min99_e/english/misinf_e/07ineq_e.htm (last visited Jan. 15, 2007).

178. The national treatment clause in article III of the GATT imposes the principle of nondiscrimination between domestically produced goods and similar goods produced abroad and imported. GATT, *supra* note 23, art. III. The clause prevents government practices that impose higher tariff and/or restrict market access options for imported goods. Several panels have explored this area of the GATT. In *United States—Section 337 of the Tariff Act of 1930*, the panel clarified several features of article III(4): (1) the article does not differentiate between substantive of procedural internal regulations; and (2) the burden is on the contracting party imposing the different treatment to show that its treatment is not less favorable. Panel Report, *United States—Section 337 of the Tariff Act*, ¶ 5.10-11, L/6439 (Nov. 7, 1989), GATT B.I.S.D. (36th Supp.) at 385-86 (1990) [hereinafter *United States—Section 337 of the Tariff Act*]. To illustrate these features, in *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, the Korean government required that stores separate domestic and imported beef by selling it in either different sections or in different stores. Panel Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 593, WT/DS161/R, WT/DS169/R (July 31, 2000). In this case, the different treatment would create greater cost for imported beef because of the separate facilities making the treatment less favorable. It should be noted that article III only protects against government-imposed, less favorable treatment.

179. JACKSON ET AL., *supra* note 12, at 479.

180. See *supra* text accompanying note 169.

181. GATT, *supra* note 23, art. XX(d).

in good faith.¹⁸² A plain meaning interpretation of article XX's text lends support to the argument. Of the ten general exceptions allowed under article XX, the most broad (a) (public morals), (b) (health and safety) and (d) (enforcement of laws in congruence with GATT) are qualified by a necessity requirement. Without that limitation, nations would have an incentive to cloak any protectionist or discriminatory schemes as measures intended to protect one of these three broad national interests. This would be too easy an escape hatch.

A panel report that addressed the meaning of "necessary" vindicates our hypothetical interpretation. The report, *United States—Section 337 of the Tariff Act of 1930*, involved a challenge by the European Community, arguing that differential investigatory and adjudicative procedures for imported products alleged to infringe a U.S. patent constituted less favorable treatment in contravention of the National Treatment clause of article III(4).¹⁸³ The panel first noted that procedural laws, including measures used to secure compliance with U.S. patent laws, are covered by article III.¹⁸⁴ Otherwise, nations could circumvent the National Treatment rule by enforcing substantive laws not violative of GATT through procedures that discriminate against importers.¹⁸⁵ The panel then listed various procedural disadvantages that Section 337 imposed on importers, including the nonavailability of choice of forum, inability to raise counterclaims, and stricter time limits.¹⁸⁶ As the purpose of article III is to protect expectations of competitive conditions between imports and domestic products¹⁸⁷ irrespective of actual harm suffered by an importing nation, the panel found that the differential measures violated the National Treatment clause.¹⁸⁸ Last, the panel considered whether article XX(d) allowed an exception.¹⁸⁹

In rejecting the U.S. claim of a valid exception, the panel focused on the meaning of "necessary." The United States first argued that section

182. Article 26 of the Vienna Convention reads: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention, *supra* note 115, art. 26.

183. *United States—Section 337 of the Tariff Act*, *supra* note 178, ¶ 3.1.

184. *Id.* ¶¶ 5.6, 5.9.

185. *Id.* ¶ 5.6.

186. *Id.* ¶¶ 3.11-12, 3.21, 3.29.

187. Here the panel cited the ruling of a previous panel as authoritative, despite the fact that previous panel reports have no official precedential force. The decision relied upon was Panel Report, *United States—Taxes on Petroleum and Certain Imported Substances*, L/6175 (June 17, 1987). *Id.* ¶ 5.13.

188. *Id.* ¶ 5.20.

189. *Id.* ¶¶ 5.22-35.

337 is necessary because it is the only existing scheme for the enforcement of patent laws against foreign producer-importers. The panel rejected this out of hand. It noted that most countries have no need for a separate enforcement scheme and concluded that the United States likewise has no need of such a scheme.¹⁹⁰ Moreover, even if a separate scheme were necessary, the panel held that this need would not justify the differential and burdensome procedural inconsistencies.¹⁹¹ Last, the panel addressed the meaning of article XX(d)'s "necessary to secure compliance" provision:

It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.¹⁹²

At first blush, such a standard provides WTO panels a lot of room to second-guess national government choices. Disputants can always argue that a different measure was "reasonably available" and entailed the "least degree of inconsistency with other GATT provisions." The fear is that such a formulation leads to an excessively strict standard of review, one slanted toward overturning challenged measures.

However, there are significant limitations to the rule that save it from being overly broad. First, one must heed the procedural stance of the case in which the issue arose. The question of whether an exception should be granted arises, as it did in this case, only after a determination that a particular measure is inconsistent with WTO rules. Exceptions that are only invoked to justify trade-restrictive practices that have been found to be inconsistent with GATT. When an underlying practice is found to be inconsistent with the GATT, the least restrictive means test

190. *Id.* ¶¶ 5.26, 5.28, 5.32. Such a broad-sweeping conclusion, unsupported by empirical evidence, briefing, expert testimony or argumentation, may offend the sensibilities of American jurists. However, panels often rely on what they assume to be common knowledge or intuitive understandings without supportive fact-finding, possibly due to limited fact-finding resources. *See, e.g.*, Panel Report, *Japan—Trade in Semi-Conductors*, ¶ 107, L/6309 (May 4, 1988), GATT B.I.S.D (35th Supp.) at 154 (1989) (finding that a nonmandatory administrative structure nonetheless constitutes a GATT violation because peer-pressure in Japanese society effectively operates to transform the structure into a system of formal, mandatory export control).

191. *United States—Section 337 of the Tariff Act*, *supra* note 178, ¶ 5.26.

192. *Id.*

comes into play only when the means chosen by a national government to implement the practice or regulation are found to be inconsistent with the WTO. In such cases, where a contracting party seeks to justify a measure that has been found to violate WTO rules by invoking a carve-out or an exception to such rules, it seems reasonable to require a measure that is both consistent with WTO rules and the least trade-restrictive means available. This makes sense as a way to backstop WTO norms by requiring limited exceptions. Demanding less would give members free reign to adopt discriminatory enforcement procedures to achieve the same level of protectionism that a prohibited substantive law would provide. The exception would gut the rule.

Second, the panel's interpretation of "necessary" in the context of article XX does not impose any additional burdens on member nations. The panel took pains to make clear that its decision does not require governments to change their substantive law or enforcement goals, only that "such law and such level of enforcement are the same for imported and domestically-produced products."¹⁹³ The requirement is merely a restatement of the National Treatment rule, which members are already obliged to respect.¹⁹⁴

Last, national governments are not required to seek out and develop less restrictive alternatives if none is already available. The panel has explained that a measure must be one that the member "could reasonably be expected to employ."¹⁹⁵ This is similar to the rule articulated in the dormant commerce clause case, *Maine v. Taylor*, which held that a state does not have to develop nondiscriminatory procedures that are merely an "abstract possibility."¹⁹⁶ Thus, a member would be able to successfully invoke an article XX exception if there were no readily available alternatives that would guarantee the same level of enforcement.

In applying the least restrictive means test, panels will have to be somewhat constrained and careful not to second-guess national policy choices. After all, the WTO may not dictate how members should meet

193. *Id.*

194. The panel did not preclude the possibility that a nation can treat domestic and foreign products differently without violating the National Treatment rule. However, the nation applying differential treatment would bear the burden of showing that the treatment is nonetheless "no less favorable," presumably by demonstrating either that the treatment is in fact more favorable or has a beneficial effect on imports. *Id.* ¶¶ 5.26-27.

195. *Id.* ¶ 5.26. The reasonably available test raises two interesting questions, which will need to be resolved in future case law. First, to what extent should high regulatory expenses of the alternative measures be an obstacle? Is an alternative not reasonably available simply because it is more expensive? Secondly, could alternatives not be available because of domestic political constraints?

196. *Maine v. Taylor*, 477 U.S. 131, 147 (1986).

their WTO obligations. Nor is the purpose of dispute settlement to allow panels to choose among the best possible means of regulating international trade. If panels were never to defer to national determinations, the result would be dramatic erosion in the willingness of member nations to accept the WTO and a concurrent build-up of animus toward the DSU's perceived overreaching.

Thus, panels should clearly apply the least trade-restrictive means test, a very nondeferential standard, in the context of article XX exceptions. The reasons are several. First, the language of article XX, with the necessity limitation, lends itself well to such an application. Few other provisions in the GATT textually suggest an inquiry into the availability of alternatives consistent with GATT and WTO rules. Second, only in the exceptions context is there likely to be a sufficient record to enable panels to determine (or even speculate on) the existence of alternatives. As parties invoking exceptions have the burden of proof to show that an exception is warranted, they are likely to bolster their case by vigorously discrediting other schemes as ineffective or unfeasible. Similarly, their counterparties will argue exactly the opposite by pointing to a plethora of reasonable and equally effective alternatives that were not adopted or considered. Third, it is reasonable as a matter of policy to subject a member state to a stricter standard of review when a panel has made the initial finding that a national policy or measure violates GATT and WTO rules. All of these reasons suggest a way to meld WTO exceptions jurisprudence with U.S. dormant commerce clause jurisprudence by requiring a least restrictive means analysis in cases that invoke exceptions, either directly or conceptually.

One possible way for panels to strike a balance between the political pressure to defer to national authority determinations and the need to strengthen judicial enforcement of WTO rules is to shift a part of the burden of proving compliance with the WTO onto domestic bodies. Panels could require, for instance, national courts to decide if a challenged measure was implemented with the intention of complying with the WTO or if the domestic legislative body or regulatory agency, as the case may be, determined that the measure was the least trade restrictive of available alternatives. Such a requirement would lead to beneficial self-policing by member states in two ways. First, linking enforcement of WTO rules to domestic dispute settlement mechanisms will likely increase the effectiveness of the WTO by giving domestic judges and lawyers an opportunity to tangibly "bring home" WTO

guarantees of nondiscriminatory market access and freedom of trade¹⁹⁷ that could yield some long-term pragmatic and political benefits as well. On a pragmatic level, such a measure would expose a greater number of domestic jurists and lawyers to the intricacies of WTO law, thereby contributing to a process of demystification and habituation of an esoteric, but important, field of international law. Second, such a review is likely to be more politically palatable to opponents of international judicial review because it incorporates a first tier of domestic review by existing domestic courts. Lastly, requiring a least restrictive means inquiry at the first-tier domestic review would make the work of panels and Appellate Bodies easier by creating a judicial record and conducting broad-based fact finding, which is often beyond the resources of WTO bodies to do themselves. Such a measure is not totally out of reach. In fact, the WTO Agreement contemplates the strengthening of domestic judicial review as a means of increasing the rigor and vigor of the WTO. For example, the Agreement on Government Procurement¹⁹⁸ requires nations to establish a domestic procedure to examine “alleged breaches of the Agreement”¹⁹⁹ and the Agreement on Preshipment Inspection²⁰⁰

197. See PETERSMANN, *supra* note 31, at 196. Some commentators have expanded the personal stakes argument to advocate for replacing the intergovernmental WTO structure with a self-enforcing “private interests system of justice” or at least by giving individuals a right to enforce GATT rules before the DSB. See, e.g., Kenneth W. Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, 1992 COLUM. BUS. L. REV. 111, 113-49.

198. The Agreement on Government Procurement (GPA) is a plurilateral agreement found in Annex 4 of the WTO Agreement. As such, the agreement does not bind all members. The GPA imposes on its parties MFN and national treatment obligations for government procurement. Furthermore, it bans the discrimination on products based on foreign source or foreign affiliation. Additionally, the GPA has transparency requirements that require member nations to publish their rules regarding government procurement as well as annual statistics regarding actual procurement. JACKSON ET AL., *supra* note 12, at 527-28.

199. Agreement on Government Procurement, art. XX(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4, Legal Instruments—Results of the Uruguay Round, 1915 U.N.T.S. 103.

200. Developing countries often use pre-shipment inspections (PSI) to safeguard national interests and to compensate for inadequacies in their administrative infrastructure by employing private companies to check shipment details such as price, quantity, and quality of goods ordered overseas. The PSI Agreement places on PSI-using governments the obligations of nondiscrimination, transparency, protection of confidential business information, avoidance of unreasonable delay, the use of specific guidelines for conducting price verification and the avoidance of conflicts of interests by the PSI agencies. Exporters in turn are obligated to use nondiscrimination in the application of domestic laws and regulations and prompt publication of such laws. In the case of a dispute between parties, the agreement provides for an independent review procedure. Agreement on Preshipment Inspection, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1868 U.N.T.S. 368.

authorizes domestic proceedings to determine whether “the parties to the dispute have complied with the provisions of this Agreement.”²⁰¹

Furthermore, forcing national legislatures or agencies to consider whether a measure is consistent with the WTO and to weigh the available alternatives strikes a reasonable balance between legislative autonomy and the duty to carry out international law obligations in good faith.²⁰² National governments may be assured a measure of deference if their determinations were in good faith and not merely conclusory. Panels should take the legislative findings into consideration when adjudicating whether to grant an article XX exception.

IV. THE STATE OF DEFERENCE IN WTO CASES

This Part examines, in detail, some of the most important cases in WTO jurisprudence that directly touch upon the question of standard of review. For purposes of this Article, it is not feasible to survey all WTO cases that speak to the subject. Instead, this Part focus on Appellate Body cases arising under the SPS Agreement²⁰³ and the Anti-Dumping Agreement. A discussion of the Anti-Dumping Agreement is necessary for obvious reasons—it is the only agreement that contains an explicit standard of review provision. One must grapple with these cases in order to understand if WTO bodies are applying *Chevron*. By way of contrast, it is also useful to consider SPS cases to see if similar considerations play out in cases where there is no explicit standard of review. At a minimum, one can determine whether the inclusion of *Chevron* in the Anti-Dumping Agreement has had an impact on WTO decision making. In other words, do outcomes under section 17.6 of the Anti-Dumping

201. *Id.* art. 4(f).

202. The obligation of nations to comply with international law obligations in good faith, referred to as *pacta sunt servanda*, is well-established as a matter of customary international law and conventional international law. See HANS Kelsen, PURE THEORY OF LAW 215-17 (Max Knight trans., 1967) (2d ed. 1960). For a discussion of codification of *pacta sunt servanda* in the Vienna Convention on the Law of Treaties, see SINCLAIR, *supra* note 120, at 83-84. Interestingly, a similar procedural requirement on legislative authorities was imposed by President Reagan's Executive Order 12,612, entitled “Federalism.” Exec. Order No. 12,612, 3 C.F.R. 252 (1988). The order admonished Congress to be sensitive to federalism implications and required agencies to conduct a federalism assessment, which considered the costs on states and the effect on state sovereignty, including states' ability to exercise traditional state powers. *Id.*

203. The SPS Agreement deals with food safety and animal and plant health standards and includes provisions on control, inspection, and approval procedures. SPS Agreement, *supra* note 8. Governments must provide advance notice of new or changed sanitary and phytosanitary regulations, and establish a national enquiry point to provide information. *Id.* art. 7. The agreement complements other WTO agreements on technical barriers to trade. The text of the SPS Agreement can be found at http://www.wto.org/english/docs_e/legal_e/15-sps.pdf (last visited Feb. 4, 2007).

Agreement differ from outcomes in an agreement, such as the SPS Agreement, that does not contain an explicit standard of review? Cases arising under the SPS Agreement often highlight article XX exceptions, thereby allowing us to see how the least-restrictive means test might fit in. It also makes sense to focus on cases arising under the SPS Agreement because the seminal *E.C.—Hormones* case, which contains the most complete and authoritative statement of the standard of review outside of the antidumping context, arose under the SPS Agreement. Under each topic, SPS and antidumping, the discussion is organized chronologically.

A. SPS Cases

1. Lessons from the Early “Beef Hormones Case”

The seminal beef hormones controversy between the United States and the European Union in *E.C.—Hormones* provides an excellent opportunity to see how some of the issues raised in this Article can play out.²⁰⁴ The case raises interesting questions regarding the role of science in trade disputes and the level of deference a WTO adjudicative body should give to a member state’s scientific data. The case also brings out issues related to the relationship between science and the least restrictive means test, as well as the existence of “smoking guns” in legislative history.

Since the 1950s, U.S. meat producers have treated farm animals with natural and synthetic hormones to promote growth.²⁰⁵ Small residues of these hormones appear in meat sold to consumers.²⁰⁶ Scientific evidence concerning the harmful effects of these hormones conflicted.²⁰⁷ The United States Food and Drug Administration (FDA) determined that the levels of hormone residues in beef resulting from hormone implants is extremely low in comparison with the amount naturally produced by the human body.²⁰⁸ The FDA set an acceptable daily intake of hormonal residues that would be surpassed only if a prepubescent child (the most vulnerable group) consumed over ten

204. Appellate Body Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *E.C.—Hormones*]

205. U.S. Dep’t of Agriculture, *A Primer on Beef Hormones* (Feb. 26, 1999), available at <http://stockholm.usembassy.gov/Agriculture/hormone.html>.

206. *Id.*

207. *Id.*; see also Gina Kolata, *Hormone-Treated Beef Termed Generally Safe*, N.Y. TIMES, Jan. 1, 1989, § 1, at 22.

208. Kolata, *supra* note 207.

pounds of beef a day.²⁰⁹ Meanwhile, in Italy, a scandal erupted in 1981 involving young children who grew enlarged breasts allegedly due to the presence of DES, a growth hormone now banned in both the United States and Europe, in baby food.²¹⁰ The scandal prompted the European Community Council to issue a series of directives prohibiting the use of hormones and restricting the importation of beef containing hormones.²¹¹ The United States requested consultations under the WTO in January of 1996 and the establishment of a panel in April of 1996.²¹² The main thrust of the U.S. claim was that the E.C. import ban violated the SPS Agreement.

The SPS Agreement sets the conditions under which a contracting party may claim an exception for discriminatory or trade-restrictive measures that are "necessary to protect human, animal, or plant life or health."²¹³ The SPS Agreement creates a presumption of legality for SPS measures aimed at protecting health and the environment if the measures are based on internationally accepted standards.²¹⁴ A member seeking to impose more stringent standards must show scientific justification by conducting a risk assessment and offering scientific evidence of the harmful effects of the regulated product.²¹⁵ The SPS Agreement also prohibits the use of arbitrary and unjustifiable distinctions in the levels of

209. See Dale E. McNiel, *The First Case Under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban*, 39 VA. J. INT'L L. 89, 97-99 (1998).

210. Kolata, *supra* note 207.

211. See Council Directive 81/602/EEC, 1981 O.J. (L 222) 32; Council Directive 88/146/EEC, Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action, 1988 O.J. (L 70) 16; Council Directive 96/22/EC, 1996 O.J. (L 125) 3. The 1996 Directive replaces all earlier directives, maintains the prohibition on the use of all hormones for growth promotion, bans the sale of all imported and domestic meats containing the hormones, and allows hormonal treatment only for zoo-technical and therapeutic purposes.

212. *E.C.—Hormones*, *supra* note 204, ¶¶ 1.1-4.

213. See GATT, *supra* note 23, art. XX(b).

214. For a detailed description of the SPS Agreement, and some of the controversies it has engendered, see Terence P. Stewart & David S. Johanson, *The SPS Agreement of the World Trade Organization and International Organizations: The Roles of the Codex Alimentarius Commission, the International Plant Protection Convention, and the International Office of Epizootics*, 26 SYRACUSE J. INT'L L. & COM. 27 (1998); see also David Livshitz, *Updating American Administrative Law: WTO, International Standards, Domestic Implementation and Public Participation* (N.Y. Univ. Sch. Of Law, Public Law & Legal Theory Research Working Paper No. 06-18, 2006), available at <http://ssrn.com/abstract=918290> (discussing how harmonization efforts pursuant to the SPS Agreement might be strengthened by greater participation from private stakeholders).

215. In order to promote international harmonization, the SPS Agreement grants a presumption of legality to measures deemed to be based on international standards. SPS Agreement, *supra* note 8, arts. 2-3, 5.

protection deemed necessary if such distinctions result in discrimination or a disguised restriction on international trade.²¹⁶

The European Community defended its directive on several grounds. It argued that the ban was permissible under the SPS Agreement in light of both general information suggestive of the harmful effects of hormones and the precautionary principle, which justifies regulatory exercise of caution in the face of scientific uncertainty.²¹⁷ The E.C. measure set higher standards than the relevant international standard, the Codex Alimentarius Commission, which had been established by the World Health Organization and the United Nations Food and Agriculture Organization as an international standard-setter.²¹⁸ The European Community argued that the existence of the precautionary principle in customary international law necessarily precludes the requirement for specific, definitive scientific evidence before a WTO member can adopt a protective measure.²¹⁹ Instead, the European Community contended that general evidence on the harms of the relevant class of hormones should be sufficient.²²⁰

The final WTO panel report, issued on August 18, 1997, struck down the E.C. measure as not based on existing international standards and not supported by scientific justification.²²¹ The panel stated that the SPS Agreement required a member to establish a scientifically identifiable risk through an "evaluation of the potential for adverse effects on human or animal health," the definition of a risk assessment under the SPS Agreement.²²² The report further found that the distinctions the European Community made between natural and synthetic hormones and their purposes were arbitrary and constituted a disguised restriction on trade.²²³ The panel ruled that the SPS Agreement placed the burden of proving that the measure is in fact consistent with the GATT on the party imposing the SPS measure. It reasoned that because the SPS Agreement contemplates harmonization with international standards, this must be the general rule and that the imposition of higher standards is an exception to the rule, thereby

216. *Id.* art. 5, ¶ 5.

217. *E.C.—Hormones*, *supra* note 204, ¶ III.6.

218. *Id.*

219. *Id.* ¶ 8.157.

220. *See id.* ¶¶ 121, 201.

221. Panel Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA (Aug. 18, 1997) [hereinafter *Panel Report Hormones*].

222. *Id.* ¶¶ 8.124, 8.134, 8.136, 8.151, 8.161-.162.

223. *Id.* ¶ 9.1(ii).

shifting the burden of proof to the party claiming the exception.²²⁴ Thus, the panel effectively relieved the United States of making a prima facie case of violation. Last, the panel decided that to the extent the precautionary principle may be considered a part of customary international law, it does not override the SPS Agreement's explicit requirement that a member state conduct a risk assessment.²²⁵

The Appellate Body affirmed the panel's basic conclusion that the E.C. directive violated the SPS Agreement, but modified the panel report in a number of ways. The Appellate Body reversed the panel's shifting of the burden of proof, noting that the SPS Agreement recognizes the autonomous right of a member to implement a higher level of protection.²²⁶ This modification preserves the discretion of member nations to set their own levels of health and environmental protection, a result that may or may not be beneficial, as we will see later. The Appellate Body Report also stated that to the extent the panel interpreted a risk assessment to require some minimum level of risk, such a quantitative limitation has no basis in the SPS Agreement.²²⁷ However, a member state must show that a SPS measure bears an "objective relationship"²²⁸ to information supported by "sufficient scientific evidence"²²⁹ derived from the risk assessment. After undertaking its independent review of the evidence presented, the Appellate Body concluded that the European Community did not present sufficient scientific evidence.²³⁰

Unlike most sections in the General Agreement, the SPS Agreement articulates a scientific test for the weighing of evidence. In the *E.C.—Hormones* case, both the panel and the Appellate Body focused on the fact that evidence presented by the European Community related to the harmful potential of "entire categories of hormones, or of the hormones at issue *in general*."²³¹ As there was no specific evidence describing the negative effects from either the use of growth hormones or the presence of such hormones in meat, the Appellate Body found that the E.C. measure was not grounded in science. The report also upheld the standard of review applied by the panel, which was to examine the underlying scientific evidence and undertake an "objective assessment of

224. *Id.* ¶¶ 8.53-.55.

225. *Id.* ¶ 8.83.

226. *See E.C.—Hormones, supra* note 204, ¶ 104.

227. *Id.* ¶ 186.

228. *Id.* ¶ 193.

229. *Id.* ¶ 180.

230. *Id.* ¶ 200.

231. *Id.* ¶ 199.

the facts.²³² To the extent that the outcome hinged on the quantity of scientific proof,²³³ this was an easy case. The European Community adduced absolutely no evidence to establish a causal linkage between hormones in meat and cancer, or other harmful effects. Its scientific data showed only a general risk of cancer.²³⁴ We can understand the *E.C.—Hormones* case as essentially a no evidence case, one that justifies no deference to national findings.²³⁵ Predicting the result in a case with some modicum of evidence is a more difficult proposition.

According to the Appellate Body, the European Community would have the right to set any level of protection it chooses as long as it could prove scientifically that there was a potential danger to human health as a result of the use of growth hormones in beef. The European Community hailed the Appellate Body report as a clear win, an affirmation of a nation's autonomy to set its own health standards, and initially announced its intent to open a new risk assessment.²³⁶ The European Community threat to conduct another risk assessment, which was not carried out, highlights several unresolved problems. Is the proof of potential danger requirement appropriate in light of the complexity of considerations that inform a national regulatory decision on health, safety and environmental concerns? Did the Appellate Body brush aside the import of the precautionary principle too lightly? Most importantly, who will be the ultimate arbiter of the adequacy of scientific evidence? Will the European Community or the Appellate Body have the final say in deciding whether a risk assessment establishes negative health effects? The first hormones case was relatively easy to decide, but what would be the outcome if the European Community had found one scientist, however spurious or disreputable, whose data established a link between hormones in beef and adverse health effects? Should an international trade body engage in the substantive weighing of complex scientific data?

232. *Id.* ¶ 117.

233. In contrast, in antidumping cases, the opposite scenario from the *E.C.—Hormones* case tend to be true in that national authorities can and do produce voluminous evidence as the quantity and quality of economic evidence may be determinative of the outcome of the antidumping investigation.

234. *See id.* ¶ 200.

235. *See generally* McNiel, *supra* note 209, at 112-31 (noting that scientific studies sponsored by the European Community from 1981 to 1994 unearthed no credible evidence on the harmful effects of hormones and arguing that the E.C. measure should have been struck down as a disguised restriction on trade).

236. *See* Gary G. Yerkey & Daniel Pruzin, *U.S. Opposes New Risk Assessment in Dispute with EU over Beef Hormones*, 15 INT'L TRADE REP. 76 (1998).

The scientific test of the SPS Agreement also complicates the least restrictive means test. It remains unclear how the SPS scientific standard interfaces with article XX(b), which permits discriminatory measures that are necessary to protect human, animal, or plant life or health. Does invocation of the SPS Agreement override the necessity requirement, so that a measure will be upheld if scientifically justified, regardless of the availability of less trade restrictive measures? The Appellate Body did not reach this question because it found the E.C. measure unsupported by scientific evidence.

The SPS test should not invalidate the necessity requirement. Not only would such a result weaken the effect of prior WTO case law concerning exceptions, but it might also encourage member nations to justify policies on unsound scientific research. The risk is heightened by the fact that the hormones case contains language to suggest that the Appellate Body will not question the purpose of a health-related measure if the measure is supported by scientific evidence.²³⁷ To the extent that such language threatens the viability of the necessity requirement and the proposed least restrictive means application of the requirement, it is clearly erroneous. Had the Appellate Body reached the question of necessity, it should have divorced the scientific inquiry from the means inquiry.

Thus, even if the European Community were able to establish the harmful potential of hormones in beef, the trade effects of its measure must be scrutinized. Instead of assessing the legality of a health policy by examining solely the scientific basis underlying the policy—a determination that entangles WTO bodies in areas in which it may be ill-suited—the panel and the Appellate Body should focus on the trade-restrictive effects of the policy. Thus, in analyzing whether a health measure is necessary, panels would concern themselves not primarily with science (other than making an objective assessment of the evidence), but with whether another reasonably feasible, less restrictive means is available. In the *E.C.—Hormones* case, the Appellate Body should have asked if a complete ban were necessary or if the same health concerns could have been addressed with other means, such as labeling, posting maximum daily consumption allowances, treating meat to reduce the potency or absorbability of the hormones, etc. Alternative means for the European Community to guard against the potential dangers of hormones in beef include stringent regulation of acceptable residue levels

237. See *E.C.—Hormones*, *supra* note 204, ¶¶ 184-186.

similar to requirements imposed by the FDA,²³⁸ disclosure standards, labeling, and other consumer protection measures.²³⁹ The only open question for the WTO would then be at which point regulatory expenses could justify not adopting these or other alternative measures.²⁴⁰

There can be no question that the Appellate Body reached the correct result in *E.C.—Hormones*, but it could have reached the result on different grounds. Had the Appellate Body examined the legislative history of the controverted E.C. directive, it probably would have agreed with the panel's finding that the directive constituted an arbitrary and unjustifiably disguised restriction on trade. The relevant report of the European Commission, which is the Community organ responsible for proposing and drafting legislation, declared that "only a total ban on the use of growth-promoters is concordant with the strategic aims now adopted for the Common Agricultural Policy, in particular the reduction of surpluses."²⁴¹ The language suggests that consumer protection was not the main impetus for the directive, but rather harmonization of Community agricultural policy and the reduction of surplus at the expense of importers. In fact, a minority dissented from the Commission report, stating that the Commission "had no evidence whatsoever that these substances were harmful to animals or humans" and that "the ban was not introduced for the protection of the consumer."²⁴² While the existence of "smoking guns" evincing lack of good faith or discriminatory intent is extremely rare in legislative histories, this is arguably one of those rare occasions.

2. Solidification of the Lessons from *E.C.—Hormones in Japan—Apples*

The *Japan—Apples* case concerns a package of nine Japanese measures aimed at protecting the Japanese apple industry from the bacterium *Erwinia amylovora*, or fire blight, a North American bacterium that infects apples, pears, quince, and some garden plants.²⁴³ Fire blight is

238. See McNeil, *supra* note 209, at 97-99.

239. *E.C.—Hormones*, *supra* note 204, ¶ 84.

240. In the *Thailand—Cigarettes* case, the panel proposed a set of similar alternatives to import restrictions without examining the regulatory costs of the proposals. See *Thailand—Cigarettes*, *supra* note 128, ¶¶ 74-81.

241. McNeil, *supra* note 209, at 106.

242. *Id.*

243. Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*, ¶¶ 8, 14, WT/DS245/AB/R (Nov. 26, 2003) [hereinafter *Japan—Apples*]; Panel Report, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/R (July 15, 2003) [hereinafter *Japan—Apples* Panel Report].

transmitted “primarily through wind and/or rain and by insects or birds to open flowers on the same or new host plants.”²⁴⁴ One of the key factual issues in the case involves whether fire blight can be transmitted from the United States by the importation of either mature, symptom-free apples or immature, infected apples, the latter of which are far more likely to be disease vectors.²⁴⁵ As the United States only allows the exportation of mature, symptomless apples, it argued that any risk assessment should ignore immature apples. Japan disagreed, fearing that immature apples may be included in export shipments from the United States through human or technical error.²⁴⁶

In response to the risks of fire blight, Japan imposed nine stringent restrictions on the importation of apples from the United States. The restrictions included: limiting imports to apples grown in Oregon and Washington; prohibiting imports from any orchard where fire blight has been detected within a 500-mile buffer zone; designation of fire blight-free zones by the United States Department of Agriculture; inspections three times per year of exporting orchards; chlorine treatment of exported apples and treatment of packing containers and packing facilities prior to shipment; isolating apples destined for Japan from those destined for other markets; certification by U.S. officials that the apples have been treated and are free of fire blight; and confirmation by Japanese officials of the U.S. certification.²⁴⁷ The United States claimed in panel proceedings that these strict measures violated various provisions of the SPS Agreement, including articles 2.2, 5.1, and 5.6.²⁴⁸ For the most part, the panel agreed with the United States, and Japan appealed to the Appellate Body.²⁴⁹ Three of the issues of greatest interest raised by Japan on appeal were that the panel erred (1) in finding that the Japanese regime inconsistent with article 2.2 of the SPS Agreement²⁵⁰ because it was “maintained without sufficient scientific evidence,” (2) in holding that the measure was not based on a risk assessment as defined in Annex

244. *Japan—Apples*, *supra* note 243, ¶ 8.

245. *Japan—Apples* Panel Report, *supra* note 243, ¶ 8.26.

246. *Id.* ¶¶ 8.109, 8.174.

247. *Id.* ¶ 8.5(a)-(i).

248. *Id.* ¶ 3.1.

249. *See generally Japan—Apples*, *supra* note 243.

250. Article 2(2) of the SPS Agreement provides:

Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5 [which provides provisional measures where the relevant scientific evidence is insufficient].

SPS Agreement, *supra* note 8, art. 2(2).

A of the SPS Agreement²⁵¹ and required by article 5.1 of the SPS Agreement,²⁵² and (3) in failing to conduct “an objective assessment of the facts of the case” as required by article 11 of the DSU.²⁵³

a. Sufficient Scientific Evidence

With respect to article 2.2 of the SPS Agreement, the panel report concluded that a measure is maintained without sufficient scientific evidence within the meaning of article 2.2 if there is no “rational or objective relationship” between the measure and the relevant scientific data.²⁵⁴ Japan argued that the United States should have had the burden of proving that fire blight could not have been transmitted from the United States to Japan even if infected, immature apples had been exported. In other words, Japan argued that the United States should have been required to demonstrate that Japan’s scientific evidence was insufficient. The United States had not even addressed the issue because it took the position that infected, immature apples (nonexportable) were irrelevant, and it presented evidence only with respect to mature fruit. Japan argued therefore, that in the absence of countervailing evidence, the panel erred in finding that Japan lacked sufficient scientific evidence. With respect to mature, symptom-free apples, Japan argued that the panel should not have substituted its own risk analysis for the one undertaken by Japan. In doing so, it failed to give Japan “the discretion conferred by Article 2.2 on an importing Member in the evaluation of relevant scientific evidence.”²⁵⁵

The Appellate Body disagreed with Japan. Relying extensively on *E.C.—Hormones*, the Appellate Body affirmed that while the complaining party has the initial burden of establishing a prima facie case of inconsistency under the SPS Agreement, it “does not imply that the complaining party is responsible for providing proof of all facts raised in relation to the issue of determining whether a measure is

251. “Risk Assessment” is defined in the SPS Agreement as “[t]he evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which *might be applied*, and of the associated potential biological and economic consequences.” *Id.* annex A, para. 4 (emphasis added).

252. The SPS Agreement provides: “Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.” *Id.* art. 5(1).

253. *Japan—Apples*, *supra* note 243, ¶ 129.

254. *Id.* ¶ 147 (quoting *Japan—Apples* Panel Report, *supra* note 243, ¶¶ 8.101—8.103, 8.180).

255. *Id.* ¶¶ 24, 149.

consistent with a given provision of a covered agreement.²⁵⁶ Any fact raised in response to a complaint must be proven by the responding party. In this case, the Appellate Body agreed with the panel that Japan had failed to substantiate its assertions that immature, infected apples could be inadvertently imported.²⁵⁷ In its discussion of export control failures, the panel had noted that even if infected apples were accidentally imported, the risk of transmission to plant life was negligible because the fire blight bacterium is unlikely to survive on crates during transit.²⁵⁸ This observation suggests that the panel was not afraid of drawing its own factual conclusions. However, what really seemed to be driving the panel, and later the concurrence of the Appellate Body, was the total absence of any evidence on two key points: (1) that mature, symptomless apples could be infected and thereby serve as a vector of disease and (2) that any immature, infected apples had ever been imported into Japan from the United States in error or otherwise.²⁵⁹ Thus, the resolution of the latter issue (risk posed by immature, infected apples) is pretty straightforward and similar to the principle established in *E.C.—Hormones*, that is, measures supported by no, weak, or unconvincing scientific evidence will not survive WTO scrutiny.

With regard to mature, symptomless apples, the Appellate Body approved of the panel's reliance on the Appellate Body report in *Japan—Measures Affecting Agricultural Products*²⁶⁰ in holding that the term "without sufficient scientific evidence" in article 2.2 of the SPS Agreement implied a "rational or objective relationship" between the measure and risk, as supported by the scientific evidence, to be determined on a case-by-case basis.²⁶¹ In applying the rational relationship standard, the Appellate Body found that the panel's conclusion that no nexus existed was supported by facts showing that mature, symptomless apples were unlikely to be carriers of fire blight. Interestingly, the Appellate Body found that the panel's reliance on experts' views on this question was within the panel's discretion on assessing the weight and value of the evidence. This suggests that the Appellate Body, while willing to defer substantially to panel assessments of the facts, was not willing to defer to Japan's determination in the same

256. *Id.* ¶ 154.

257. *Id.* ¶¶ 155-156.

258. *Id.* ¶ 145 (summarizing panel report).

259. *Id.* ¶¶ 143-168.

260. Appellate Body Report, *Japan—Measures Affecting Agricultural Products*, WT/DS76/AB/R (Feb. 22, 1999) [hereinafter *Japan—Agricultural Products*].

261. *Japan—Apples*, *supra* note 243, ¶¶ 162-164 (citing *Japan—Apples* Panel Report, *supra* note 243).

way. Within the context of the article 2.2 discussion, however, it is difficult to draw conclusively that national determinations under the SPS Agreement will not be accorded great deference. This is because both the panel and the Appellate Body could have reached the conclusion that the Japanese measure was not supported by sufficient scientific evidence based on a procedural finding that Japan had failed to rebut the United State's prima facie case. This would not require a de novo assessment of the facts, but merely a weighing of the available evidence.

b. Risk Assessment

The starting point for the *Japan—Apples* analysis of risk assessment was the Appellate Body's decision in *Australia—Salmon*, which held that a risk assessment pursuant to article 5.1 of the SPS Agreement must include three steps: (1) “*identify* the [relevant] diseases”; (2) “*evaluate the likelihood* of entry, establishment or spread of these diseases”; and (3) “*evaluate the likelihood of entry . . . according to the SPS measures which might be applied*.”²⁶² Identification of the disease was not at issue, so the analysis focused on steps two and three. The panel had concluded that Japan's risk assessment did not satisfy either of the elements, and the Appellate Body again agreed. First, the risk assessment must be specific. A study of the general risks of fire blight was not sufficient.²⁶³ This is again a direct application of *E.C.—Hormones*' conclusion that the European Community's risk assessment was not sufficient because it showed only the existence of a general risk of cancer, without focusing in on the “particular kind of risk [t]here at stake.”²⁶⁴ Just as the European Community had to show consuming hormone-treated beef posed a risk of cancer, Japan had to show a specific causal link between imported U.S. apples and the transmission of fire blight to Japanese plant life. The risk of disease transmission varied quite significantly from plant species to plant species. Unfortunately, Japan had not evaluated the risk of disease based on specific host plants. In other words, Japan argued that American apples posed a risk of transmitting fire blight to Japanese apple and pear trees, but did not show how apple and pear trees may become infected. As a result, the panel properly found that Japan had failed in step two. The Appellate Body was quick to point out, however, that the result does not

262. *Id.* ¶ 196 (quoting Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, ¶ 121, WT/DS18/AB/R (Oct. 20, 1998) [hereinafter *Australia—Salmon*]).

263. *Id.* ¶¶ 197, 203.

264. *Id.* ¶ 199 (citing *E.C.—Hormones*, *supra* note 204, ¶ 200).

mandate any particular risk assessment methodology. Members are free “to consider in their risk analysis multiple agents in relation to one disease, provided that the risk assessment attribute a likelihood of entry, establishment or spread of disease to each agent specifically.”²⁶⁵ This statement should be seen as reaffirmation of the margin of discretion afforded to a member nation to carry out risk assessments in the manner it sees fit, so long as it covers the essential causal points.

The discussion of step three is the most interesting. Recall that step three requires an evaluation of the likelihood of entry, establishment, or spread of disease in conjunction with the SPS measures “which might be applied.”²⁶⁶ The Appellate Body agreed with the panel that the phrase “which might be applied” requires more than an evaluation of the measures already in place. In other words, the Appellate Body required an alternative means analysis. It noted:

[T]he evaluation contemplated in paragraph 4 of Annex A to the *SPS Agreement* should not be distorted by preconceived views on the nature and the content of the measures to be taken; nor should it develop into an exercise tailored to and carried out for the purpose of justifying decisions *ex post facto*.²⁶⁷

This is a fairly clear injunction to members to broaden their field of vision to include alternative measures. So, what criteria are members supposed to use in making risk assessments? In keeping with the view that members need a measure of flexibility, the Appellate Body gave only slight guidance. It faulted Japan for failing to assess the “relative effectiveness” of the various individual components of its measure; however, it did not elaborate on the meaning of “relative effectiveness.”²⁶⁸ However, one can speculate. Recall that the bundle of nine measures set up a very strict regime for U.S. apple exports. Perhaps the Appellate Body is suggesting that they were excessive and unnecessary. Would the same result have been achieved with perhaps only five of the measures? Were there less trade restrictive measures that would have achieved the same result? Indeed, the Appellate Body favorably quoted the panel’s critique that Japan made no analysis of the measures’ “relative effectiveness and whether and why all of them in combination are required in order to reduce or eliminate the possibility of entry, establishment or spread of the disease.”²⁶⁹

265. *Id.* ¶¶ 200, 203-204.

266. *Id.* ¶ 208.

267. *Id.*

268. *Id.* ¶ 209.

269. *Id.* (citing *Japan—Apples* Panel Report, *supra* note 243, ¶ 8.288).

The Appellate Body went on to agree with the panel's finding that Japan had failed step three. Because Japan evaluated all nine measures as a complete package, it was obvious that "no phytosanitary policy other than the regulatory scheme *already in place* was considered."²⁷⁰ The Appellate Body has set up a fairly high standard. A specific, not general, risk assessment is required. The assessment must incorporate other measures besides the existing scheme. The relative effectiveness of each measure must be weighed individually. What can one adduce from all this? Overall, neither the panel nor Appellate Body reports broke new ground insofar as both reports relied upon and affirmed principles established in *E.C.—Hormones*. Despite this, however, the case can be read as suggestive of a new direction in SPS jurisprudence, one which signals a new willingness to inquire into (and to ask member nations to assess) alternative measures. In doing so, the Appellate Body also seems much more comfortable with giving panels wide latitude in assessing and weighing evidence before them. As a result, *Japan—Apples* may stand for the twin propositions of high deference to panels, à la *Chevron*, and low deference, anti-*Chevron*, for national authorities. This becomes even clearer in the Appellate Body's resolution of the next issue.

c. Objective Assessment of the Facts

Japan piggybacked another claim to its article 2.2, "sufficient scientific evidence," argument, which was that the panel had failed to make an "objective assessment of the matter before it"²⁷¹ as required by article 11 of the DSU.²⁷² Recall that article 2.2 dealt with the question of whether fire blight could be transmitted from imported U.S. apples to Japanese plants. Japan alleged that the panel erred by (1) focusing on mature, symptomless apples, (2) failing to give effect to the precautionary principle, and (3) failing to appreciate that the risk of fire blight presented was not purely theoretical.²⁷³ In addressing these three allegations, the Appellate Body's point of departure was, once again, *E.C.—Hormones*, which established a "duty to make an objective assessment of the facts [as], among other things, an obligation to consider the evidence presented to a panel and to make factual findings

270. *Id.*

271. Article 11 of the DSU requires a panel to "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." DSU, *supra* note 72, art. 11.

272. *Japan—Apples*, *supra* note 243, ¶ 46.

273. *Id.* ¶¶ 47, 49-50.

on the basis of that evidence.”²⁷⁴ *E.C.—Hormones* had also affirmed that a panel, as the trier of fact, has discretion to assess the credibility and weight to be given to a piece of evidence. Since then, the Appellate Body has consistently followed this practice.²⁷⁵ The Appellate Body will not hem in a panel’s margin of discretion. Indeed, the Appellate Body took care to clarify that

[i]n assessing the panel’s appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence.²⁷⁶

This formulation clearly echoes the hornbook formulation of the abuse of discretion standard that U.S. courts have used in applying *Chevron*. In applying the test, the Appellate Body noted that Japan failed to offer any evidence or argument challenging the objectivity of the panel’s assessment.²⁷⁷ Effectively, Japan merely complained that the panel did not give as much weight as Japan would have liked to the risk statements made by Japan’s experts. The Appellate Body’s response was basically, “Too bad.” While a panel’s discretion is necessarily limited by its duty to make an objective assessment of the facts of the case, according different weight to evidence lies clearly within bounds of the panel’s discretion as trier of fact.

The Appellate Body found that the panel did not err in finding that the risk of transmission of fire blight, from either mature or immature apples, was extremely unlikely.²⁷⁸ Again, the panel properly exercised its

274. *Id.* ¶ 221 (citing *E.C.—Hormones*, *supra* note 204, ¶ 133).

275. *Id.* (citing Appellate Body Report, *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 161, WT/DS135/AB/R (Mar. 2001) [hereinafter *E.C.—Asbestos*]); see also Appellate Body Report, *European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, ¶ 125, WT/DS219/AB/R (July 22, 2003); Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) [hereinafter *E.C.—Bed Linen*]; Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶ 299, WT/DS231/AB/R (Sept. 26, 2002); Appellate Body Report, *Korea—Taxes on Alcoholic Beverages*, ¶¶ 161-162, WT/DS75/AB/R, WT/DS84/AB/R (Jan. 18, 1999); *Japan—Agricultural Products*, *supra* note 260, ¶¶ 141-142; Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, ¶ 151, WT/DS166/AB/R (Dec. 22, 2000) [hereinafter *U.S.—Wheat Gluten*]; *Australia—Salmon*, *supra* note 262, ¶ 266; *Korea—Dairy Products*, *supra* note 125, ¶ 138.

276. *Japan—Apples*, *supra* note 243, ¶ 222 (citing *E.C.—Asbestos*, *supra* note 275, ¶ 159 (quoting *U.S.—Wheat Gluten*, *supra* note 275, ¶ 151)).

277. *Id.* ¶ 238.

278. *Id.* ¶ 226.

duty to weigh the evidence in a way that the Appellate Body would not second-guess. However, the Appellate Body did criticize the panel for not being “sufficiently explicit” in its reasoning.²⁷⁹ Specifically, the panel should have been more precise about both the scope of its factual analysis as well as the allocation of burdens of proof on key facts related to disease transmission.²⁸⁰ Nevertheless, the Appellate Body agreed with the panel’s determination that the evidence submitted by Japan on the risk of fire blight transmission by immature or mature apples was “essentially circumstantial or deemed unconvincing by the experts.”²⁸¹ The Appellate Body may quibble with the clarity and completeness of a panel’s reasoning, but these flaws do not amount to a failure to make an objective assessment of the facts.

Japan’s third challenge under article 11 of the DSU alleged that the panel failed to give effect to the precautionary principle. Japan argued that the “need [for] caution emphasized by the experts” and “general need [for] prudence” require the panel to recognize “the risk of complet[ing] the pathway from infected apple[s].”²⁸² First, the Appellate Body reiterated the finding, first made in *E.C.—Hormones*, that the precautionary principle, while certainly “relevant” to the SPS Agreement, had not yet attained the status of “authoritative formulation” of international law outside the field of international environmental law.²⁸³ Moreover, it did not release members from their WTO obligations, and, as such, did not “override the provisions of Articles 5.1 and 5.2 of the *SPS Agreement*.”²⁸⁴ In this case, Japan did not argue that the panel should have applied the precautionary principle as a separate principle of *jus cogens*, or nonderogable norm of international law. Nor did Japan even argue that the precautionary principle should have informed the panel’s interpretation of the substantive requirements of the SPS Agreement. This was unfortunate, as it would have been very interesting to have the Appellate Body speak on both questions. Rather, Japan contended that the precautionary principle was embodied in the opinions of experts cautioning against the removal of all measures designed to protect against fire blight; therefore, the opinions should have been accorded greater weight. Japan took issue only with the panel’s assessment of evidence.²⁸⁵ By this point, the result should have been

279. *Id.*

280. *Id.* ¶¶ 227-228.

281. *Id.* ¶ 231.

282. *Id.* ¶ 232.

283. *Id.* ¶ 233 (citing *E.C.—Hormones*, *supra* note 204, ¶¶ 123-124).

284. *Id.* (citing *E.C.—Hormones*, *supra* note 204, ¶ 125).

285. *Id.* ¶ 234.

predictable. The Appellate Body noted that the panel had considered the evidence offered by Japan's own two experts, both of whom felt uncomfortable with the idea of lifting all phytosanitary measures in light of Japan's sensitive island-ecosystem. However, both experts expressed in their statements that the completion of the pathway from U.S. apples to Japanese host plants was unlikely.²⁸⁶ After due consideration, the panel came to a different conclusion than Japan, but did not exceed the bounds of its discretion in doing so. Once, again, the Appellate Body deferred to the panel's appreciation of the evidence.²⁸⁷

Japan—Apples reaffirms and solidifies most of the central conclusions in *E.C.—Hormones*. The Appellate Body used this case to reiterate, with some insistence, that trade-restrictive measures adopted under the SPS Agreement will receive heightened scrutiny, especially with respect to the sufficiency of scientific evidence that must support a strong causal link between the measures adopted and the targeted risks. Most importantly, the Appellate Body explicitly required Japan both to evaluate the necessity of the nine measures it adopted and to contemplate whether the goals it sought to advance could be accomplished by less restrictive means. The Appellate Body's insistence on a specific risk analysis also signaled a continued willingness on the part of the WTO to hold members to account for basing SPS measures on unconvincing evidence and findings of generalized risks. The trend begun in *E.C.—Hormones* has not gone away. Rather, it would not be surprising if subsequent cases, stepping on the shoulders of *E.C.—Hormones* and *Japan—Apples*, were to require not only a specific risk assessment, but one that is broken down into individual components, together with a disaggregated consideration of the alternatives to each individual measure. The Appellate Body hints that it may be willing to head in this direction by inquiring into the relative effectiveness of each SPS measure adopted.²⁸⁸ Lastly, the dispute underscores the very limited place *Chevron* holds: *Chevron* dictates substantial deference to panels' assessment of the facts and conclusions, but does not dictate deference to the assessments and conclusions of members. Thus, at least with respect to cases arising under the SPS Agreement, *Chevron* has no place. Let us see if *Chevron* fares any better in antidumping cases.

286. *Id.* ¶¶ 235-236 (citing *Japan—Apples* Panel Report, *supra* note 243, ¶ 6.71, ¶ 241 (Dr. Smith), ¶ 263 (Dr. Geider) of Annex 3 thereto).

287. *Id.* ¶ 238.

288. *Id.* ¶ 209.

B. Antidumping Cases

The year 2001 saw a flurry of activity in the SPS and antidumping areas. The Appellate Body issued a number of decisions dealing with the Anti-Dumping Agreement, many of which tackled controversial issues left unresolved under the dispute settlement regime of the pre-WTO GATT. This Part examines three of the antidumping cases, *E.C.—Bed Linen*,²⁸⁹ *Thailand—Steel*,²⁹⁰ and *U.S.—Hot Rolled Steel*,²⁹¹ with a view to answering the following questions:

- (1) How has the Appellate Body interpreted and applied article 17.6's special standard of review provisions?
- (2) As applied, does article 17.6 differ significantly from article 11 of the DSU?
- (3) If such interpretation and application does not result in the type of deference article 17.6's proponents expected, is this correct as a matter of law? As a matter of policy? As a practical matter?

This Part highlights *E.C.—Bed Linen*, *Thailand—Steel*, and *U.S.—Hot Rolled Steel* because the three reports, all issued within a four-month window, represent the most focused, reasoned, and sustained expositions to date of the Appellate Body's views on the standard of review in the Anti-Dumping Agreement. Read together, the three cases provide a consistent answer to each of the three questions posed above.

1. *E.C.—Bed Linen*

In *E.C.—Bed Linen*, India successfully argued that the European Community's practice of "zeroing"²⁹² in the calculation of margins of

289. *E.C.—Bed Linen*, *supra* note 275.

290. Appellate Body Report, *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R (Mar. 12, 2001) [hereinafter *Thailand—Steel*].

291. Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001) [hereinafter *U.S.—Hot Rolled Steel*].

292. The practice of "zeroing" is briefly described by the Appellate Body in its report as follows:

[F]irst, the European Communities identified with respect to the product under investigation—cotton-type bed linen—a certain number of different "models" or "types" of that product. Next, the European Communities calculated, for each of these models, a *weighted average* normal value and a *weighted average* export price. Then, the European Communities compared the weighted average normal value with the weighted average export price for each model. For some models, normal value was *higher* than export price; by subtracting export price from normal value for these models, the European Communities established a "*positive dumping margin*" for each model. For other models, normal value was *lower* than export price; by subtracting export price from normal value for these other models, the European Communities

dumping violated article 2.4.2²⁹³ of the Anti-Dumping Agreement. In defending its imposition of antidumping duties on bed linens from India, the European Community essentially argued that the panel was mistaken about the ordinary meaning of article 2.4.2. According to the European Community, article 2.4.2 requires a comparison of “the weighted average of prices of all *comparable* export transactions,” which, so the European Community argued, “is not the same as requiring a comparison with a weighted average of *all* export transactions.”²⁹⁴ Rather,

where the product under investigation consists of various “non-comparable” types or models [e.g., duvets versus sheets, twin sets versus king sets], the investigating authorities should first calculate “margins of dumping” for each of the “non-comparable” types or models, and, then, at a subsequent stage, combine those margins in order to calculate an overall margin of dumping for the product under investigation.²⁹⁵

Thus, the European Community asserted that there are “two stages in calculating margins of dumping . . . and contend[ed] that Article 2.4.2 provides *no guidance* as to how the ‘margins of dumping’ for each of the types or models should be combined in the second stage in order to calculate an overall margin of dumping.”²⁹⁶ Therefore, the European Community asserted that, as “zeroing” takes place during this second

established a “*negative* dumping margin” for each model. Thus, there is a “positive dumping margin” where there *is* dumping, and a “negative dumping margin” where there *is not*. The “positives” and “negatives” of the amounts in this calculation are an indication of precisely *how much* the export price is above or below the normal value. Having made this calculation, the European Communities then added up the amounts it had calculated as “dumping margins” for each model of the product in order to determine an *overall* dumping margin for the product *as a whole*. However, in doing so, the European Communities treated any “negative dumping margin” as zero—hence the use of the word “zeroing”. Then, finally, having added up the “positive dumping margins” and the zeroes, the European Communities divided this sum by the cumulative total value of all the export transactions involving all types and models of that product. In this way, the European Communities obtained an overall margin of dumping for the product under investigation.

E.C.—Bed Linen, *supra* note 275, ¶ 47.

293. The Anti-Dumping Agreement explains how domestic investigating authorities must proceed in establishing “the existence of margins of dumping”; that is, it explains how they must proceed in establishing that there is actionable dumping. It reads, in part:

Subject to the provisions governing *fair comparison* in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all *comparable export transactions* or by a comparison of normal value and export prices on a transaction-to-transaction basis.

Anti-Dumping Agreement, *supra* note 9, art. 2.4.2 (emphasis added).

294. *E.C.—Bed Linen*, *supra* note 275, ¶ 49.

295. *Id.*

296. *Id.*

stage of the domestic antidumping process, it cannot be inconsistent with article 2.4.2. Accordingly, the European Community concluded that its methodology represented a permissible interpretation of article 2.4.2. The crux of the European Community's argument was that the panel failed to accord its interpretation of article 2.4.2 the proper deference.²⁹⁷

The Appellate Body disagreed with the European Community. It turned first to article 2.1²⁹⁸ for the proposition that any methodology for establishing the existence of margins of dumping under article 2.4.2 must concern the dumping of a *product*. In this case, the European Community had defined the product in its own antidumping investigation as all "bed linen of cotton-type fibres," which "[n]otwithstanding the different possible product types due to different weaving construction, finish of the fabric, presentation and size, packing, etc., all of them constitute a single product."²⁹⁹ Insofar as all bed linens were the same product, the European Community had to take into account, in establishing the existence of margins of dumping for all transactions involving all models or types of the product, not just those with a positive margin of dumping. Thus, the Appellate Body agreed with the panel that "zeroing" was not permitted because the effect of "zeroing" is to eliminate from the overall dumping calculation those transactions of the same product with a negative dumping margin.³⁰⁰

In doing so, the Appellate Body affirmed the panel's determination that the European Community relied on an impermissible interpretation of the Anti-dumping Agreement. What is remarkable about the decision is not the stance that there are impermissible interpretations, but the process through which the panel and Appellate Body reached that decision. As always, the Appellate Body started with the language of the applicable provision, article 2.4.2,³⁰¹ and noted that it requires a "fair comparison" between export price and normal value.³⁰² The language of

297. *Id.*

298. *Id.* ¶ 51. The Anti-Dumping Agreement states, in pertinent part:

For the purpose of this Agreement, a *product is to be considered as being dumped*, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

Anti-Dumping Agreement, *supra* note 9, art. 2.1 (emphasis added).

299. *E.C.—Bed Linen*, *supra* note 275, ¶ 52 (emphasis removed) (citing Commission Regulation 1069/97, Imposing a Provisional Anti-dumping Duty on Imports of Cotton-Type Bed Linen Originating in Egypt, India, and Pakistan, 1997 O.J. (L 156) ¶ 10 (E.C.)).

300. *Id.* ¶ 55.

301. *See id.* ¶ 51.

302. *Id.* ¶ 59.

article 2.4.2 expands on the meaning of "fair comparison" by calling for "a comparison of a weighted average normal value with a weighted average of prices of all *comparable* export transactions."³⁰³ Next, the Appellate Body established the ordinary meaning of the word "comparable" by relying on the *Oxford Dictionary* definition, "able to be compared."³⁰⁴ It then applied this definition to encompass all models and types of bed linens because they were all, even by the European Community's own admission, the same product and thus "able to be compared."³⁰⁵ It bolstered its definition by looking to the context of article 2.4 in general, which deals more broadly with a fair comparison between export price and normal value. It found no conflict between the use of the term "comparable" in articles 2.4 and 2.4.2 and held the European Community accountable to the same standard under each.³⁰⁶ Lastly, the European Community made the argument that the above interpretation would not allow members to address dumping targeted to certain types of the product under investigation, as contemplated by article 2.4.2, second sentence.³⁰⁷ In response to the European Community's argument that the provision can be read to refer to dumping of certain types or models, the Appellate Body flatly refused to acknowledge such a possibility. It wrote:

It seems to us that, had the drafters of the *Anti-Dumping Agreement* intended to authorize Members to respond to such kind of "targeted" dumping, they would have done so explicitly in Article 2.4.2, second sentence. The European Communities has not demonstrated that any provision of the Agreement implies that targeted dumping may be examined in relation to specific types or models of the product under investigation.³⁰⁸

The Appellate Body properly refused to expand the substantive requirements of the Anti-Dumping Agreement.

303. *Id.* ¶ 56 (emphasis added).

304. *Id.* ¶ 57 (citing THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 269 (1995)).

305. *Id.*

306. *Id.* ¶¶ 59-60.

307. The Anti-Dumping Agreement states:

A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly *among different purchasers, regions or time periods*, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted-average-to-weighted-average or transaction-to-transaction comparison.

Anti-Dumping Agreement, *supra* note 9, art. 2.4.2 (emphasis added).

308. *E.C.—Bed Linen*, *supra* note 275, ¶ 62.

The Appellate Body also noted that in its analysis, the panel had explicitly recognized its duty to apply the customary rules of interpretation of international law.³⁰⁹ After applying the customary norms of interpretation, the panel ruled that the European Community acted inconsistently with article 2.4.2 of the Anti-Dumping Agreement in establishing the existence of margins of dumping on the basis of a methodology which included “zeroing.”³¹⁰ The Appellate Body deduced from “the emphatic and unqualified nature of this finding of inconsistency that the Panel did not view the interpretation given by the European Communities of Article 2.4.2 of the *Anti-Dumping Agreement* as a ‘permissible interpretation’ within the meaning of article 17.6(ii) of the *Anti-Dumping Agreement*.”³¹¹ Therefore, the panel did not fail to apply the standard of review set out in article 17.6(ii) of the Anti-Dumping Agreement.

The analysis of the panel, upheld by the Appellate Body, of article 17.6(ii) of the Anti-Dumping Agreement is very interesting. Note that neither the panel nor the Appellate Body determined that article 2.4.2 admitted more than one permissible interpretation. One would expect this to be the threshold question. A plain reading of article 17.6(ii) suggests that this should be step one of the analysis. Instead, the panel skipped this step and proceeded directly to the question of whether the European Community’s interpretation was a permissible one. Another way of describing the panel’s approach is to say it ignored the plain

309. The panel in *E.C.—Bed Linen* wrote:

Thus, in considering those aspects of the European Communities’ determination which stand or fall depending on the interpretation of the AD Agreement itself rather than or in addition to the analysis of facts, we first interpret the provisions the AD Agreement. As the Appellate Body has repeatedly stated, Panels are to consider the interpretation of the WTO Agreements, including the AD Agreement, in accordance with the principles set out in the *Vienna Convention on the Law of Treaties (Vienna Convention)*. Thus, we look to the ordinary meaning of the provision in question, in its context, and in light of its object and purpose. Finally, we may consider the preparatory work (the negotiating history) of the provision, should this be necessary or appropriate in light of the conclusions we reach based on the text of the provision. *We then evaluate whether the European Communities’ interpretation is one that is “permissible” in light of the customary rules of interpretation of international law.* If so, we allow that interpretation to stand, and unless there is error in the subsequent analysis of the facts under that legal interpretation under the standard of review under Article 17.6(i), the challenged action is upheld.

Panel Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶ 6.46, WT/DS141/R (Oct. 30, 2000) (emphasis added) [hereinafter *E.C.—Bed Linen Panel Report*].

310. *Id.* ¶ 6.119.

311. *E.C.—Bed Linen*, *supra* note 275, ¶ 65.

language of article 17.6(ii), including its own description of it,³¹² and conducted a de novo review of whether the interpretation advanced by the European Community was consistent with the Anti-Dumping Agreement. While the panel's approach may be correct as a matter of law, insofar as the WTO dispute settlement bodies should have the ultimate responsibility for making authoritative interpretations of WTO law, it certainly does not follow the procedures set out in article 17.6(ii). Nonetheless, the Appellate Body upheld the panel's decision as well as the means of reaching the decision. Therefore, *E.C.—Bed Linen* interprets article 17.6(ii) as a single-step process, not the two-step procedure (first, if more than one interpretation is possible and second, if the decision under review rested on one of the permissible interpretations) reminiscent of *Chevron* that the text of article 17.6(ii) suggests. Is *E.C.—Bed Linen* an anomaly? The next two cases, *Thailand—Steel* and *U.S.—Hot Rolled Steel*, suggest it is not.

2. *Thailand—Steel*

Thailand—Steel addressed a number of issues arising from the imposition of final antidumping duties on imports of various iron and nonalloy steel products from Poland.³¹³ While most issues in the Appellate Body report are too technical (dealing with methodologies for calculating normal value) to be of interest in this Article, two aspects of the case are important for helping us understand the line of reasoning begun in the *E.C.—Bed Linen* and completed in *U.S.—Hot Rolled Steel*. First, the Appellate Body faulted the panel for assuming "there is always continuity between claims raised in an underlying anti-dumping investigation and claims raised by a complaining party in a related dispute brought before the WTO."³¹⁴ This is not necessarily the case because the parties involved in an underlying national antidumping investigation are usually exporters, while those involved in WTO dispute settlement are the member nations of the WTO. "Therefore, it cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute."³¹⁵ In a related finding, the Appellate Body also chided the panel for considering only nonconfidential information made available to the parties or their attorneys in the underlying national investigation. In order to fulfill its duty under article 17.6(i) to determine

312. See *E.C.—Bed Linen* Panel Report, *supra* note 309, ¶ 6.46.

313. *Thailand—Steel*, *supra* note 290, ¶¶ 1-2.

314. *Id.* ¶ 94.

315. *Id.*

whether the establishment of the facts was proper and whether the evaluation of those facts was unbiased and objective, the panel must examine all the facts before it, whether in confidential or nonconfidential documents.³¹⁶

Lastly, Thailand argued that “it is not the task of the Panel itself to examine whether the facts were properly established, and the Panel’s belief regarding the basis of a determination is not relevant.”³¹⁷ The Appellate Body dismissed this argument out of hand without much discussion. It reiterated that the obligation of national authorities to rely on “positive evidence” in making material injury determinations due to dumping and the panel’s obligations under article 17.6(i) are distinct; article 17.6(i) does not prevent a panel from reviewing whether the injury determination was based on “positive evidence.”³¹⁸ In other words, looking into how the facts were established is a key part of the panel’s job, one that is required by article 17.6(i).

Two additional points made in *Thailand—Steel* are relevant to our discussion. First, a panel’s review of the establishment of the facts at the national level needs to be a meaningful one. Even though article 17.6(i) allows for greater deference to national authorities with respect to factual questions than article 17.6(ii) does for questions of law, a panel is still required to take an active role to meet the requirements of article 17.6(i).

The Appellate Body chastised the panel for two decisions that would have narrowed both the scope and the depth of the panel’s review. The panel erred in assuming that the issues in the underlying Thai antidumping investigation would parallel those in the WTO proceeding. The panel had interpreted the Anti-Dumping Agreement as requiring the reasoning supporting the dumping determination to be formally or explicitly stated in documents in the record of the national investigation to which interested parties had access at least at the time of the final national determination. The Appellate Body disagreed, finding no such

316. *Id.* ¶¶ 107-112, 115-116.

Based on the ordinary meaning of these words, the proper establishment of the facts appears to have no logical link to whether those facts are disclosed to, or discernible by, the parties to an anti-dumping investigation prior to the final determination. Article 17.6(i) requires a panel also to examine whether the evaluation of those facts was “unbiased and objective”. The ordinary meaning of the words “unbiased” and “objective” also appears to have no logical link to whether those facts are disclosed to, or discernible by, the parties to an anti-dumping investigation at the time of the final determination.

Id. ¶ 116.

317. *Id.* ¶ 131.

318. *Id.* ¶ 137.

requirement. The panel also erred in limiting its review to information available to all parties in the national proceeding, rather than to all relevant information, confidential or not. Thus, panels must be mindful of the fact that the WTO proceeding may cover more issues than the national investigation; thus, panels must expand their scope of their review accordingly. This makes a lot of sense because the WTO dispute is likely to cover questions of law not addressed, or applicable, in the national proceeding, which is based on domestic, not WTO, law. At least some of those new questions of law may require facts not presented or made available to all parties, in the domestic proceeding. Given the limited fact finding ability of WTO panels, it is counter-productive to further hobble panels by limiting them to nonconfidential information disclosed to all interested parties. So, if panels are to conduct a meaningful review of the unbiased and objective nature of the national investigation, they must have full access to all the information used by the national investigating authority.

3. *U.S.—Hot Rolled Steel*

U.S.—Hot Rolled Steel stems from the imposition of antidumping duties by the United States International Trade Commission (USITC), following an injury investigation by the United States Department of Commerce, on imports of hot rolled steel from, among others, Japan.³¹⁹ After the USITC published its final affirmative determination of injury to the U.S. hot rolled steel industry, Japan brought a case under the WTO, alleging that the specific antidumping measures as well as certain provisions of U.S. antidumping laws, regulations, and administrative procedures were inconsistent with the Anti-Dumping Agreement and the GATT 1994.³²⁰ For the purpose of this Article, the most interesting aspects of the case revolve around the interpretation of article 17.6.

As a threshold matter, the Appellate Body noted that article 17.6 is identified in article 1.2 and Appendix 2 of the DSU as one of the “special or additional rules and procedures” which prevail over the DSU “[t]o the extent there is a difference between [those provisions and the provisions of the DSU].”³²¹ The Appellate Body referenced an interpretative axiom it had adopted in *Guatemala-Cement*, a 1998 dispute which involved claims under the Anti-Dumping Agreement:

319. *U.S.—Hot-Rolled Steel*, *supra* note 291, ¶ 2.

320. The factual aspects of the case are set out in great detail in paragraphs 2.1 to 2.9 of the panel report. See Panel Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel on Products from Japan*, ¶¶ 2.1-2.9, WT/DS184/R (Feb. 28, 2001).

321. DSU, *supra* note 72, art. 1(2) & app. 2.

In our view, it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them.³²²

Thus, the Appellate Body must determine the extent to which article 17.6 complements or conflicts with article 11 of the DSU. The Appellate Body first interprets article 11's requirement that panels "make an objective assessment of the matter" before it broadly to include both factual and legal matters. With respect to the assessment of facts, the Appellate Body wrote:

Article 17.6(i) of the *Anti-Dumping Agreement* does not expressly state that panels are obliged to make an assessment of the facts which is "objective." However, it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* "assessment of the facts of the matter." In this respect, we see no "conflict" between Article 17.6(i) of the *Anti-Dumping Agreement* and Article 11 of the DSU.³²³

With regard to interpretation of law, the Appellate Body also saw mostly similarities between article 17.6(ii) and the DSU's article 3(2). Both require recourse to customary laws of interpretation of international law as enshrined in articles 31 and 32 of the Vienna Convention on the Law of Treaties.³²⁴ This aspect merely confirms that the usual rules of treaty interpretation under the DSU apply to the Anti-Dumping Agreement as well. This is not surprising insofar as the Vienna Convention guides interpretation of treaties in any field of international law, not just trade. Thus, the Appellate Body correctly concluded there is no conflict between the first sentence of article 17.6(ii) and article 3(2) of the DSU insofar as the text of each closely tracks the other.

The second sentence of article 17.6(ii) requires panels to uphold legal interpretations of the Anti-Dumping Agreement if they are one of the permissible interpretations under the Vienna Convention.³²⁵ It presupposes that application of the Vienna Convention could yield at least two permissible interpretations of the Anti-Dumping Agreement. The Appellate Body then instructed panels to determine if a measure

322. *U.S.—Hot Rolled Steel*, *supra* note 291, ¶ 51 (citing Appellate Body Report, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, ¶ 65, WT/DS60/AB/R (Nov. 2, 1998)).

323. *Id.* ¶ 55.

324. *Id.* ¶ 60.

325. *Id.* ¶ 59.

rests upon a permissible interpretation under the Vienna Convention.³²⁶ It seems to suggest that this is a required first step in a panel's analysis. "In other words, a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*."³²⁷

In support of the proposition, the Appellate Body cited its two earlier reports in *E.C.—Bed Linen* and *Thailand—Steel*.³²⁸ However, in neither case did the panel nor the Appellate Body address, much less answer, the question of whether application of the Vienna Convention allows more than one permissible interpretation. Rather, in both, the Appellate Body agreed with the panel's determination that the interpretation advanced by the national dumping authority was not a permissible one,³²⁹ without answering the threshold question of the possibility of admitting multiple interpretations. Thus, for example, in *Thailand—Steel*, the Appellate Body, after agreeing with the panel's interpretation of the mandatory nature of the fifteen factors to assess the impact of dumped imports on the domestic industry, in a display of circular logic, concluded as follows:

We also note that the Panel, by means of a thorough textual and contextual analysis, clearly applied the customary rules of interpretation of public international law. Further, the Panel's interpretation that Article 3.4 requires a mandatory evaluation of all the individual factors listed in that Article clearly left no room for a "permissible" interpretation that all individual factors need *not* be considered.³³⁰

Similarly, in *E.C.—Bed Linen*, the Appellate Body upheld the panel's "emphatic and unqualified" determination that the European Community's interpretation of the Anti-Dumping Agreement was an "impermissible" one.³³¹ In such a case, the panel is not faced with the choice of deferring to a permissible interpretation, the Appellate Body had opined.³³² Neither *E.C.—Bed Linen* nor *Thailand—Steel* complied with the Appellate Body's injunction in *U.S.—Hot Rolled Steel* to follow a two-step process. Both cases skipped step one. Neither panel first determined if the applicable provisions of the Anti-Dumping Agreement was capable of more than one permissible interpretation.

326. *Id.* ¶ 60.

327. *Id.*

328. *Id.* ¶ 60 n.39.

329. See *E.C.—Bed Linen*, *supra* note 275, ¶¶ 63-65; see also *Thailand—Steel*, *supra* note 290, ¶ 127.

330. *Thailand—Steel*, *supra* note 290, ¶ 127.

331. *E.C.—Bed Linen*, *supra* note 275, ¶ 65.

332. *Id.*

Ultimately, in *U.S.—Hot Rolled Steel*, the Appellate Body concluded that article 17.6(ii) also did not conflict with article 11 of the DSU, but rather supplemented it. “Article 17.6(ii) simply adds that a panel shall find that a measure is in conformity with the *Anti-Dumping Agreement* if it rests upon one permissible interpretation of that Agreement.”³³³ As interpreted by the Appellate Body, the heart of what article 17.6 adds to the DSU is the first step. Yet, when panels skip step one, no reversal ensues, nor does the Appellate Body even critique the panel’s methodology. Given that the Appellate Body often brings its own reasoning to bear even when it upholds a panel’s underlying conclusion, this is very odd, to say the least. What’s going on?

V. WHY IS THE WTO “IGNORING” THE *CHEVRON* DOCTRINE?

A review of key cases arising under the SPS and Anti-Dumping Agreements yields three observations about the standard of review, and the future of the *Chevron* doctrine, in the WTO. These observations can also be framed as answers to the three questions posed *supra* Part IV.B. First, as applied by WTO panels and the Appellate Body, there are no significant differences between the standard of review under the SPS Agreement and the Anti-Dumping Agreement, despite the latter’s special provision in article 17.6. Second, the Appellate Body sees no conflict between article 17.6 and article 11 of the DSU. Rather, the two articles are interpreted as complementing each other when possible. Third, in both SPS and antidumping cases, the WTO has shown a willingness to examine alternatives and require member nations to demonstrate that they have considered less trade-restrictive alternatives. Each of these conclusions has significant normative implications for the future of *Chevron* in the WTO.

In *E.C.—Hormones*, the first case to address the question of the standard of review in the WTO, the Appellate Body explained that panels have a duty to make an “objective assessment” of the facts before them, derived from article 11 of the DSU. The assessment must be a meaningful one, requiring a close examination of the underlying scientific evidence showing the need for protective measures. With respect to key factual determinations, such as whether hormones in meat

333. *U.S.—Hot Rolled Steel*, *supra* note 291, ¶ 62. As an interesting side note, it is worth noting that the Appellate Body also does not follow its own prescriptions in *U.S.—Hot Rolled Steel*, at least with respect to one issue which made the United States rather upset, that is, whether the Department of Commerce had to accept submissions of requested data (in this case, weight conversion factors for certain product sales to affiliated companies) when they are provided past the deadlines established by the Department of Commerce. *Id.* ¶¶ 63-90.

cause cancer or whether fire blight can be transmitted from imported fruit to plants, the WTO requires panels to actively weigh the persuasiveness, quality, and quantity of scientific evidence. When panels undertake such an assessment and arrive at a different conclusion from that reached by a member nation, the Appellate Body will uphold the panel's factual conclusions even if they are determinative of the legal outcome. The Appellate Body confirmed, in *E.C.—Bed Linen* and *U.S.—Hot Rolled Steel*, that the same standard applies to the Anti-Dumping Agreement. Indeed, it stated explicitly in *U.S.—Hot Rolled Steel* that article 17.6(i) can not conceivably mean anything other than the “objective assessment of the facts of the matter” required by article 11 of the DSU.³³⁴

The second observation—that there is no conflict between article 17.6 and article 11—flows logically from the first. In *U.S.—Hot Rolled Steel*, the Appellate Body seemingly went out of its way to emphasize the similarities between the two standard of review provisions with respect to questions of law. Noting that article 17.6 would trump article 11 only if it were impossible to comply with both, the Appellate Body concluded the two did not conflict. It highlighted how both provisions require an objective assessment of the matter, and both rely on customary rules of interpretation codified in the Vienna Convention. With respect to the question of article 17.6(ii), which requires panels to uphold national determinations if they rest on a permissible interpretation, the Appellate Body did not articulate guidelines for either arriving at multiple permissible interpretations or deciding if multiple permissible interpretations were possible. Rather, in *E.C.—Bed Linen*, *Thailand—Steel*, and *U.S.—Hot Rolled Steel*, the Appellate Body upheld the panels' independent assessment on the permissibility of the legal interpretations advanced by respondent government party. Thus, as applied, article 17.6 is virtually identical to article 11, surely not the result American negotiators sought during the Uruguay Round of negotiations when they pushed so hard for article 17.6.

A pattern has emerged in which the spotlight shines on the availability of least trade restrictive alternatives. For example, even though the SPS Agreement gives member nations the discretion to impose a higher level of health and safety protection than agreed-upon international standards, such discretion may be exercised only if members are able to demonstrate a strong causal link between the harm they seek to avoid and the measures adopted. In its assessment of the

334. *Id.* ¶ 55.

causal link, the approach of the WTO Appellate Body closely parallels the inquiry of U.S. courts in dormant commerce clause cases in that both examine (1) whether the measure were a disguised form of protectionism and (2) whether other less trade restrictive means were available. Of course, in the first SPS case, the Appellate Body did not reach the question of whether the European Community must adopt the least trade restrictive one. However, in the *Japan—Apples* case a few years later, the Appellate Body interpreted into the SPS Agreement an obligation to disaggregate a package of SPS measures and examine the effectiveness and necessity of each individual measure. It accomplished this by interpreting risk assessment broadly to include a thorough inquiry into alternative measures. By questioning the need for the strict regime Japan imposed, the Appellate Body made it easier for panels to measure the regime Japan imposed with a fairly stringent “were they necessary” yardstick.

In antidumping cases, the least restrictive means test does not inquire into the availability of other alternatives because the alternative is always the same—i.e., not imposing antidumping duties and fines. Rather, the test expresses itself in a more subtle way. In *E.C.—Bed Linen*, the test found expression in restricting the methodology for calculating the margin of dumping by requiring the European Community to take into account all import transactions of the same product—all bed linens rather than just the types and models that had a positive dumping margin. Requiring a national authority to take into account all transactions takes away some discretion from the investigating authority, but yields a more complete, and hence more accurate, method for calculating dumping margins. Most importantly, however, the requirement will result in fewer impositions of antidumping duties, which is the trade-enhancing alternative. In *Thailand—Steel* and *U.S.—Hot Rolled Steel*, the Appellate Body accomplished the same goal by widening the scope of information national authorities and panels must take into account in antidumping cases to encompass both confidential information and economic data submitted outside deadlines. As in *E.C.—Bed Linen*, broadening the scope of review translates into effective limits on the ability of national authorities to impose antidumping duties and fines.

It seems fairly clear that the Appellate Body has essentially disregarded or ignored article 17.6’s special standard of review, choosing instead to interpret and apply it as complementary or identical to article 11 of the DSU. Professor Tarullo has posited two possible

explanations.³³⁵ First, it is possible that the Appellate Body has misunderstood the importance of the standard of review, but that is highly unlikely given that the members of the Appellate Body possess a high level of legal expertise and experience, and the cases demonstrate an appreciation of the difference.³³⁶ Another explanation is that the Appellate Body believes article 17.6(ii) is superfluous and rightly should not be given effect because reliance on customary rules of interpretation as required by the Vienna Convention will always yield only one permissible explanation.³³⁷ This explanation is belied by the Appellate Body's recognition in *U.S.—Hot Rolled Steel* that article 17.6(ii) presupposes the possibility of more than one permissible interpretation.

I think the explanations are both simpler and deeper than the two offered above. First, the Appellate Body is clearly sensitive to the structural differences between the domestic context in which *Chevron* developed and the WTO. For example, it rebuked the panel in *Thailand—Steel* for failing to recognize that the domestic and WTO proceedings cover very different questions. It is possible that the Appellate Body does not apply *Chevron* because it recognizes that the justifications for *Chevron* are weak or nonexistent when transposed into the WTO context. Moreover, to the extent that the Appellate Body takes its role as authoritative interpreter of the WTO agreements seriously, and there is no reason to think it does not, it can discharge this duty only by undertaking a meaningful review of national determinations. A meaningful review with respect to the facts means, among other things, that critical information may not be excluded (*E.C.—Bed Linen*), panels must have the ability to examine all facts available to the national investigating authority (*Thailand—Steel*), and a reasonable timetable must be given to respond to requests for information from the antidumping investigatory authority (*U.S.—Hot Rolled Steel*). With respect to legal conclusions, a meaningful review means that the Appellate Body can (1) conclude that an interpretation of the Anti-Dumping Agreement advocated by a member nation is not a permissible one and (2) inquire into the availability of alternative means to accomplish the goal. Neither of these positions leaves much room for deference. Furthermore, the Appellate Body has shown itself determined

335. See Tarullo, *supra* note 98, at 148-52 (arguing that the WTO's article 17.6(ii) decisions impose a deadweight loss on all WTO members and presenting a very useful template for assessing the extent of such loss or cost).

336. See *id.* at 148-49.

337. *Id.* at 150-52 (arguing that the Vienna Convention does not produce such clear results).

to interpret away any conflict between article 17.6 and article 11 of the DSU and to apply them as one complementary standard. This has the effect of conflating the standard of review jurisprudence in antidumping cases with that of other WTO agreements, all of which are subject to article 11 of the DSU.

The normative implications are several. First, WTO dispute settlement bodies are not applying *Chevron* deference to national determinations, and they are showing no inclination to do so in the future. To my mind, this suggests that efforts by governments, trade diplomats, and scholars to persuade the WTO to give greater weight to *Chevron* are unlikely to meet with success. Rather, those who desire greater deference must be prepared to earn it. If a practical lesson can be gleaned from the cases examined in this Article, it is that the Appellate Body is more likely to defer to a national determination containing a reasoned, thorough, and objective consideration of the alternatives available. This holds true in both SPS and antidumping cases.

The arguments in favor of applying a least trade restrictive test discussed *supra* Part III.D are persuasive with respect to both SPS and antidumping cases. One reason is that, at the most fundamental level, both types of cases are conceptually identical to article XX exceptions cases. A nation imposing measures to protect domestic plants and animals from disease under the SPS Agreement in essence relies on the same privilege granted by article XX's broad health and safety exception. The measures would facially violate WTO rules but for the successful invocation of a compelling reason for the carve-out. Likewise, the imposition of prospective duties on imports is facially inconsistent with basic WTO norms, but is allowed under limited circumstances as an exceptional form of trade remedy for the trade-distorting practice of dumping. Under these circumstances, it makes sense for WTO panels to closely scrutinize both the factual and legal conclusions of the domestic authority to ensure that the invocation of the exception was in good faith. Inquiring into the existence of alternative means to achieve the same goals is another check on disguised protectionism.

WTO dispute settlement bodies are, for the most part, getting it right by not applying *Chevron*.³³⁸ However right they are, ignoring *Chevron* is not without cost. By not applying *Chevron* in the context of article 17.6(ii) antidumping cases, WTO bodies make themselves an easy target of criticism for ignoring negotiated treaty obligations, departing

338. See Oesch, *supra* note 100, at 659.

from accepted norms of international law, and judicial activism.³³⁹ All this tends to be expressed as a generalized sense of outrage arising from thwarted sovereignty. In instances where the United States has lost a trade remedies case in the antidumping or countervailing duties arena, the dissatisfaction sometimes had led to veiled or unveiled threats of withdrawal from the WTO. While the outrage and threats have rarely been justified, they nevertheless have had a political cost in terms of undermining the legitimacy of the DSU and weakening public support for the WTO in general. The WTO, still relatively in its infancy, simply can not afford to ignore the grumblings. So, the question has become how to balance sovereignty concerns against certainty and predictability in the world trading system.

Currently, no *Chevron* deference is given to national determinations in the WTO. However, recent cases suggest that there are limited circumstances under which the WTO seems more willing to apply greater deference. If the national measure has been adopted only after the relevant nation has examined other alternatives and concluded, in good faith, that the measure was the least trade restrictive means available, then *Chevron* deference applies. If no least restrictive analysis was undertaken, then deference is unlikely. Panels should explicitly require members to undertake and present an analysis of alternative means in the context of article XX exceptions, SPS cases, and antidumping cases. Application of the test coupled with encouragement of self-policing mechanisms at the domestic level may be one way to resolve the power struggle.

VI. CONCLUSION

The Dispute Settlement Understanding of the WTO greatly strengthened the rule of law in the international trade arena. It introduced procedures that address many of the problems which plagued the fragmented and politicized dispute resolution system under the pre-WTO GATT system. However, the appropriate level of deference for panels to give to national determinations remains largely unclear. The core WTO agreements (other than the Anti-Dumping Agreement) give little guidance both substantively, in terms of setting standards of review, and procedurally, in terms of application guidelines.

339. See, e.g., Ragosta et al., *supra* note 98 (arguing that the dispute settlement process is inherently flawed because it lacks democratic oversight and that WTO bodies have been overly activist and have failed to give effect to negotiated provisions).

International trade negotiators and some commentators have attempted to explain the need for panel deference in terms of the U.S. administrative law model. We have seen how the *Chevron* doctrine is both unworkable in the WTO context and unsuitable in terms of doctrinal and policy justifications. Nevertheless, there is a clear need to balance national autonomy to implement valid domestic policies and the WTO dispute settlement bodies' authority to effectuate and interpret WTO obligations. Currently, panels and the Appellate Body seem to be resolving the tensions between the two goals one-sidedly by effectively ignoring *Chevron*. Given the difficulties inherent in applying *Chevron* in the WTO context, this may be the only viable option as a practical matter. By the same token, the structural and policy differences between U.S. administrative law and WTO law discussed in this Article render *Chevron* inapplicable as a normative and doctrinal matter.

The cases discussed in this Article bear this out. The Appellate Body has not been applying *Chevron*, and, in fact, goes out of its way to interpret away differences between the special standard of review in article 17.6 of the Anti-Dumping Agreement and the standard of review in article 11 of the DSU applicable to all other WTO disputes. In order for the WTO not to languish or atrophy between intensive care and the crematorium, it must abide by a standard of review that strikes a balance between the legal goals of certainty and predictability and the political goal of securing the goodwill and support of its members. The standard of review tempered by the restrictive means test proposed in this Article provides such balance.