



**ROSS BECROFT**

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# The Standard of Review in WTO Dispute Settlement

Critique and Development

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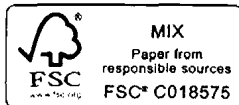
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# Preface

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This book deals with the question of what kind of standard of review WTO panels should apply when reviewing whether a WTO member has complied with its obligations under the WTO Agreements. The key conceptual issue is the degree of deference (if any) that WTO panels ought to apply to measures of WTO members. This is important because it may affect the allocation of power between international organizations and States. In the case of the WTO, this question is particularly relevant because many measures derive from domestic administrative or judicial processes, and WTO panels are often not merely examining whether domestic laws or decisions made by domestic governments comply with WTO obligations.

I argue that the WTO should adopt a flexible standard of review that would vary depending upon the type of measure being examined. It is contended that panels should, as a general proposition, apply a highly intensive and non-deferential factual standard of review when examining domestic measures. If, however, WTO members have separately retained certain jurisdictional competencies to deal with particular disciplines, such as in the case of anti-dumping and countervailing measures, then a more deferential standard of review should apply. This approach constitutes a completely new conceptual framework, but it would not always vary the standard of review that is presently applied.

In this book, I examine existing WTO jurisprudence and literature on this issue, and I also conduct a brief survey of standards of review within selected domestic and international legal systems. From this analysis, I contend that the WTO standard of review should be based on three major considerations: the promotion of key objectives of WTO dispute settlement, enhancing adjudicative legitimacy, and procedural effectiveness. I conclude that a new flexible standard of review as proposed would best satisfy these considerations in an overall sense. That is, this test provides the best balance of these sometimes competing issues. I then go on to articulate the theoretical elements of this new standard, and then discuss how this standard may be applied to several WTO Agreements where its application may be contentious.

I conclude that this new standard of review would be a significant enhancement to the WTO dispute settlement system. It would provide for a more balanced and consistent interpretation of the WTO Agreements. Further, this

standard, and the underlying principles, may provide the foundations for developing similar standards in other international dispute bodies in the future. This work ultimately concerns the nature and scope of judicial review in international trade law, treaty interpretation, and constitutional questions about the level of intrusion by international bodies in domestic affairs.

The genesis of this book was the idea that the standard of review exercised by WTO panels may affect the way in which the WTO Agreements are interpreted and applied. This legal concept may then result in more or less strict adherence to WTO commitments. Therefore, the standard of review is an influential mechanism that has the potential to mediate the legal relationship the WTO and its membership, being predominantly sovereign States. It is my view that the reform of the standard of review as advocated in this work will develop and strengthen the WTO and the international trading system.

Ross Becroft  
Melbourne  
May 2012

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# Abbreviations

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## GENERAL ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ADJR Act	Administrative Decisions (Judicial Review) Act 1977 (Cth)
Agreement on Customs Valuation	Agreement on Implementation of Article VII of the GATT 1994
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the GATT 1994
APA	Administrative Procedure Act
ATC	Agreement on Textiles and Clothing
BISD	Basic Instruments and Selected Documents
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)
EC	European Communities
ECHR	European Court of Human Rights
ECJ	European Court of Justice
GATS	General Agreement on Trade in Services
GATT or GATT 1947	General Agreement on Tariffs and Trade
GATT 1994	General Agreement on Tariffs and Trade 1994, Annex 1A, Marrakesh Agreement Establishing the World Trade Organization
ICJ	International Court of Justice
ICSID	International Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ITO	International Trade Organisation
ITO Charter	Charter for an International Trade Organization
Maastricht Treaty	Treaty on European Union
Marrakesh Agreement	Agreement Establishing the World Trade Organization

NAFTA	North American Free Trade Agreement
Safeguards Agreement	Agreement on Safeguards
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
Trade Remedy Agreements	The Anti-Dumping Agreement, SCM Agreement and Safeguards Agreement
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
TMB	Textile Monitoring Body
USITC	United States International Trade Commission
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WTO Agreements	The Marrakesh Agreement and the documents contained in its four annexes
WTO Tribunals	WTO Arbitral Bodies, Panels and the Appellate Body

## GATT REPORT ABBREVIATIONS

<i>Korea-Resins</i>	GATT Panel Report, <i>Panel on Korea-Anti-Dumping Duties on Imports of Polyacetal Resins from the United States</i> , ADP/92 and Corr.1, adopted 27 April 1993, BISD 40S/205
<i>New Zealand-Finnish Transformers</i>	GATT Panel Report, <i>New Zealand-Imports of Electrical Transformers from Finland</i> , L/5814, adopted 18 July 1985, BISD 32S/55
<i>US-Fur Felt Hats</i>	<i>Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade</i> , GATT/CP/106, adopted 22 October 1951
<i>US-Norwegian Salmon AD</i>	GATT Panel Report, <i>Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway</i> , ADP/87, adopted 27 April 1994, BISD 41S/229



- US-Section 337 Tariff Act* GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S/345
- US-Swedish Steel* GATT Panel Report, *United States – Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*, ADP/47, 20 August 1990, unadopted

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- Argentina-Footwear (EC)* Appellate Body Report, *Argentina-Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
- Argentina-Footwear (EC)* Panel Report, *Argentina-Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, 575
- Argentina-Hides and Leather* Panel Report, *Argentina-Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
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- Australia-Apples* Appellate Body Report, *Australia-Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010
- Australia-Apples* Panel Report, *Australia-Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R
- Australia-Salmon* Appellate Body Report, *Australia-Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
- Australia-Salmon* Panel Report, *Australia-Measures Affecting Importation of Salmon*, WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS18/AB/R, DSR 1998:VIII, 3407
- Brazil-Retreaded Tyres* Appellate Body Report, *Brazil-Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
- Brazil-Retreaded Tyres* Panel Report, *Brazil-Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, 1649
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- Canada-Aircraft* Appellate Body Report, *Canada-Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
- Canada-Autos* Appellate Body Report, *Canada-Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985

- Canada-Autos* Panel Report, *Canada-Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043
- Canada-Continued Suspension* Appellate Body Report, *Canada-Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008
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- Canada-Periodicals* Appellate Body Report, *Canada-Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
- Canada-Periodicals* Panel Report, *Canada-Certain Measures Concerning Periodicals*, WT/DS31/R and Corr.1, adopted 30 July 1997, as modified by Appellate Body Report WT/DS31/AB/R, DSR 1997:I, 481
- Chile-Alcoholic Beverages* Appellate Body Report, *Chile-Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281
- Chile-Alcoholic Beverages* Panel Report, *Chile-Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS87/AB/R, WT/DS110/AB/R, DSR 2000:I, 303
- Chile-Price Band System* Panel Report, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, 3127

- China-Auto Parts* Appellate Body Reports, *China-Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009
- China-Auto Parts* Panel Reports, *China-Measures Affecting Imports of Automobile Parts*, WT/DS339/R, WT/DS340/R, WT/DS342/R and Add.1 and Add.2, adopted 12 January 2009, as upheld (WT/DS339/R), and as modified (WT/DS340/R, WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R
- China-Publications and Audiovisual Products* Appellate Body Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010
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- Colombia-Ports of Entry* Panel Report, *Colombia-Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009
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- EC-Approval and Marketing* Panel Report, *European Communities-Measures of Biotech Products Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII
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- EC-Asbestos* Panel Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, 3305
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- EC-Chicken Cuts (Brazil)* Panel Report, *European Communities-Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Brazil*, WT/DS269/R, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XIX, 9295

- EC-Chicken Cuts (Thailand)* Panel Report, *European Communities-Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Thailand*, WT/DS286/R, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XX, 9721
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- EC-Computer Equipment* Panel Report, *European Communities-Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, as modified by Appellate Body Report WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, DSR 1998:V, 1891
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- EC-Sardines* Appellate Body Report, *European Communities-Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
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- Guatemala-Cement II* Panel Report, *Guatemala-Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
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- Japan-Alcoholic Beverages II* Appellate Body Report, *Japan-Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
- Japan-Apples* Appellate Body Report, *Japan-Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
- Japan-Apples* Panel Report, *Japan-Measures Affecting the Importation of Apples*, WT/DS245/R, adopted 10 December 2003, as upheld by Appellate Body Report WT/DS245/AB/R, DSR 2003:IX, 4481
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