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WTO DISPUTE PROCEDURES, STANDARD OF REVIEW, AND DEFERENCE TO NATIONAL GOVERNMENTS

By Steven P. Croley and John H. Jackson*

I. INTRODUCTION

Increasing international economic interdependence is obviously becoming a growing challenge to governments, which are frustrated by their limited capacities to regulate or control cross-border economic activities.¹ Many subjects trigger this frustration, including interest rates, various fraudulent or criminal activities, product standards, consumer protection, environmental issues and prudential concerns for financial services.² Although it has been said that "all politics is local,"³ it has also been said, with considerable justification, that "all economics is international."⁴

The Uruguay Round's result (including the Agreement Establishing the World Trade Organization (WTO)) is one important effort to face up to some of the problems associated with interdependent international economic activity. Central and vital to the WTO institutional structure is the dispute settlement procedure derived from decades of experiment and practice in the GATT, but now (for the first time) elaborately set forth in the new treaty text of the Dispute Settlement Understanding, as part of the WTO charter.⁵ Over the last fifteen years, many countries have come to recognize the crucial role that dispute settlement plays for any treaty system. It is particularly crucial for a treaty system designed to address today's myriad of complex economic questions of international relations and to facilitate the cooperation among nations that is essential to the peaceful and welfare-enhancing aspect of those relations.⁶ Dispute settlement procedures assist in making rules effective, adding an essential measure of predictability and effectiveness to the operation of a rule-oriented system in the otherwise relatively weak realm of international norms.⁷ Thus, the GATT contracting parties resolved at the 1986 launching meeting of the Uruguay Round (at Punta del Este) to deal with some of the defects and problems of existing dispute settlement rules. The result of that resolve was the new DSU.

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¹ See, e.g., JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* §1.1 (1989); see also *infra* note 2.

² See John H. Jackson, *Alternative Approaches for Implementing Competition Rules in International Economic Relations*, 2 SWISS REV. INT'L ECON. REL. 2, 2-25 (1994); John H. Jackson, *Reflections on Problems of International Economic Relations*, in *TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: RELEVANCE OF DOMESTIC LAW AND POLICY* 307 (Proceedings of Trilateral Symposium on International Law, July 25-28, 1994) (forthcoming 1996); John H. Jackson, *The Uruguay Round, World Trade Organization, and the Problem of Regulating International Economic Behaviour*, in *POLICY DEBATES/DÉBATS POLITIQUES* (Ottawa, Centre for Trade Policy and Law, 1995) [hereinafter *Uruguay Round*].

³ See TIP O'NEILL & GARY HYMEL, *ALL POLITICS IS LOCAL* (1994).

⁴ Peter F. Drucker, *Trade Lessons from the World Economy*, FOREIGN AFF., Jan./Feb. 1994, at 99, 99.

⁵ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 ILM 1140 (1994) [hereinafter *Final Act*]. The Final Act embodies, inter alia, the Agreement Establishing the World Trade Organization, opened for signature Apr. 15, 1994, 33 ILM at 1144 [hereinafter *WTO Agreement*]. See primarily the part of that Final Act devoted to dispute settlement, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to WTO Agreement, 33 ILM at 1226 [hereinafter *DSU*]; see also H.R. DOC. NO. 316, 103d Cong., 2d Sess. (1994); HUGO PAEMEN & ALEXANDRA BENSCH, *FROM THE GATT TO THE WTO—THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND* 71 (1995).

⁶ See Jackson, *Uruguay Round*, *supra* note 2.

⁷ See generally PAEMEN & BENSCH, *supra* note 5; JACKSON, *supra* note 1, ch. 4.

Yet dispute settlement by an international body such as GATT or WTO panels treads on the delicate and confusing issue of national "sovereignty." Even if one recognizes that some concepts of "sovereignty" are out of date or unrealistic in today's interdependent world,⁸ the word still raises important questions about the relationship of international rules and institutions to national governments, and about the appropriate roles of each in such matters as regulating economic behavior that crosses national borders. The GATT dispute settlement procedures have increasingly confronted these questions, including 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.

To pose a concrete example: Suppose that a government applies certain domestic product standards, perhaps for reasons of domestic environmental policy, in a manner that causes some citizens (or foreign exporters) to argue that the government action is inconsistent with certain WTO norms (such as rules in the WTO Technical Barriers to Trade Agreement). Suppose also, however, that a national government agency (or court) determines that the national action is *not* inconsistent with WTO rules, and another nation decides to challenge that determination in a WTO proceeding. It would seem clear that the international agreement does not permit a national government's determination *always* to prevail (otherwise the international rules could be easily evaded or rendered ineffective). But should the international body approach the issues involved (including factual determinations) *de novo*, without any deference to the national government? Certainly, it has been argued in GATT proceedings (especially those relating to antidumping measures)⁹ that panels should respect national government determinations, up to some point. That "point" is the crucial issue that has sometimes been labeled the "standard of review."¹⁰

This issue is not unique to GATT or the WTO, of course; nor even to "economic affairs," as literature in the human rights arena indicates.¹¹ Even so, during the past several years the standard-of-review question has become something of a touchstone regarding the relationship of "sovereignty" concepts to the GATT/WTO rule system. Indeed, in the waning months of the Uruguay Round, the standard-of-review issue assumed such importance to some negotiators that it reached a place on the short list of problems called "deal breakers"—problems that could have caused the entire negotiations to fail. This was particularly odd, given that the issue was one that only a few persons understood, and that was virtually unnoticed by almost all the public or private policy makers concerned with the negotiation. Clearly, certain economic interests were deeply concerned, most notably those in the United States who favored greater restraints on the capacity of the international body to overrule U.S. government determinations on antidumping duties, and who were perceptive and economically endowed enough to carry their views deeply into the negotiating process.¹² And those views cannot be easily dismissed. In many ways they go to a central problem for the future of the trading system—how to reconcile competing views about the allocation of power between national governments and international institutions on matters of vital concern to many

⁸ See, e.g., Louis Henkin, *The Mythology of Sovereignty*, ASIL NEWSLETTER, Mar.–May 1993, at 1.

⁹ See *infra* part II.

¹⁰ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Art. 17.6, in Annex IA to WTO Agreement, *supra* note 5 [hereinafter Anti-Dumping Agreement].

¹¹ R. St. J. Macdonald, *Margins of Appreciation*, in EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS, ch. 6 (R. St. J. Macdonald, Franz Matscher & Herbert Petzold eds., 1993); see also Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474 (1982).

¹² Based on interviews by Professor Jackson.

governments, as well as the domestic constituencies of some of those governments. They also raise important "constitutional" questions about international institutions and the potential need for "checks and balances" against misuse or misallocation of power in and for those institutions.¹³

For immediate purposes, however, we want to focus on the more particular question of the proper standard of review for a WTO panel when it undertakes to examine a national government's actions or rulings that engage the issue of consistency with the various WTO Agreements and are subject to the WTO's DSU procedures. We will not here explore another interesting standard-of-review question—pertaining to the review by the new WTO Appellate Body established under the DSU of a report by a first-level panel acting under the DSU. In this appeal procedure, the Appellate Body's review is limited to "issues of law covered in the panel report and legal interpretations developed by the panel."¹⁴ The difficult question will be how to distinguish questions of law from other questions (fact?). But it seems clear that the standard of review of the first-level panel as it examines national government actions and determinations is a question of law, and so could very well come before the Appellate Body at some point, probably quite early in the evolution of the WTO.

Naturally, the standard-of-review issue is one that many legal systems face. Indeed, some negotiators drew on certain national-level legal doctrines for analogies to use in the GATT/WTO context. For example, the matter has been the subject of considerable litigation, and Supreme Court attention in the United States, and the European Union Court of Justice in Luxembourg has faced similar issues in its jurisprudence. In fact, one of the questions that interests us most is whether it is appropriate to draw an analogy from national-level jurisprudence—specifically, from U.S. jurisprudence—for help in determining the scope or standard of review of an international body over national-level activity.

We proceed here, then, as follows. In part II, we explore briefly the GATT context of the question, remembering that Article XVI:1 of the WTO Agreement mandates that GATT jurisprudence will "guide" the jurisprudence and practice of the WTO.¹⁵ In part III, we look at the new WTO Agreements relevant to the standard-of-review question, and consider their potential meaning against the backdrop of some of the history of the Uruguay Round negotiation. In part IV, we turn to the jurisprudence of U.S. administrative law, which has struggled for many decades with a somewhat similar standard-of-review question, associated in recent years with the U.S. *Chevron* doctrine, explained in part IV. In part V, we explore some of the basic policies underlying the *Chevron* doctrine and argue that those policies do not find easy application in the context of an international proceeding. Finally, in part VI we briefly draw some tentative conclusions and suggest some avenues that may be useful for considering the approach of the WTO panels.

II. BACKGROUND: ILLUSTRATIVE GATT PANEL JURISPRUDENCE

Clearly, the desire of some negotiators to deal explicitly with this subject in the Uruguay Round was influenced by their reaction (or that of their constituencies) to some GATT panel cases, especially antidumping cases, in which observers felt the panels had overreached their authority and been too intrusive in disagreeing with national government

¹³ See Jackson, *Uruguay Round*, *supra* note 2.

¹⁴ See DSU, *supra* note 5, Art. 17.6, 33 ILM at 1236.

¹⁵ WTO Agreement, *supra* note 5, Art. XVI:1.

authorities. Thus, it is worth noting some of the GATT panel reports that addressed this question or topics related to it.¹⁶

In fact, a very early GATT working party discussed this subject in 1951 in a case involving a complaint by Czechoslovakia against a U.S. escape clause action that had raised tariff barriers on the importation of "hatter's fur." The working party concluded in favor of the United States, reasoning as follows:

48. These members were satisfied that the United States authorities had investigated the matter thoroughly on the basis of the data available to them at the time of their enquiry and had reached in good faith the conclusion that the proposed action fell within the terms of Article XIX as in their view it should be interpreted. Moreover, those differences of view on interpretation which emerged in the Working Party are not such as to affect the view of these members on the particular case under review. If they, in their appraisal of the facts, naturally gave what they consider to be appropriate weight to international factors and the effect of the action under Article XIX on the interests of exporting countries while the United States authorities would normally tend to give more weight to domestic factors, it must be recognized that any view on such a matter must be to a certain extent a matter of economic judgment and that it is natural that governments should on occasion be greatly influenced by social factors, such as local employment problems. It would not be proper to regard the consequent withdrawal of a tariff concession as *ipso facto* contrary to Article XIX unless the weight attached by the government concerned to such factors was clearly unreasonably great.¹⁷

By contrast, in a case brought by Finland against New Zealand's application of antidumping duties on imports of transformers, the panel ruled in 1985 that New Zealand authorities had not sufficiently established the validity of a "material injury" determination,¹⁸ a ruling that rejected New Zealand's contention that neither other contracting parties nor a GATT panel could challenge or scrutinize that determination. The panel said that to refuse such scrutiny "would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT."¹⁹ The panel in this connection further noted that a similar point had been raised, and rejected, in the 1955 report of the panel on complaints relating to Swedish antidumping duties.²⁰ The 1985 panel shared the view expressed by the 1955 panel that "it was clear from the wording of Article VI that no anti-dumping duties should be levied until certain facts had been established." The 1985 panel further pointed out, again quoting the 1955 panel: "As this represented an obligation on the part of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged."²¹

To examine another example, in a case against Korea's antidumping duties on polyacetal resins, the United States challenged the Korean Government's determination of injury. Korea argued that "it was not the task of the Panel to second guess the KTC

¹⁶ We will not here analyze in detail the jurisprudence of the GATT panel reports regarding the standard of review. Rather, in this article we focus on the policy arguments and the question of applying analogous national legal system rules about such a standard.

¹⁷ GATT DISPUTE SETTLEMENT PANEL, "HATTER'S FUR CASE", REPORT ON THE WITHDRAWAL BY THE UNITED STATES OF A TARIFF CONCESSION UNDER ARTICLE XIX OF THE GATT, 1951, paras. 8-14, GATT Sales No. GATT/1951-3 (1951), portions reproduced in JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 556 (2d ed. 1986).

¹⁸ GATT Dispute Settlement Panel, New Zealand—Imports of Electrical Transformers from Finland, GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS [BISD], 32d Supp. 55, 69, para. 4:7 (1985) [hereinafter New Zealand Transformers].

¹⁹ *Id.* at 67, para. 4:4.

²⁰ GATT Dispute Settlement Panel, Swedish Anti-Dumping Duties, BISD, 3d Supp. 81 (1955).

²¹ New Zealand Transformers, *supra* note 18, at 68, para. 4:4 (quoting Swedish Anti-Dumping Duties, *supra* note 20, at 85-86, para. 15).

[Korean government body] [T]he Panel's job was not to conduct a *de novo* investigation nor to attach its own weights to the different factors."²² Nevertheless, relying on language in the relevant GATT antidumping agreement, the panel decided that the KTC's injury determination before the panel did not meet the requirements of that treaty language.²³ Other cases have raised similar issues and, indeed, the criticism of the panel's approach in some cases is clearly what engendered the U.S. effort to obtain some limitations on the "standard of review" in the Uruguay Round negotiations.

Some later cases, however, seemed to take a more restrained view of a panel's authority. In the 1994 case of U.S. restrictions on imports of tuna, for instance, the panel noted:

The reasonableness inherent in the interpretation of necessary was not a test of what was reasonable for a government to do, but of what a reasonable government would or could do. In this way, the panel did not substitute its judgement for that of the government. The test of reasonableness was very close to the good faith criterion in international law. Such a standard, in different forms, was also applied in the administrative law of many contracting parties, including the EEC and its member states, and the United States. It was a standard of review of government actions which did not lead to a wholesale second guessing of such actions.²⁴

Similarly, in the prominent cases of twin complaints by Norway against the U.S. antidumping and countervailing duties on imports of Atlantic salmon, the panel in both cases ruled mostly in favor of the United States, finding that the U.S. action was not inconsistent with its GATT obligations, and seemed quite cautiously restrained in its approach (too restrained, some argue). The Government of Norway wrote a letter criticizing the panel's approach, to which the panel replied, saying, *inter alia*, that "the panel found it inappropriate to make its own judgement as to the relative weight to be accorded to the facts before the USITC."²⁵

Thus it can be seen that the standard-of-review question is recurring and delicate, and one that to some extent goes to the core of an international procedure that (in a rule-based system) must assess a national government's actions against treaty or other international norms. Indeed, a more detailed review of these and other cases would show that quite a few concepts invoked by panels over the years relate to the broader question of the appropriate relationship of international dispute settlement proceedings to national government actions.²⁶ With such broader questions in mind, we turn to the

²² GATT Dispute Settlement Panel, Korea—Anti-Dumping Duties on Imports of Polyacetal Resins from the United States, GATT Doc. ADP/92, para. 57 (1993) [hereinafter *Korea Resins*].

²³ *Id.*, paras. 208–13.

²⁴ GATT Dispute Settlement Panel, United States—Restrictions on Imports of Tuna, GATT Doc. DS29/R, para. 3.73 (1994) [hereinafter *Tuna II*].

²⁵ GATT Dispute Settlement Panel, United States—Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, GATT Doc. ADP/8, at 232 (1992); GATT Dispute Settlement Panel, United States—Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, GATT Doc. SCM/153, paras. 209–12 (1992). Many GATT panel cases discuss this question of "deference." See, e.g., United States—Section 337 of the Tariff Act of 1930, BISD, 36th Supp. 345 (1990); *Korea Resins*, *supra* note 22, paras. 208–13; United States—Taxes on Automobiles, GATT Doc. DS31/R, paras. 5.11–5.15 (1994); United States—Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, GATT Doc. ADP/8, paras. 43–67 (1992).

²⁶ Many concepts struggle with drawing the appropriate line between overreaching intrusion by international panels and tribunals into sovereign national affairs, on the one hand, and the inevitable necessity for an effective rule-based system to accord such panels and tribunals the power to evaluate national government actions, on the other. These concepts include the question of exhaustion of national remedies as a prerequisite to an international case; questions of the leeway given to national governments under exceptions to GATT Article XX that require "necessary" criteria; questions relating to how a national authority should weigh different factors that could lead to an injury test in antidumping or countervailing duty cases, such as in the U.S. challenge to the latitude granted by the Korean Government to national regulations as measured against the nondiscriminatory obligations of Article III (national treatment); and various questions relating to the burden of proof in a contentious proceeding between nations. Some of these are expressed in cases cited in note 25 *supra*.

more particular question of the appropriate standard of review for GATT/WTO panels, focusing especially on antidumping.

III. THE LAW AND NEGOTIATING CONTEXT OF THE WTO

Relevant Texts

The Uruguay Round texts contain several different explicit or implied references to the standard-of-review question. The most prominent of these is found in the Anti-Dumping Agreement in Article 17.6. This provision, which applies *only* to antidumping measures, reads as follows:

In examining the matter referred to in paragraph 5:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.²⁷

Article 17.6 is not the only provision bearing on the standard of review. Also relevant are two Ministerial Decisions taken at the final Ministerial Conference of the Uruguay Round at Marrakesh, Morocco, in April 1994, and made part of the text of the Uruguay Round Final Act. These state, respectively:

DECISION ON REVIEW OF ARTICLE 17.6 OF THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Ministers decide as follows:

The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article VI of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application.

DECLARATION ON DISPUTE SETTLEMENT PURSUANT TO THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 OR PART V OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Ministers recognize, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.²⁸

As both of these passages suggest, the antidumping provisions were not uncontroversial, for the Ministerial Decisions seem both to limit the application of those provisions, and to raise questions about how they fit into the overall jurisprudence of the WTO. To understand the source of that controversy, one must read these texts, Article 17.6 in

²⁷ Anti-Dumping Agreement, *supra* note 10.

²⁸ Ministerial Decisions, in Final Act, *supra* note 5.

particular, in the light of their negotiating context and history. That history, as we understand it, was briefly as follows.²⁹

Negotiating Context

Some government representatives thought it would be wise to have language constraining the standard of review by a GATT or WTO panel, and believed that U.S. administrative law jurisprudence provided a useful model for this constraint. As explained in more detail below, the U.S. jurisprudence seemed to suggest an approach whereby the courts (absent definitive statutory language to the contrary) would show deference to administrative actions by the executive branch of government, if those actions were based on a "reasonable interpretation" of the statute. Thus, negotiators suggested that the international rules of procedure should restrain WTO panels from ruling against a nation if its approach or interpretation was "reasonable."

This suggestion provoked opposition from at least two quarters. First, it drew opposition from many nations that felt such a rule would overly constrain panels while giving too much leeway to national governments to act in a manner inconsistent with the purposes of the WTO Agreements. In addition, many believed that a "reasonable" standard would allow different nations to develop different approaches to the international rules of the WTO Agreements, thus reducing consistency and reciprocity, and potentially allowing many different national administrative versions of the same treaty language.

Second, the "reasonable" standard worried certain other interests who wanted to ensure the effectiveness of many rules of the WTO, particularly those in the intellectual property area. These interests also believed that the "reasonableness criteria" would constrain panels too much, and make it difficult to successfully challenge objectionable practices that were inconsistent with various WTO rules.

In the tense moments of the final days of the negotiations, several compromises were reached. First, the text of Article 17.6 was reworded to use the word "permissible" rather than "reasonable" as justification for a national approach, *but* (a very big "but") this provision was preceded by the language of the first sentence in 17.6(ii), which we discuss below. No less important, the negotiators compromised so that the limiting language on standard of review would apply only to the antidumping text (which attracted the proposals in the first place), and not necessarily to other dispute settlement cases before the WTO panels. The Ministerial Decisions quoted above reflect the divisions of opinion on these issues by calling for consideration in three years of whether Article 17.6 "is capable of general application," and "recognizing" the "need for consistent resolution of disputes" with regard to "anti-dumping and countervailing duty measures."³⁰ As to the general approach for panels (outside the antidumping area), while there are no provisions in the DSU explicitly concerning the "standard of review" as such, some language may be construed as relevant. The most interesting, perhaps, is found in DSU Article 3.2: "Recommendations and rulings of the DSB [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements."³¹

²⁹ These observations are based partly on interviews by Professor Jackson of negotiators and business observers of the negotiations, and on articles during 1993 in *Inside U.S. Trade*. The reader should note that in reviewing this negotiating history, or "*travaux préparatoires*," we are *not* arguing that it should necessarily be used by a panel interpreting the WTO texts, since, as we note below, that is a matter of controversy. We present it here to assist us as observers in better identifying the issues embedded in various competing approaches to interpretation.

³⁰ See text at note 28 *supra*.

³¹ DSU, *supra* note 5, 33 ILM at 1227.

This language could be interpreted as a constraint on the standard of review, but possibly not to the extent of Article 17.6 of the Anti-Dumping Agreement.

The Fruits of Compromise

Now to focus on the structure of Article 17.6 of the Anti-Dumping Agreement itself. The key language is in paragraph 6(ii), quoted above.³² This was the compromise language of the Uruguay Round negotiators. What does it mean? A better understanding of its meaning must await future panel decisions. (Thus, early cases may be enormously important in this regard.) But, at least on the face of it, subsection (ii) seems to establish a two-step process for panel review of interpretive questions. First, the panel must consider whether the provision of the agreement in question admits of more than one interpretation. If not, the panel must vindicate the provision's only permissible interpretation. If, on the other hand, the panel determines that the provision indeed admits of more than one interpretation, the panel shall proceed to the second step of the analysis and consider whether the national interpretation is within the set of "permissible" interpretations. If so, the panel must defer to the interpretation given the provision by the national government.

Note that, in the first step of the analysis, subsection (ii) instructs the reviewing panel to consider the interpretive question, mindful of "the customary rules of interpretation of public international law." According to negotiators, this admonition is a direct, albeit implicit, invocation of the Vienna Convention on the Law of Treaties.³³ Interestingly, however, it is not clear in light of that Convention whether or how a panel could ever reach the conclusion that provisions of an agreement admit of more than one interpretation. This is true because the Vienna Convention provides a set of rules for the interpretation of treaties—defined as any "international agreement[s] concluded between States in written form and governed by international law" and thus clearly including the GATT/WTO³⁴—aimed at resolving ambiguities in the text. Articles 31 and 32 of the Vienna Convention are particularly relevant here. Article 31, "General rule of interpretation," sets forth a set of rules guiding the interpretation of the text of a treaty.³⁵

³² See text at note 27 *supra*. We will largely ignore Article 17.6(i), which suggests that panels should not redo national government fact determinations. Of course, the troublesome question of what is "fact" and what is "law" is involved, and much national jurisprudence addresses that question (in a different context, to be sure). See, e.g., BERNARD SCHWARTZ, ADMINISTRATIVE LAW §10.5 (3d ed. 1991) (explaining judicial treatment of law-fact distinction). As a practical matter, at least for some time, the WTO panels will likely not have the capacity to do much in the way of fact determination. The 17.6 text does authorize review by the WTO panels of the fact-gathering procedures. There are still some problems in this realm, since many nations also do not have adequate fact-gathering procedures. Moreover, the private parties concerned are often the real participants in national-level administrative procedures, while at the WTO panel the government is the party and the government may not have had any realistic chance to present facts at the national level. But we put these issues aside for the future.

³³ This statement is based on interviews with negotiators and observers.

³⁴ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 2, para. 1(a), 1155 UNTS 331, 8 ILM 679 (1969) [hereinafter Vienna Convention]. Of course, the Convention does not bind countries that have not accepted it (including, as of 1995, the United States), but it is widely accepted that almost all of the Convention codifies customary international law, or has become later customary international law. See, e.g., LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 418 (3d ed. 1993). The position of the U.S. Executive generally recognizing the Vienna Convention as an authoritative guide to customary international law regarding treaties is explained at the beginning of part III (before §301) of 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 145 (1987) [hereinafter RESTATEMENT]. In particular, Articles 31 and 32 of the Convention, which cover the interpretation of treaties, are often considered to codify, or currently represent, customary international law.

³⁵ Specifically, Article 31 provides that a treaty shall be interpreted in accordance with the ordinary meaning to be given its terms in their context and in light of the treaty's purposes, where context includes any "agreement relating to the treaty" and any "instrument in connection with the conclusion of the treaty"; furthermore, "any subsequent agreement . . . regarding the interpretation of the treaty or the application

Article 32, "Supplementary means of interpretation," provides additional guidelines for any case in which application of the rules in Article 31 still leaves the meaning of a provision "ambiguous or obscure," or when it renders a provision "manifestly absurd or unreasonable."³⁶ 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—"[r]ecourse . . . to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion"—will resolve any lingering ambiguities.

Thus, it is not clear what sort of ambiguity in an agreement's provision is sufficient to lead a reviewing panel to the second step of the analysis contemplated in Article 17.6(ii). Once a panel has invoked Articles 31 and 32 of the Vienna Convention, it presumably will have already settled on a nonambiguous, nonabsurd interpretation. Article 17.6 thus raises several questions about the relationship between it and Articles 31 and 32: Is any ambiguity whatsoever sufficient to move a panel to consider the range of permissible interpretations? Or does a provision admit of more than one interpretation for the purposes of Article 17.6(ii) after application of Article 31, but before application of Article 32? Or does a provision admit of more than one interpretation for the purposes of Article 17.6(ii) only after application of both Articles 31 and 32? In short, just what sort of ambiguity is sufficient to trigger a panel's deference? Without answering these questions, Article 17.6(ii) does, at least on the surface, suppose that a panel could somehow reach the conclusion that a provision admits of more than one permissible interpretation, for the second sentence of paragraph 6(ii) would otherwise never come into play. Indeed, some of the negotiators seem to feel that this is precisely the case: there never can be resort to the second sentence. Others, however, mostly proponents of the original "reasonable" language who desire more constraint on panels, argue the contrary.³⁷

of its provisions" shall be taken into account together with the treaty's context. Vienna Convention, *supra* note 34, Art. 31, paras. 1-3.

³⁶ Article 32 of the Vienna Convention reads as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

³⁷ One of the most significant, but almost hidden, issues surrounding Article 17.6 is the potential for use of negotiating history (*travaux préparatoires*). The habitual technique for lawyers from some jurisdictions, such as the United States, is to turn readily and immediately to such history (often called "legislative history"), although even in the United States some members of the Supreme Court in recent years have disparaged this approach. See, e.g., *Gustafson v. Alloyd Co.*, 115A S.Ct. 1061, 1071 (1995) (Kennedy, J.); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 521 (1992) (Scalia, J., concurring). Some lawyer-negotiators with these legal habits may have important knowledge of the Uruguay Round negotiations, some having even been present in the midnight discussions and compromises, and thus may be eager to argue one way or another that this history should determine the meaning of Article 17.6 (and other clauses of the Anti-Dumping Agreement). Such an interpretive approach raises several problems.

First of all, the approach under the Vienna Convention, now understood to be applicable to the interpretive deliberations of WTO panels, is generally considered to relegate preparatory history (Article 32) to a subsidiary role in interpretation, to be used only when the means specified in Article 31 do not resolve an interpretive problem. See, e.g., *Tuna II*, *supra* note 24; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 630 (4th ed. 1990). Application of this approach could mean that the first sentence of Article 17.6(ii), by implicit incorporation of Articles 31 and 32, always resolves the interpretive issue in question, with no option to turn to 17.6(ii)'s second sentence. Of course, those with the "legislative history habit" might argue that 17.6's own such history clearly demonstrates a different intent. They might further argue that the Vienna Convention's approach is not favored by the structure and language of 17.6 itself.

Yet there are important reasons to apply the "supplementary" or subsidiary approach to preparatory work, some of which can be briefly mentioned. For one thing, not all national negotiators were present at some of the tiny meetings used to resolve differences in the late nights at the end of the negotiations. For another,

IV. THE U.S. JURISPRUDENCE: A VALID SOURCE OF ANALOGY?

As already suggested, an apparently similar standard-of-review issue, raising analogous questions, figures prominently in U.S. administrative law (the same is probably true for other countries as well). In U.S. law, that issue concerns the level of deference that federal courts reviewing decisions made by federal administrative agencies will exercise toward those decisions. Until fairly recently, and broadly speaking, reviewing courts exercised considerable deference with respect to agencies' "factual" determinations, and accorded less deference to agencies' "legal" decisions.³⁸ This two-tiered approach reflected a familiar division of function between the separate branches of government, according to which agencies were to handle the more or less "technical" aspects of statutory implementation, while courts were to ensure that agencies exercised their authority within the boundaries of the law. This bifurcated approach also followed the U.S. Administrative Procedure Act's direction for courts to "decide all relevant questions of law,"³⁹ which itself reflected traditional understandings of the proper roles of courts and agencies. Traditionally, judicial deference to agencies' legal determinations required special justification, whereas deference to factual determinations did not. That general rule was altered, however, in 1984, when the U.S. Supreme Court handed down its decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁴⁰ in which the Court articulated a new standard of review for agencies' interpretations of law—the *Chevron* doctrine.⁴¹

The Chevron Doctrine

Courts applying the *Chevron* doctrine face two sequential questions, often referred to as "step one" and "step two" of *Chevron*. First: Has Congress "directly spoken to the precise question at issue,"⁴² or is the statute interpreted by the agency "silent or ambiguous"?⁴³ To answer this question, the reviewing court applies the "traditional tools of

nations that did not participate at all in the negotiations but join the WTO later will understandably not want to be bound by an uncertain and often unobtainable negotiating history. Indeed, the lack of documentation on much of this history reinforces the danger of relying on it, which leads to a third reason recommending the Vienna Convention's approach to preparatory work. In the past, negotiators who have left government to join the private practice of law have written articles or testified in various government proceedings about their own negotiating experiences as evidence of the negotiating history. In some cases, these persons have received fees for such testimony from a party in interest. Such testimony cannot always be given full credibility.

³⁸ See, e.g., *FTC v. Gratz*, 253 U.S. 421, 427 (1920).

³⁹ 5 U.S.C. §706 (1988).

⁴⁰ 467 U.S. 837 (1984).

⁴¹ While *Chevron* is widely and rightly considered an important change in administrative law jurisprudence, the case is more evolution than revolution. Its tenor and logic are traceable at least to *Gray v. Powell*, 314 U.S. 402, 411 (1941) (directing the lower courts to respect reasonable agency decisions). See also *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130–31 (1944) (suggesting that appellate court should have deferred to agency's interpretation since that interpretation had "a reasonable basis in law"). In the decades between 1941 and 1984, the Court sent widely varying signals with respect to the extent of judicial deference agency interpretations of statutes should enjoy. See generally KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* §3.1 (3d ed. 1994). *Chevron* aimed at settling some of the confusion born of these mixed signals.

For analysis and commentary on the doctrine and its application (still a matter of some debate), see, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372–82 (1986); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Abner J. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Peter Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984; Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986); Cass Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071 (1990); Russell L. Weaver, *Some Realism About Chevron*, 58 MO. L. REV. 129 (1993).

⁴² *Chevron*, 467 U.S. at 842.

⁴³ *Id.* at 843.

statutory construction."⁴⁴ If, upon applying those traditional tools, the reviewing court concludes that Congress has indeed spoken to the precise issue in question, then "that is the end of the matter";⁴⁵ the court will hold the agency faithful to Congress's will, as unambiguously expressed in the statute.⁴⁶

If the court concludes instead that the statute is "silent or ambiguous" with respect to the interpretive question at issue, then the reviewing court proceeds to a second question—step two: Is the agency's interpretation of the statute a "reasonable" or "permissible" one?⁴⁷ If the court determines that the agency's interpretation is not reasonable, then the court will supply one. If, however, the court determines that the agency's interpretation is reasonable, the court will defer to the agency's interpretation, even if—and this is the bite of the *Chevron* doctrine—the agency's interpretation is not one the court itself would have adopted had it considered the question on its own.⁴⁸

At least at first glance, then, the *Chevron* doctrine is straightforward: It instructs courts to defer to agencies' interpretations of law if and only if the statute in question is ambiguous and the agency's interpretation is reasonable. A close reading of *Chevron*, however, reveals that the doctrine itself is ambiguous, not least of all with respect to exactly how much interpretive ambiguity is necessary to proceed to step two.⁴⁹ Will any statutory ambiguity suffice, or must the provision in question be utterly ambiguous, even after the reviewing court's application of the traditional tools of statutory construction, before the court will move on to address the reasonableness question? The best answer may be somewhere in between. What is clear is that *Chevron* provides sufficient leeway for lower courts to find ambiguities, or not, as they will.⁵⁰ Accordingly, while lower courts cite and apply *Chevron* and its progeny routinely, their decisions vary widely with respect to what constitutes sufficient ambiguity to trigger step two of the doctrine.

According to many U.S. administrative law scholars, the *Chevron* doctrine constituted a significant shift of power from courts to agencies.⁵¹ As explained shortly below, the

⁴⁴ *Id.* n.9; see also *KMart Corp. v. Cartier, Inc.*, 486 U.S. 281, 300 (1988) (Brennan, J., concurring); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

⁴⁵ *Chevron*, 467 U.S. at 842.

⁴⁶ For examples of lower courts' invocation of step one of the *Chevron* doctrine, see, e.g., *Skandalis v. Rowe*, 14 F.3d 173, 178–79 (2d Cir. 1994); *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 17 F.3d 1463, 1464 (D.C. Cir. 1994), *rev'd on other grounds*, 115 S.Ct. 2407 (1995); *Satellite Broadcasting & Communications Ass'n of Am. v. Oman*, 17 F.3d 344, 348 (11th Cir.), *cert. denied*, 115 S.Ct. 88 (1994).

⁴⁷ *Chevron*, 467 U.S. at 842–44.

⁴⁸ *Id.* at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.") (citations omitted).

⁴⁹ *Chevron* also left open the question whether the deferential standard articulated in the case would apply only to agency rule making, as in *Chevron* itself, or also to agency adjudication, the other main mode of agency decision making. Some lower courts interpreted *Chevron* to apply to adjudicatory decisions, too. See, e.g., *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569–71 (D.C. Cir. 1987). Eventually, the Supreme Court resolved this question. See *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574 (1988) (applying *Chevron* to agency adjudication). Finally, *Chevron* was not crystal clear about whether the standard of review articulated in that case applied to "pure" questions of statutory interpretation or, rather, only to agencies' application of law to particular facts. Supreme Court jurisprudence since the *Chevron* case has clarified that question somewhat. In *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987), the Court made clear that *Chevron* deference does indeed apply to "pure" questions of statutory construction, as well as to applications of legal standards to facts—notwithstanding suggestions to the contrary in earlier post-*Chevron* cases, see *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987).

⁵⁰ Part of this confusion owes to the open-endedness of the *Chevron* doctrine's essential concepts—"ambiguous," "precise," "reasonable." Part owes to the fact that the traditional rules of statutory construction are themselves contradictory and thus easily subject to manipulation. And post-*Chevron* Supreme Court jurisprudence has shed little light on the matters. For a most helpful overview, see Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994).

⁵¹ See, e.g., DAVIS & PIERCE, *supra* note 41, §3.3.

shift is commonly justified by reference to some of the most important principles underlying U.S. administrative government—expertise, accountability and administrative efficiency. But, first, the important surface similarities between the *Chevron* doctrine in U.S. administrative law, on the one hand, and the standard of review set forth in Article 17.6 of the Anti-Dumping Agreement, on the other, deserve careful attention.

Chevron and Article 17.6(ii)

For one thing, *Chevron* requires a federal court to defer to an agency's interpretation of an ambiguous statutory provision so long as that interpretation is "reasonable" or "permissible,"⁵² even if the reviewing court would have interpreted the statute differently had it considered the question in the first instance. Similarly, Article 17.6 requires a GATT/WTO panel to defer to a party's interpretation of an ambiguous Agreement provision so long as that interpretation is "permissible,"⁵³ even if (by direct implication) the reviewing panel would have adopted an alternative interpretation had it considered the question originally. Second, the *Chevron* doctrine instructs courts to employ the "traditional tools of statutory construction" when determining whether the statutory provision in question is "ambiguous" in the first place.⁵⁴ Article 17.6, for its part, instructs panels to apply the "customary rules of interpretation of public international law" when determining whether the Agreement provision in question "admits of more than one permissible interpretation." Third, as noted, the *Chevron* doctrine is somewhat unclear about the level of ambiguity that is required to trigger step two of the *Chevron* analysis and, accordingly, lower courts vary widely on their approach to this issue. Article 17.6, similarly, is unclear about how panels will ever get to "step two" of the 17.6 standard, given the section's implicit invocation of the interpretive rules set forth in the Vienna Convention on the Law of Treaties.

Finally, and most fundamentally, both *Chevron* and the standard-of-review issue in Article 17.6 bear important implications about the distribution of legal and political authority. In the U.S. administrative regime, *Chevron* spelled an important shift of interpretive power from federal courts to agencies (and, thus, to the President). According to the conventional wisdom, whereas courts previously had most of the authority to resolve ambiguities in legislation, now agencies have significant authority to determine what Congress meant. Unless agencies exercise that authority unreasonably, courts must go along.

While this wisdom is sound so far as it goes, *Chevron's* allocation of power is probably more complicated and more subtle than the conventional view suggests. Because reviewing courts have significant leeway to find, or not to find, a step-one ambiguity, courts retain significant power to vindicate or invalidate agencies' interpretive decisions. This is true because where courts' *Chevron* analyses end at step one, agencies often lose, and where the analyses proceed to step two, agencies usually win.⁵⁵ Thus, courts retain an important check on agency authority, even though as a formal matter agencies and not courts have the authority to pass on the interpretive question initially. *Chevron* ties courts' hands only insofar as step one requires a court to defer to an interpretation it would have invalidated otherwise. *Chevron* shifts power to courts, however, insofar as step one

⁵² See 467 U.S. at 843–44; see also *Cardoza-Fonseca*, 480 U.S. at 454 (Scalia, J., concurring); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407, 2414–16 (1995); *Reno v. Koray*, 115 S.Ct. 2021, 2027 (1995); *Nations Bank v. Variable Annuity Life Ins. Co.*, 115 S.Ct. 810, 813 (1995).

⁵³ Interestingly, as noted above, early drafts of Article 17.6 used the word "reasonable" instead of "permissible," but that formulation was ultimately rejected by negotiators.

⁵⁴ See, e.g., *Chevron*, 467 U.S. at 843 n.9.

⁵⁵ See, e.g., *DAVIS & PIERCE*, *supra* note 41, §3.6, at 129–30; *Starr*, *supra* note 41, at 298–99; *Sunstein*, *supra* note 41, at 2104–05.

allows a court to defer to what it considers a preferred interpretation of a statute that, under the pre-*Chevron* regime, the court would not have been able to support. In sum, *Chevron* comes with offsetting effects on federal judicial power: Reviewing federal courts “lose” in the sense that they must defer to unwelcome agency interpretations that, before *Chevron*, they could have invalidated; but they “gain” in the sense that they are permitted to vindicate welcome interpretations that, before *Chevron*, they would have been required to invalidate. What is more, courts hold the key to *Chevron*’s step two—given that the reviewing court itself decides at step one whether there is an ambiguity of sufficient proportions to proceed to step two.⁵⁶

While *Chevron*’s (re)allocation of interpretive authority between agencies and courts is complex, Congress’s power almost certainly was curtailed as a result. This is so because, after *Chevron*, there are more interpretations of statutory provisions that courts can potentially uphold; again, some interpretations that courts would have been required to invalidate before *Chevron* will now be upheld. As a result, Congress must now speak with greater specificity, or run the risk that an agency will interpret a statute, with judicial blessing, in a manner that pre-*Chevron* courts would have said Congress did not intend.

Chevron-Type Deference and Interpretive Authority in the GATT/WTO Context

In the GATT/WTO context, the standard-of-review question implicates a similar allocation of interpretive power—among countries that first interpret a disputed provision of the Anti-Dumping Agreement, GATT/WTO panels hearing disputes, and members party to the Anti-Dumping Agreement. Here, too, the issue is complex and subtle. On the one hand, if panels were to interpret Article 17.6 as requiring considerable deference to a member’s interpretation of a provision, disputing members would enjoy greater authority vis-à-vis GATT/WTO panels. On the other hand, if panels were to interpret Article 17.6 as requiring considerable deference where a provision admits of more than one interpretation, and as providing them with considerable leeway to determine whether a provision does admit of more than one interpretation, then panels themselves would enjoy significant power both to invalidate interpretations (under step one of 17.6) they deemed undesirable and to vindicate interpretations (under step two of 17.6) they deemed desirable. What is more, the power of WTO members, analogously to the power of Congress, would be compromised under a *Chevron*-like application of Article 17.6. Some of the members’ intentions—specifically, those that were ambiguously, but nevertheless ascertainably, expressed in the Agreement—would not necessarily be vindicated under a *Chevron*-like interpretive framework. Indeed, beneficiaries of antidumping duty orders probably sought a *Chevron*-like standard of review for precisely this reason—so that panels would be less powerful. As suggested above, such interests no doubt thought that a *Chevron*-type standard, by making it more difficult for panels to invalidate a party’s interpretation as contrary to the intent of the GATT/WTO membership, would effectively allocate power to GATT/WTO disputants and away from the members collectively. But, to reiterate, since panels will decide what is ambiguous, the result of the standard could conversely shift more power to panels.

None of this is to suggest, however, that Article 17.6(ii) should be interpreted like the *Chevron* doctrine, whatever hopes may or may not have motivated certain negotiators. At least two important differences distinguish the standard of review embodied in 17.6 from *Chevron* deference. First, Article 17.6(ii) uses the word “permissible,” which may

⁵⁶ Indeed, as one author indicates, arguably the Supreme Court has not even followed the *Chevron* case in a number of its later decisions. See Merrill, *supra* note 41, at 980–90.

not be identical in meaning to "reasonable" or "permissible" as construed in U.S. law.⁵⁷ In U.S. law, the essential test for step two of the *Chevron* analysis is whether the agency's interpretation is "rational and consistent with the statute,"⁵⁸ a test that agencies can quite easily pass. Second, the "customary rules of interpretation of public international law" referred to in Article 17.6 certainly are by no means identical to the "traditional tools of statutory construction" in U.S. domestic law, the latter being more quickly consulted and more open-ended than the former (especially, as indicated above, with regard to legislative history). As already explained, Articles 31 and 32 of the Vienna Convention aim at resolving any facial ambiguities in treaty text. In U.S. law, in contrast, it is well understood that application of the traditional tools of statutory construction can exacerbate as much as eliminate statutory ambiguities.⁵⁹

These important differences notwithstanding, at least some GATT/WTO disputants and negotiators⁶⁰ have recognized both the analogy between *Chevron* and the standard of review for international panels, and the specific doctrinal and theoretical similarities between *Chevron's* and Article 17.6's approaches to those analogous issues. In fact, the *Chevron* doctrine seems likely to shape the perspective of U.S. disputants in particular, for whom it is such a familiar and influential doctrine in their home regime. Thus the question arises, and will arise in future panel cases, about how far the *Chevron* analogy can be sustained in the context of GATT/WTO panel review. Should future GATT/WTO panels exercise *Chevron*-like deference? Or should they instead interpret the word "permissible" rather narrowly and/or apply the Vienna Convention's rules governing treaty interpretation in such a manner as to be very reluctant ever to conclude that an agreement provision "admits of more than one interpretation"? Part V is a first attempt to consider this crucial question.

V. POLICY CONSIDERATIONS: THE LIMITS OF THE *CHEVRON* ANALOGY

Some Common Justifications for Chevron Deference

One traditional justification for greater judicial deference to agencies on legal questions in the U.S. administrative regime is that of agency expertise—the "expertise argument." This justification comports with traditional understandings about the respective roles of the different branches of government and agencies' place in modern government. Agencies, on this view, are the technical experts that put into operation the policy judgments made by legislators. Indeed, technical expertise is the *raison d'être* of agencies; by focusing on a particular regulatory field, or sector of the economy, agencies

⁵⁷ Indeed, it is at least possible that "reasonable" and "permissible" are not perfectly synonymous within *Chevron* jurisprudence, notwithstanding that in *Chevron* itself the Court repeatedly used both the word "reasonable," see *Chevron*, 467 U.S. at 844, 845, 865, and the word "permissible," *id.* at 843 n.11, 866.

⁵⁸ *NLRB v. United Food & Commercial Workers Union*, Local 23, 484 U.S. 112, 123 (1987); accord *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990); see also *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987).

⁵⁹ For a classic treatment of the point, see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 *VAND. L. REV.* 395 (1950).

⁶⁰ See *supra* part III. Often GATT/WTO panels, just like U.S. federal courts, consider interpretations supplied in the first instance by U.S. administrative agencies, since under U.S. domestic law the Commerce Department and the International Trade Commission carry out the administration of GATT implementing legislation. In an antidumping procedure under U.S. antidumping legislation, a petitioner brings a case before the Commerce Department, which determines whether there was dumping—the "margin of dumping" question. If the Commerce Department concludes there was dumping, the case moves to the ITC, which determines the extent of the injury—the "material injury" question. (A closely analogous procedure, which assigns similar roles to the Commerce Department and the ITC, governs countervailing duties cases as well.) Both Commerce Department and ITC final decisions can be appealed to the U.S. Court of International Trade. In any event, when the Commerce Department makes a ruling in an antidumping case, it does so by implicitly or explicitly interpreting the U.S. statute in light of the U.S. Uruguay Round implementing legislation and, thus, in light of the GATT/WTO Agreement itself. See *infra* note 67.

can do what Congress lacks the time and other institutional resources to do. *Chevron* itself, which presented the question whether the statutory term "stationary source" referred to an entire pollution-emitting plant or, rather, to every single smokestack within such a plant, supplies an apt example of when an agency's special technical expertise can aid statutory interpretation.⁶¹ According to the expertise argument, agencies are deemed to understand even the legal ramifications of the problems agencies are created to work on. Admittedly, the dichotomy between legal and factual questions may at times be difficult to maintain, but that observation argues as much in favor of as it does against *Chevron* deference.

Agency expertise, however, is not the only common justification for *Chevron*-type deference. Sometimes the doctrine is justified also on democratic grounds. According to the argument from democracy, it is agencies, not courts, that are answerable to both the executive and the legislative representatives of the citizenry. Because judges are not elected, while presidents and legislators are, and because agencies but not judges are accountable to the President and to Congress, judicial deference to agency decisions enhances the political legitimacy of the administrative regime.⁶²

Finally, *Chevron* may be justified also in the name of administrative efficiency or coordination. Before *Chevron*, different federal courts in different jurisdictions could interpret the same statutory provision differently. Multiple interpretations by different federal courts would mean that the statute "said" different things in those different jurisdictions. Such confusion could be eliminated by appellate review, but agencies faced uncertainty pending review, and the possibility of different interpretations across different appellate circuits remained. Because multiple agencies do not typically interpret the same statutory language,⁶³ however, *Chevron* deference allows the agency charged with administering a statute to interpret that statute. One agency, rather than many federal courts, now resolves ambiguities in the statute that the agency in question is charged to administer. Such interpretive streamlining not only reduces uncertainty but also promotes regulatory coordination. Once an agency has settled on a reasonable interpretation, it can act on the basis of that interpretation nationally.

These three arguments are not offered here to supply an unassailable normative defense of the *Chevron* doctrine; whether *Chevron* was a welcome development in U.S. administrative law is a debatable question beyond the scope of the present analysis. While

⁶¹ At issue in the case was the meaning of the term "stationary source" in the Clean Air Act Amendments of 1977. The amendments required states to develop permit systems to govern the construction and operation of new or modified major stationary sources of air pollution in regions of the nation that had not yet achieved national air quality standards. The permit systems were to impose stringent emissions requirements on such sources. The agency, the Environmental Protection Agency (EPA), sought to allow states to adopt a plantwide definition of "stationary source" for the purposes of the permit programs. That way, a state could issue a permit allowing a plant to construct or modify one smokestack that did not meet the strict emission requirements, so long as the emissions of that entire plant (taking all of its smokestacks together) did not increase. According to *Chevron*, such a decision, involving complicated and technical trade-offs, is best left to the agency specifically delegated the responsibility of regulating air quality and administering the Clean Air Act and its amendments, rather than to judges, who "are not experts in the field." *Chevron*, 467 U.S. at 865.

⁶² This argument, too, finds expression in *Chevron* itself:

Judges . . . are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is . . .

Id.

⁶³ Rather, agencies enjoy *Chevron* deference with respect to their own statutes—their organic statutes and any other statutes that an agency is specifically charged with administering. See Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

these common justifications resonate with some of the most fundamental principles underlying administrative government, they do not necessarily exhaust the arguments that might be offered on behalf of *Chevron*. Each of the above justifications is subject to serious objection when applied to international review, however.

Chevron-Type Deference and GATT/WTO Panels

Whatever the doctrine's ultimate merits or demerits, *Chevron's* central concept of "reasonableness" has at the very least a surface appeal. In fact, across many substantive areas of U.S. law, legal rules impose in one form or another requirements that are satisfied by reasonableness; where parties have acted in a reasonable way or have adopted reasonable positions, legal institutions and legal rules do not interfere. In the GATT/WTO context, the permissibility standard of Article 17.6 has a similar commonsense ring. The WTO Anti-Dumping Agreement will invariably raise many complicated interpretive questions involving a variety of underlying factual and legal issues. So long as a member's interpretation of the Agreement is permissible—within the realm of the plausible, in some general sense—deference on the part of reviewing panels may be sensible. After all, members may reasonably disagree about the meaning of the Agreement's provisions, and unless GATT/WTO panels have some privileged access to the meaning of the Agreement, there may be no reason to substitute a panel's interpretation for that of one authority. In addition, a deferential posture on the part of antidumping panels may help guard against panel activism more generally. Whatever the merits of *Chevron* in U.S. administrative law, then, do not the doctrine's general justifications also argue for a *Chevron*-like standard of review in the context of the Anti-Dumping Agreement?

Return first to the expertise argument, which justifies a deferential standard of review on the grounds that agencies are experts within their respective statutory domains. In the GATT/WTO context, there is probably no analogous rationale, certainly not one as strong. That GATT/WTO members have superior information to GATT/WTO panels about the meaning or ultimate aim of the Agreement's provisions seems implausible. Nor is any particular GATT/WTO member an "expert" relative to any other. GATT/WTO members undoubtedly have their own incentives to become experts about the meaning of the Agreement, but none can plausibly claim expertise over any other.

Granted, disputing parties who have made decisions facing a GATT/WTO panel challenge almost surely have vastly more *factual* information than reviewing panels do. Because panels themselves lack many fact-gathering resources, they are ill-positioned to second-guess a party's factual determinations. Article 17.6(i), appropriately, reflects this reality by establishing a rather deferential standard of review of factual conclusions. That standard provides that panels shall ask only whether an authority's factual determinations were "proper" and whether an authority's evaluation of those facts was "unbiased and objective."⁶⁴ If these conditions hold, a panel is to defer to the authority's view of the facts, "even though the panel might have reached a different conclusion."⁶⁵ But parties' technical superiority over factual matters does not justify a deferential standard of review for authorities' interpretation of the Agreement's provisions. National authorities probably do not bring to a dispute any specialized understanding that renders them specially qualified to ascertain the legal meaning of *international agreements*, in the same way that

⁶⁴ See Anti-Dumping Agreement, *supra* note 10, Art. 17.6(i), *quoted in text* at note 27 *supra*.

⁶⁵ *Id.* This standard of review of facts may appear similar to a long-standing "arbitrary and capricious" standard in U.S. administrative law, but arguably the language of Article 17.6(i) gives an even greater obligation to the panels to evaluate the process of fact-finding. In addition, since antidumping cases are often very fact specific, requiring a series of decisions determining whether facts are "sufficient" for findings (*inter alia*) of dumping, causation, material injury or retroactivity, the line between "fact" and "law" may be particularly fuzzy.

the EPA's specialized understanding of environmental regulatory issues arguably renders that agency specially qualified to ascertain the meaning of "stationary source."

This leads to a second and related distinction between the posture of agencies and GATT/WTO members. In stark contrast to administrative agencies, GATT/WTO members are not specifically charged with carrying out the GATT/WTO. To be sure, members are obligated to fulfill their responsibilities under the WTO Agreement. In that limited sense, GATT/WTO members are charged with administering the GATT/WTO. But no country or combination of countries was ever delegated the responsibility of implementing the WTO Agreement in the way that administrative agencies are charged with implementing their statutes. Countries party to an antidumping dispute are not delegates whose technical expertise specially qualifies them to make authoritative interpretive decisions. They are, rather, interested parties whose own (national) interests may not always sustain a necessary fidelity to the terms of international agreements. Thus, while there may well be reasons for panels to defer to an authority's permissible interpretation of the WTO Agreement, expertise of parties to a panel dispute is probably not among them.

The same is true for the argument from democracy. Indeed, this argument cuts in the opposite direction from *Chevron*, once transplanted to the GATT/WTO context. Unlike agencies, national authorities that are parties to an antidumping dispute are not accountable to the GATT/WTO membership at large. GATT/WTO panels, not disputing parties, are the membership's delegates. Panels are delegated the authority to try to vindicate the political decisions—the compromises, the trade-offs—made by members as a whole. Therefore, while GATT/WTO panels resemble courts, and while they are asked to adjudicate claims between competing national parties, their interpretation of any WTO Agreement will *not* displace the interpretations of any body that is accountable to the membership—will not, in other words, displace interpretations by others who can plausibly be said to be representatives of the GATT/WTO membership. The argument in *Chevron* that judges should defer to the interpretive decisions made by those accountable to the citizenry's representatives simply has no analogue in the GATT/WTO antidumping context.

The observation that national authorities, unlike agencies, are not accountable to the membership at large speaks to the very purpose of the dispute settlement process, indeed the GATT/WTO Agreement itself—an agreement that, at bottom, seeks to overcome the significant coordination or collective-action problems that its membership otherwise faces. Absent the Agreement (or one like it), individual members have an incentive to erect trade barriers that may "benefit" them individually, to the greater detriment of other members. Furthermore, absent some dispute settlement process for keeping members faithful to the Agreement, members have similar incentives to apply the Agreement in ways "advantageous" to them. Further still, absent a standard of review for legal questions that prohibits self-serving interpretations of the Agreement that are *arguably* but not *persuasively* faithful to the text, members have an incentive to erode the Agreement through interpretation. In this light, respecting the policy preferences and judgments of the GATT/WTO constituency argues against, not in favor of, a *Chevron*-like standard of review.

Indeed, the fundamental problem with attempting to transplant a *Chevron*-like national standard of review to the GATT/WTO context is that such an approach overlooks the basic fact that in an international proceeding the underlying legal problem is rather different: Whereas in a national procedure the court is reviewing a national administrative action or determination under the national law, such as a statute, the international body has the task of ascertaining the meaning and application of an international norm. The question before the international body generally is whether the interpretation of

an agreement underlying a national government's action is actually consistent or inconsistent with that agreement. This is not necessarily the same question as that faced by the national courts, at least in some legal systems. Of course, the international rule may be the applicable national rule if the treaty has direct "statutelike" application⁶⁶ (if, for example, the treaty is self-executing), and the international rule may also have a role in influencing national interpretations of national law.⁶⁷ But in many cases, at least in the United States, the courts are reviewing *national law*,⁶⁸ which is determinative of the outcome of the national case, even if that determination proves to be inconsistent with *international obligations*. The international body, on the other hand, is charged with interpreting and applying the international norms engaged by the case.⁶⁹ Accordingly, in almost all cases the parties to the dispute at the international process (nation-state governments) are different from the parties in the national case, which may be private firms, or subordinate parts of the government.

The efficiency argument fares no better in justifying a deferential standard of review. Whereas in the U.S. administrative law setting there is typically little danger of multiple interpretations of the statutory language by several different agencies, in the GATT/WTO setting multiple interpretations of agreement provisions is precisely one of the problems that panel review is designed to ameliorate. For in the GATT/WTO context it is highly likely that multiple countries will confront interpretive questions about one and the same GATT/WTO provision. The danger of multiple interpretations of the same provision as a threat to reciprocity thus seems considerable; as already observed, the Agreement itself is a response to a serious international coordination problem. At the same time, there seems to be little threat that the new GATT/WTO panels will render multiple and incompatible interpretations of the same agreement provision. Even though GATT/WTO panels are composed (at least at the initial stage) on an ad hoc basis, and even though, strictly speaking, GATT/WTO cases do not constitute binding precedent on subsequent GATT/WTO panels, the jurisdiction of these panels (in contrast to that of U.S. federal courts) is not confined to specific geographical regions. Moreover, while the principle of *stare decisis* does not govern GATT/WTO dispute settlement, panels very often make authoritative references to previous panels' decisions relating to the same or similar issues, and multiple panels' consistent treatment of a given issue over time can assume the force of a "practice" that guides panel interpretation of the Agreement. Here again, then, the GATT/WTO context presents an inverse situation as compared to U.S. administrative law: Whereas in the U.S. domestic context *Chevron* deference shifts interpretive power away from multiple courts and to one agency, similar deference in the antidumping context would shift interpretive power away from one institution and to multiple and varied parties to the GATT/WTO, each with a different culture and legal institution.

⁶⁶ *Status of International Law and Agreements in United States Law*, RESTATEMENT, *supra* note 34, ch. 2; see also John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AJIL 310 (1992).

⁶⁷ RESTATEMENT, *supra* note 34, §114, which reads: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." (citing, *inter alia*, *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)).

⁶⁸ On U.S. law, see, e.g., *id.* §111 (non-self-executing treaties), and §115 (later-in-time statute supersedes a self-executing treaty). See, e.g., *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 667-68 (Fed. Cir. 1992). See also JOHN H. JACKSON, WILLIAM DAVEY & ALAN O. SYKES, *INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXTS* 321 (3d ed. 1995). The law in the European Union is not completely clear on this subject. The preamble to the document recommending approval of the Uruguay Round suggests that the Uruguay Round treaties will not be "directly applicable" in Europe. Commission of the European Communities, COM(94)143 final.

⁶⁹ This point has also been made by David Palmeter, *United States Implementation of the Uruguay Round Anti-Dumping Code*, J. WORLD TRADE, June 1995, at 39, 76.

Of course, to argue that expertise, accountability and efficiency do not counsel in favor of a *Chevron*-like application of Article 17.6(ii) is not to argue that a *Chevron*-like approach is ultimately unjustifiable. Rather, the argument here is that some of the most common and most powerful justifications of the *Chevron* doctrine carry very little weight once transplanted to the context of GATT/WTO dispute settlement. To the extent that the *Chevron* doctrine influenced the drafting of Article 17.6, consideration of the appropriateness of that approach is in order. If Article 17.6 is to be applied in a *Chevron*-like way, its justification must come from outside the *Chevron* paradigm. We conclude with one possible justification.

VI. CONCLUSION: SOVEREIGNTY AND STANDARD OF REVIEW IN INTERNATIONAL LAW

While the analysis here has focused on scope of review in the GATT/WTO antidumping context specifically, the basic question considered reaches beyond the process of GATT/WTO dispute resolution itself. The standard-of-review question is faced at least implicitly whenever sovereign members of a treaty yield interpretive and dispute settlement powers to international panels and tribunals. Moreover, as national economies become increasingly interdependent, and as the need for international cooperation and coordination accordingly becomes greater, the standard-of-review question will become more and more important. The difficulty is clear: On the one hand, effective international cooperation depends in part upon the willingness of sovereign states to constrain themselves by relinquishing to international tribunals at least minimum power to interpret treaties and articulate international obligations. Recognizing the necessity of such power does not lessen the importance at the national level of decision-making expertise, democratic accountability or institutional efficiency. On the other hand, nations and their citizens—and particularly those particular interests within nation-states that are reasonably successful at influencing their national political actors—will want to maintain control of the government decisions.

Such parties may at times invoke the principle of national “sovereignty”⁷⁰ to justify a deferential standard of review in the international context. At the same time, national authorities may also resist relinquishing interpretive power to GATT/WTO panels on the grounds that doing so compromises their sovereignty. Admittedly, the word “sovereignty” has been much abused and misused; nevertheless, if the term refers to policies and concepts that focus on an appropriate allocation of power between international and national governments, and if one is willing to recognize that nation-states *ought* still to retain powers for effective governing of national (or local) democratic constituencies in a variety of contexts and cultures—perhaps using theories of “subsidiarity”—then a case can be made for at least *some* international deference to national decisions, even decisions regarding interpretations of international agreements. After all, if the decisions and policy choices of national political and administrative bodies (such as the Commerce Department and the ITC in the United States)⁷⁰ are too severely constrained by panel interpretation of the Agreement, those bodies and their constituencies will understandably resist. Important sovereignty values, in short, will inevitably come into conflict with the values underlying the newest embodiment of the GATT/WTO dispute settlement process. And there is no *a priori* reason why coordination values must, in *every* case across every context, trump sovereignty values. Some trade-off is necessary.⁷¹

⁷⁰ See *supra* note 60 (explaining roles of ITC and Commerce Department).

⁷¹ Alan Sykes, *The (Limited) Role of Regulatory Harmonization in the International System*, paper for Conference on the Multilateral Trade Regime in the 21st Century: Structural Issues, Columbia Law School (Nov. 3–4, 1995). See also ALAN O. SYKES, *PRODUCT STANDARDS FOR INTERNATIONALLY INTEGRATED GOODS MARKETS* (Brookings Institution 1995). For one example, the treaty word “necessary” in text like that of GATT Article 20 (which provides, *inter alia*, an exception from other GATT obligations for measures “necessary to

Yet merely identifying important sovereignty values does not by itself provide a persuasive argument justifying deferential panel review. Standing alone, the argument that deferential review is necessary to protect authorities' national sovereignty fails to acknowledge that some balance between authorities' interest in protecting their sovereignty, on the one side, and the broader interest in realizing the gains of international coordination, on the other, must be struck. The argument proves too much, in other words, as it unwittingly challenges the very rationale of the GATT/WTO itself.

We thus approach the end of our analysis by identifying a major problem without recommending any easy solution. The problem is how to formulate and articulate the necessary mediating principle or principles between the international policy values for which a dispute settlement is desired, on the one hand, and the remaining important policy values of preserving national "sovereign" authority both as a check and balance against centralized power, and as a means to facilitate good government decisions close to the constituencies affected, on the other hand. Our appeal is to the dual propositions that the national-level approach to the standard-of-review issue, specifically a *Cheuron*-like approach, does not provide appropriate analogies for the international approach, but that there is nevertheless an important policy value in recognizing the need for some deference to national government decisions. A reasonable, nuanced approach by the WTO panels is important for the credibility of the WTO dispute settlement system, and such an approach will lessen the dangers of inappropriate unilateral reactions by governments and citizen constituencies of nation-state members of the WTO. It should be obvious that this approach is needed for virtually all types of cases and not just those in antidumping or other specified categories.

Of course, we do not here prescribe any particular standard of review for panels considering national governments' interpretations of treaty obligations. Time and experience with particular cases will likely clarify the appropriate standard, or standards (since these may vary with different subject matters). Indeed, perhaps all that is required is that panels (including appellate panels) perceive and show sensitivity toward the issues involved when an international body reviews the legal appropriateness of national government authorities' actions. In this connection, panels should keep the relevant purposes, strengths and limitations of their institution in mind.

For example, panels should be cautious about adopting "activist" postures in the GATT/WTO context. For one thing, the international system and its dispute settlement procedures, in stark contrast to most national systems, depend heavily on voluntary compliance by participating members. Inappropriate panel "activism" could well alienate members, thus threatening the stability of the GATT/WTO dispute settlement procedure itself. Relatedly, panels should recognize that voluntary compliance with panel reports is grounded in the perception that panel decisions are fair, unbiased and rationally articulated.

Quite apart from these concerns, panels would be well advised to be aware also of the potential shortcomings of the international procedures, shortcomings that sometimes relate to a shortage of resources, especially (but not only) resources for fact-finding, as well as to the need for a very broad multilateral consensus. Moreover, panels should also recognize that national governments often have legitimate reasons for the decisions they take. At times, for example, such governments can justifiably argue that an appropriate allocation of power should tilt in favor of the national governments that are closest to the constituencies most affected by a given decision. More generally, panels should

protect human, animal or plant life or health") may need to be interpreted to recognize that governments should be authorized to have some choice among several government measures (not mandated to choose, e.g., the "least restrictive" measure), as long as the choice does not unduly detract from the basic broader policy goals of the treaty.

keep in mind that a broad-based, multilateral international institution must contend with a wide variety of legal, political and cultural values, which counsel in favor of caution toward interpreting treaty obligations in a way that may be appropriate to one society but not to other participants.

Notwithstanding these (and other) reasons for "judicial restraint," panels must at the same time understand the central role that the GATT/WTO adjudicatory system plays in enhancing the implementation, effectiveness and credibility of the elaborate sets of rules the WTO was created to maintain. Successful cooperation among national authorities to a large extent rests with the institutions given the responsibility to help carry out the WTO's dispute settlement procedures. Thus, when a particular national authority's activity or decision would undermine the effectiveness of WTO rules, or would establish a practice that could trigger damaging activities by other member countries, panels will undoubtedly show it less deference.