WTO'S STANDARD OF REVIEW: THE EFFECTS ON MEMBER STATES' NATIONAL LAWS

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G62/80691/12

THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE DEGREE OF MASTER OF LAWS OF THE UNIVERSITY OF NAIROBI,

AUGUST 2016

DECLARATION

I, KAMAU MARY WANGARI do declare that this is my original work and bas not been submitted and is not currently being submitted for a degree in any other institution.

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This dissertation is submitted for examination with my knowledge and approval as the University Supervisor.

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ACKNOWLEDGMENT

I would like to express my profound gratitude to my supervisor, Mr. Stephen Kiptinness for his profound insight, guidance and invaluable assistance in writing this thesis.

My utmost thanks to my parents, my siblings and my husband who have offered me moral and economic support in my academic endeavors.

Thank you.

DEDICATION

To my family. Thanks for the support.

LIST OF ABBREVIATIONS

ADA Anti-Dumping Agreement

AB Appellate Body

ATC Agreement on Textiles and Clothing

CVM Counter Veiling Measures

DSB Dispute Settlement Board

DSU Dispute Settlement Understanding

GATT General Agreement on Trade and Tariffs

IBRD Internationa Bank for Reconstruction and Development

IMF International Monetary Fund

ITO International Trade Organization

MFNMost Favoured Nation

NTNational Treatment

SPS Sanitary and Phytosanitary

VCLT Vienna Convention on the Law of Treaties

WTO World Trade Organization

LIST OF CASES

Argentina – Measures affecting Imports of Footwear, Textiles, Apparels and Other items, WT/DS56/AB/R (22nd April, 1998)

Australia – Measures Affecting the Importation of Apples from New Zealand, WT/DS367

European Communities - Measures Affecting Meat and Meat Products (Hormones), WT/DS26/AB/R

European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R, WT/DS293/R,

New Zealand - Imports of Electrical Transformation from Finland, GATT Basic Instruments and Selected Documents, 32Suppl.

United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R, adopted 19 January 2001

United States-Restrictions on Imports of Tuna, GATT Doc.DS29/R, 1994

United States – Continued Suspension of Obligations in the EC – Hormones Dispute, WT/DS320/AB/R, adopted 14 November 2008

United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R and WT/DS178/AB/R, adopted 16 May 2001

United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WT/DS192/AB/R, adopted 5 November 2001

United States – Definitive Safeguard Measures on Certain Steel Products, WT/DS248/AB/R

United States – Final Countervailing Duty Determination with Respect to Certain Softwood

Lumber from Canada, WT/DS257/R, circulated 29 August 2003 (notice of appeal filed 21 October 2003.

United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WT/DS192/AB/R, adopted 5 November 2001

United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear, WT/DS24/R (8th November, 1996).

ABSTRACT

There is a set mode of dispute resolution in WTO involving the Panel and AB. The decisions made by the two WTO bodies however have an impact on National Laws of both the recommending and opposing states. This being the case, the laws of member states may be interfered with for not meeting the standards set by WTO.

Whereas the purpose of dispute settlement cannot be over-emphasized, problems arise anytime there is a convergence between national law and WTO's. The standard of review presupposes that WTO agreements will take precedence over national law hence elevating the standard of review over national laws of member states.

This thesis seeks to evaluate the extent to which the standard of review by Panels affect national laws of member states, identify the challenges experienced during the DSB rulings especially where national laws are brought into question. The study would also seek an understanding as to whether the standard of review can be formalized and harmonized in the context f WTO dispute resolution mechanism.

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1.1 INTRODUCTION

Matthias Oesch defines authority that imposes a trade remedy.[1] It involves the WTO Panel taking control of how the members' exercise their rights that imposes trade remedy measures in legal disputes such as law. The world trading system is affected by three standard of review approaches, first is *de novo* approach where issues are reviewed afresh by the panel with little concern to what the national authority' have held. Second is deference where the panel may accept national authority's findings pursuant to compliance necessary procedures required. The third approach involves the panel accepting national determination subject fulfilling certain conditions.[2]

Dispute settlement in international trade among contracting parties cannot be over-emphasized addresses the present day myriad economic problems of international relations and aid co-operation that is imperative for peaceful and welfare enhancing aspect of a nations relations.[3] The process of Dispute settlement helps in many respects, apart from ensuring state' compliance or certainty and respect for the process,[4] it makes rules effective, efficient and predictable in the operation of a rule based system within a shaky international legal regime.[5] It also promotes consistency and predictability in dispute resolution between member states, where the respondent state is allowed to put forward facts relevant to the case as well as the relevant law.[6] However the extent to which national law will be considered is as stated before, not known and discretionary

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[1] Matthias Oesch, 'Standards of Review in WTO Dispute Resolution', (2003) 6 *Journal of International Economic Law* 635.
[2] Holger Spamann, Standard of review for WTO panels in trade remedy cases a critical analysis', (2004) 38(3) *Journal of World Trade* 509
[3] John H Jackson, *The Uruguay Round, World Trade Organization, and the Problem of Regulating International Economic Behaviour,* in Policy Debates (Centre for Trade Policy and Law: Ottawa, 1995).
[4] John Jackson, Davey William and Sykes Alan, *Legal Problems of International Economic Relations: Cases, Materials and Text* 3rd ed. (West Publishing Company: Minnesota, 1995) at 360.
[5] Hugo Paeman and Alexandra Bensch, *From the GATT to WTO: The European Community in the Uruguay Round* (1995) at 71.
[6] Sharif Bhuyian, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System No. 4* (Cambridge University Press: Cambridge, 2007) at 148.

to every Panel and Appellate Body.[7] The respect that WTO members give to decisions of the DSB goes to show their interest and an understanding of the benefits that are accrued by each contracting state when the WTO rules are adhered to by all.[8]

It is with this in mind that contracting parties in GATT 1986 resolved at Uruguay Round to regulate the defects and problems inherent in existing dispute resolution mechanisms under the GATT/WTO stable.[9] In the *Tuna* cases, the USA imposed restrictions on imports of tuna from Norway in 1994. According to the GATT Panel "It was a standard of review of government actions which did not lead to a wholesale second guessing of such actions."[10]

This is one of the greatest bones of contention in settling of disputes in the WTO,[11] as there is no formal standard of (ADA). ADA.[12] Thus with regards to breach of WTO rules with regard to other Agreements, it is the Panel or the AB which sets its own standards.[13]

The study analyzes the WTO standard of review with respect to its effects on member countries national laws. The focus of the study would be the legal basis of the standard of review, its various approaches, merits of standard of review and the grounds up on which the panel uses to make decisions in the review process. Lastly the case study will show the effects of standard of review on specific national laws and therefore the sovereign right of nations to legislate.

1.2. BACKGROUND TO THE PROBLEM

[7] Ibid.
[8] Ibid.
[9] Steven *Supra note* 6 at 193.
[10] GATT Dispute Settlement Panel, United States-Restrictions on Imports of Tuna, GATT Doc.DS29/R, para. 3.73 (1994)
[11] Bhuyan *Supra* note 6 at 11.
[12] Ibid. at 145.
[13] Ibid.

After the devastating effects of the Second World War.[14] Consequently the International Monetary Fund (IMF) were formed, there arose a to regulate thus the was born.[15] There was established a to. This is the body that became known as WTO, which was created after the Uruguay Round in 1995 with 153 members accounting for 97% of global trade.[16]

The GATT/WTO works on certain principles that are designed to make it easier for states to trade with one another. The principle of "reciprocates".[17] The principle of nondıscrımınatıon.[18] The principle of (MFN) another state, which should apply.[19] "most favoured trading partners". The principle of (NT) envisages equal treatmet of imported or locally-produced goods upon entry of foreign goods into the market.[20] The principle involves. Last is the principle of predictability through binding and transparency. Businesses have a clearer view of their future opportunities when they are assured. Additions were however made later.[21]

Dispute resolution within international trade was not taken very seriously in its history since inception.[22] , the trading system came under GATT. Signatories became known as Contracting Parties and meet (known as Rounds) to discuss matters relating to trade and tariffs.[23] World Trade Organization was formed during one of these rounds known as the (UR).[24] This has been heralded as one of the most complex trade negotiations ever carried out in known history. Out of

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[14] World Trade Organization (WTO), *Understanding the WTO: Basics, the GATT years: from Havana to Marrakesh*, available at www.wto.org › the WTO › accessed on 20 April 2013.
[15] Ibid.
[16] Trish Kelly, *The Impact of the WTO: The Environment, Public Health and Sovereignty* (Edward Elgar: Cheltenham, 2007) at 1.
[17] Jackson *supra* note 3.
[18] Article I and II, GATT 1994.
[19] Ibid.
[20] Article III and XVII, GATT 1994.
[21] *IMF Survey,* 27 August, 1973.
[22] Overseas Development Institute, *The Tokyo Round and Developing Countries* (ODI: London, 1977) at 4.
[23] Ibid.
[24] Bhuyian *Supra note 6* at 148.

this came about over 30,000 pages of rules and regulations for trade.[25] The Final Act which comprised this agreement forming the WTO and the discussions.[26]

The build up to the standard of review did not begin with the Uruquay Round, earlier the Kennedy Round of 1964 moved away from previous GATT rounds pre-occupation with.[27] Although it had a modicum of successes in cutting, industrial tariffs by 35%, many tropical products such as agricultural products, textiles, clothing and raw materials (iron and steel) did not enjoy the tariff reduction. This meant that items of interest to developing countries were unfavorably treated.[28]

The Tokyo Round lasted for seven years up to 1973 with 102 countries participating, the first round to try reforming the system to respond to the challenges of the day.[29]

The Uruguay Round was held in September 1986, in Punta del Este (Uruguay), it took seven years to complete with 123 participants.[30] It presented very innovative mechanisms of dispute resolution. Unlike the previous regimes.[31]

The current round of negotiation is known as the Doha Round 2001. Doha agreement came at the backdrop of enhancing globalization, inclusivity.[32] There however have been disagreements.[33] "The 2008 Ministerial meeting broke down over a disagreement between exporters of agricultural bulk commodities and countries with large numbers of subsistence farmers on the

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[25] Ibid.
[26] Ibid.
[27] Kelly *Supra note* 16.
[28] ODI *supra* note 23 at 2.
[29] GATT Uruguay Round, *ODI briefing paper*, Overseas Development Institute, 28 June 2011.
[30] Ibid.
[31] Asif H Qureshi, *International Economic Law* (Sweet and Maxwell: London, 2007) at 345.
[32] 'In the twilight of Doha', *The Economist* (65) July 27, 2006
[33] Ian F Fergusson, *World Trade Organization Negotiations: The Doha Development Agenda* (Congressional Research Service: Washington, 2008) at 9.

precise terms of a 'special safeguard measure' to protect farmers from surges in imports."[34] European Commissions′ says "The successful conclusion of the Doha negotiations would confirm the central role of multilateral liberalization and rule-making. It would confirm the WTO as a powerful shield against protectionist backsliding."[35] There has been a dilemma since June 2012.

STATEMENT OF THE PROBLEM

Dispute resolution at the WTO has no explicit clause. DSU[36] that has been used to justify standard of review only obliges the Panels.[37] However, Panels have interpreted this de novo or deference both of which are extreme forms of remedy in international trading regime.

This preference is supported by the idea that is the only multi-lateral dispute resolution mechanism with compulsory jurisdiction over member states. It also requires complete compliance at the international and national levels to the extent that member states are required to streamline national policies in accordance to the norms. De novo and deference have been adopted both of which fail to balance jurisdictional competences of the Panels and national authorities especially when determining matters of law and fact in international trading transactions.[38]

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[34] WTO trade negotiations: Doha Development Agenda, *Europa*, 31 October 2011.
[35] Ibid.
[36] Article 11, DSU: The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.
[37] Ibid.
[38] Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade'*, (2001) 12 *European Journal of International Law* 58.

De novo involves an independent examination by the Panel of a domestic institutions' measures in question.[39] Deference re-examines the substance of the findings investigated by national authorities. But it is limited to formal examination of compliance with the procedure in question.[40]

In their quest to establish a rule based regime in international trading transactions, Panels need not adopt de novo or deference. Panels should neither insist on de novo evaluation of matters dealt with by national authorities nor adopt a total deference. This is because adopting either interferes. Whereas de novo would lead to an appeal in municipal courts, deference would be tantamount to a violation of international norms regarding national determinations. This would undermine the objectives of liberalization of international trading rules.

It is suggested that taking a middle ground better serves the interests and objectives of trade. Adopting extreme measures (de novo or deference) not only has an adverse consequence on the integrity of the WTO dispute resolution mechanisms but makes member states' reluctant to support the Panel in the face of national issues.[41]

1.4. OBJECTIVES OF THE RESEARCH

1. To establish the standard of review and how the Panel rulings affect national laws of member countries of the WTO

2. To identify challenges faced by states during DSB hearings where the validity of their national laws are brought into question

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[39] Tarun Jain, Standard of Review of DSB in anti-dumping disputes, available at *http://ssrn.com/author=660701,* accessed on 16 August 2016.
[40] Matthias Oesch, 'Standards of Review in WTO Dispute Resolution', (2003) 6 *Journal of International Economic Law* 638.
[41] Jain *supra* note 45 at 9,

3. To get a greater understanding of the current standard of review

1.5 RESEARCH QUESTIONS

The following questions will be taken into considerations

1. What are the challenges faced by states during DSB hearings where the validity of their national laws are brought into question?
2. What is the correlation between WTO rules as well as institutions with national governments?
3. What best way forward in reaching a compromise where the Panel's rulings will not adversely affect national laws?

1.6 HYPOTHESIS

National laws are affected by the DSB's rulings on various international trade or economic related matters. This results in loss of sovereignty as the member states can only make laws that are WTO compliant or risk losing out on the benefits of WTO in terms of trade. Moreover, the standard of review has not been formalized as yet apart from the ADA. Thus member states national laws are brought to the DSU for review and this review is carried out in a manner that is discretionary and which results in the ceding of national WTO at behest of Panel. This brings about a lack of consistency in reviewing national laws which leads to uncertainty in WTO rulings.

1.7 LITERATURE REVIEW

Many scholars have negative standard of sovereign right of nations. But in the opinion of Zlepting,[42] as a constitutional of WTO, plays a very important role in national institutions. To that extent standard of review becomes a legitimizing behind the DSB which he uses to recommend a cogent procedural bias for standard of review by suggesting a "deliberation test".

According to Zlepting, full legalization of WTO dispute resolution mechanism is a positive mechanism of specific legal provisions the. It has made it possible for decisions of the process to be obligatory to all member states. This includes: judicial review by the AB, centralization of dispute resolution which has brought about coherence, consistency and unity in dispute resolution. When dispute resolution was established on mutual understanding and set values of international trade relations. Consequently the system never invoked mandatory obligations. This has invariably reduced the scope of political and diplomatic dealings in matters of international trade.

This has partly been achieved through the constitutionalization of WTO dispute resolution mechanisms. International trade correlation between WTO trading tenure and national sovereignty, how sovereignty is distributed between national and international bodies and ultimately, balancing and assessment of values and policies in the WTO trading regime.

Constitutionalism of WTO dispute resolution mechanisms refers to practices and constituting documents that enumerate a governance structure. The essence of this structure is to "protect freedom and non-discrimination across frontiers"[43] Constitutionalism is a legal framework for "balancing and weighing different, equally legitimate and democratically defined basic values

[42] Stefan Zleptnig, 'The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority', (2002) 6 (17) *European Integration online Papers* 1.
[43] E.-U. Petersmann, 'The WTO Constitution and Human Right', (2000) 4 *Journal of International Economic Law* 20.

and policy goals of a polity dedicated to promote liberty and welfare."[44] It has generated norms that are encapsulated in AB mandate of elaboration of norms and values of WTO that are subject of national constitutional dispensation.[45] That notwithstanding, the author concludes that constitutionalization of the WTO will only be sustainable the moment are made part of the WTO norm setting framework.

Bhuyian,[46] on his part considers the DSU to be 'original' there is none like it and all the disputes among contracting states with regard to trade are to be brought before it. It is also "compulsory", "exclusive" and "automatic."[47] By compulsory it is meant that there is no other mode of resolving trade disputes for contracting parties of WTO.

The exclusivity of the DSU can be found in Agreement which gives over any other procedure or system in resolving disputes among member states. The decision of DSU is binding. Once the complainant begins the process, the respondent does not have an option but to follow through with the process.[48]

The end result of settling a dispute would be that the party in breach is compelled to stop the practice complained of. In the event that the practice does not stop, the respondent is compelled to pay compensation to the plaintiff. If an adequate compensation cannot be reached, the plaintiff can claim that concessions be applied. These concessions will however be applied to goods or services in the agreement that is subject of the breach.[49]

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[44] T. Cottier, 'Limits to International Trade: The Constitutional Challenge', (2000) *ASIL Proceedings of the Annual Meeting* 221.
[45] D. Z. Cass, 'The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade', (2001) 12 *European Journal of International Law* 42.
[46] Bhuyian *Supra note* 6.
[47] Ibid. at 7.
[48] Ibid.
[49] DSU, Article 22.2 and 22.3.

DSU settling a matter regarding national measures compatibility with WTO is in effect a way of reviewing national law's conformity with WTO but the national measures are based on a law and this law has been adjudicated upon by quasi-judicial or administrative measures, then this decision by DSU will have wide ranging effect on the decisions made by these other bodies.[50]

According to Leroux, Member states' policies have been impacted by the Panel decisions[51] and a balance should be struck as to the obligation member states owe to other contracting states versus the autonomy of their laws.[52] There is a two-step procedure to be followed. First, the DSB is to consider the Article in contention and see whether it has various interpretations, if it has only one, it is true. If the article is ambiguous, the DSB shall look at the national law interpretation and see whether it complies with the various interpretations available and if not, national law will be in contravention of WTO.[53]

If the reverse were to happen, the national interpretation will be given precedence, which would drastically reduce the power of the Panel. In turn member states would have varying interpretation of the law and this would lead to a loss of certainty which is a key pillar of the DSU mandate.[54] The panels have the final say on whether or not an Article or agreement is ambiguous. This illustrates that in either way, the Panel would not lose too much of their power.[55]

States generally strive to maintain their sovereignty and in instances where they feel that it is being threatened they will invoke it. It is proposed that there must be some balance between

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[50] Jackson *supra* note 3.
[51] Eric Leroux, 'Eleven Years of GATS Case Law: What Have We Learned?', (2007) 10 (4) *Journal of International Economic Law* 749.
[52] Ibid
[53] Steven *Supra note* 11 at 200.
[54] Ibid. at 205.
[55] Ibid.

sovereignty and decisions of Panel bodies in resolving disputes.[56] In their conclusion, Croley and Jackson do not offer a formal is adopt in national laws instead opine some measure of sensitivity be shown for national laws[57].

Benvenisti and Downs[58] note that national courts have begun to actively interpret international laws which have been brought on by the realization that there is continuing interference of national laws by international organs and the passivity of national state actors only aggravates the same. They proceed to state that the state and international boundaries have narrowed and the merger is reflected in the Panel interference with national laws and administrative decisions.

Karen[59] is of the view of resolving disputes by unfair to the developing nations as the remedies provided are skewed. This is illustrated in questions of validity of national law before the DSU where recourse is placed on the lacuna in existing principles of international customs rather than national law even where it is clear that it is the subject of a dispute.[60]

1.8. THEORETICAL FRAMEWORK

The Positivist theory of law provides a background for this study. The study will be conducted taking the law as it is and not as it ought to be.[61] However the morality of the law of the rulings

[56] Steven *Supra note* 11 at 211.
[57] Ibid. at 213.
[58] Eyal Benvenisti and George Downs, 'National Court, Domestic Democracy, and the Evolution of International Law', (2009) 20 (1) *European Journal of International Law* 60.
[59] Bhuyian *Supra note* 6 at 23-24.
[60] Ibid.
[61] Omony John Paul, *Key Issues in Jurisprudence: An in-depth discourse on Jurisprudence problems* (Law Africa Publishing: Nairobi, 2006) at 48.

reached. Austin stated that, "the existence of the law is one thing, its merit or demerit is another".[62]

The standard of review addresses an age old question that is germane to legal theory namely the meaning of law and should be its end result. Two schools of thought have been at the centre of the discourse since time immemorial: the positivist. Positivist theories generally as a series of symbols that are normally obeyed having been passed by the sovereign.[63] Therefore positivism puts emphasis on the state as the highest institution in so far as law making is concerned. Anything prescription falling outside the four corners of the definition would not be law. This would therefore mean that national law should always prevail anytime it conflicts with international law.

This does not however happen all the time, the AB often varies stipulations of the national institutions and statutory provisions anytime it departs from treaty agreements, in essence challenging sovereignty right of nations to legislation.[64]

The natural law school comes in to correct the gap by propounding that the law is not just confined to legislative or statutory laws but the essence of law is to do justice.[65] According to this theory justice is the end game of the law and much more important than sovereignty or statehood and where the two (domestic or national and international) conflict the interests of justice or natural law must prevail.[66] The natural law school thus gives justification and legitimacy for the AB in departing from Panel decisions and therefore domestic statutory

[62] John Austin, *Campbell, Robert, ed. Lectures on Jurisprudence or the Philosophy of Positive Law **1** 3rd ed.* (John Murray: London, 1869) at 22.
[63] Ibid.
[64] Zleptnig *supra* note 48.
[65] John Rawls, *A Theory of Justice* (Harvard University Press: Cambridge, Mass., 1971) at 198.
[66] Ibid.

prescriptions in line with international law. The challenge to national law and sovereignty is a manifestation of compulsory jurisdiction obtained through supra-national adjudication pursuant to WTO dispute resolution mechanisms. This underscores the reality that being signatories to this system states become subordinate to WTO legal systems.

1.9. CONCEPTUAL FRAMEWORK

The WTO has been heralded as one of the greatest international bodies due to the effect that it has on trade relations among nations. The economies all WTO and the world as a whole.[67] In times of disputes among member states, a dispute mechanism has been put in place to ensure that conflicts are resolved amicably. In cases where the disputing party has legislation that is the source of dispute due to their non WTO compliance, the rules shall be looked into to ascertain its legal status.[68] Rules of WTO, is expected to comply with the DSB ruling.[69] One of the ways in which a member state complies with the ruling is by repealing the law to conform to the WTO regulations.[70]

According to the WTO, trade scholars have viewed standard of review as arising: "… where a panel is examining the domestic law of a Member as interpreted by domestic authorities and tribunals to determine whether the law, or the actions of those authorities and tribunals (including fact-finding), or both are in compliance with provisions of the covered agreements."[71] Other scholars such as Jackson content that standard of review may arise "…when the panel must review a national statute or administrative action where the issue is whether a specified

[67] Jackson *Supra note 3*.
[68]Bhuyian *Supra note* 6.
[69] Jacxkson *Supra* note 3 at 344.
[70] Ibid
[71] Trebilcock *supra* note 12 at 69.

standard contained in the GATT rules has been met."[72] Merrill on his part prescribes an American perspective of the scope for the standard of review in judicial and administrative as a legal review of administrative decisions.[73]The focus of this study is not judicial review in domestic legal proceedings but standard of review at the international level.

1.10 RESEARCH METHODOLOGY

The research used a desktop review of secondary and primary data. Secondary sources of data included text books, journal articles, news media, internet sources and decided cases. The latter becomes necessary because the research is based on the decisions of the various Panels and AB which are part of the DSB and are well documented in various written material. Second, is a desk top review of primary data such as GATT/WTO documents, Vienna Conventions and other international legal instruments. Data was collected through the development of questionnaire. Respondents were randomly selected from a sample frame that comprised persons involved in dispute resolution at the international level. The questionnaire is specifically developed for this particular purpose. The findings are analyzed and presented in graphic format.

1.11 CHAPTER BREAKDOWN

Chapter 1: The introduction, background, statement of the problem, objectives, research questions, hypothesis, theoretical review and research methodology.

Chapter 2: Makes an assessment of the challenges faced by states during DSB hearings where the validity of their national laws are brought into question

[72] Jackson, Davey, and Sykes *supra* note 14 at 364.
[73] T. W. Merrill, 'Judicial Deference to Executive Precedent',(1992) 101 *Yale Law Journal* 971.

Chapter 3: Legal framework interpretation of the provisions by Panels in exercising their mandate. The focus is an analysis of WTO examine whether some aspects of the same can be borrowed and interpolated in the DSB. The effect of interpreting the standard of review on national laws is analyzed. Case study on WTO dispute resolution mechanisms especially standard of review on EU law.

Chapter 4: Research methodology, data collection, data analysis and the findings of the fieldwork.

Chapter 5: Conclusion and the recommendations.

CHAPTER TWO

CHALLENGES FACED BY PANES IN THE ASSESSMENT OF THE STANDARD OF REVIEW

2.1. Introduction

The success of any treaty system such as the WTO depends on the ability of member countries to design a dispute resolution mechanism whose prime mandate is to bring about order in its operations. In their very nature, dispute settlement procedures are key to making rules that are effective in enhancing regime.[74] This has been necessitated by the effects of globalization where many states are ever more dependent on others for economic existence.[75] This inter-dependence is a recipe for conflict especially where countries espouse different standards for their products services.

The constitutes one of remedies to solve disputes arising from inter-dependence on international economic activities.[76] GATT contracting parties resolved at the Uruguay Round in 1986. Central to this mechanism was dispute settlement procedure emanating from a long period of experimentation by GATT. This framework was encapsulated known as and Understanding.

The Understanding dispute resolution mechanisms.[77] With that in mind any discourse on has many inconsistencies as legal and administrative action for state actions that do not conform to the norms of GATT/WTO.[78] That did not happen.[79]

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[74] Paemen and Bensch, *supra* note 5.

[75] Steven Coley and Jacob H Jackson, 'WTO Dispute Procedures, Standard of Review and Deference to National Governments', (1996) 90 (2) *American Journal of International Law* 193.

[76] Ibid.

[77] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

[78] Andrew T. Guzman, 'Determining the Appropriate Standard of Review in WTO Disputes', (2009) 42 *Cornell Int'l L.J.* 45.

[79] Oesch *supra* note 1 at 6-7.

Designing an appropriate closely the WTO exercises judicial powers in relation to member states.[80] Despite the fact that member states reserve Article XX of GATT,[81] as a defense mechanism.[82] In so doing the panel and AB decide the intensity of deference to give to a compliance.[83]

2.2. Merits of Standard of Review

By their very nature the WTO deals with complex questions of an international economic nature therefore dispute settlement system would facilitate co-operation among nations which is essential for the enhancement of peace and welfare of their relationships.[84] The introduction of the standard of review which essentially involves the reviewing of national decision or by policies by WTO panels and Appellate Bodies (AB) have a lot of merits in the harmonization of WTO law and success of free trade.[85] Just like in domestic courts the capacity of a panel to review depends on the relative strength of the court. For the AB it is valued for bringing consistency to law making. This is because at a general level they have qualified jurists who focus specifically on questions of law.[86] On the other hand trial courts or panels in this case have a better grasp of the issues in the case and therefore better placed to determine matters of fact as compared to the AB.[87]

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[80] Guzman *supra* note 85 at 977.
[81] Art. XX, GATT.
[82] Bradly J. Condon, GATT *Article XX and* Proximity-of-Interest: *Determining the* Subject *Matter of Paragraphs B and G',* (2004) 9 *UCLAJ. INT'L L. & FOREIGN AFF*. 137.
[83] Croley and Jackson *supra* note 82 at 193.
[84] Jackson *supra* note 3.
[85] Oesch *supra* note 1 at 637.
[86] Ibid.
[87] Ibid.

To a greater extent, the WTO in determining the standard of review uses standards like those used in domestic litigation.[88] The Panel and AB are able to review these decisions owing to their neutrality which allows them to be more stringent in reviewing national decisions.[89] However, this does not shield reviewing courts from exhibiting less knowledge over the case as compared to national courts.[90] The panels are less familiar with the background to the cases and poor positioning to. Moreover, panels also lack the required capacity and skills relevant in decision making.[91]

2.3. Absence of clear legal provisions

There is a general marked absence of clarity in the legal provisions that regulate (AB) the case, viewed the standard of review as being an objective test but fails to define what in their view is objective.[92]

2.3.1. Legalization of Dispute Settlement

There has been a marked increase.[93] The growth in the supranational adjudication within the WTO is a shift from optional to mandatory obligations that subordinates national decision-making processes.[94] The procedural rules that have been developed great cases in this standard review is a good model. The concept of legalization has been defined by leading scholars as:

> Highly legalized institutions are those in which rules are obligatory on parties through links to the established rules and principles of international law, in which rules are precise (or can be made precise through the exercise of delegated authority), and in which

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[88] Guzman *supra* note 85 at 45.
[89] Ibid. at 46.
[90] Appellate Body Report, *European Community- Measures Concerning Meat and Meat Products (Hormones),* 115, WT/DS26/AB/R, WT/DS48/AB/R Uan. 16, 1998).
[91] Ibid.
[92] Jan Bohanes & Nicolas Lockhart, *Standard of review in WTO law*, in *The Oxford Handbook of International Trade Law*, Daniel Bethlehem, Donald McRae, Rodney Neufeld, Isabelle van Damme ed (Oxford University Press: Oxford, 2009) at 389.
[93] Zleptnig *supra* note 48 at 7.
[94] J. Cameron and K. R. Gray, 'Principles of International Law in the WTO Dispute Settlement Body', (2001) 50 *International and Comparative Law Quarterly* 248.

> authority to interpret and apply the rules has been delegated to third parties acting under the constraint of rules.[95]

The emergence this system has blurred the line between legalized and non-legalized institutions. The result is a continuous process that begins with other aspects.[96] Legalized institutions develops a criterion for.[97] In relation to the WTO, obligation refers to commitments that are legally enforceable or responsibility of states for breaches of law. Precision refers to clarity of behavior that is expected of actors. Delegation is the authority designed to 3rd parties for the implementation of the agreement who are mainly adjudicators and administrative agencies.

Governance at the GATT was through diplomatic influence and anti-legalistic attitudes that mainly favored developed states.[98] These were like minded trade policy officials with a common sense of how the international trading system should look like.[99] This group was known as 'club model'.[100] Dispute resolution in this environment was biased and predetermined in favor of elite groups inclined towards political manipulation.[101] Changes from informed happened during the period experienced formal legalization and constitutionalization.[102] The acceptance of this trade

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[95] R O Abbott, 'The Concept of Legalization', (2000) 54 *International Organization* 418
[96] Ibid.
[97] Ibid. at 401.
[98] R. E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem (NH): Butterworths, 1993) at11.
[99] R. O. Keohane and J. S. Nye, "The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy," *Visions of Governance for the 21st Century, Working Paper No. 4* (John F. Kennedy School of Government, 2000).
[100] Ibid.
[101] E. Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years', (1999) 8 *Minnesota Journal of Global Trade* 4-6.
[102] A. Stone Sweet, 'Judicialization and the Construction of Governance', (1999) 32 *Comparative Political Studies* 149.

regime and option of panel decisions transformed WTO into a instrument for the enforcement of trade obligations.[103]

The WTO dispute resolution mechanism created positive consequences as it came with mandatory trade obligations.[104] States began viewing international trade relations differently, from political obligations towards legal compliance in the context of treaty obligations within the definition of adjudication processes in trade relations.[105] Legalization transformed trade relations away from interests and power relations towards legally binding obligations.[106]

WTO agreements reinforced the legalization of dispute settlement processes[107] involved weak and strong nations and could initiate panel selection without the possibility of being blocked by the defendant "If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel."[108] Henceforth, panel reports would be adopted unless consensus existed not to adopt it (negative consensus)[109] which amounted to compulsory jurisdiction. An appellate process also exists through the AB[110] as the final judicial body so as to bring coherence, consistency and predictability.

2.3.2. Obligations, Precision and Delegation

[103] A. Stone Sweet, "The New GATT: Dispute Resolution and the Judicialization of the Trade Regime", in *Law Above Nations. Supranational Courts and the Legalization of Politics*, ed. M. L. Volcansek (Gainesville: University Press of Florida, 1997) at 118;
[104] Hudec *supra* note 112 at 9.
[105] Sweet *supra* 113 at 171.
[106] Ibid. at 409.
[107] Jackson *supra* note 4 at 11
[108] Article 6.1, DSU.
[109] Article16.4, DSU.
[110] Article 17, DSU.

Contracting parties felt little obligations in the initial stages of GATT. The intensification of legal obligations in dispute settlement saw an increase in necessity for special provisions such as standard of review.

Precision involved panels as well as the AB awarding judgments that limit the sphere of the unclear provisions by giving direction for future behavior. Secondly member states gave in to rules that covered their trade relations.[111]

With regard delegation, as the role of diplomacy in resolving trade disputes reduced, judicial dispute settlement systems took centre stage. States delegated dispute settlement mandate to the panels and AB. The distribution of interpretive power from member states (principles) and agents (panels and AB) was done through standard of review.[112] The legalization of international trade relations through standard of review has become the ultimate dispute settlement mechanism.

2.3.3. Constitutionalization of WTO

Legalization of international trade relations especially standard of review has raised fundamental constitutional issues like the nature of the nations, dissemination levels, policies a centralized system.[113]

Constitutionalism used within the WTO context refers to "the practice as well as to documents that define the structure of a particular system of governing rules."[114] To the extent that the GATT/WTO has certain constitutional functions[115] whose design is to "protect freedom and non-

[111] Codes and Agreements were concluded in areas such as dispute settlement, subsidies and countervailing duties, trade in services etc.
[112] Zleptnig *supra* note 48 at 8.
[113] Ibid. at 9.
[114] Jackson *supra* note 4 at 101.
[115] Petersmann *supra* note 49 at 219.

discrimination across frontiers" [116] as well as guarantee free flow of trade as a human right.[117] For this reason, constitutionalism provides a framework that allows a "balancing and weighing different, equally legitimate and democratically defined basic values and policy goals of a polity dedicated to promote liberty and welfare."[118] Scholars have come to view constitutionalism in GATT/WTO as being desirable in the long term if the protection of human rights and environment will make a foot hold on WTO trade regime as norms for the regulation of free trade.[119] Constitutionalism is eventually viewed as a "judicial norm-generation"[120] that allows the AB to elaborate norms and values within WTO in the same way they are found in constitutional law at the national level.[121]

The essence of WTO constitutional readings is designed not only to govern but mostly restrict independent behavior of national states and regulate separation of power between national and international agencies.[122] The role of judicial review "touchstone regarding the relationship of 'sovereignty' concepts to the GATT/WTO rule system."[123] This would therefore mean that standard of review is a significant constitutional feature within the WTO legal framework.[124] The extent to which international rules constrain domestic institutions in pursuing legitimate policies is a relevant one.[125] When states enter international treaties, they do so, on the premise that they would lose certain aspects of sovereignty. This has occurred due to legalization of WTO and its

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[116] Petersmann *supra* note 49 at 20.
[117] Ibid.
[118] Cottier *supra* note 50 at 221.
[119] R. Howse and K. Nicolaidis, "*Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*", Paper presented at the Conference on Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium (Kennedy School of Government, Harvard University, 2000), available at<http://www.ksg.harvard.edu>. accessed on 12 June 2016.
[120] Cass *supra* note 48 at 42.
[121] M. Krajewski, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law', (2001) 35 *Journal of World Trade* 175.
[122] Zleptnig *supra* note 48 at 10.
[123] Jackson *supra* note 3 at 135.
[124] Cass *supra* note 51 at 57.
[125] Jackson *supra* note 3 at 33-35.

imposition of mandatory obligations on state parties.[126] This in terms of individual and public rights shapes and limits the ability of member states to regulate policy in environment, public health or even state intervening in the protection of state enterprises.[127]

2.3.4. Conflict between Supranational Adjudicators and Member States

While pursuing consistency as well as certainty in development of WTO law and trade related issues, WTO panels and AB undermine the concept of nationhood or sovereignty. Although acceptability the concept of sovereignty is waning, the standard of review impacts on the relationship between international institutions and national governments.[128] The focus of standard of review is how to allocate power between national governments and to curb potential of misallocation of power.[129]

The most important engagement between WTO and member states is the conflict between supranational adjudicators which lose sovereignty. Features of the WTO law reflect a supranational dispute resolution mechanism bestowed upon judges in panels as well as the AB. Other constitutional measures of WTO law have further strengthened judicial organs in the control over member states. The WTO has set boundaries on the exercise of public power such as legal competence and rules on standard of review borrowed from national laws,[130] such the requirements for 'rational relationships', 'proportionality'.[131] Thus the institutional role of the WTO has transformed its legal architecture, international trading regime and exposed members to quasi constitutional powers and judicial supervision through the panel and AB.[132] Ultimately

[126] Krajewski *supra* note 132 at170.
[127] Ibid.
[128] Louis Henkin, The Mythology of Sovereignty, *ASIL Newsletter*, March-May 1993, at 1.
[129] Jackson *supra* note 4 at 54.
[130] Ibid. at 58.
[131] R. Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Macmillan: London, 1998).
[132] Cass *supra* note 48 at 49.

member states are compelled to ensure that national policy and law in trade complies with provisions of the WTO.[133]

2.3.5. Member States have Different Policies

The dilemma in standard of review is a familiar one, on the application of trading rules evenly and consistently among member states whilst respecting the preference and priorities of domestic institutions.[134] This is meant to encourage trade and discourage trade protectionist practices, where policy of was exclude meat treated with hormones from its markets.[135] The US policy on the other hand was permissive of hormone treated meat.[136] It is evident that the two jurisdictions had divergent perspectives on this issue which was not motivated by trade.[137] Therefore the need to overturn such a policy that existed regardless of existing trade relations should be left to stand.[138] Besides where the differences in policy are not motivated by protectionist tendencies, the desire by the panel and AB to second guess the policy does not exist.

2.3.6. Balancing Economic and Non-Economic Values

The GATT/WTO were created to specifically regulate international trade and usher in an era of free trade by reducing barriers to trade. However one of its greatest challenges has been how to balance economic and issues[139] safety, matters that were originally outside the WTO but now forming part and parcel of the WTO legal framework.[140] The three are known as being barriers to trade and continue to challenge perceptions about international trading regime.[141] This constrains

[133] Zleptnig *supra* note 48 at 11.
[134] Ibid.
[135] *EC-Hormones* AB Report.
[136] Ibid. para.9.
[137] Guzman *supra* note 85 at 15.
[138] *Ibid.* at 11-15.
[139] J. L. Dunoff, 'The Death of the Trade Regime', (1999) 10 *European Journal of International Law* 733.
[140] M. J. Trebilcock and R. Howse, *The Regulation of International Trade* 2nd ed. (Routledge: York, 1999) at 135.
[141] Dunoff *supra* note 150 at 745.

the capacity of member states to regulate non-economic issues that interferes with international trading system because they are mainly implied and not explicitly provided.[142]

WTO adjudicates legality national environment, health, safety. The above mentioned are matters with far reaching economic and social impact on citizens of the member states. Given that different member states have different standards in environmental, health and safety within a single trading block, the tension created complicates standard of review.[143] Due to this difficulty, it seizes being a legal question but a political one as to whether a state should respond reviews that change domestic legislation. Traditionally legal dispute resolution mechanisms are not equipped to deal with conflicts in policy and science and therefore resort to political settlement.[144] When the WTO is viewed as the arena of politics, its legitimacy suffers as it compromises compliance by member countries.[145] This likewise threatens the integrity of the WTO trading regime.[146] Therefore the need for a standard of review to deal with conflicts of a scientific nature has never been that urgent. The question is how much have national governments ceded regulatory authority in environment, health and safety to the WTO? To answer this question is an examination of SPS agreements to show the extent of the problem.

2.4. Standard of Review in SPS Agreement

agreements presents two problems that relate first to the justification of scientific evidence and second the requirements of consistency.[147] The problem has however metamorphosed into one

[142] Zleptnig *supra* note 48 at 12.
[143] Dunoff *supra* note 150 at 755-56.
[144] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge (MA): MIT Press, 1996) 254-55.
[145] Howse *supra* note 130 at 51.
[146] D. R. Kelemen, 'The Limits of Judicial Power: Trade-Environment Disputes in the GATT/WTO and the EU', (2001) 34 *Comparative Political Studies* 622.
[147] Ibid.

involving whether panels should question or review the correctness of risk assessment undertaken by national bodies or should substitute it with an international finding.

The essence of the SPS was for national governments to stipulate measures that would give protection to humans, animals and plant life or health.[148] This would have an effect on international trade because they are restrictive as barriers to international trade.[149] A framework has been set forth by the SPS agreement properly upheld: First, the measure should be in line with standardizing bodies.[150] Secondly, any unilateral measure stricter than international standard can only be accepted on scientific grounds. Thirdly, the criteria of evaluating science based regulations can be done through enacting protective measures.[151] However, in doing so the measure can only be applied in a manner that is necessary backed by scientific evidence [152] and not "disguised restriction on international trade".[153]

2.4.1. Assessment of models of Standard of Review in SPS Measures

in SPS has to models which include: *de novo*. Deference has to do with instances where the AB accepts in whole the decision of national courts so long as it adheres to procedural standards. *De novo* on the other hand gives too the procedure only) as against the merits. This seems fundamentals SPS.[154]

This is desirable because procedural requirements of the SPS agreements are generally under-developed and therefore they are not likely to be considered as criteria upon which national measures can be tested and assessed.[155] It is doubtful whether national checks would be

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[148] SPS Agreement, Preamble.
[149] Trebilcock and Howse *supra* note 151 at 145.
[150] Ibid, at 150-52.
[151] Article 2.1, SPS Agreement.
[152] Ibid. Article 2.2.
[153] Ibid. Article 2.3.
[154] Ibid. at 10.
[155] Ibid.

transparent together with the decision making process. This model would ultimately escape the scrutiny of WTO dispute settlement bodies.[156]

2.4.2. *De Novo* Standard of Review

In *Biotech* case,[157] the US complained that some EU countries restricted the importation of biotechnology agricultural products from the US even though such products had been approved for importation. This according to the US violated Articles 2, 5, 7 and 8 of SPS. The panel held that was desired since panels lacked sufficient scientific competence to make decisions over intricate issues of a technical and scientific nature.[158] That is notwithstanding that helped eminent, generally "very difficult for them to be sure that they are focusing on the most relevant statements."[159] Besides since panel members are nit individually experts in the fields in question they face challenges in interpreting opinions, assessment of conflicting facts and the kind of conclusions to draw.[160] The effect of this is that the outcome or decisions made are not necessarily but worsen an already bad situation.[161] This can be summarized as lack of expertise.

2.4.3. Assessment of Risk

Adequate expertise is a major factor in arriving at a proper finding of standard of review. This is because the assessment of risk is not purely scientific exercise as it has connotations of socio-

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[156] Michael Trebilcock & Julie Soloway, *International trade policy and domestic food safety regulation: the case for substantial deference by the WTO Dispute settlement Body under the SPS Agreement*, in Daniel Kennedy, James Southwick (eds.), *The Political Economy of International Trade Law* (Cambridge University Press, Cambridge: 2002) at 541.
[157] Panel Report, *European Communities – Measures 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, 847 (hereinafter *Biotech Case*)
[158] Ibid.
[159] Tracey Epps, *To defer or not to defer? Has the Appellate Body resolved the issue of an appropriate standard of review in SPS cases*, p. 12
[160] Lukasz Gruszczynski, *Regulating Health and Environmental Risks under WTO Law: A Critical Analysis of the SPS Agreement*, Oxford University Press, Oxford: 2010) at 140-2
[161] Trebilcock and Soloway *supra* note 167 .at 542.

cultural underpinnings of individual states.[162] It also involves subjective judgment of those undertaking the task that bring their attitudes and value judgment on a particular community to the assessment, the end result is that the final report distorts the risk estimate to the state. Under such conditions, a panel is least qualified to make judgment as judges do not have such expertise as compared to WTO members that maintain a set of measures.[163] Overturning such a measure would mean that a panel would need to impose its version of science on a WTO member thus defeating the very purpose of the exercise. To that extent national agencies become more suited to make such decision rather than an international agency.[164]

leads two results: first it allows. Secondly, condemn. This problematic because decisions that could compromise human safety are lost in the interests of trade liberalization. It may not be worth damaging the environment in the interest of making gains arising from increased trade. Other costs include the risk of non-compliance by the defendant whose overall effect would compromise the credibility of the WTO dispute settlement system.[165]

2.4.4. *De Novo* slows down Settlement Process

According to most important functions DSU efficient settlement of trade disputes by balancing the is amplified by to the effect the 6 with of 9 months.[166] This may not always be possible under. This the other agreements.[167]

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[162] David Winickoff et al, *Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law'*, (2005) 30 *Yale Journal of International Law* 81.
[163] Catherine Button, *Power to Protect. Trade, Health and World Trade Organization*, (Hart Publishing, Oxford and Portland: 2004) at 181
[164] Ibid.
[165] Gruszczynski *supra* note 172 at 11.
[166] Button *supra* note 175 at 181.
[167] In *Biotech* and *Suspension* cases the dispute lasted for approximately 4 years. In the *Australia-Apples* case, two delays were experienced one concerned the composition of panels which dated as far back as 2007. A second one involved the compilation of the report which was postponed twice. There is no doubt that such delays would have been avoided if deferential standard of review had been adopted. It would substantially shorten the *de novo* process that is potentially long and protracted.

The AB has responded to this in some of its later judgments, it reversed the panel decision in *Suspension* case for instance it was of the view that a deferential model of review needed to be adopted in its factual determinations and findings of a scientific nature. According the AB the duty of a WTO member is to undertake a it. This means scope panels operations sufficient evidence (of a scientific nature or otherwise).[168] The task of the panel was therefore limited to identifying and verifying the.[169]

It be said that the preference approach is a major departure by the WTO dispute settlement framework. It gives greater latitude to national state agencies to control the conduct of risk assessment in the context of SPS agreements.

2.5. Legitimacy of WTO and Standard of Review

Legitimacy of WTO and standard of review creates stability both on the governed as well as the governors which establishes mutuality and voluntariness on part of the former.[170] In the context of the WTO legitimacy conjures a situation where the process is accepted due to a belief that it is right.[171] Legitimacy could make people and states accept or mistrust an international institution.[172] For example those who protested 1999 underscored the legitimacy crisis that is suffered by the WTO.[173] Since international governance lacks coercive force, it is mandatory that the WTO should seek democratic legitimization.[174]

[168] Appellate Body Report, *US – Continued Suspension*, para. 590.
[169] Ibid. para. 591.
[170] J. Steffek, "The Power of Rational Discourse and the Legitimacy of International Governance," *EUI Working Papers RSC 2000/46* (European University Institute: Florence, 2000) at 7.
[171] Ibid at 6.
[172] Ibid at 3.
[173] J. Atik, 'Democratizing the WTO', (2001) 33*The George Washington International Law Review* 451-53.
[174] L. R. Helfer and A. M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', (1997) 107 *Yale Law Journal* 284.

The dilemma with international organizations such as the WTO is that they lack “common founding myths, symbols or unifying values. For that matter "power of legitimacy"[175] otherwise at the level.[176] For the WTO, legitimate exercise of power becomes its key element because of its current status of exercising constitutional like features that border on supranational settlement. WTO settlement body finds itself balancing between and restrictive. Thus practitioners in contest legitimacy credentials. This more so against the role played by the especially interpretation and law making activities.[177] These are very sensitive areas of WTO law and policy which has made many scholars vouch for the WTO to seek for more legitimization.[178]

2.6. Conclusion

The standard of review is a unique concept that reviews powers of WTO judges over governments and the policies they make.[179] It has equally restructured the hierarchy and distribution of power between nations and international legal system.[180] Through it, the manner and extent through which decisions are made in three specific areas (environment, health and subsidies). The danger with this framework is its ability to disrupt but the.[181] The fact that the panel can alter the scope of the standard of review means that they can unilaterally distribute review power.[182] This can only lead to the conclusion that standard of review supports the view that WTO carries a heavy constitutional baggage. Not to mention projecting standard of review in a new constitutional role that was never envisaged.

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[175] Zhigen *supra* note 48 at 14
[176] Steffek *supra* note 182 at 28.
[177] Howse *supra* note 130 at 37-39.
[178] E. Stein, ‘International Integration and Democracy: No Love at First Sight’, (2001) 95 *American Journal of International Law* 530.
[179] Jackson *supra* note 4 at 158-59.
[180] Cass *supra* note 51 at 58.
[181] This concern was expressed by the Appellate Body in the *Hormones* report.
[182] Dehousse *supra* note 142 at 43.

Furthermore, it is evident agreements deferential. This is because although *de novo* allows the panel national governments findings, it has been felt by the AB that they are ill equipped to do so. For various reasons, *de novo* standard is not the correct approach because the panel lacks the required expertise to make risk assessment. Other than that, it is potentially costly in terms of human life and damage to the environment. But much more importantly it does not allow for an expeditious contrary to and 12.9. Chapter three will evaluate the legal framework of standard of review within the WTO dispute resolution framework.

CHAPTER THREE

LEGAL FRAMEWORK FOR STANDARD OF REVIEW AND CASE STUDY

3.1. Introduction

States find it difficult to control cross border economic activities[183] and therefore rely on to regulate global trade.[184] The inability of states to control rising interest rates, criminal activities, product standards, consumer protection, environmental degradation and protection of domestic financial services creates frustration at the national level.[185] The reality is that conflicts have been inevitable especially where national economic regulations are at variance with international obligations.[186] In international law all states are equal and sovereign[187] but this principle is being challenged by some decisions emanating from GATT dispute resolution mechanisms.[188]

Chapter three addresses the legal framework for standard of review that is based on the GATT/WTO documents, Vienna Convention as well as the Ministerial decisions. This will be done in ascertaining the parameters within which the Panel can question decisions of national institutions.

3.2. The Legal Basis For

of review which is equivalent judicial review domestic legal parlance arises in two contexts. First, during the panel stage administration issue make decision on whether it complies with WTO rules and other international obligations.[189] In other words it addresses to what extent an

[183] Jackson *supra* note 3 at 1.1.
[184] Croley and Jackson *supra* note 82 at 193.
[185] Jackson *supra* note 3.
[186] Croley and Jackson *supra* note 82 at 198.
[187] John H. Jackson and Rafael Tiago Juk Benke, *The WTO Cases on US 'Trade Remedies': Opening a Discussion'*, (2003) 6 *JIEL* 111.
[188] Ibid.
[189] Thomas W Merrill, 'Judicial Deference to Executive Precedent', (1992) 101 *Yale Law Journal* 969.

international dispute resolution body can review national institutions in matters of economic regulations which is considered as sovereign right of nations.[190] Second is where the AB reviews decisions made by the panel discussed above.[191] In effect it addresses how the amount of credit the AB should give to the.[192]

standard review became more legalized in the Uruguay round as a tool for balancing the sovereignty of nations and international trading regulations based on the GATT/WTO rules.[193] Henceforth the standard of review developed certain guidelines known as reasonableness standard.[194] This approach which was favored by the USA sort to impose constraints on the panel while investigating what had been determined by the national government.[195] In practice the reasonableness standard would give in to governmental decisions only if the agreements were interpreted reasonably.[196] This approach was opposed by many states as it would place unnecessary constraints on the panel.[197] It would also undermine consistency in the application of the GATT/WTO law if national institutions were given the leeway to develop individual approaches to international trade disputes.[198] In effect this would have led to chaos in the.[199] Finally never resolved the sticky issue of standard of review.

3.3. International Law

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[190] Croley and Jackson *supra* note 79 at 193.
[191] James Headen Pfitzer and Sheila Sabune, *Burden of Proof in WTO Dispute Settlement: Contemplating Preponderance of the Evidence* (International Centre for Trade and Sustainable Development (ICTSD: Geneva, 2009) at 6.
[192] Jackson *supra* note 4 at 134-35.
[193] Daniel K. Tarullo, 'The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions', (2002) 34 *Law and Pol'y Int'l Bus*. 110.
[194] J. A. Restani and I. Bloom, 'Interpreting International Trade Statutes: Is the Charming Betsy Sinking?', (2001) 24 *Fordham International Law Journal*1533.
[195] G. N. Horlick and P. A. Clarke, 'Standards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO', in *International Trade Law and the GATT/WTO Dispute Settlement System*, ed. E. -U. Petersmann (The Hague: Kluwer, 1997) 318.
[196] Zleptnig *supra* note 48 at 3.
[197] Jackson *supra* note 3 at 141.
[198] Ibid.
[199] Ibid. at 142.

The standard of review remains a legal process in international law and therefore subject to international legal standards and procedures framed under the Vienna Convention, international trade law and Ministerial Decisions.

3.3.1. **The**

17.6 envisages interpreting using customary in formulation of standard of review rules. To this point, the panels have incorporated the application of the VCLT to give direction to the interpretation of agreements in GATT/WTO framework.[200] This is because, WTO is considered as a treaty whose ramifications affect international.[201] under "… an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[202] allows treaties under be construed pursuant to the. true from historical perspective. Whereas there was reluctance to use VCLT in GATT because then it did not comprise international agreement in the strictest sense of the word,[203] Panels have expanded sources of interpretation beyond the history of GATT.[204]

The rules that guide the interpretation of international treaties is found in Article 31[205] and 32[206] of the VCLT. In invoking these rules the AB sort to achieve clarity that is encapsulated in

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[200] P Nichols, 'GATT Doctrine', (1996) 2 *Virginia Journal of International Law* 390.

[201] James Cameroon and Kevin R Gray, 'Principles of International Law in the WTO Dispute Settlement Body', (2001) 50 *International and Comparative Law Quarterly* at 253.

[202] Article 2 (1), VCLT.

[203] In *EEC-Regulation on Imports of Parts and Components* (1990) 2 WTM 3, Article XX of GATT, 1947 was interpreted in accordance with Article 31 of VCLT.

[204] Article 32, VCLT

[205] A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

[206] 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

fundamental principles of VCLT of interpretation in good faith.[207] However the universality and application of VCLT in international trade agreements is in question for the reason that not all countries (such as the US) are members of the Vienna Convention.[208] This dilemma was dealt with by the AB in *Japan-Texas* case[209] where the US complained that the Japanese tax system discriminated against whisky, Cognac and other spirits imported into the Japanese market from the US. The AB affirmed the panel' decision that Japanese taxation on imported liquor was in agreement with further declared VCLT codified international customary law and therefore it was binding to all states.[210]

According to Article 31 (1), the construal of an international agreement must be done in good faith. Article 31 (1) also invokes the principle of *pacta sunt servanda*[211] which means "agreements must be kept, the rule that agreements and stipulations, especially contained in treaties, must be observed."[212] would means once a state becomes a WTO affiliate (as an international agreement), all its duties become binding upon the parties in good faith. In addition words of the agreement should be given common connotation in the framework of the treaty. Concerning this article, the includes the. In the *Underwear Panel* decision, the,[213] considered relevant purposes interpreting Articles 6.2 and 6.4 of ATC that relate to putting in place safeguard measures.

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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.

[207] Article 31 (1), VCLT

[208] Cameroon *supra* note 213 at 254.

[209] *Japan-Texas* at 10.

[210] *Japan-Texas* at 10.

[211] Preamble, VCLT.

[212] Bryan A Garner, *Blacks Law Dictionary 9th ed* (Thomson Reuter: St. Paul, Minnesota, 2009) at 8.

[213] WT/D33/2.

The failure to resolve a dispute in good faith,[214] leads to the next stage of treaty interpretation. The gist of Article 32 of VCLT in WTO Agreements is the use of supplementary tools of interpretation or the circumstances surrounding the treaty.[215]

Article 32 was invoked in the Panel case of *EC-Bananas* as a confirmation of the Panel's conclusion arising from the use of Article 31. The use of Article 31 and 32 have been further entrenched by Article 3.2 of DSU on interpretation following standards laid down by. Further dispute criticized panel for its failure to apply customary procedures of international law in construing international agreements.[216]

3.4. GATT/WTO

The WTO law does not have express provisions on the limits of how standard of review should be conducted.[217] However, much of the jurisprudence available on this discourse has been developed by the institutions framework mainly the Panels and Appellate Body (AB). Case law emanating from the two bodies identifies GATT and and as legal basis of standard of review. This is in addition to ministerial decisions as a precursor to the articulation of Article 17.6 of ADA which has incorporated aligned to.[218]

3.4.1. Article 17.6 Anti-Dumping Agreement (ADA)

Challenges settling trade had been rife since the inception of global trading structures especially GATT/WTO. The most challenging one became the standard of review due to its capacity to compromise the sovereignty of WTO member states. This became more prominent during the

[214] Article 31, VCLT.
[215] Article 32, VCLT.
[216] *United States-Import Prohibition of Certain Shrimp and Sharp Products* (1998) WT/DS58/AB/R, Section VI, A, para. 115.
[217] A. M. Slaughter, and D. Snidal, 'The Concept of Legalization', (2000) 54 *International Organization* 401.
[218] Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

Uruguay Round and its text bears this out. The clearest indication is Article 17.6 which applies to Anti-Dumping Agreements that relates to the Panels' objectivity of .

In *Transformation,*[219] there was a desire by the negotiators to deal with this matter owing to a number of GATT Panel cases relating to anti dumping issues.[220] Most negotiators were of the view that the panel had exceeded its mandate in disagreeing with member countries institutional findings.[221] Subsection 2 of the ADA establishes a two tier process through which the panel can review national decisions: First is is capable. Second, consideration as to whether the interpretation complies with permissible interpretation? If the answer to both questions is yes then the national interpretation takes precedence. The section also addresses customary international.

3.5. Institutional Framework

A number of institutions have been created context international trade. These include: the, DSB, Panels and the Appellate Panel. This section analyzes the role of these institutions in the standard of review.

3.5.1. The Role of the Panel and AB.

The backbone of is and[222] DSU a body comprising of resolves trade disputes. role panels is to carry out quasi-judicial functions and complaints from member states over the violation of GATT/WTO agreements. The mechanism is set in motion by a WTO Member invoking the DSU

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[219] GATT Dispute Settlement Panel, *New Zealand. Imports of Electrical Transformation from Finland*, GATT Basic Instruments and Selected Documents, 32Suppl. 55, 69, para. 4.

[220] GATT Dispute Settlement Panel, *New Zealand. Imports of Electrical Transformation from Finland*, GATT Basic Instruments and Selected Documents, 32Suppl. 55, 69, para. 4.7ing Duties, 3rd Supplement 81 (1985); GATT Dispute Settlement Panel, *Korea-Anti-Dumping Duties on Imports of Polyacetal Resins from the United States,* GATT Doc. ADP/92, para. 57 (1993); GATT Dispute Settlement Panel, *United States-Restriction on Imports of Tuna*, GATT Doc. DS29/R, para. 3.73 (1994).

[221] Ibid.

[222] Annex 2 to the WTO Agreement (1994) 33 ILM 1226.

compulsory jurisdiction by calling settle dispute.[223] A that is dissatisfied with the Panels' decision can appeal to the Appellate Body (AB) on matters that arises legal questions emanating from the WTO agreement.[224]

This represents a paradigm shift from the former system that was dominated by power politics where only the rich states could get fair hearing. The current framework is rule oriented and impartial. Thus even the weaker and smaller states have been empowered to question trade decisions of bigger and economically dominant states that injure their economies.[225] One very important aspect of the Panels is the review of national administrative actions, more particularly in the imposition of anti-dumping duties.[226] Thus they have been given capacity to second guess decisions of member states and institutions that contradict stated international obligations under the WTO.[227] In doing so, the Panels ignored "…their obligation to afford an appropriate level of deference to national authorities and eroding bargained for trade remedy protection."[228]

3.5.2. Panel

Panels under the WTO are established DSU. jurisdiction of is to hear and resolve disputes between the member states.[229] Panels have a that fall within agreements.[230] Primary responsibility the Panel is to help the DSB to come up with rulings and recommendations.[231] When a Panel fails within confines of Article 11, it would be found to have deliberately

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[223] Article 6, DSU
[224] Cameroon and Gray *supra* note 213 at 248.
[225] Ibid. at 249.
[226] Article 6, DSU
[227] Petersmann *supra* note 49 at 64.
[228] Article 3.7, DSU.
[229] Felix Maonera, *Understanding the WTO Dispute Resolution System* (Trade and Development Studies Centre: Harare, 2005) at 10.
[230230] Article 11, DSU
[231] Article 7.1, DSU

disregarded to consider evidence submitted to it. This would amount to incompatibility with the Panels' duty to make an objective assessment of the facts. To large extent it a denial of fairness or violation of the rules of natural justice.[232] Panels may also on their own motion dispose of even where the parties are silent.[233]

3.5.3. Appellate Body (AB)

Decisions of the Panels have an appeal process that goes to the AB. The AB was established in 1995 as a body within the WTO framework that is situated in Geneva.[234] The AB hears reports of appeals issued by WTO members. It is presided over by 7 individuals, outstanding in law and international trade with no affiliation with Government. However an usually out all of whom are representative of WTO members. The AB can made by the.

Appeals AB must be based on findings, consequently the AB cannot examine new evidence. Matters of fact are however not subject for appeal. The process of appeal from the panel to the AB takes between 60-90 days.[235] The appellate process takes two forms: first where a decision is reversed, the AB can decision.[236] The AB may decide an issue not contemplated by the Panel in attempting to resolve the dispute from the Panel ruling excluding the factual position.

3.6. Ministerial Decisions

In addition to Article 17.6, there Marakesh in 1994. The first one agreed with para. 6 of that implemented on Countervailing Duties, that it should be subject to review after three years, within which consideration would be made on whether the provision would be of general

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[232] *EC-Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, 16 January 1998 at 48.
[233] Maonera *supra* note 241 at 10.
[234] Article 17.6, DSU
[235] Article 17.6, DSU
[236] Article 3.3, DSU

provision.[237] The second Ministerial Decision on Subsidies and Counter-veiling Measures at the same venue further recognized critical role played by Article VI of GATT on dispute resolution. It also underscored necessity for consistent resolution of disputes.[238] Both were

3.7. Dispute Settlement Body (DSB)

The DSB stands for an understanding of set of laws and procedures.[239] These that concern rights and obligations member states of the WTO.[240]

3.7.1. Interpreting Using of DSB

There no explicit of review clause provided for under the DSB, however the AB has implied mandates a "make an objective assessment of the matter before it."[241] gist Article is should dispute, how it conforms relevant agreements.[242] This clarification made by the AB is evident in the *EC-Hormones*[243] case where it was noted that in the framework of SPS Agreements, the applicable was facts not *de novo* or deference.[244]

Thus the Panel and AB have continued with the same pattern in subsequent cases to illustrate the DSB.[245] use of 11 DSB was further found suitable in the case of where found: has a direct bearing on this matter and it essentially expresses with ample suitable regard to, thrust Article 11 is that: "an objective assessment of the matter before it, including an objective assessment of the

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[237] Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

[238] Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the GATT 1994 or Part V of the Agreement on Subsid ies and Counter-veiling Measures.

[239] Preamble, DSB

[240] Article 1, DSB

[241] Article 11, DSB.

[242] Tarun Jain, Standard of Review of DSB in Anti-Dumping Disputes, available at *http://ssrn.com/abstract=1136766,* accessed on 26 May 2014, at 6

[243] *European Communities – Measures concerning meant and meat products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (13th February, 1998).

[244] *Ibid*. Para 117, 133.

[245] See *Argentina – Measures affecting Imports of Footwear, Textiles, Apparels and Other items*, WT/DS56/AB/R (22nd April, 1998), paras 118-121.

facts of the case and the applicability of and conformity with the relevant covered agreements."[246] A duty is imposed on panels not to overturn national authorities' findings and instead in their fact finding endeavor make, "objective assessment of the facts."[247] Secondly, uniformity with applicable agreement customary interpreting public should observed all legal matters.[248] This brings us to the application of the two tests of under: namely and adequate explanation.

3.7.2.

the case, the AB held that proper fact finding had been in line with the standard of review guidelines in Article 11. In this case, there was no de novo investigation conducted by the AB and it further did not consider all relevant facts and how they supported the outcome most favored Argentinean 4 safeguard (SG) measures.[249]

However in *US-Glutton*,[250] New Zealand and Australia alleged that the USA had imposed safeguard measures on the importation of lamp contrary to 5, 8, 11 on Safeguard Measures I, II and GATT. Panel found the USA to have been inconsistent with its requirements in its failure show. It was further held that national authority need not have monopoly in the evaluation of relevant facts. An adept national authority should go beyond submissions by the parties and present cogent evidence. Such a body has a duty to investigate all relevant factors when the circumstances so require.

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[246] Ibid.
[247] *Ibid.* para. 117
[248] *Ibid.* para. 118
[249] AB Report, *Argentina,* para. 121.
[250] *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R and WT/DS178/AB/R, adopted 16 May 2001, para 110-114, 148-149.

3.8.3. Adequate explanation

Whereas the fact finding stage envisages an investigation of all relevant facts by the national authority, these same circumstances need to be adequately explained. This explanation goes beyond what is advanced by the parties in their presentations and should include a refusal of all alternative explanations.[251] This is what forms the contents of the published national report that is presented to the Panel.[252] In *US-Lamb* case,[253] the Panel also found that should satisfy.

This decision was upheld in the,[254] called for formation a Panel to resolve a row with the US over the latter's unilateral resolution to impress restrictions on the imports of Yarn from Pakistan. The safeguard in place violated Article 24 of the ATC. The Panel found for the complainant that imposing transitional safeguards by US on imports of Combed Cotton Yarn were not consistent with the USA obligations this decision Panel found Article 11 suitable in ATC.[255] The thrust of which was that the panel should refrain from using materials of evidence that are available after the national proceedings are completed.[256] The US went ahead and implemented the decision of the AB.

3.8. Judicial

As it highlighted before the Panel and AD have made many decisions on the issue of standard of review. Without clear legal provisions, the Panel and AD have been tasked with formulating

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[251] Ibid.
[252] AB Report, *US – Wheat Gluten*, *supra* note 61, para. 156-163.
[253] *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R and WT/DS178/AB/R, adopted 16 May 2001, para 110-114, 148-149.
[254] Ibid.
[255] AB Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, para. 74, 76.
[256] *Id.* para. 77-80.

rules for the guidance of standard of review. These rules are encapsulated in some of the cases that are analyzed below.

3.8.1. The Underwear Case[257]

This case raised an issue whether the Panel could review the US authorities position on restricting imports of textiles from a WTO member (Costa Rica). The facts of this case were that Costa Rica made a complaint to the DSB that the US had restricted the importation of textiles from Costa Rica in breach of the ATC. The Panel found for the complainant that the restrictions imposed by the USA were invalid. The panel ruled that it would neither substitute national determinations nor defer such decisions to member states for purposes of decision making.[258] By arriving at this decision, the panel used an "objective assessment test" which could be done in a three tier test: First, the examination of all relevant facts by the national authority, secondly, such determinations arrived at exhibited consistency with a member state's international obligations.[259]

3.8.2. The Hormones Case

The issue in this case was whether the sovereign WTO ascertain suitable health limited by the usage of. The facts were that EC had banned its beef from being preserved with growth hormones from as far back as 1988. In line with this policy a ban was issued by the European Community (EC) allegedly for human health reasons, against the beef cows hormones for. this beef emanated US and Canada. basis of the ban was out of concern of the negative impact of the meat on consumer health. The US Canada dismissed these claims that could not be scientifically

[257] Panel, *United States – Underwear (Underwear)*, WT/DS24/R.
[258] Ibid. paras 7.9 - 7.12.
[259] Ibid. para 7.13.

proven. In the view of the US and Canada, such a ban violated the SPS agreement. Consequently the WTO established two panels to deal with the dispute.[260]

The panel found that the EC measures contravened, was in breach of of GATT. in that case further breaching Article 5.5; the differences were unjustifiable, resulting in comparison allowed that were used for therapeutic EC failed to invoke

The further authenticated the existed. However the fundamental[261] Although an arbitrary take into account.

Overall was upheld by. most important out AB was continued silence on concerns[262] However, it enumerated two options through could conducted under regime. First, where a review would be adopted to give the panel total discretion to arrive at conclusions that are not at variance with those from the member state in question.[263] Secondly, where panels would not undertake fresh investigations but rather limit itself to whether the procedure at the national level agrees with the WTO Agreement.[264] In the latter, the understanding is that it was treaty interpretation[265] AB averred that the standard of review should equalize between guidelines set up by SPS Agreement and state jurisdiction competences surrendered to the WTO as envisaged in international law.[266] In dismissing the appellant's case, the AB was categorical that Article 11 is the main provision in respect of the factual and legal aspects of the standard of review.[267]

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[260] AB, *European Communities*.
[261] Ibid.
[262] Contrary to the arguments of the EC – the principle of deference (Art. 17.6 ADA) should be capable of a general application – the Appellate Body concluded that Art. 17.6 is specific only to the ADA and does not apply to other WTO Agreements.
[263] Zleptnig *supra* note 48 at 3.
[264] SPS Agreement, Art. 5.1. para. 111.
[265] Cameron and Gray *supra* note 213 at 248.
[266] Appellate Body, *Hormones*, para 115
[267] Ibid. para 116.

3.11. Case Study, Effect of WTO Panel decisions on EU Law

The European Union and the WTO have a lot in common, first both are a conglomeration of states that have voluntarily come together for purposes of enforcing internal markets.[268] However the EU is a more closely knit union while the WTO is more of a loose institution. For the EU enforcement would be against one of its members while for the WTO, it would be against all member states including the EU. Tensions often arise amongst the two bodies when WTO rules and regulations are to apply to the EU through WTO dispute mechanisms at the Panel and the AB.[269]

The EU began as the European Economic Community and a common market by establishing a strong political and legal institution. It has since expanded its mandate from trade and agriculture to competition, environment, consumer protection and social policy issues.[270] Institutions within the EU have developed with a greater desire for constitutional legitimacy in line with its powers and functions. To that extent, the EU has grown into a closely knit regional organization.[271]

The WTO on the other hand has developed rule based systems for the promotion of multilateral trade leading to calls for the development of democratic institutions that leverage on existing international co-operation through organizations such as the EU. This has made it possible for peaceful resolution of trade disputes between states so as to build respect for values of institutional frameworks such as MFN, non discrimination and the exceptions extended to developing countries.[272]

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[268] Gráinne de Búrca and Joanne Scott, *The Impact of the WTO on EU Decision-making*. The Jean Monnet Seminar and Workshop on the European Union, NAFTA and the WTO Advanced Issues in Law and Policy, Harvard Jean Monnet Working Paper 06/00, Harvard Law School, Cambridge, MA, 2000.
[269] Ibid. at 2.
[270] Ibid.
[271] Ibid.
[272] J.H.H., Weiler, The Constitution of the Common Market, in P. Craig & G. de Burca, *The Evolution of EU Law* (OUP: Oxford:1999).

The EU has on occasions struggled with challenges of reconciling free trade with provisions of national regulations. The EU has been forced to respond when one of its members' regulations is found incompatible with WTO rules as in happened in the Beef, Hormones cases, Eco labeling and even Aircraft noise. In anyone of these conflicts, the EU has acknowledged the binding nature of WTO law by imposing limits on the nature of the obligations in order to guard their legal orders' integrity as well as the unique nature of the EU value system, norms and political order. The focus of this section is on how the WTO dispute resolution mechanisms affects EU decision making by examining the amendment to the Cosmetics Directive.

3.11.1. The Cosmetics Directive

The Cosmetics Directive was a piece of legislation by EU member states meant to ban the advertising and sale of make-ups containing substances listed in annexes 2 of the Directive. An amendment to the Council Directive was sort to ensure compliance with WTO rules and regulations.[273] Article 4 (1) of the Directive bans the that contain in[274] objective of the amendment was to "…take account of the need to comply with international law, the proposed amendment prohibits the performance of tests on animals on the territory of the Member States for the purpose of complying with the Directive, but not the marketing of products which have been tested on animals. This represents advancement for animal protection in the European Union. Moreover, the prohibition in its revised form cannot be challenged under WTO rules."[275] The EU set out 4 aims for amending the Cosmetic Directive: first was the introduction of the . was replacement of the was revision of the coming on the

[273] OJ L 262 27.09.76 p.169. The Directive has so far been amended twenty-five times. Available at *http://europa.eu.int/eur-lex/en/lif/reg/en_register_133016.html*. accessed on 15 August 2016.
[274] Council Directive 93/35 OJ 1993 L 151 at 32.
[275] COM(2000) 189 final. 4.

In pursuing this amendment, the EU was cognizance of the WTO context within which the amendment had to be made, "However, for any measures to be effective and enforceable it is also necessary to take account of the constraints arising from compliance with international trade rules, in particular those of the WTO."[276] A major concern for the commission is the extent to which directive would contravene discriminatory practices on treatment like products from the EU and outside it contrary to WTO rules.[277] Further, the EU cannot rely on Article XX of GATT to justify the ban.[278]

In conclusion the postponement of the ban and approach of EU was that of caution pending the development of methods of testing before using international dispute resolution mechanisms. Therefore the effect of WTO on EU decision making is both implied and explicit. There is clear evidence of direct application of WTO norms on EU law and decision making. The greatest impact is exerted indirectly by dispute resolution bodies (Panel and AB), as applied by EU institutions in the formulation of legislation. The final Council Directive Inco-operated WTO jurisprudence on non discrimination into its final document.[279]

3.12. Conclusion

Despite the fact that the standard of review is currently the hottest topic in international trading relations and WTO law in particular, the GATT/WTO has not found it appropriate to regulate it a clear. Therefore panels have had to rely on provisions that were temporarily set under the Uruguay Round. Article 17.6 that provides a modicum of framework is not a substantive provision as it was a last minute and compromise provision to temporarily deal with emerging

[276] COM(2000) 189 final at. 3.
[277] Ibid at 3
[278] Ibid. at 3-4.
[279] Búrca and Scott *supra* note 282.at 10.

standard of review issues. For that matter, it is inadequate in several respects, it is an adoption of the American position. Secondly, it makes reference to the construal of trading rules in line with the customary international law principles under the VCLT. It must be remembered that the Vienna Convention was not established with trading agreements in mind. This is in addition to failing the universality test since not all WTO members belong to VCLT (such as the US).

Consequently, the Panel and AD have played a leading standard review in WTO trading regime. For example the AB has ruled in the case of *US-Cotton Yarn* [280] that the most SG, CVM ATC comprises two tests, and adequate explanation underlying factors which guard against the arbitrary review by the panel of the decision of national authorities. For purposes of consistency and proper development of WTO law, there is a need for member countries concise framework that would least violate sovereignty of the member states.

[280] AB Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, para. 74.

CHAPTER FOUR

RESEARCH METHODOLOGY, DATA COLLECTION AND FINDINGS

4.1. Introduction

The research method used in this study is qualitative in nature as it seeks to describe how the standard of review affects national laws during WTO dispute resolution process. The research used the the field. The questionnaire was chosen as a method of data collection for various reasons; first it is practical as it can allow for collection of significant considerable[281] Questionnaires are easy to be conducted either amount relatively little effect authenticity dependability. Further questionnaires'.[282] The analysis is capable also of being done scientifically, objectively. The quantified of change.

4.2. Research Design

The design of the research is purely descriptive and case study. The purpose of using descriptive design is to describe how the standard of review works in actual fact how it affects national laws of independent states. Descriptive design is not just a collection of findings but it involved the analysis, comparison and interpretation of data.[283] The researcher used descriptive survey as a data collection method that involved administering questionnaires to a sample of respondents. It was found useful in determining the respondents' attitudes, opinions and habits towards standard of review. However, after the findings were reported, conclusions were made and solutions to some of the problems suggested.

4.2.1. Case Study

[281] David Silverman, *Doing Qualitative Research: A Practical Handbook* (Sage Publications: Los Angeles, 2005) at 5.
[282] Ibid.
[283] Ibid at 98.

A case study was chosen so as to study the area in question more closely in the context of how standard of review affects domestic legislation. The definitive advantages of the case study are, it allows for more detail in addition to providing context in a more holistic manner. It made it possible for a thorough understanding and background to the subject matter.[284] The EU was chosen because to represent occasions where the standard of review has led to changes in domestic legislation.

4.3. Research Site

The research site chosen is Nairobi where the respondents are randomly selected from a sample frame that comprises persons involved in dispute resolution at the international level. This is mainly trade and industry, selected lawyers. choice is informed by its proximity and more accessible to the researcher as well as respondents.

4.3.1. Sampling Techniques

The study used both probability and non-probability sampling.[285] First a random sample was carried out to gather information on which sectors Nairobi knew about the standard of review. After this process the population divided into homogenous sub-groups after which a simple random sample of each group was taken.[286]

Non probability sampling was also used since the researcher' interest was the representation of the concept. It was aimed at a theoretical representation of study population by maximizing the scope of the study.[287] In more specific terms it set out to illustrate how a small group of representative of the whole represents the impact of WTO dispute resolution on national.

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[284] Olive M Mugenda and Abel G Mugenda, *Research Methods: Quantitative and Qualitative Approaches* (ACTS Press: Nairobi, 2003) at 117.

[285] Keith Punch, *Introduction to Social Science Research: Qualitative and Quantitative Approaches* 2nd ed. (Sage: Loss Angeles, 2005) at 133

[286] Ibid

[287] Ibid at 187.

Purposive sampling was then used to target individuals that were considered reliable for purposes of the study.[288] For those reasons, organizations, institutions and individuals that are involved in dispute resolution were selected. Consequently, advocates who deal with commercial matters, staff at the in addition to trade attaches in selected embassies were selected. I considered the organizations, institutions and individuals chosen to be information rich since they are directly involved in international trade matters that are central to the study. In purposive sampling, snow ball sampling was used by asking people in the organizations and institutions about what they knew about standard of review. Beginning with a few people i was able to get a critical number that increased the sample size as new contacts were mentioned from the initial sample. It came out that a majority of the original sample did not have an idea on the concept of standard of review and more particularly how it affects national law. Out of this finding a decision was made on the right people to administer the questionnaire to for the purposes of the study.

4.3.2. Target Population

Four types of respondents were selected as a vital part of achieving the objectives of the study. They included: members of the Kenya National Chamber of Commerce, Ministry of Foreign Affairs, attaches in selected embassies (China and Brazil) and a few advocates. It was felt that the six groups would enable reliable conclusions to be made.

4.3.3. Research Instruments

The research used questionnaire as the instrument to collect data. Specific questions were designed for purposes of guiding the collection of data.[289]

4.4. Data collection and analysis

[288] C R Kothari, *Research Methodology: Methods and Techniques* (New Age International: New Delhi, 2004) at 152.

[289] Ibid. at 100

This chapter is split into three parts. Part one being data collection of secondary information, part two is the case study and part three is the data collection and analysis of primary data and findings. The findings are presented using bar charts.

4.5. Data collection

Two sets of data were collected for this study: secondary data and primary data. Secondary data played an important part in the introductory part of the project by laying out the theoretical and conceptual foundation of the study. Primary data was used to solidify and validate the outcome of secondary data.

4.5.1. Secondary sources

The study began by making extensive use of secondary data found in the various libraries. This information was found in text books, online databases, decided cases, conference papers and reports, journal articles, Acts of Parliament, unpublished theses and international legal instruments especially the GATT/WTO. It was supplemented by a comparative analysis of the cases, legislations and constitutions from the various jurisdictions as part of the desk top review meant to inform the researcher about the existence of formal systems tasked with dispute resolution at the national level. However it was found to be insufficient of the assessment of standard of review, the amount of detail found at this level.

4.5.2

which involved development of an instrument whose sole purpose was to guide the collection of detailed and unique insights into peoples' experiences and perceptions about the subject matter. This enabled the researcher to get to areas that were not previously considered as being important. Out of a total of 150 individuals the questionnaires were sent to, however only 107 responded.

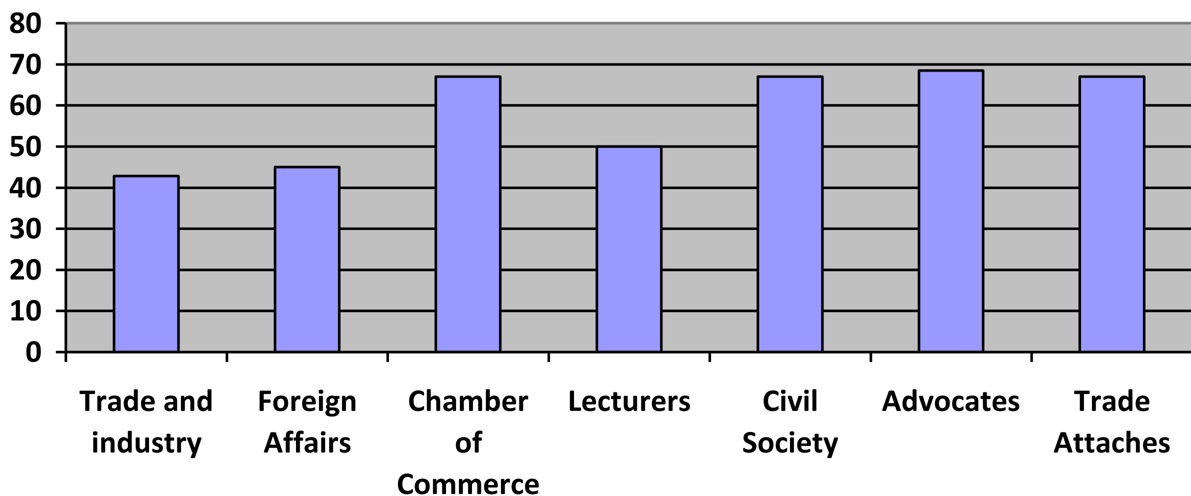
4.6. Data analysis

The data collected was analyzed to test the variables, hypothesis and assumptions in reference to the research questions, objectives and literature review.[290] The basis of this analysis is to bring out the impact of WTO dispute resolution mechanisms and especially standard of review on national law and relationships between the two. The key findings will be summarized and interpreted with a view of determining areas of intervention.

4.7. Findings

The study interviewed 107 respondents, spread in the following format to avoid bias: 35 middle level managers from the, 33 from Foreign Affairs, 22 Advocates, 9 from the Kenya Chamber of Commerce, 15 members of the civil society, 3 trade attaches and 4 University lecturers. The findings are analyzed using spread sheet and the tabulations represented graphic form using pie and bar charts.

4.7.1. Knowledge of Standard of Review

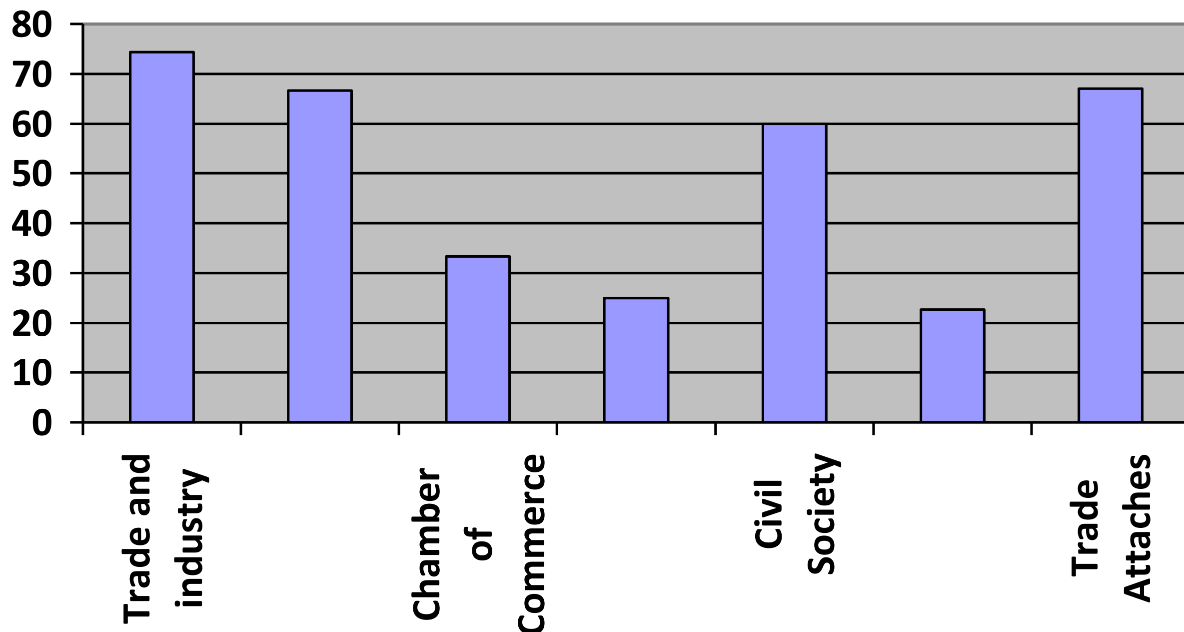


The concept of standard of review was not a very well known to most of the respondents. Out

[290] Chava Franfort-Nachmias, *Research Methods in the Social Sciences 5th ed*. (Arnold: London, 1996) at 249

of the 35 staff of the Ministry of Trade and Industry, only 15 or 42.8% knew about the standard of review. In the Ministry of Foreign Affairs 15 out of 33 or 45%, 3 out of 3 or 100% of Trade Attaches, 2 out of 3 or 67% of members of the Chamber of Commerce, 2 out of 4 or 50% of lecturers, 15 out of 22 advocates or 68.5% and civil society 10 out of 15 or 67% respectively knew about the standard of review.

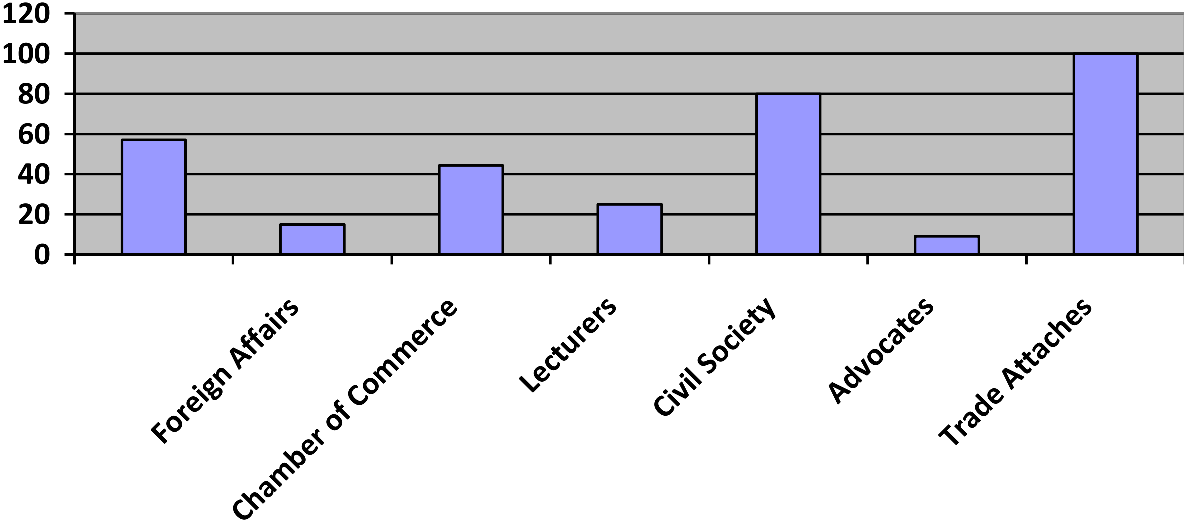
4.7.2. Level of Satisfaction with the WTO



When the respondents were asked whether they were satisfied with the standard of review, 25 out of 35 or 74.4% of respondents from, 10 out of 33 or 33.3%, 5 out of 22 or 22.7% of the Advocates, 3 out of 9 or 33.3% of members of the Chamber of Commerce, 1 out of 4 or 25% of University lecturers and 12 out of 15 or 60% of members of Civil Society interviewed agreed that they were satisfied with the standard of review. However different reasons were given for the satisfaction. For some it was because of harmonization of international trade law, while

others viewed it as being facilitative of international free trade and in the process provides consistency in international trade law, legalization of dispute resolution and constitutionalization of WTO.

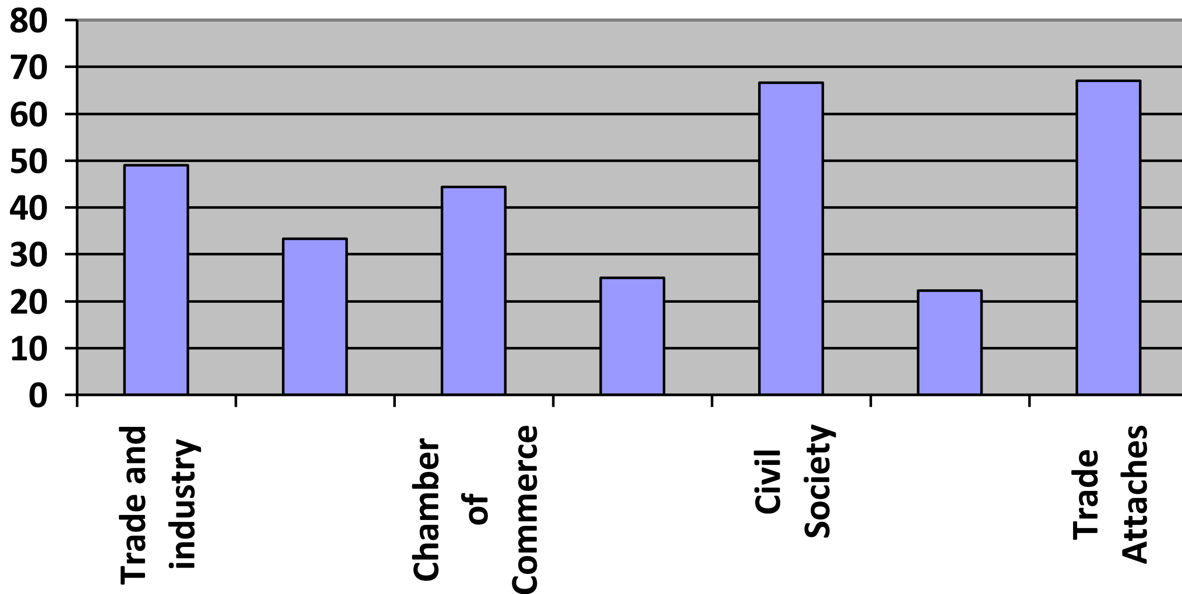
4.7.3. Overturning Decisions of National Institutions by DSB



Trade attaches and the civil society showed overwhelming support by the very act of the DSB overturning decisions on trade matters made by national institutions. 100% of trade attaches supported it, out of the 15 respondents from civil society, 10 or 66.6% of respondents supported it. The support by the civil society and trade attaches for overturning decisions of national institutions was based on the fact that often national institutions are not strong enough to act as a check on a states' policies and law especially so, if they violate regulations of international trading.

Conversely, 20 out of 35 or 57.1%) of members of the, 5 out 33 (15%) of Foreign Affairs, 2 out of 22 (9%) of Advocates, 4 out of 9 (44.4%) of Chamber of Commerce, 1 out of 4 (25%) of lecturers viewed this aspect as an act of interfering in the sovereign rights of nations.

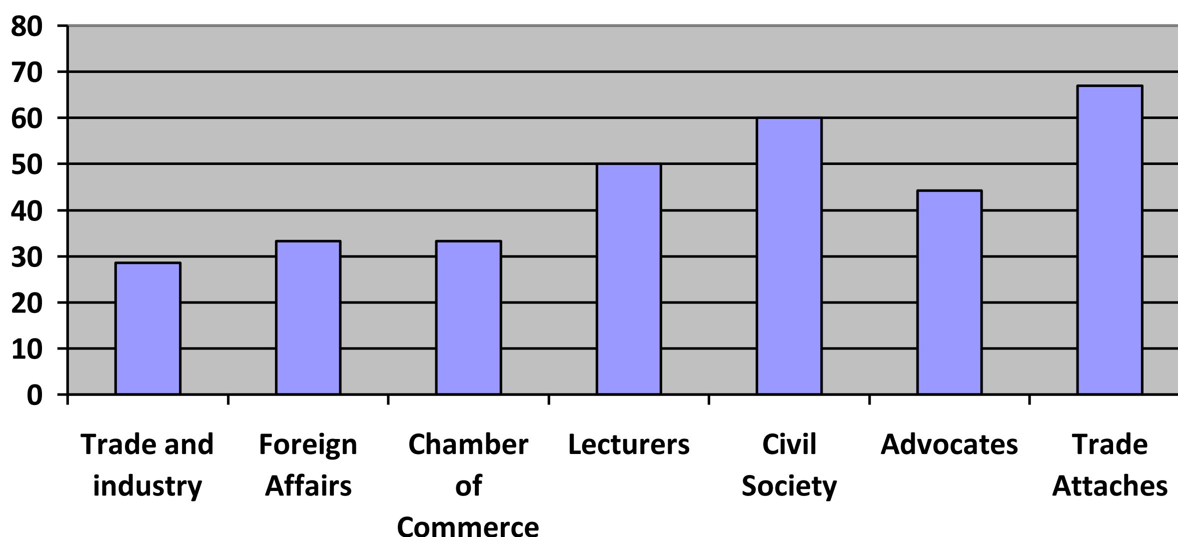
4.7.4. Validity of Exercising Standard of Review



The validity of overturning decisions of national institutions was supported by 16 out of 35 (49%) of respondents. 10 out 33 (33.3%) of respondents from Ministry of Foreign Affairs also supported it as well as 6 out of 22 (25%) of Advocates, 4 out of 9 (44.4%) of members of Chamber of Commerce, 1 out of 4 (25%) of lecturers and 10 out of 15 (66.6%) of the Civil Society.

The lack of support for the validity of standard of review is supported by secondary data which is premised on the idea that states are sovereign and should be left to deal with disputes that emanate from its national borders. Therefore overturning such decisions could amount to not only violating sovereignty but undermine the authority of the state.

4.7.5. Legitimacy of Standard of Review



Majority of the respondents were not convinced that the legitimate exercise. Out of 35, only 10 or 28.5% of the respondents supported idea that standard of review is a legitimate process, 10 or 33.3% out of 33, 10 (44.2%) out 22 of Advocates, 3 (33.3%) out of 9 of members of Chamber of Commerce, 2 (50%) out of 4 lecturers and 10 (66.6%) out of 15 of Civil Society respondents answered 'no' to whether the exercise of powers pursuant to standard of review is legitimate.

4.8. Conclusion

The very important WTO dispute resolution mechanism. Some of its advantages include the harmonization of an otherwise unregulated international trading system. This has been done through the constitutionalization of global trade regulations and in the process allows for an amicable resolution of international trade disputes. The standard of review also facilitates development of international trade and helps in giving notice to existing rules that are meant to apply globally. However as shown in the findings the standard of review faces many challenges that are related to the aspect of overturning decisions made by national institutions on matters of international disputes. For many respondents granting enormous powers that are discretionary to the WTO dispute resolution mechanisms provides a window for the abuse of such powers. This

explains why many respondents are not comfortable with this aspect of standard of review. Majority viewed this as a form of violation and interference in sovereignty of independent states that is guaranteed in international law. The DSB suffers from legitimacy problems that emanates from the idea that weighty matters that touch on the sovereignty of the nation must involve public participation. This is more particular in countries like Kenya where sovereignty resides in the people and can only be delegated through a popular participatory process.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1. CONCLUSION

The study set out to do three things: to find the extent of the standard of review on the Panel rulings and how they influence the national laws of member states of WTO, to identify some of the challenges faced by states during DSB hearings where the validity of their national laws have been brought into question. Thirdly to get a greater understanding of the current standard of review and whether a more formalized standard can be put in place.

The study has established that although the standard of review is a unique concept it highlights the WTO's constitutional system. It defines the review powers of WTO judges over governments and the policies they make. It has equally restructured the hierarchy and distribution of power between nations and international legal system. Through it, the manner and extent through which decisions are made in three specific areas (environment, health and subsidies). The danger with this framework is the ability to disrupt not only the balance of power but also the abilities allotted fact that they can at "one stroke of the pen"[291] alter the scope of the standard of review means that they can unilaterally distribute review power. This can only lead to the conclusion that standard of review supports the view that WTO carries a heavy constitutional baggage. Not to mention projecting standard of review in a new constitutional role that was never envisaged.

Furthermore, it is evident agreements deferential. This is because although *de novo* allows the panel national governments findings, it has been felt by the AB that they are ill equipped to do so. For various reasons, *de novo* standard is not the correct approach because the panel lacks the required expertise to see it through. Other than that, it is potentially costly in terms of human life

[291] Dehousse *supra* note 142 at 43.

and damage to the environment. But much more importantly, contrary to Article 3.3 and 12.9 of DSU it does not allow for expeditious dispute resolution. Chapter three will look at a more detailed legal framework within the WTO dispute resolution framework.

However despite the fact that the standard of review is currently the hottest topic in international trading relations and WTO law in particular, the GATT/WTO has not found it appropriate to regulate it clear. Therefore panels have had to rely on a provision that was set to be temporary under the Uruguay Round. Article 17.6 that provides a modicum of framework is not a substantive provision as it was a knee jack, last minute and compromise provision to temporarily deal with emerging issues of standard of review. However, it is inadequate in several respects: first it is an adoption of the American position. Secondly, it makes reference to the construal of trading laws in line customary under the VCLT. be remembered that the Vienna Convention was not established with trading agreements in mind. This is in addition to failing the universality test since not all WTO members belong to VCLT (such as the US).

Consequently, the Panel and AD have played a leading rules of standard review in WTO trading regime. For example the AB has ruled in the case of *US-Cotton Yarn*[292] that the most appropriate standard of review in SG, CVM and ATC is Article 11 of DSU. The two tests in that include and adequate explanation of underlying factors guards against the arbitrary review by the panel of the decision of national authorities. For purposes of consistency and proper development of WTO law, there is a need for member countries concise framework that would least violate sovereignty of the member states.

5.2. RECOMMENDATION ON THE WAY FORWARD

[292] AB Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, para. 74, 76.

5.2.1. Greater Legitimization of WTO

There is a need for greater legitimization of the WTO than is currently the case. A reinforcement of the legality.[293] What is not clear and therefore needs to be explored is how larger egalitarian legitimization of .

Habermas's political theory centers on rationalization of the decision- and rule-making process by way of civic discussion. According to Habermas the exercise of political and administrative power at the WTO will be in the long run legitimized, through.[294] Moreover, citizens belief in the fairness of the outcome is on normative grounds,[295] created by the them. Consequently, a legal order's legitimacy (and integrative function) lies on the broad rationalization of the process of decision making, through legitimate institutionalization of communication. Subsequently, it will bring forth reasonable results.[296] Constitutional courts have a role within this concept to be custodians of a thought through democracy progress coherent "realization of deliberative conditions."[297] There is need for a number of institutional reforms aimed at overcoming the democratic shortcomings filling the legitimacy gap.[298]

5.2.2. Institutional Reforms and harmonization of the Standard of Review

There is need for the realization of specific strength of various institutions in WTO dispute resolution. The hub of this approach should be acknowledging separate, which allows, since. Panels and the AB on the other hand are inadequately positioned to evaluate domestic preferences and priorities. therefore are not designed to perform this role. The key asset. concern.

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[293] Howse *supra* note 130 at 68.

[294] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge (MA): MIT Press, 1996) at 147-57.

[295] Ibid

[296] Howse supra note 130 at 42-43.

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

[298] Jackson *supra* note 3 at 67

They. Therefore, the two positions need to be harmonized in the absence of a standard of review legal framework.

APPENDIX: 1

Mary Wangari Kamau

(G62/80691/2012)

University of Nairobi

School of Law

10 September 2014

Administrator

School of Law

Dear Sir/Madam

RE: AUTHORIZATION TO COLLECT DATA

I am an LLM student at the School of Law and wish to get authority to collect data in various state institutions such as the office Attorney General. My topic of interest is "**Standard of Review and the Effect of National Laws on WTO's Dispute Settlement Body's Rulings".**

I would highly appreciate your co-operation. Thanking you in advance

Mary Wangari Kamau

APPENDIX: 2

Mary Wangari Kamau

School of Law

P.O. Box 30197-00100

Nairobi

10th September 2014

To: The Respondents

As someone involved in the laws, would greatly appreciate a few minutes of your time to respond to the enclosed questionnaire.

help determine standard review to be applied. This information will be used as part of a review of the current legal framework on resolving trade disputes among and between nations.

respondents that deal with trade agreements. by you treated as 15.

Thanking you in advance

Yours faithfully

APPENDIX: 3

QUESTIONAIRE

The following questionnaire is part of a study to determine the Standard of Review and the Effect of National Laws on WTO's Dispute Settlement Body's Rulings. experience. tick, while give brief explanation.

1. **Introduction**

   What is your name (Optional)……………………………………………………………

   What do you do in this institution………………………………………………………..

   …………………………………………………………………………………………

2. GATT/ institutions with national governments in the context of standard of review by the DSB and what role does each play in regulating international trade disputes under the WTO dispute resolution mechanism?

   …………………………………………………………………………………………

   ………………………………………………………………………………………

3. Do you know the standard of review in WTO? □ Yes □ No
4. Does it have any merit? □ Yes □ No
5. If yes which ones?
   a. Harmonization of WTO law □ Yes □ No
   b. Facilitation of international free trade □ Yes □ No
   c. Consistency in international trade law □ Yes □ No

d. Legalization of dispute resolution Yes No

e. Constitutionalization of WTO Yes No

6. Are you satisfied with existing legal provisions on standard of review? Yes No
7. If no state why?

…………………………………………………………………………………………
…………………………………………………………………………………………

8. If yes state why?

…………………………………………………………………………………………
…………………………………………………………………………………………

9. Are you satisfied with the level of assessment at the standard review? Yes No
10. Should DSB overturn decisions made by national institutions (de novo)? Yes No
11. Explain your answer?

…………………………………………………………………………………………
…………………………………………………………………………………………

12. What are the challenges faced by states during DSB hearings where the validity of their national laws are brought into question?

…………………………………………………………………………………………

13. Do you find the standard of review a legitimate exercise of power? Yes No
14. What is the best way forward in reaching a compromise where the Panel's rulings will not adversely affect national laws?

…………………………………………………………………………………………
…………………………………………………………………………………………

Thank you very much

BIBLIOGRAPHY

BOOKS

Button, Catherine, *Power to Protect. Trade, Health and World Trade Organization*, (Hart Publishing: Oxford and Portland, 2004).

Bhuyian, Sharif, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System No. 4* (Cambridge University Press: Cambridge, 2007).

Chow, Daniel and Thomas Schoenbaum, *International Trade Law: Problems. Cases and Materials* (Wolters Kluwer US 2008).

Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Macmillan: London, 1998).

Garner, A, *Blacks Law Dictionary 9th ed* (Thomson Reuter: St. Paul, Minnesota, 2009).

Gruszczynski, Lukasz, *Regulating Health and Environmental Risks under WTO Law: A Critical Analysis of the SPS Agreement*, Oxford University Press, Oxford: 2010).

Hudec, R. E, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem (NH): Butterworths, 1993).

Habermas, J. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge (MA): MIT Press, 1996).

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

Jackson, John Davey William and Sykes Alan, *Legal Problems of International Economic Relations: Cases, Materials and Text* 3rd ed. (West Publishing Company: Minnesota, 1995).

Jackson, John H, *The Uruguay Round, World Trade Organization, and the Problem of*

Regulating International Economic Behaviour, in Policy Debates (Centre for Trade Policy and Law: Ottawa, 1995).

Jackson, John and Davey William and Sykes Alan, *Legal Problems of International Economic Relations: Cases, Materials and Text* 3rd ed. (West Publishing Company: Minnesota, 1995).

Keohane, R. O. and J. S. Nye, 'The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy', *Visions of Governance for the 21st Century, Working Paper No. 4* (John F. Kennedy School of Government, 2000).

Kelly, Trish, *The Impact of the WTO: THE Environment, Public Health and Sovereignty* (Edward Elgar: Cheltenham, 2007).

Kothari, C R, *Research Methodology: Methods and Techniques* (New Age International: New Delhi, 2004).

Maonera, Felix, *Understanding the WTO Dispute Resolution System* (Trade and Development Studies Centre: Harare, 2005).

Mugenda, Olive M and Abel G Mugenda, *Research Methods: Quantitative and Qualitative Approaches* (ACTS Press: Nairobi, 2003).

Nachmias, Chava Franfort, *Research Methods in the Social Sciences 5th ed.* (Arnold: London, 1996).

Omony, J. P. *Key, Issues in Jurisprudence: An in-depth discourse on Jurisprudence problems* ((Law Africa Publishing, Kenya n.d.).

Overseas Development Institute, *The Tokyo Round and Developing Countries* (ODI: London, 1977).

Paeman, Hugo and Alexandra Bensch, *From the GATT to WTO: The European*

Community in the Uruguay Round (1995).

Pfitzer, James Headen and Sheila Sabune, *Burden of Proof in WTO Dispute Settlement: Contemplating Preponderance of the Evidence* (International Centre for Trade and Sustainable Development (ICTSD: Geneva, 2009).

Punch, Keith, *Introduction to Social Science Research: Qualitative and Quantitative Approaches* 2nd ed. (Sage: Loss Angeles, 2005).

Qureshi, Asif H, *International Economic Law* (Sweet and Maxwell: London, 2007).

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

Silverman, David, *Doing Qualitative Research: A Practical Handbook* (Sage Publications: Los Angeles, 2005).

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

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

Weiler, J.H.H., The Constitution of the Common Market, in P. Craig & G. de Burca, *The Evolution of EU Law* (OUP: Oxford, 1999).

JOURNAL ARTICLES

Alter, K. J. 'Resolving or exacerbating disputes? The WTO's New Dispute Resolutions System', (2003) 79 *International Affairs* 783-800.

Atik, J, 'Democratizing the WTO', (2001) 33*The George Washington International Law Review* 451.

Benvenisti, Eyal and George W. Downs 'National Court, Domestic Democracy, and the Evolution of International Law', (2009) 20 (1) *European Journal of International Law* 59-72.

Bohanes, Jan and Nicolas Lockhart, *Standard of review in WTO law*, in Daniel Bethlehem, *The Oxford Handbook of International Trade Law* (Oxford University Press: Oxford, 2009).

Breyer, Stephen, 'Judicial Review of Questions of Law and Policy', (1986) 38 *Administrative Law Review* 363.

Cameron, J. and K. R. Gray, 'Principles of International Law in the WTO Dispute Settlement Body', (2001) 50 *International and Comparative Law Quarterly* 248.

Condon, Bradly J, GATT *Article XX and* Proximity-of-Interest: *Determining the* Subject *Matter of Paragraphs B and G',* (2004) 9 *UCLAJ. INT'L L. & FOREIGN AFF*. 137.

Croley, Steven P. and John H. Jackson 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments', (1996) 90 (2) *American Journal of International.*

Davis, Martha S, 'A Basic Guide to Standards of Judicial Review', (1988) 33 *S.D. L. REV*. 469.

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

Guzman, Andrew T, *Determining the Appropriate Standard of Review in WTO Disputes*', (2009) 42 *Cornell Int'l L.J.* 45.

Hudec, E, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years', (1999) 8 *Minnesota Journal of Global Trade* 4-6.

Helfer, L. R. and A. M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', (1997) 107 *Yale Law Journal* 284.

Jackson, John H. and Rafael Tiago Juk Benke, *The WTO Cases on US 'Trade Remedies': Opening a Discussion'*, (2003) 6 *JIEL* 111.

Jackson, John H, 'Alternative Approaches for Implementing Competition Rules in International Economic Relations', (1994) 2 *Swiss Review of International Economic Relations* 2-25.

Jackson, John H, 'Dispute Settlement and the WTO Emerging Problems', (1988) 1 (3) *Journal of International Economic Law* 329.

Kelemen, D. R, 'The Limits of Judicial Power: Trade-Environment Disputes in the GATT/WTO and the EU', (2001) 34 *Comparative Political Studies* 622.

Krajewski, M, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law', (2001) 35 *Journal of World Trade* 175.

Leroux, Eric, 'Eleven Years of GATS Case Law: What Have We Learned?', (2007) 10 (4) *Journal of International Economic Law* 749-79.

Merrill, Thomas W, 'Judicial Deference to Executive Precedent', (1992) 101 *Yale Law Journal* 969.

Nichols, P, 'GATT Doctrine', (1996) 2 *Virginia Journal of International Law* 390.

Oesch, Matthias, 'Standards of Review in WTO Dispute Resolution', (2003) 6 *Journal of International Economic Law* 635.

Raustila, Kal, 'Rethinking the Sovereignty Debate in International Economic Law', (2003) 6 (4) *Journal of International Economic Law* 841-878.

Restani, J. A. and I. Bloom, 'Interpreting International Trade Statutes: Is the Charming Betsy Sinking?', (2001) 24 *Fordham International Law Journal* 1533.

Slaughter, A. M and D Snidal, 'The Concept of Legalization', (2000) 54 *International Organization* 401.

Spamann, Holger, 'Standard of Review for WTO Panels in Trade Remedy Cases a Critical Analysis', (2004) 38(3) *Journal of World Trade* 509.

Sweet, A, ‘Stone ‘Judicialization and the Construction of Governance’, (1999) 32 *Comparative Political Studies* 149.

Tarullo, Daniel K, ‘The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions’, (2002) 34 *Law and Pol'y Int'l Bus*. 110.

Winickoff, David et al, *Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law'*, (2005) 30 *Yale Journal of International Law* 81.

Zdouc, Werner, ‘WTO Dispute Settlement Practice Relating to the GATS’, (1999) *Journal of International Economic Law* 295-346.

ELECTRONIC SOURCES

Howse, R. and K. Nicolaidis, "*Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*", Paper presented at the Conference on Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium (Kennedy School of Government, Harvard University, 2000), available at<http://www.ksg.harvard.edu>. accessed on 12 June 2016.

Jackson, John H, *The WTO Dispute Settlement Procedures: A Preliminary Appraisal,* Institute for International Economics, available at *http://www.iie.com* at 163, accessed on 20 April 2013.

Jain, Tarun, Standard of Review of DSB in anti-dumping disputes, Available at *http://ssrn.com/author=660701*, accessed on 16 August 2016.

World Trade Organization (WTO), *Understanding the WTO: Basics, the GATT years: from Havana to Marrakesh*, available at www.wto.org › the wto › accessed on 20 April 2013.

Conference papers/Seminar/Workshops

Búrca, Gráinne de and Joanne Scott, *The Impact of the WTO on EU Decision-making*. The Jean Monnet Seminar and Workshop on the European Union, NAFTA and the WTO Advanced Issues in Law and Policy, Harvard Jean Monnet Working Paper 06/00, Harvard Law School, Cambridge, MA, 2000.

Newspaper reports

Drucker, Peter F, Trade Lessons from the World Economy, *Foreign Affairs*, January/February 1994

Henkin, Louis, The Mythology of Sovereignty, *ASIL Newsletter*, March-May 1993.

'In the twilight of Doha',The Economist (65) July 27, 2006.

WTO Trade Negotiations *Europa*, 31 October 2011.

Thesis

Habermas, J, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge (MA): MIT Press, 1996).