

Messenger, Review of Ross Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development*

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## Ross Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development*

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As international regulation and oversight increases in scope and effectiveness, questions of the appropriate standard of review to be applied by international judicial bodies become increasingly important. Indeed, there is a flurry of interest in the ways in which international bodies determine whether prior decisions are reviewable or not and the level of deference they should pay to national decision-makers.<sup>1</sup> If too deferential a position is taken, the effectiveness of international institutions such as the WTO to ensure compliance with their obligations is undermined. If too intrusive a position is taken, however, States are less likely to agree to such commitments in the first place as perennial sovereignty debates resurface at home. Ross Becroft's book is thus particularly timely and a welcome addition to an area of investigation that is of increasing relevance to the effective functioning of the WTO system.

In *The Standard of Review in WTO Dispute Settlement*, Becroft sets out a clear argument for a new approach to the standard of review to be applied by WTO panels. While the other core text on the standard of review at the WTO, Matthias Oesch's *Standards of Review in WTO Dispute Resolution*,<sup>2</sup> provides a comprehensive analysis of the topic, Becroft takes a different approach. Rather than offering a reference text, instead Becroft openly sets out a clear critique of the WTO's current approach to the standard of review applied by panels and offers a bold alternative. His book is divided into two separate parts: in the first, he provides an examination of the current standard of review at the WTO, its provenance and failings, while in the second, he proposes an alternative standard of review that he believes is workable within the WTO system.

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<sup>1</sup> For example, the recent symposium hosted by <worldtradelaw.typepad.com> over Simon Lester's article, 'The Development of Standards of Appellate Review for Factual, Legal and Law Application Questions in WTO Dispute Settlement', 4 *Trade Law and Development* 1 (2012) 125. Examining similar issues in the context of international human rights obligations: A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012)

<sup>2</sup> M Oesch, *Standards of Review in WTO Dispute Resolution* (OUP 2003)

In the first part, Becroft's analysis of the negotiating history and case-law to date at the WTO is particularly clear and concise. He identifies key threads within the jurisprudence while highlighting the pressing problem facing the Appellate Body's preferred 'objective assessment' standard<sup>3</sup> found in Art 11 Dispute Settlement Understanding<sup>4</sup> ('DSU'); specifically that it is too broad and vague giving limited help to panels seeking guidance in this matter. The analysis of the role the Tokyo Round Codes played in providing models for key sections of the DSU and the consequences of this are particularly strong. He reinterprets Art 11 DSU not as the provision setting out the standard of review for panels (the position put forward by the Appellate Body) but rather as the incorporation of some minimal due process rights. It is a convincing and well-reasoned argument that plays a vital role later in the book as he suggests the validity of departing from Art 11 as the basis for a new standard.

His analysis is not undertaken in a vacuum, however. Becroft takes great pains to tie the critical appraisal of the negotiating history and case-law into the wider theoretical underpinnings of a standard of review at the WTO. By extending his analysis beyond the two traditional poles of de novo review or total deference, Becroft identifies a range of different approaches to the WTO standard of review that may be of inspiration or use. Having given an overview of the origins and development of the WTO standard of review and examined the possible alternatives, he sets out his own proposed standard in the second part of the book.

This second part is the most interesting: Becroft proposes an entirely new standard of review for use at the WTO. The proposed standard comprises of two limbs: first, a general standard of review to be applied to all WTO Agreements, and a second specific standard of review that would differ depending on the Agreement under examination. In this way, Becroft offers a standard that would have the advantages of a general standard (uniformity, transparency and, arguably, predictability) while tackling the problems that a uniform standard would present, namely the wide range of differences between WTO Agreements in subject-matter and scope. While not advocating a different standard for each Agreement, Becroft instead suggests that where the text of the Agreement indicates a different standard, then a specific standard of review could be applied in that instance.

Becroft maintains consistency between the two limbs of his standard of review by introducing a test of jurisdictional competence whereby the WTO is assumed to have full authority to review national measures (thus permitting a standard close to de novo review) unless the specific Agreement in question suggests that Members are to be accorded a certain level of deference (the SPS Agreement is used as the most notable of these types of Agreement). Such an approach is a dramatic reversal of the traditional framing of the relationship between State and International Organization. Rather than presupposing that competences lie with the State, the WTO is given general jurisdiction only to be restricted where provided for.<sup>5</sup> While advocating his new standard's consistency with the WTO system as it is, building on the existing provisions of the DSU, the fundamentals of Becroft's argument are far more radical than he would suggest.

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<sup>3</sup> The relevant provision reads: '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.'

<sup>4</sup> All available at <<http://docsonline.wto.org>> (accessed 20.11.2012)

<sup>5</sup> In Judge Hackworth's memorable words (regarding the competences of the UN though applicable to other International Organizations): 'There can be no gainsaying the fact that the Organization is one of delegated and enumerated powers. It is to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements concluded by them. Powers not expressed cannot freely be implied.' Dissenting Opinion, *Reparations for Injuries Suffered in the Service of the United Nations: Advisory Opinion* (ICJ Reports 1949) 198

As for the practical application of his standard of review, Becroft applies it to a range of Agreements, keen to identify its potential strengths and how it might work in practice. By looking at both Agreements covering trade remedies (the Anti-Dumping Agreement, the SCM Agreement and the Safeguards Agreement) and non-trade remedies (the SPS Agreement, TBT Agreement and GATT 1994)<sup>6</sup>, he tests his proposed standard against sufficiently different circumstances that doubts as to the viability of the standard in practice are minimised.

Insofar as there are problems with the arguments set out, the most serious is in some ways the result of Becroft's own insistence on the practical viability of his proposed standard. He offers the reader not only a critique of the current WTO standard of review but also an alternative. While for most of the book his claims are convincing, the legal justification for introducing a new standard is problematic.<sup>7</sup> His argument is first that Art 11 DSU (setting out the 'objective assessment' approach) was never intended to be the basis for the WTO standard of review and that it offers no clear guidance beyond minimal due process requirements. This is convincingly put across in earlier sections of the book. It is the second step which is weaker: he argues that as there is no specific instruction on a standard of review within the WTO Agreements (other than the anomalous Art 17.6 Anti-Dumping Agreement), Art 3.2 DSU grants the Appellate Body sufficient grounds to develop a new standard of review to be applied by panels. Recourse to Art 31(1) VCLT is used to justify the Appellate Body's ability to interpret the DSU teleologically in order to create a new standard of review. Should the reader be unconvinced, he also offers two alternative propositions: the first, on grounds of the Appellate Body and panels' inherent jurisdiction as international judicial bodies; the second, that any adjudicator must always have regard and develop procedures to ensure due process rights in order to emphasis 'the impartiality and workability of the dispute settlement process.'<sup>8</sup>

The problem with his position is twofold: first, debates over inherent jurisdiction are highly contentious and perceived extensions of authority by the Appellate Body have been met with heated responses from the Membership;<sup>9</sup> second, the distinction between the application of law and the interpretation of law ought not be blurred to such an extent.<sup>10</sup> Interpretation requires something to interpret, to interpret lacunae is to take a bold step toward a profoundly different relationship between International Organizations and the sovereign States that create them. The WTO system itself has been particularly cautious, where the Appellate Body drafted its own Working Procedures<sup>11</sup> only under the authority of, and in consultation with, the Dispute Settlement Body.<sup>12</sup>

In Becroft's defence, this radicalism is part of his argument at various stages and he argues strongly on legal and policy grounds. It seems likely where readers are unconvinced by the potential viability of introducing his standard of review, it may well be more than the result of diametrically opposed views of how the international legal system should function rather than the arguments over the standard of review themselves. Further, the potential application of his standard (were it to be introduced) is entirely believable as he flags the advantages and limitations of his approach throughout its development and the hypothetical case-studies.

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<sup>6</sup> All available at <<http://docsonline.wto.org>> (accessed 20.11.2012)

<sup>7</sup> Ross Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (Edward Elgar 2012) ('Becroft') 115

<sup>8</sup> Becroft, 118

<sup>9</sup> On the debates following the *amicus curiae* issues arising from the *Shrimp/Turtle* dispute: P Mavroidis, 'Amicus Curiae Briefs Before the WTO: Much Ado About Nothing', Jean Monet Working Paper 2/01 (2001) 8

<sup>10</sup> On the distinction in WTO dispute settlement proceedings: L Bartels 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35 *Journal of World Trade* 499

<sup>11</sup> Currently: *Working Procedures for Appellate Review* (4 January 2005) WT/AB/WP/5

<sup>12</sup> *Establishment of the Appellate Body: Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995* (19 June 1995) WT/DSB/1, para 14

Becroft concludes by referring to the relationship between increasing attention to questions over standard of review and increasing complexity and sophistication in legal systems.<sup>13</sup> As the WTO progresses and matures, these questions become more pressing: Becroft's contribution not only provides clear analysis of the area but also some bold, if controversial, solutions. If WTO law and international law more generally are to mature into the institutions that have been built for them, bold solutions like Becroft's may well be exactly what are needed.

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<sup>13</sup> Becroft, 226