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Jan Wouters and Sanderijn Duquet

**The Principle of Reasonableness
in Global Administrative Law**

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TOWARDS A MULTIPOLAR ADMINISTRATIVE LAW: A THEORETICAL PERSPECTIVE

Jean Monnet Working Paper 12/13

Jan Wouters and Sanderijn Duquet

**The Principle of Reasonableness
in Global Administrative Law**

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Prologue:
**Towards a Multipolar Administrative Law:
A Theoretical Perspective**

The idea that administrative law concepts can remain stable over time has been abandoned. Today, administrative agencies are no longer conceived of as simply executive “machines” and command-and-control bodies. There is a growing tension within countries between the executive branches and social expectations for rights-based institutions, and administrative bodies accordingly develop in an increasingly interstitial and incremental manner. This also happens because the separation of society and administration is less clear, and the public-private dividing line has blurred: dual relationships are becoming an exception; networking and multipolar linkages between norms, actors and procedures are the rule. Legal systems have become more interdependent, due to the import-export of administrative models: this has several implications, such as the fact that some basic principles of administrative law beyond the State have been developing. Furthermore, economic and political analyses of public administrations are increasing; this requires the adoption of multi-disciplinary approaches in examining the field.

All these phenomena – to name but a few – constitute the main features of an emerging “multipolar administrative law”, where the traditional dual relationship between administrative agencies and the citizen is replaced by multilateral relations between a plurality of autonomous public bodies and of conflicting public, collective and private interests. For a long time, administrative law was conceived as a monolithic body of law, which depended on its master, the modern State: as such, administrative law was intended to be the domain of stability and continuity. Continuity in the paradigms for study paralleled the idea of continuity in administrative institutions. However, from the last quarter of the 20th century, both assumptions became obsolete. Administrative institutions have undergone significant changes, due to several factors such as globalization, privatization, citizens’ participation, and new global fiscal responsibilities. Thus, it is necessary to review the major transformations that took place in the field over the last 30 or 40 years, and to address the consequent transformations in the methods used to study this branch of law.

To analyze this emerging multipolar administrative law, the first objective should be to decouple the study of administrative law from its traditional national bases. According to this tradition, administrative law is national in character, and the lawyer’s “ultimate frontier” is comparison, meant as a purely scholarly exercise. On the contrary, administrative law throughout the world is now grounded on certain basic and common principles, such as proportionality, the duty to hear and provide reasons, due process, and reasonableness. These principles have different uses in different contexts, but they share common roots.

A second objective would be to consider each national law’s tendency toward macro-regional law (such as EU law) and global law. While the leading scholars of the past labored (to a great extent in Germany and Italy, less so in France and the UK) to establish the primacy of national constitutional law (“*Verwaltungsrecht als konkretisiertes Verfassungsrecht*”), today the more pressing task is to ensure that the

increasingly important role of supranational legal orders is widely acknowledged. Whereas administrative law was once state-centered, it should now be conceived as a complex network of public bodies (infranational, national, and supranational).

A third objective should be the reconstruction of an integrated view of public law. Within legal scholarship, constitutional law, administrative law, and the other branches of public law have progressively lost their unity: for instance, constitutional law is increasingly dominated by the institution and practice of judicial review; most administrative lawyers have been overwhelmed by the fragmentation of legal orders, which led them to abandon all efforts at applying a theoretically comprehensive approach. The time has come to re-establish a unitary and systematic perspective on public law in general. Such an approach, however, should not be purely legal. In the global legal space, the rules and institutions of public law must face competition from private actors and must also be evaluated from an economic and a political point of view.

To better analyze and understand such a complex framework, to elaborate and discuss new theories and conceptual tools and to favor a collective reflection by both the leading and the most promising public administrative law scholars from around the world, the Jean Monnet Center of the New York University (NYU) School of Law and the Institute for Research on Public Administration (IRPA) of Rome launched a call for papers and hosted a seminar (<http://www.irpa.eu/gal-section/a-multipolar-administrative-law/>). The seminar, entitled “Toward a Multipolar Administrative Law – A Theoretical Perspective”, took place on 9-10 September 2012, at the NYU School of Law.

This symposium contains a selection of the papers presented at the Seminar. Our hope is that these articles can contribute to the growth of public law scholarship and strengthen its efforts in dealing with the numerous legal issues stemming from these times of change: discontinuity in the realm of administrative institutions requires discontinuity in the approaches adopted for studying administrative law.

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**THE PRINCIPLE OF REASONABLENESS
IN GLOBAL ADMINISTRATIVE LAW**

By Jan Wouters and Sanderijn Duquet*

Abstract

In both national civil and common law systems the principle of reasonableness is known as a standard of judicial review for administrative acts. The present paper examines whether also at the European and international level a principle of reasonableness is used as a standard against which (quasi-) judicial bodies scrutinize administrative acts. It is argued that the common understanding exists that reasonableness serves as an important guiding principle in order to find agreement between the views of a multitude of actors, whether formally participating or not, in global arenas. Based on an analysis of cases before EU courts, the WTO Dispute Settlement Body, the ILO Administrative Tribunal and the UN Dispute Tribunal, it is submitted that although current European and international legal practice does not offer a single formula or test, the openness of reasonableness makes it fit for use as a standard of judicial review at different layers of governance.

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1. Introduction

Human beings are endowed with reason. Reason enables them to consciously make decisions and to assess the reasonableness of decisions taken by other people. Although possibly an abstraction of human behaviour, the idea of using reason has been transposed to appraise administrative performance. In national administrative law, the transposition can be found in the general understanding that all administrative action has to be grounded in the rule of law and the rule of reason. Both in civil and common law systems, the “principle of reasonableness” is known as a standard of judicial review for administrative action. Nonetheless, comparative studies show considerable differences in the reasonableness tests developed by national courts as to the level of intensity, quality, and the terminology used.¹ Reasonableness, as understood in this paper, is a substantive standard that can be applied to review the content of the administrative action taken, as opposed to a procedural standard which focuses on the formal ways a decision is made.² Typically, a decision of a public authority is judged unreasonable when the decision taken does not logically follow from the legally relevant factors that ought to have been taken into account by that authority.³

The present paper explores whether also at the European and international level a principle of reasonableness is used as a standard against which (quasi-) judicial bodies scrutinise administrative action. First, it will elaborate on reasonableness as a component of “multipolar administrative law”. Second, it will examine how reasonableness has been conceptualised at the national level as a standard for the judiciary to assess the validity of administrative acts (Section II). Subsequently, Section III turns to the applicable standard of review before the EU courts and the WTO Dispute

¹ M.E. Magill and D.R. Ortiz, “Comparative Positive Political Theory”, in S. Rose-Ackerman and P.L. Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar Publishers, Cheltenham, 2010) pp. 139-144.

² Examples of the latter would be “a reasonable period” in which a decision has to be taken or the duty to reasonably motivate it, principles most jurisdictions are acquainted with. In most domestic systems, administrative law has evolved as primarily concerned with procedure, resulting in its principles largely being procedural in character, see C. Harlow, “Global Administrative Law: The Quest for principles and Values”, 17 *European Journal of International Law* (2006) p. 192.

³ See also Paul Craig’s definition of a reasonableness review: “a judicial decision as to whether the weight and balance ascribed by the primary decision-maker to considerations that have been or can be deemed relevant was reasonable”. Craig, however, also admits that the very nature of reasonableness review remains contested; P. Craig, “The Nature of Reasonableness Review”, 1 *Current Legal Problems* (2013) pp. 1-2.

Settlement Body, as well as to international administrative tribunals dealing with civil servant cases. Section IV uses recent examples from the jurisprudence of the ECJ, the WTO DSB, the ILO Administrative Tribunal and the UN Dispute Tribunal to illustrate how international courts have used a reasonableness standard to review administrative action. It will be seen that, depending on the judicial body at hand, the principle is closely associated with other principles which act as standards of judicial review: proportionality, due diligence and fairness. Section V introduces benchmarks for a review of administrative decisions and rules of international institutions and networks using a reasonableness standard. We conclude that, although current European and international legal practice does not offer a single formula or test, reasonableness can be defined in such a way that makes it fit for use as a standard of review in global administrative law (Section VI).

2. Why Reasonableness Can Be Conceived as a Component of Multipolar Administrative Law

Individuals have traditionally been identified at the receiving end of administrative law. A citizen is an addressee of government measures. Sabino Cassese defines this relationship as the bipolarity between the “*administré*” and the “*autorité publique*”.⁴ The individual’s one-dimensional relationship with the State has altered over time. The *administré* has increasingly been given rights in administrative procedures that allow him to be informed, to be heard, and to have decisions reviewed. This applies both to individuals functioning within the administration (civil servants) and those who are merely affected by decisions taken by it. In addition, constituencies have become more organised and involved in the craftsmanship of administrative law-making itself, both at national and international levels.⁵ Cassese derives from these tendencies the emergence of a multipolar administrative law, with citizens as right bearers and agencies as promoters of these rights.

⁴ S. Cassese, “New paths for administrative law: A manifesto”, 10 *International Journal of Constitutional Law* (2012) p. 13.

⁵ *Ibid.*; J. Cohen and Ch. Sabel, “Global democracy?”, 37 *NYU Journal of International Law and Politics* (2005) p. 765.

A multipolar view on global administrative law offers interesting insights in international and transnational administration. It does not require the identification of a single centre of authority in administrative decision-making as it pictures the latter as a flexible bargaining game between agents in the organisation or network and a variety of stakeholders. But what standards should the outcome of this process meet? Ideally, participants can recognise the decision of the administration as the result of deliberations in which arguments have been presented and compromises have been made. We wish to explore if and how this idea of multipolar deliberation can be translated in a normative criterion for assessing the quality of the administrative output.

The central thesis defended in this paper is that such a standard, at least in theory, exists in the form of the principle of reasonableness, but that this principle is in need of further delineation in order to be fully adapted to the realities of multipolar global administrative law. This thesis draws on three interconnected hypotheses. The *first* is the existence of a common understanding that all global administrative law-making has to stand a reasonableness requirement. Many national legal systems demand that administrative action be reasonable, rendering it void if it fails this prerequisite.⁶ There is no reason to expect anything less from global administrations, whose decisions often impact upon individual rights.⁷

Second, we suggest a connection between a multipolar global administrative law and reasonableness. This goes back to the ideas of John Rawls in his major works *A Theory of Justice* and *Political Liberalism*. Rawls defines reasonableness as a constitutive element of his theory that justice must be reached under circumstances that are fair.⁸ Rawls applies the term “reasonable” to persons, judgments, institutions, society, justice, religion and dialogues.⁹ His ideas on the “reasonable citizen” stand out in this regard. Justice is created as the result of bargaining between reasonable citizens and the fair agreement that results from it.¹⁰ Reasonable citizens prefer living in a society in which they cooperate with their fellow citizens on terms that are acceptable to

⁶ J. Raz, “Legal principles and the limits of law”, 81 *Yale Law Journal* (1972) p. 840.

⁷ B. Kingsbury, N. Krisch, R.B. Stewart, J.B. Wiener, “Global governance as administration-national and transnational approaches to global administrative law”, 68 *Law & Contemp. Probs.* (2004) pp. 1-14.

⁸ V. Päiväsalo, *Balancing Reasonable Justice: John Rawls and Crucial Steps Beyond* (Ashgate Publishing, Farnham, 2007) p. 78.

⁹ J.W. Boettcher, “What is reasonableness?”, 30 *Philosophy Social Criticism* (2004) p. 598.

¹⁰ J. Rawls, *A Theory of Justice* (Oxford University Press, Oxford, 1999 revised ed.) p. 11-15.

all. They agree upon basic equal freedoms, to be accepted by others as well, which subsequently can be used for administrative and judicial application of rules to particular cases.¹¹ Rawls explains that reasonable citizens, although having an autonomous morality, will accept rules even when this means some sacrifices have to be made to their own interests. He anticipated judgments of reasonable persons to vary to some degree, resulting in “reasonable disagreement”.¹² Since clashes between principles are unavoidable, suitable conceptual frameworks have to be established to help reasonable people dealing with pluralism.¹³ Applying his theory to the international level, Rawls argues that legal morality should not aspire to build comprehensive moral doctrines.¹⁴ Rather, the focus has to be on the finding of agreement and overlapping consensus, again, with respect for reasonable disagreement.¹⁵ Rawls presents this as the preferred way for people with different traditions to reasonably agree on certain fundamental aspects of international order.¹⁶ His ideas have been translated by others to explain policy-making at the global plane. Recently, Cohen and Sabel have picked up the idea of dialogical reasonableness. They employ the term “deliberative polyarchy”, or the idea that decision-making works through mutual reason-giving with the aim “to find solutions that others can be reasonably expected to support as well – or at least to acknowledge the relevance and importance of the supporting reasons, even if they disagree about the precise content of those reasons and the best way to balance them”.¹⁷ Reasonableness serves as an important guiding principle in order to find agreement between the views of a multitude of actors, whether formally participating or not, in global arenas.

The *third* hypothesis is that judicial review carries out a control function on the reasonableness of an administration’s behaviour.¹⁸ By installing judicial review at the

¹¹ E.-U. Petersmann, “De-fragmentation of international economic law through constitutional interpretation and adjudication with due respect for reasonable disagreement”, 6 *Loy. U. Chi. Int’l L. Rev.* (2008-2009) pp. 209-248.

¹² Päivänsalo, *supra* note 9, at xv.

¹³ *Ibid.*

¹⁴ See J. Rawls, *The Law of Peoples* (Harvard University Press, Cambridge, 2001) 199 p.

¹⁵ Petersmann, *supra* note 11, p. 216.

¹⁶ Päivänsalo, *supra* note 8, p. 167.

¹⁷ Cohen and Sabel, *supra* note 5, p. 779.

¹⁸ This is not to say that there are no other important accountability enhancing measures that may be contributing to the same cause. Mechanisms strengthening political accountability of global administrations surely play a key role in reflecting multipolar views.

global level it is accepted that an individual can challenge administrative action that affects his legal position. We submit that judicial review is an important corollary of multipolar administrative law. It enables individuals to question administrative action that directly influences their individual rights. Organizing judicial review at international level benefits the protection of the individual as well as general citizen interests. Furthermore, judicial review indirectly encourages reasoned decision-making, by requiring the administration to provide the facts and reasons that supported its decision.¹⁹

One last caveat is due: the goal of this paper is not to prescribe a uniform standard of reasonableness, but rather to introduce benchmarks for a reasonableness review in diverse international institutions and networks. National administrative law will serve as an inspiration. Thereto, the following section tries to extract cogent usages of the reasonableness standard from the domestic level, before returning to reasonableness at the global level in the section thereafter.

3. Reasonableness as a Standard of Judicial Review in Domestic Legal Orders

The reasonableness principle has been integrated far and wide in judicial reasoning. Yet, the weight accorded to it in national legal systems, as well as the way it has been defined, differs to a great extent. This section examines the many shades of reasonableness as a standard in judicial review. It will do so by categorising reasonableness standards according to their function in domestic systems. The reasonableness standard's legal conception has been firmly established in the UK. The standard appeared first in 1598, in *Rooke's* case, and has been defined further by English courts in the 1948 *Wednesbury* decision.²⁰ The *Wednesbury* standard found entrance in fellow common law and Commonwealth countries: New Zealand and Australia adopted it *verbatim*, in Canada and the United States it inspired the legal

¹⁹ C. Tobler, "The Standard of Judicial Review of Administrative Agencies in the U.S. and EU: Accountability and Reasonable Agency Action", 22 *B.C. Int'l & Comp. L. Rev.* (1999) p. 214.

²⁰ *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*, 10 November 1947, Court of Appeal, England, [1947] *EWCA Civ 1*. For a general discussion on the *Wednesbury* case, consult W. Wade and Ch. Forsyth, *Administrative Law*, (Oxford University Press, Oxford, 2009) p. 293 *et seq.*

tradition.²¹ Reasonableness has occupied a less central position in civil law countries. Although the standard appears in Germany and France in legal reasoning, it is applied in a supportive role rather than as a self-standing yardstick for judicial review.²² Italian, Belgian and Dutch courts are more receptive to it and openly acknowledge the existence of a reasonableness standard.²³

Fundamental to the application of a reasonableness analysis is the concept's impact on administrative discretion – be it broadly or narrowly defined by courts. In other words, how far can a court go in looking into administrative action? The scope of review can be conceptualised by placing it on a spectrum. At the ends of the spectrum two extreme visions arise on how to control administrative discretion. At the one end, the administration is given *carte blanche*. At the other end of the spectrum, the administration's decisions are reviewed to the merits. In this scenario, a judge is allowed to repeat the administration's work and, if necessary, to rule out the administration's decision and replace it with its own. Judicial review in domestic legal orders is designed in such a manner that neither of these extreme visions on judicial review applies. In contrast, the reasonableness test has been constructed all along the spectrum, allowing for more or less administrative discretion. In the next paragraphs, we present three

²¹ M. Taggart, "Proportionality, Deference, Wednesbury", *New Zealand Law Review* (2008) pp. 423-482; M. Taggart and M. Cohn, "Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom", 58 *Am. J. Comp. L.* (2010) pp. 583-629.

²² M. Bobek, "Reasonableness in Administrative Law: A Comparative Reflection on Functional Equivalence, in Reasonableness and Law", in G. Bongiovanni, G. Sartor and Ch. Valentini (eds.), *Reasonableness and law* (Springer, New York / Heidelberg, 2009) p. 323. Magill and Ortiz however argue that, although the "grounds review in the French system are complicated, they bear some resemblance to reasonableness review in the US system". See Magill and Ortiz, *supra* note 1, pp. 143-144. Similarly, it has been argued that the German principle of *Verhältnismäßigkeit* (literally meaning proportionality) has a "close but not an exact correspondence in the common law principle of reasonableness" although the latter is "less objective and more abstract". See M.P. Singh, *German administrative law in common law perspective* (Springer, New York / Heidelberg, 1985) pp. 88-89.

²³ For a discussion on the Belgian reasonableness standard, see C. Berx, *Rechtsbescherming van de Burger tegen de Overheid*, (Intersentia, Antwerp, 2000) p. 363; Tak discusses *redelijkheid* (reasonableness) as incorporated in article 3:4(1) of the Dutch *Algemene Wet Bestuursrecht*, see A.C.Q. Tak, *Het Nederlands bestuursprocesrecht in theorie en praktijk* (Wolf Legal Publishers, Nijmegen, 2005) pp. 520-528; see also: P.J.J. van Buuren and T.C. Borman, *Algemene Wet Bestuursrecht: Tekst & Commentaar* (Kluwer, The Hague, 2007) p. 73. For the Italian practice, see D. Tiscornia, T. Agnoloni and M.-T. Sagri, "Balancing rights and values in the Italian Courts: a statistical and conceptual analysis", 10 *Law, Probability and Risk* (2011) pp. 265-275. In the Netherlands and Belgium, reasonableness also has been conceptualised as a standard of good governance that guides the administration in taking its decisions. See A. Mast, J. Dujardin, M. Van Damme and J. Vande Lanotte, *Overzicht van het Belgisch administratief recht* (Kluwer, Mechelen, 2012) p. 48.

broad categories of intensity to perform a reasonableness review.²⁴ Within each of those, the content of the reasonableness standard may alter, given the particularities of the national legal orders it stems from.

3.1. Manifest Unreasonableness

At the one end of the spectrum, where the level of judicial intervention is at its lowest, one can find the English “Wednesbury unreasonableness” standard in the original meaning given to it by Lord Greene. The test recognises the non-interference of courts with the discretion assigned to public authorities, provided that (i) the authority took into account all the things it ought to have taken into account, (ii) the authority did not take into account things they should not have taken into account and (iii) the decision is not unreasonable, *i.e.* it is not a decision that a reasonable authority could ever have come to. Consequently, reasonableness covers the substantive irregularity of administrative action. In particular, the high threshold of the last step in the test has restricted judicial meddling. To successfully apply the Wednesbury test, a decision has to be so outrageously deficient of logic or moral standards that no reasonable administration would ever have even considered taking it. The test has been referred to as the “extreme deference” test or “super Wednesbury”.²⁵ By definition, this standard is high in order to avoid the substitution of judicial discretion for administrative discretion.²⁶

Reasonableness in this sense has been applied in other legal systems as well, sometimes called “the patent unreasonableness standard” (by the Canadians), “*erreur manifeste d’appréciation*” (by the French) or “manifest unreasonableness”.²⁷ The main characteristics are the following. First, essentially, manifest unreasonableness functions

²⁴ Other authors, notably Barak and Sadurski, have defined reasonableness in two senses (a strong and a weak) rather than three. See A. Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, Cambridge, 2012) p. 374; W. Sadurski, “Reasonableness and Value Pluralism in Law and Politics”, in Bongiovanni, Sartor and Valentini, *supra* note 22, pp. 129-146.

²⁵ C. Harlow and R. Rawlings, *Law and Administration* (Cambridge University Press, Cambridge, 2009) p. 116.

²⁶ H. Barnett, *Constitutional and Administrative Law* (Routledge, London, 2010, 8th ed.) p. 778.

²⁷ On the Canadian standard, see L. Lebel, “De Dunsmuir à Khosa”, 55 *McGill Law Journal* (2010) pp. 311-318; G.P. Heckman, “Substantive Review in Appellate Courts since Dunsmuir”, 47 *Osgoode Hall L.J.* (2009) pp. 751-786; In France, the goal of the “*erreur manifeste d’appréciation*” standard is to “imposer aux autorités un minimum de bon sens et de logique, ou d’éviter les solutions déraisonnables”, see G. Dupuis, M-J Guédon and P. Chrétien, *Droit administrative* (Sirey Université, 2011, 12ed.) p. 664.

as a negative principle – hence the stress of the domestic standards on the unreasonableness. Second, judicial interference on the basis of such a standard only applies in the rare case where there is an almost complete disconnection between the facts of a case and its outcome. This disconnection has to be so extreme or outrageous that it is almost absurd. Third, resulting from this, a high burden is placed on the individual to prove such extreme erroneous way of decision-making by the administration. Fourth, importantly, the manifest unreasonableness standard does not offer a structured test. In its most extreme form, it does not require any balancing exercise by judges.²⁸ Manifest unreasonableness can be caught by judges by merely looking at the case from a distance. Importantly, manifest unreasonableness may overlap with a rationality standard. In theory, reasonableness is inclusive of, but not to be reduced to, rationality.²⁹ To be more precise, irrationality means “devoid of reasons” while unreasonableness can be described as “devoid of satisfactory reasons”. Yet, when unreasonableness is defined in its most extreme way, similar to a rationality standard, it targets to rule out decisions that do not find any ground in the reasoning of the administration.

3.2. Soft Look Reasonableness

The manifest unreasonableness standard targets arbitrary decision-making. Although useful, a rather low number of cases adhere to this standard of review. Throughout domestic legal orders, judicial bodies have adopted understandings of the reasonableness standard that allow for increased judicial action. Accordingly, the English *Wednesbury* standard was loosened over time through judges’ interpretations.³⁰ The more lenient version of *Wednesbury* unreasonableness permitted for reasonableness to be used not only in cases where there is a complete disconnection between the facts and the outcome but also when the facts disproportionately differ from the decision taken or the rule made. The “so outrageous” argument was dropped in

²⁸ Barak, *supra* note 24, p. 376.

²⁹ G. Bongiovanni, G. Sartor and Ch. Valentini, “Introduction”, in Bongiovanni, Sartor and Valentini, *supra* note 22, pp. xii-xiii. See Wade and Forsyth, *supra* note 20, p. 296. The distinction made in philosophy between unreasonableness and irrationality does not give rise to different tests applied in national or international courts to distinguish the notions. See J. Church, “Reasonable Irrationality”, 96 *Mind* (1987) pp. 354-366.

³⁰ P. Craig, *EU Administrative Law* (Oxford University Press, Oxford, 2012) pp. 647-648.

favour of a test that requires a certain balancing of the reasoning of the administration. In reviewing administrative action, judges will consider more intensively the facts of the case and the interpretation of the arguments brought forward. In other words, judicial review focuses on the facts taken into account, conclusions drawn from the facts and the relationship between the administrative decision and those conclusions. Yet, as this “soft look test” essentially remains an adaptation of the *Wednesbury* test, it leaves considerable room for the administration. As long as the latter has taken into account all facts and arguments it ought to have taken into account, the judge will show deference to the administration’s decision.

The conceptualisation of reasonableness as a standard that rules out manifest unreasonableness as well as quite manifest unreasonableness has known a wide application in national legal orders. The Canadians termed soft look reasonableness as “reasonableness *simpliciter*”, where the decision is upheld if it is supported by any reasons that can stand up to a somewhat probing examination, even if the court might have decided differently. Interestingly, in 2008 the Canadian Supreme Court did away with the distinction between the standard of reasonableness *simpliciter* and patent unreasonableness (see above).³¹

US courts, when reviewing an agency’s factual findings, apply a “substantial evidence test”. The evidence that supports the facts has to be “such evidence as a reasonable mind might accept as adequate to support a conclusion”.³² Similarly, the “arbitrary and capricious standard” in the US³³, before its meaning changed in the 1970s, was used for the same purpose.³⁴

³¹ *Dunsmuir v. New Brunswick*, 7 March 2008, Supreme Court of Canada, [2008] 1 S.C.R. 190. In its judgment, the Supreme Court quoted David Mullan: “[T]o maintain a position that it is only the ‘clearly irrational’ that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective ‘clearly’ to irrational is surely a tautology. Like ‘uniqueness’, irrationality either exists or it does not. There cannot be shades of irrationality.”

³² See *Consolidated Edison Co. v. Labor Board*, 5 December 1938, US Supreme Court, [1938] 305 U.S. 197.

³³ APA § 706(2)(A). In the US a reasonableness test is also applied to review whether an agency has correctly interpreted the law. Reviewing courts in the US allow, when the meaning of a statute is ambiguous, that it may be determined by agencies implementing the statute. The test applied is the Chevron’s two-step formula for reviewing questions of law. In a first step, the court will state what the applicable law is. In step two, the court reviews the agency’s view for reasonableness. This second step is similar to a review under the arbitrary and capricious test. See *Chevron USA, Inc. v. Natural Resources Defense Council*, 25 June 1984, US Supreme Court, [1984] 467 US 837, pp. 844-845. Because of the weight accorded to the second step of the Chevron test, David Zaring has recently argued that reasonableness has become the overarching standard for judicial review of agency action. See D. Zaring,

The conceptualisation of reasonableness as a soft standard that checks whether there is a proportional linkage between facts and outcome clearly ventures into the terrain of the proportionality standard. In national case-law, proportionality therefore may be conceived either as the more structured part of the reasonableness test³⁵ or as the preferred alternative to it.³⁶ The latter option seems especially valid when a fundamental right is at issue. Where human rights are concerned, the *Wednesbury* test has been complemented with higher scrutiny tests.³⁷ Important changes in jurisprudence were introduced following the ECHR's *Smith & Grady* case,³⁸ which found that the UK reasonableness test did not meet the requirements of its Article 13 and therefore did not constitute an effective remedy.³⁹ The 1998 Human Rights Act remedied this by requiring interpretations of human rights law to be consistent with European Union law and the European Convention on Human Rights.⁴⁰ The latter bodies, as will be further explained below, strongly prefer a proportionality test over a reasonableness test.⁴¹ In South Africa and Canada, the constraining of constitutional rights for the benefit of realising a social purpose is allowed provided that it is

“Reasonable Agencies”, 96 *Va. L. Rev.* (2010) pp. 135-197. However, this paper will not go into the details of a reasonableness review to rule out errors of law and rather focus on the reasonableness standard to control discretion.

³⁴ Craig, *supra* note 30, p. 645.

³⁵ See the Belgian practice, in which the proportionality standard serves as a concrete application of the reasonableness principle; D. Batselé, T. Mortier, M. Scarcez, *Algemeen Administratief Recht* (Bruylant, Brussels, 2012) p. 59; Berx, *supra* note 23, p. 365.

³⁶ See, for example, in the case of *Kay and Others v. The United Kingdom*, 21 September 2010, ECHR, no. 37341/06, para. 36, in which it is submitted that with “the ‘Wednesbury’ test ... moving closer to proportionality [so that] in some cases it is not possible to see any daylight between the two tests”.

³⁷ See *R. v. Ministry of Defence ex parte Smith*, 3 November 1995, England and Wales Court of Appeal, [1995] *EWCA Civ 22*. However, the English legal tradition grounded in reasonableness has created suspicion by domestic judges to use other standards of review. See Barnett, *supra* note 26.

³⁸ See *Smith and Grady v. United Kingdom*, 27 September 1999, ECHR, [1999] 29 *EHRR* 493, paras. 137-139: “The threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court’s analysis of complaints under Article 8 of the Convention.”

³⁹ But see Craig, *supra* note 3, p. 35, who argues that it were “infirmities in review of evidence that led the Strasbourg Court to conclude that reasonableness review was insufficiently searching to satisfy the ECHR”, rather than the test itself.

⁴⁰ See United Kingdom, Human Rights Act 1998: Chapter 42 [2000].

⁴¹ The application of the reasonableness test in human rights cases has been referred to as the “anxious scrutiny” test. Harlow and Rawlings draw from this that three applications of *Wednesbury* are possible: an extreme test, a general test and a test to be used where an important interest is at stake, particularly in human rights cases. Each choice on the scale is a step to greater intensity. See Harlow and Rawlings, *supra* note 25, at 116.

at 116. The combination of the three tests allows *Wednesbury* to cover if not all, the majority of cases.

reasonable in a democratic society.⁴² The interpretation of reasonableness in such cases comes down to a proportionality requirement and has as such been employed.⁴³ Even in British case-law, however, it has been suggested that proportionality is the preferred test also when there is no human right at stake.⁴⁴

3.3. Hard Look Reasonableness

Finally, a reasonableness standard can be used to review matters beyond the facts at issue. This is where reasonableness is given its strongest meaning. In the US, the arbitrary and capricious standard has been explained in this way in cases where administrative action is based upon a record. This has resulted in the “hard look” standard to be applied by courts. Substantiated in the 1970s and 1980s⁴⁵ by courts’ broad reading of the Administrative Procedure Act (APA), the heightened standard of judicial review is used to review an administration’s discretion in a detailed way.⁴⁶

Judges are expected to review whether the administrative body has taken a hard look at the issues.⁴⁷ The agency will have done so when it is able to show that it has developed logical arguments to come to the decision it has taken. In other words, courts will look at the thought-process of the agency and its weighing of the facts at hand. This approach clearly differs from the “manifest unreasonableness test”, in that the latter

⁴² Canada, Art. 1, Constitution Act, 1982, Schedule B, Part I: Canadian Charter of Rights and Freedoms reads: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

⁴³ Barak, *supra* note 24, p. 133, referring to *S. v. Makwanyane and Another*, 6 June 1995, Constitutional Court of the Republic of South Africa [1995] ZACC 3, para. 104 in which the Constitutional Court observed: “The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality”.

⁴⁴ See *R. v. Secretary of State for the Home Department ex parte Brind*, 18 November 1992, High Court (Queen's Bench Division) [1992] UKHL 4; *R. (Daly) v. Secretary of State for the Home Department*, 23 May 2001, House of Lords [2001] HRLR 49; *R. (Association of British Civilian Internees Far Eastern Region) v. Secretary of State for Defence* [2003] Q.B. 1397, C.A. (England and Wales), paras. 34-35 in which Dyson LJ submitted: “we have difficulty in seeing what justification there now is for retaining the Wednesbury test... But we consider that it is not for this court to perform its burial rites. The continuing existence of the Wednesbury test has been acknowledged by the House of Lords on more than one occasion.” On the on-going discussion, see also: Harlow and Rawlings, *supra* note 25.

⁴⁵ See *Citizens to Preserve Overton Park v. Volpe*, 2 March 1971, US Supreme Court [1971] 401 U.S. 402 and *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 24 June 1983, US Supreme Court [1983] 463 U.S. 29.

⁴⁶ P.M. Garry, “Judicial Review and the ‘Hard Look’ Doctrine”, 7 *Nev. L.J.* (2006-2007) p. 159.

⁴⁷ M. Stephenson, “A Costly Signaling Theory of ‘Hard Look’ Judicial Review”, 58 *Administrative Law Review* (2006) p. 754.

only checks the possible disconnection between facts and outcome. It also goes one step further than reasonableness in its second sense. A hard look review for reasonableness will actively scrutinise the way the facts have been taken into account by the administration. This adds an extra dimension to the deficits the reasonableness test is trying to rule out. In American legal tradition, the test has been structured in a way that it allows courts to interfere where certain defects are present.⁴⁸

The strong emphasis of this standard on the provision of reasons by the administration is beneficial for the governed.⁴⁹ The review aims to control the decision-making process, including whether adequate consideration was given to the interests of the recipients of administrative action. Courts may use it to review whether the administration has made its decision after having consulted interested parties, and moreover, whether it has actually used that information in deciding in individual cases as well as in its rule-making.⁵⁰ Hard reasonableness furthermore requires an administration to keep a record of its decision-making process: the substantial evidence it based itself on, how it has handled views expressed by interested parties, what methodologies have been used and the weight it has accorded to these.⁵¹

Few national jurisdictions allow for hard look review of administrative action. Unsurprisingly, objections relate to the intensity of the judicial review and the possible frictions in the separation of powers doctrine. National jurisdictions are reluctant to give considerable leeway to those performing judicial review in order to avoid the intermingling in political processes. This objection may be less stringent at the international level where the governance is less strictly vested in separate powers.⁵²

⁴⁸ Garry, *supra* note 46, p. 156. The 1983 State Farm case created a list to be used by courts to find agency rule-making arbitrary and capricious: “Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”

⁴⁹ Craig, *supra* note 30, p. 645.

⁵⁰ Journal editors, “Rationalizing Hard Look Review after the Fact”, 122 *Harv. L. Rev.* (2008-2009) pp. 1909-1930.

⁵¹ R. Stewart as referred to in *ibid.*, at 1912.

⁵² S. Cassese, “Administrative Law without the State - The Challenge of Global Regulation”, 37 *NYU J. Int’l. L. & Pol.* (2004) p. 677.

3.4. Preliminary Conclusion

The principle of reasonableness provides a wide-ranging though imprecise standard for the substantive review of administrative decisions. Describing reasonableness with precision is difficult, since its meaning varies from one jurisdiction to another. Nevertheless, in a considerable number of jurisdictions reasonableness has been given characteristics that allow for a kind of typology based on the intensity of the review rather than its nature.⁵³ “Manifest unreasonableness” relates to the very rare cases in which an administration has acted arbitrarily. “Soft look reasonableness” scrutinises disconnections between the facts and the administrative decision or general norm. Finally, “hard look reasonableness” reviews the administration’s thought-process that has resulted in the decision or general norm. The typology, in itself, is subject to alterations. While the soft look reasonableness test is derived from the manifest unreasonableness test, both tests will often be applied in a single test. This single test may still refer to the “manifest” character of the error. To confuse matters even further, little guidance is offered on how the standard is to be applied *in concreto*.⁵⁴ Moreover, reasonableness may also be difficult to differentiate in a clear manner from other principles of review such as rationality (especially in its manifest unreasonableness meaning), proportionality (especially in its soft look meaning) and touches upon principles of equity and fairness.

The following sections aim to examine whether, in global administrative bodies, the reasonableness principle could serve as a fully suitable standard of review. Its flexibility makes it an appropriate standard to review different contexts, as has been exemplified by its use in domestic legal orders. The comprehensiveness of the standard leads us to suspect that reasonableness can play a meaningful role in the fragmented global administrative space.

⁵³ See Paul Craig, who also clearly distinguishes between the nature of a reasonableness review (a balancing exercise of factors taken into account by the administration) and the intensity with which the review is deployed. Craig, *supra* note 3, p. 9 and p. 33.

⁵⁴ For example, the *Wednesbury unreasonableness* serves as a common and convenient label to review administrative action. The *Wednesbury* decision distinguishes between proper and improper use of governmental discretion, and constructs this in light of the “unreasonableness” standard. See Wade and Forsyth, *supra* note 20, p. 303.

4. The Global Context: What Standard of Review?

The body of global law is far from unitary.⁵⁵ Instead, the global legal space consists of regulatory bodies and networks, governed by their own set of rules, procedures and peculiarities.⁵⁶ Nevertheless, global, transnational and regional administrations have had to deal with relatively similar internal tensions. For example, rule-makers have to adopt high-level decisions and make complex assessments while taking into account State, member and other interests, such as those of national bureaucracies and civil society.⁵⁷ These complexities influence the organisation of judicial review at the international level and the optimal level of deference to be accorded to decisions. Various standards of review have been proposed and applied. To study what a reasonableness standard means in reviewing regulations or general norms, we will first focus on the applicable standard in the EU and the World Trade Organization (WTO). Second, the paper examines the standard in the judicial review of individual decisions.

4.1. Judicial Review of General Norms

Out of the many transnational entities that review general norms, we selected the EU Courts and the WTO Dispute Settlement Body (DSB), as they represent dissimilar models of transnational administration. Moreover, their engagement with multipolarity at the global level has been different. They have taken a different stance on the role of the citizen and his rights. Where in the EU Courts private individuals have standing to contest the legality of EU acts and to challenge Member States' laws and regulations (albeit indirectly, through so-called preliminary references from national courts), the WTO DSB is much more State-oriented. The WTO is a member-driven organisation that has not fully incorporated the dynamics of citizen-driven governance. The WTO DSB reviews rule-making by national governments. Yet, domestic policy-making may not

⁵⁵ Cassese, "Administrative Law without the State", *supra* note 52, p. 670.

⁵⁶ N. Krisch, B. Kingsbury, R.B. Stewart, "The Emergence of Global Administrative Law", 68 *Law and Contemporary Problems* (2005) p. 61; M. De Bellis, "Public law and private regulators in the global legal space", 9 *Int. J. Constitutional Law* (2011) pp. 425-448.

⁵⁷ S. Cassese, "What is Global Administrative Law and why study it?", *RSCAS Policy Papers* 2012/04, p. 3.

reflect the same increase in multipolarity that is present in other forums, such as the EU.⁵⁸

4.1.1. The Standard of Review in EU Administrative Law

European Union law lacks a detailed set of administrative law rules. Judicial review is organised on the basis of unwritten legal principles as applied in case-law.⁵⁹ Influenced by German and French law, the proportionality principle has been transformed into a widely used test for the ECJ to review administrative decisions.⁶⁰ Together with the principles of equality and legal certainty, proportionality as a general principle of EU law lies at the heart of the ECJ's judicial review.⁶¹ This is made explicit in Article 5 (1) TEU: "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality". In theory, a proportionality review constitutes of a threefold test of the effectiveness, necessity and proportionality *stricto sensu*. Nonetheless, the ECJ uses a variety of different formulas when applying it.⁶² The proportionality test may furthermore vary in intensity depending on the context of the case.

The preference for proportionality, so it is argued, also stems from the tradition of EU courts to look hard at the facts and arguments presented, leading to a higher scrutiny test.⁶³ Given this preference for a proportionality test, one can wonder what role is left for a reasonableness test before the EU courts. Analysing the case-law, it

⁵⁸ In this sense, Shaffer and Trachtman suggest possible approaches, both nationally and sub-nationally, to international participation, accountability, and global and social welfare. The WTO DSB is uniquely placed to deal with some of these concerns. The major advantage of the system is that those excluded from national political decision-making processes, i.e. other States, can still raise concerns about regulations adopted. See G. Shaffer and J. Trachtman, "WTO Judicial Interpretation" in A. Narlikar, M. Daunton and R.M. Stern, *The Oxford Handbook on The World Trade Organization* (Oxford University Press, Oxford, 2008) p. 554.

⁵⁹ J. Schwarze, *European Administrative Law* (Sweet and Maxwell, London, 2006, 2nd ed.) p. 708.

⁶⁰ The ECJ also uses the proportionality principle in other cases, such as assessing the compatibility of national legislative and regulatory measures with the free movement of goods, persons, services and capital, and in assessing the compatibility of the behaviour of business enterprises with EU antitrust rules. A very important conceptual contribution in this respect has been made by Walter van Gerven, both as Advocate General at the ECJ (1988-1994) and in his scholarly writings: see *inter alia* W. van Gerven, "Principe de proportionnalité, abus de droit et droits fondamentaux", 5 *Journal des Tribunaux* (1992) pp. 305-309; see generally: E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford, 1999) 187 p.

⁶¹ See generally: T.-I. Harbo, "The Function of the Proportionality Principle in EU Law", 16 *European Law Journal* (2010) pp. 158-185.

⁶² Craig, *supra* note 30, p. 590 *et seq.*

⁶³ Craig, *supra* note 3, p. 36.

becomes clear that a reasonableness test may be applied in cases where it serves the same purpose of the proportionality test. It can be submitted that where proportionality is invoked as a ground for review of European administrative discretion the so-called “manifestly inappropriate” test or “manifest error” test will be called upon to marginally review the decision – quite similar to reasonableness as conceived in its manifest and soft look meaning in national case-law (*supra*). This is especially the case where the bounds of executive power are widely drawn, and notably when it is reviewing general norms stemming from political processes. In the 1999 *Upjohn* case, the ECJ summarised its practice as follows⁶⁴:

According to the Court’s case-law, where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to a limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned. Thus, in such cases, the Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion.

As a consequence, the proportionality test will often be applied at the same time that a reasonableness test would be applied, only ruling out manifest and soft look defects in rule-making. It may be referred to by the ECJ, yet only in such a way as to support a proportionality test. Furthermore, the invocation of an alleged breach of a fundamental right of an individual will effectuate a more intense and structured review of the kind a reasonableness test cannot offer.⁶⁵

⁶⁴ Case C-120/97 *Upjohn Ltd v. The Licensing Authority established by the Medicines Act 1968 and Others*, 21 January 1999, European Court of Justice [1999] *ECR I-223* (discussing whether Community law requires the Member States to establish a procedure for judicial review of national decisions revoking marketing authorisations which involves a more extensive review than that carried out by the European Court of Justice in similar cases) para. 34. The Court also referred to its judgments in Joined Cases 56/64 and 58/64 *Consten and Grundig v. Commission*, 13 July 1966 [1966] *ECR 299*, Case 55/75 *Balkan-Import Export v. Hauptzollamt Berlin-Packhof*, 22 January 1976 [1976] *ECR 19*, para. 8, Case 9/82 *Øhrgaard and Delvaux v. Commission*, 14 July 1983 [1983] *ECR 2379*, para. 14, Case C-225/91 *Matra v. Commission*, 15 June 1993 [1993] *ECR I-3203*, paras. 24 and 25, and Case C-157/96 *National Farmers’ Union and Others*, 5 May 1998 [1998] *ECR I- 2211*, para. 39.

⁶⁵ K. Lenaerts and J.A. Gutiérrez-Fons, “The Constitutional Allocation of Powers and General Principles of EU law”, 47 *Common Market Law Review* (2010) pp. 1629-1669. See also: T. Tridimas, *The General*

The hard look reasonableness principle has not been applied by the EU courts to review general norms. An example of a case in which the applicant suggested such a review can be found in the *Pfizer* judgment. This concerned a case in which the Court of First Instance had to review whether the Council had manifestly erred by taking a precautionary approach when redrawing an authorisation for an additive to animal feeding stuffs based on an assessment that did not unambiguously demonstrate risks involved.⁶⁶ *Pfizer* argued that factual errors had been made and that the Council had disregarded the (non-binding) opinion of the Scientific Committee on Animal Nutrition (SCAN). As such, it requested the Court to take a hard look at the Council's thought-process and its consideration of the facts at hand.

The CFI did not qualify the case as one where the Court had to apply an intense review. It was submitted that Community institutions can use data as well as their discretionary powers to facilitate the adoption of preventive measures to protect human health when respecting procedural requirements, the principle of proportionality and, although less explicitly referred to, the principle of soft look reasonableness.⁶⁷ The latter standard was used to justify the reasoning of and objectives set by the Council (the Court emphasised that the treatment of patients needing a particularly high level of protection is a valid objective, which could not be denied on any reasonable grounds by the applicant company)⁶⁸ and to rebut the applicant's argument that the ban on virginiamycin would cause an increase of certain antibiotics.⁶⁹ The choice of the court for a proportionality standard directly relates to its qualification of the case as one in which considerable deference is to be accorded to the administration. In conclusion, the CFI ruled that "there is nothing to suggest that the policy choice made by the

Principles of EU Law (Oxford University Press, Oxford, 2007, 2nd ed.) 591 p. However, the debate on the precise meaning and scope of the proportionality test is also still on-going. See J. Schwarze, *supra* note 59, p. 677.

⁶⁶ Case T-13/99 *Pfizer Animal Health v. Council of the European Union*, 11 September 2002, European Court of First Instance [2002] ECR II-3318.

⁶⁷ J.L. da Cruz Vilaca, "The Precautionary Principle in EC Law", 10 *European Public Law* (2004) pp. 369-406.

⁶⁸ *Pfizer Animal Health v. Council*, *supra* note 66, para. 340.

⁶⁹ *Ibid.*, para. 426. The CFI argued that "it is reasonable to accept ... the potential effects of an increase in the use of antibiotics for therapeutic purposes would, to some extent, be offset by the fact that antibiotics were no longer being used as growth promoters".

institutions was unreasonable in that regard⁷⁰ and therefore did not find a manifest error.

4.1.2. The Standard of Review in WTO Law

The WTO scrutinises domestic administrative action for conformity with the rules of the multilateral trading system. Its DSB has also developed a rich jurisprudence on domestic administrative regulations and procedures. In this context, the applicable standard of review has been defined in rather general terms. Regardless, the reasonableness standard has been consistently applied. First, reasonableness standards are included in agreements covered under the dispute settlement system's jurisdiction.⁷¹ One such example is Article X:3(a) of the General Agreement on Tariffs and Trade (GATT). The provision requires administrations to be "uniform, impartial and reasonable".⁷² The standard can only be invoked in specific circumstances. Case-law has limited its application to the administration of regulations and decisions rather than the instruments themselves.⁷³ The substantive content of the legal instruments being administered is not challengeable under the GATT provision. The term "administer" may include national administrative processes, understood as "a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision".⁷⁴ The use of the X:3(a) GATT reasonableness standard is further limited by evidence requirements. Since a claim brought under foregoing provision is considered a

⁷⁰ *Ibid.*

⁷¹ Appendix 1 of the DSU (Article 1.1 of the DSU). The 1984 Havana Charter for the International Trade Organization had already stated in its article 11 that "no Member shall take unreasonable or unjustifiable action within its territory" injurious to the rights or interests of investors.

⁷² Article X:3(a) provides: "Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article". Article X:1 defines the coverage of Article X:3(a) as follows: "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any Member, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use".

⁷³ *EC - Bananas III*, Ecuador, Guatemala, Honduras, Mexico and the United States v. European Communities, 9 September 1997, WTO Appellate Body, *WT/DS27/AB/R*, para. 200; The Appellate Body, however, does not see a reason why a "legal instrument that regulates the application or implementation of that instrument cannot be examined under Article X:3(a) if it is alleged to lead to a lack of uniform, impartial, or reasonable administration of that legal instrument"; see *EC - Selected Customs Matters*, United States v. European Communities, 13 November 2006, WTO DSB Appellate Body, *WT/DS315/AB/R*, paras. 199-201.

⁷⁴ *Ibid.*, para. 224.

weighty accusation, it must be supported by solid evidence.⁷⁵ To make a case, the complainant must “discharge the burden of substantiating how and why those provisions necessarily lead to impermissible administration of the legal instrument”.⁷⁶

Second, reasonableness has been incorporated into the WTO’s all-encompassing standard of review. The latter can be read in Article 11 DSU, which obliges panels “to make an objective assessment of the facts of the case”.⁷⁷ The content of Article 11 DSU has been clarified in the case-law. The Appellate Body (AB), in *EC-Hormones*, did so, first, by confirming that Article 11 is the applicable standard of review.⁷⁸ Furthermore, the AB did not follow the European Communities in its reasoning that the appropriate standard was one of “deferential reasonableness”, a soft look reasonableness test. The panel’s review had to be more substantial than solely assessing the propriety and objectivity of the Communities’ risk assessment process; it had to be an objective assessment of facts.⁷⁹ In addition, in *Hormones*, the Appellate Body indicated that scientific evidence needs to be “reasonably sufficient” to justify an SPS measure.⁸⁰ The AB did not go as far as to structure the standard of review. In *US – Cotton Yarn*, it elaborated on the matter as follows:

Our Reports in these disputes under the Agreement on Safeguards spell out key elements of a panel’s standard of review under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations. This standard may be summarized as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation

⁷⁵ *US - Oil Country Tubular Goods Sunset Reviews*, Argentina v. United States, 29 November 2004, WTO DSB Appellate Body, *WT/DS268/AB/R*, para. 217; see also *EC - Selected Customs Matters*, *supra* note 73, paras. 186, 188.

⁷⁶ *EC - Selected Customs Matters*, *supra* note 73, paras. 199-201. The mere existence of differences in the laws themselves is not sufficient to show a breach of the uniformity requirement in Article X:3(a), see *Ibid.*, paras. 215-216.

⁷⁷ Art. 11 DSU.

⁷⁸ The AB rejects two other forms of review: a *de novo* review of the evidence and a review that would result in the substitution of the panel’s judgment for that of the competent authority. See C.-D. Ehlermann and N. Lockhart, “Standard of review in WTO law”, 7 *J. Int. Economic Law* (2004) p.501.

⁷⁹ J. Peel, “Of apples and oranges (and hormones in beef): Science and the standard of review in WTO disputes under the SPS agreement”, 61 *International and Comparative Law Quarterly* (2012) p. 434; Shaffer and Trachtman, *supra* note 58, p. 554. The authors state that art. 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 includes a more deferential standard of review the AB has so far not extensively applied.

⁸⁰ Ehlermann and Lockhart, *supra* note 78, p. 517.

has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data.

The "objective assessment" one-size-fits-all approach of the Appellate Body leaves room for discussion. Although no explicit reference to a reasonableness standard is made, the idea that a judicial body has to assess the weighing of facts by and the reasoning of an administration is clearly present. In *US-Cotton Yarn*, it was accepted that a panel has to "put itself in the place of that [national government] at the time it makes its determination".⁸¹ Hence, the panels will substantively review the reasoning of competent authorities that have adopted regulations. This extensive review is put forward as a necessity: "A panel can assess whether the 'competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel".⁸² The review comes close to a *de novo* review, or in other words, to a hard look reasonableness review of the reasoning and the weighing of facts. Moreover, Mitchell observed that the reasonableness requirement may be seen as incorporating aspects of the hearing and bias rules.⁸³ One can therefore argue that in WTO cases, a hard look reasonableness test is preferred over a soft look reasonableness test. As has been explained above, the approach of the European courts has been more deferential in similar cases. This has been exemplified in WTO settings, where the deferential point of view of the EU clashed with the hard look approach which is more common in the US.⁸⁴

⁸¹ *US - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Pakistan v. United States, 8 October 2001, WTO DSB Appellate Body, *WT/DS192/AB/R*, para. 78.

⁸² *US - Lamb*, New Zealand v. United States, 1 May 2001, WTO DSB Appellate Body, *WT/DS177/AB/R*; *WT/DS178/AB/R*, para 106: "A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation."

⁸³ See A.D. Mitchell, *Legal principles in WTO disputes* (Cambridge University Press, Cambridge, 2011) p. 170. Mitchell argues at 172: "This demonstrates how the reasonableness requirement may reflect not merely the no evidence rule (in relation to whether a reasonable person could have come to the conclusion reached) but also the hearing rule (in that a failure to rely on existing laws could deprive interested parties of the chance to respond to the methodology to be used)". The hearing and bias rules have been laid down, primarily in Art 8.2, 8.3, 15, 21, 22 and 27 DSU.

⁸⁴ Peel, *supra* note 79, p. 437.

4.2. Judicial Review of Individual Decisions Related to the International Civil Servant

Global administrative law is perhaps purest when it is used by the administrative body to organise its own administration. An organisation's staff carries out the former's objectives, which requires administrative regulation and control.⁸⁵ The number of civil servants being employed has steadily increased over the years as well as the recruitment from places all over the world, and consequently, from different legal backgrounds. The management of an international organisation and its staff differs considerably from the rule-making within the same IOs. Nevertheless, here too, one can observe an evolution that has been taking place in favour of multipolarity. As an individual directly exposed to the exercise of organisational power, the international civil servant may be caught in a vulnerable position.⁸⁶ Administrative Tribunals are in fact established for that reason: to subject the exercise of administrative power to judicial control, if not as a human right,⁸⁷ than at least as a matter of principle.⁸⁸ Civil servants have more rights than ever to question administrative procedures they have been subjected to in the course of their employment: (the missing of) promotions, dismissals, disciplinary measures, etc. all have given rise to the challenging of administrative decisions before specialised administrative tribunals. The civil servant is no longer solely an *administré*, he has become a citizen, entitled to rights vis-à-vis his employer. He may step up and ask for

⁸⁵ C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, Cambridge, 2005, 2nd ed.) 535 p.; R. Dhinakaran, "Law of the International Civil Service: A Venture into Legal Theory", 8 *International Organizations Law Review* (2011) p. 168, observes that, in most cases, the interests of the organisation and its staff members are similar.

⁸⁶ Dhinakaran, *supra* note 85, p. 167; K.S. Carlston, "International Administrative Law: A Venture in Legal Theory", 8 *Journal of Public Law* (1959) p.329

⁸⁷ See in this regard the European Court of Human Rights' case-law on the application of Art 6 (1) of the European Convention, providing for "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law", in administrative proceedings where "civil rights and obligations or of any criminal charge" are at stake. The 1999 *Pellegrin* case is interesting, for establishing a functional criterion based on the nature of the civil servant's duties. In other words, it made a distinction between those acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities and other civil servants. See *Pellegrin v. France*, 8 December 1999, ECHR, No. 28541/95. Doing so, it clearly relied on ECJ case-law on employment in the public service within the meaning of Article 45 (4) TFEU, see for example: *Commission v. Belgium*, 17 December 1980, ECJ [1980] ECR 3881.

⁸⁸ See Amerasinghe, *supra* note 85, referring to President of the World Bank, memorandum to the Executive Directors, 14 January 1980, pp.1-2.

reasoned, fair, and well-balanced decisions.⁸⁹ The function of the agency has changed accordingly; it increasingly acts as a promoter and controller of the administration.

International administrative tribunals have to seek a balance between the organisations' discretion in regulating its internal affairs and the protection of civil servants from uncontrolled exercise of organisational power.⁹⁰ Defining the applicable standard of review requires a careful analysis. Administrative tribunals have followed a particular line of jurisprudence, based on the internal law of the organisation. Consequently, the standards of review applied may differ. The ILOAT in Judgment No. 191, in *Re Ballo* (1972), stated that in exercising control over the discretionary power by international administrations, the Tribunal must⁹¹

determine whether that decision was taken with authority, is in regular form, whether the correct procedure has been followed and, as regards its legality under the Organization's own rules, whether the Administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier, or finally, whether there has been a misuse of authority.

This approach has been copied by other Tribunals.⁹² The ILOAT standard controls three potential defects of administrative action: discriminatory exercise of power, procedural irregularities and substantive irregularities.⁹³ The latter concerns the necessary relationship between the facts and the outcome of the administrative process. While not referring to it directly, this approach encompasses a reasonableness test as it has been defined in national case-law, albeit in differing levels of intensity. The *Re Ballo*

⁸⁹ See in this respect also: *Bustani v. OPCW*, 16 July 2003, ILOAT, 95th session, *Judgment No. 2232*, para. 16, in which it is stated that measures taken by the organisation that are punitive in nature "could only be taken in full compliance with the principle of due process, following a procedure enabling the individual concerned to defend his or her case effectively before an independent and impartial body." For further reading, see J. Klabbers, "The Bustani Case before the ILOAT: Constitutionalism in Disguise", 53 *International and Comparative Law Quarterly* (2004) pp. 455–464. C.F. Amerasinghe, "Accountability of International Organisations for Violations of the Human Rights of Staff", in J. Wouters, E. Brems, S. Smis, P. Schmitt (Eds.), *Accountability for Human Rights Violations by International Organisations* (Intersentia, Antwerp, 2010) p. 542.

⁹⁰ Dhinakaran, *supra* note 85, p. 169.

⁹¹ *Ballo v. UNESCO*, 15 May 1972, ILOAT, Judgment No. 191, pp. 6-7.

⁹² See, for example, reference to the *Ballo* judgment by the UN Dispute Tribunal in *Obdeijn v. UNSG*, 10 February 2011, UNDT, Judgment No. UNDT/2011/032, p. 17.

⁹³ Amerasinghe, *supra* note 85, p. 303-306.

standard, in particular, refers to “essential facts which have not been taken into consideration”, which draws on a soft look test.

Other Tribunals have constructed the standard of review differently. In cases involving the review of individual decisions the IMF Administrative Tribunal consistently has invoked the following standard set forth in the Commentary on the Statute:⁹⁴

With respect to review of individual decisions involving the exercise of managerial discretion, the case-law has emphasized that discretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures.

Even if the wording is different, the standard encompasses the three main elements of the *Re Ballo* judgment. To rule out substantive irregularities, the IMF Tribunal mentions, likely inspired by the American legal tradition, an “arbitrary and capricious” test. As we have discussed in a previous section, the American check can encompass both a soft and hard look review of reasonableness.

In sum, there is no fixed standard of review in Administrative Tribunals of international organisations.⁹⁵ Rather than mentioning a broad all-encompassing standard of review (such as the reasonableness standard), Tribunals opted to spell out a number of potential malfunctions which could occur.⁹⁶ According to Amerasinghe, these enumerations reflect sins most frequently encountered by judges.⁹⁷ Further research is needed to establish the conditions that need to be fulfilled for a successful application of the reasonableness standard. Furthermore, it is of particular interest to examine how the standard is used and how it contributes to multipolarity in this particular setting.

⁹⁴ See, e.g., *Ms. BB v. IMF*, 23 May 2007, Administrative Tribunal of the IMF, Judgment No. 2007-4.

⁹⁵ Reference can also be made to the necessary reasonableness of the Tribunal itself in delivering a judgment. Article 2 (1) (e) The Statute of the United Nations Appeals Tribunal (UNAT) limits its competence to hear appeals filed against a judgment rendered by the Dispute Tribunal when it is asserted that the Dispute Tribunal has “erred on a question of fact, resulting in a manifestly unreasonable decision”. The appeals tribunal’s competence is limited to reviewing reasonableness in its narrowest sense. Article 2 (1) (a-d) of the Statute of the United Nations Appeals Tribunal mentions as alternative grounds of competence: (a) Exceeded its jurisdiction or competence; (b) Failed to exercise jurisdiction vested in it; (c) Erred on a question of law; (d) Committed an error in procedure, such as to affect the decision of the case.

⁹⁶ Amerasinghe, *supra* note 85, p. 304.

⁹⁷ *Ibid.*

5. Reasonableness and Other Standards of Review

Previous sections have indicated that similarities of the reasonableness standard and other standards of review are common. The next section examines in greater depth the relationship of a reasonableness standard with the principles of proportionality, due diligence and fairness. By screening case-law of the international and regional bodies introduced, the role of the reasonableness standard is further examined.

5.1. Reasonableness as Proportionality

The particular intersection of the principle of proportionality and that of reasonableness in national and European settings has been introduced above. The discussion deserves some further elaboration, as it also arose in global case-law. Proportionality provides a structural framework for substantive judicial review which has been applied in various degrees by courts and tribunals to assess administrative decisions. Similar to when applying the reasonableness standard, judges are supposed to fully recognise and respect the administration's discretion in their review. Additionally, proportionality and reasonableness will often yield the same result, as it is unlikely that a decision that is found reasonable will be judged disproportionate or the other way around. Consequently, lack of proportionality is a strong indicator for unreasonableness.⁹⁸ Moreover, Barak argues that reasonableness often cannot be distinguished from the proportionality standard's requirement that a rational connection must exist between the law's purpose and the means chosen to realise this.⁹⁹

The equalising of proportionality and reasonableness standards stems from the civil law tradition¹⁰⁰ and has permeated European and international levels. Nevertheless, proportionality remains a distinct legal concept, with its own specific standard of assessment.¹⁰¹ To distinguish the two standards, della Cananea puts forward both a functional and a structural difference: functional in the sense that proportionality requires a balancing exercise which reasonableness does not demand, and structural,

⁹⁸ M. Fordham, *Judicial Review Handbook* (Hart Publishing, London, 2008) p. 524.

⁹⁹ Barak, *supra* note 24, p. 376.

¹⁰⁰ Bobek, *supra* note 22, p. 321, calls the proportionality standard "one of the best German export articles".

¹⁰¹ For further reading on the historical origins of proportionality, as well as a graphic mapping the migration of the principle, see Barak, *supra* note 24, p. 175.

since reasonableness involves a much less disciplined and methodical test than proportionality.¹⁰² While the latter distinction is commonly accepted, scholars have argued that a consideration of weight and balance is required in a reasonableness review.¹⁰³

The European context, as introduced, provides interesting examples of the interplay between the two standards. The ECJ's long-standing practice to review administrative action using a proportionality standard complicates the successful use of reasonableness as a standard of review. The reasoning in EU case-law is to such an extent permeated with proportionality that, even where applicants invoke a violation of the reasonableness standard, the EU courts are inclined to translate that claim into the proportionality test. An interesting illustration thereof can be found in the 2008 *Moreno* judgment of the EU's Civil Service Tribunal (Tribunal).

Ms. Coto Moreno, an official of the European Commission, sought the annulment of a decision to exclude her from a reserve list to recruit administrators for "Financial Resource Management". In her submissions before the Tribunal, the applicant expressly invoked a breach of the principle of reasonableness, as well as the principle of equality, in support of the plea that the Commission had over-emphasised the specialist knowledge of the test-takers in favour of other comprehensive skills, such as the ability to summarise and express oneself. As a defendant the Commission had replied to these arguments, applying the same reasonableness template. It specifically stated that it "considers it reasonable to attach greater importance to candidate's specialist knowledge in that field".¹⁰⁴ The Tribunal, conversely, examined the case in light of the more familiar EU standards of judicial review. Following an assessment based on the principle of equality, it continued to evaluate the claim exclusively on the basis of the "manifestly disproportionate" standard, which it did not find violated, without even referring to the reasonable character of the decision reviewed.¹⁰⁵

A similar observation holds in a case brought by Italy against the Commission in 2004 seeking partial annulment of a Commission Decision concerning the reclaiming of

¹⁰² See G. della Cananea, "Reasonableness in Administrative Law", in Bongiovanni, Sartor and Valentini, *supra* note 22, p. 304.

¹⁰³ See Barak, *supra* note 24, p. 375; Craig, *supra* note 3, p. 5.

¹⁰⁴ Case F-127/07 *Coto Moreno v. Commission*, 11 September 2008, ECJ Civil Service Tribunal, [2008] ECR 0000, para. 43.

¹⁰⁵ *Ibid.*, para. 49.

aid granted by the Friuli-Venezia Giulia Region in Italy to road haulage companies in the Region.¹⁰⁶ The Italian Government claimed a breach of the principle of reasonableness (*principio di ragionevolezza*) by the Commission in ordering the recovery of State aid. Since it was considered clear from its arguments that Italy also found the decision disproportionate, only the proportionality of the latter was reviewed.¹⁰⁷

As these cases illustrate, the ECJ¹⁰⁸ commonly substitutes a proportionality test for reasonableness by parties in a dispute. These cases only allow the reviewer to take a soft look at matters and the proportionality standard has been considered to be more apt to deal with this. At first sight, the dominance of the proportionality test under EU law leaves little scope for a reasonableness test. However, although direct references to a review based on reasonableness are uncommon in EU case-law, the concept is often present, hidden within the judicial reasoning.¹⁰⁹ A case in point is the Tribunal's 2011 *Angioi* judgment. The applicant sought the annulment of a Commission decision that excluded her, after having obtained insufficient grades in a language and numerical pre-test, from taking a selection test for a recruitment reserve database. The Tribunal held that "any limitation of the principle of proportionality must be justified on objective and reasonable grounds" and that "a reasonable relationship of proportionality between [language] requirements and the objective [has to be] envisaged".¹¹⁰ Interestingly, reasonableness is made part of the proportionality test in two distinct ways: as a benchmark to justify limitations of proportionality and as a specification on how the proportionality test itself should be applied. In the present case, the Tribunal decided that the language requirements were valid, since it considered it "reasonable for EPSO [*European Personnel Selection Office*] to ascertain that those persons could immediately perform their duties, that is to say, inter alia, that they would be able to

¹⁰⁶ Case C-372/97 *Italian Republic v. Commission*, 29 April 2004, ECJ, Judgment of the Court (Sixth Chamber) [2004] ECR I-03679.

¹⁰⁷ *Ibid.*, Opinion of Advocate General Alber delivered on 15 May 2003, p 80. The Judgment of the Court lacks references to the reasonableness argument submitted by Italy.

¹⁰⁸ See also the European Court for Human Rights' use of proportionality standard; M. Klatt and M. Meister, "Proportionality - A benefit to human rights?", 10 *International Journal of Constitutional Law* (2012) pp. 687-708.

¹⁰⁹ A. Adinolfi, "The Principle of Reasonableness in European Union Law", in Bongiovanni, Sartor and Valentini *supra* note 22, p. 383.

¹¹⁰ Case F-7/07 *Angioi v. Commission*, 29 June 2011, ECJ Civil Service Tribunal [2011] ECR 0000, para. 93.

understand at least one of the working languages of the institutions which come to recruit them”.¹¹¹

The integration or translation of reasonableness as a standard of review into a proportionality test may be typical for the EU courts given the dominance of the latter test in their judicial practice, but it is noteworthy that also the reverse may occur. In a recent UNDT case, the tribunal recalled its role in disciplinary cases and thereby clarified that the test to apply in deciding whether a decision was reasonable and fair included a proportionality test:¹¹²

There are therefore three elements to be taken into account when deciding if a decision was reasonable and fair: i) Did the Respondent follow a fair and lawful process to investigate and decide the allegations of serious misconduct? ii) Did the Respondent have sufficiently established facts to reach the conclusion that misconduct had been committed? And, where appropriate, iii) Was the response to the findings proportionate?

At first sight, the first step of this “reasonableness and fairness” test relates to procedural standards of review rather than substantive ones. However, it can also be read as a way to introduce a hard look review of the reasonableness. It allows, in other words, the reviewing body to actively scrutinise the administration’s taking into account of opinions and evidence brought forward. The second can be considered to be a reasonableness test *per se*, and brings to mind the first two elements of reasonableness formulated in the English *Wednesbury* case (*supra*). Interestingly, the UNDT firmly held that the third step included a substantive review based on proportionality standard. This provides for an interesting division of labour between the reasonableness standard (dealing with the way facts have been considered) and proportionality (dealing with the actual balancing exercise).

¹¹¹ *Ibid.*, para. 96.

¹¹² *Applicant v. Secretary-General of the United Nations*, 16 March 2011, UNDT, *UNDT/2011/054*, para. 49.

5.2. Reasonableness as Duty of Care

In the UN context, it has been reiterated in numerous cases that the principle that administrative bodies and administrative officials have to act reasonably fully applies and is subject to judicial review.¹¹³ Moreover, it is a general principle of administrative justice that administrative bodies and officials shall act fairly and reasonably and comply with the requirements imposed on them by law.¹¹⁴ UN bodies are not only bound by their respective mission statements that mandate them to make decisions but also by a general duty of care or due diligence. The standard of reasonableness is meaningfully intertwined with due diligence obligations of the administration. The latter requirement can be defined as the obligation for an administration to act in a manner that is to be expected from a reasonable administration.

The case of whistle-blower James Wasserstrom, the former Head of the Office for the Coordination of Oversight of Publicly Owned Enterprises in the UNMIK Mission in Kosovo, brought before the UNDT illustrates an application of a reasonableness review in its due diligence dimension at the global level. Mr. Wasserstrom had filed a complaint at the UN Ethics Office for having been retaliated against following his reporting of concerns over corporate governance issues and a political takeover of a Board of the Kosovo Electricity Unity, which included a local Minister and his direct superior at UNMIK.¹¹⁵ The applicant stated that acts of alleged retaliation consisted of the closure of his office, ending his assignment with UNMIK, and commencing an unauthorised and unwarranted investigation against his person. The Ethics Office had found a case of *prima facie* retaliation and tasked the UN Office of Internal Oversight Services (OIOS) to further investigate the matter. The latter's investigation report instead concluded that although some of the acts seemed excessive, they could not be classified as retaliation. The Ethics Office subsequently dismissed the complaint, blindly accepting the findings and recommendations of the internal investigation "without raising any questions, or

¹¹³ *Yisma v. Secretary General of the United Nations*, 31 March 2011, UNDT, *UNDT/2011/061*; *Abu Hamda v. Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, 30 March 2010, UNAT, *UNAT/2010/022*; *Sanwidi v. Secretary-General of the United Nations*, 27 October 2010, UNAT, *UNAT/2010/084*. The Dispute Tribunal has also emphasised it is not a decision-maker and that its role is limited to the judicial review of the exercise by the Secretary-General of his broad administrative discretion. Secretary-General of the United Nations, *Administration of Justice at the United Nations*, A/66/275, 8 August 2011, 110 p.

¹¹⁴ *Abu Hamda v. Commissioner General UNRWA*, *supra* note 113, para. 37.

¹¹⁵ *Wasserstrom v. Secretary-General of the United Nations*, 21 June 2012, UNDT, *UNDT/2012/092*.

causing such further enquiries to be made, as would any reasonable decision-making body properly directing itself in accordance with the applicable legal principles”.¹¹⁶ Furthermore, the decision-makers at the Ethics Office had solely read the OIOS report and had disregarded its annexes which comprised fundamental conflicts in evidence, several additional witnesses that confirmed Wasserstrom’s allegations and more particularly a pattern of evidence of retaliation.¹¹⁷

The UNDT found that the central duty of an Ethics Office is “not simply to rubberstamp the Investigation Report and recommendation by OIOS, but to carry out an independent review of the Report”.¹¹⁸ It furthermore considered that “any reasonable reviewer properly directing herself/himself to the questions of fact and law would have seen it as part of their duty to examine the Annexes and/or requested ID/OIOS to make further enquires”.¹¹⁹ Similar to administrative deference accorded in national legal systems, the UNDT held that there were a range of reasonable options the Ethics Office had been entitled to choose from. Yet, it concluded that “any reasonable reviewer” would have examined the factual inconsistencies in the report and its annexes or would have taken at least further investigative steps, and held the Office in violation of this reasonableness standard.

The *Wasserstrom* judgment reflected on the reasonableness standard in its due diligence meaning, but furthermore linked it to the question what facts and evidence are to be considered by an administration. This relates to the core understanding of the reasonableness test, as defined in national case-law: reasonableness serves as a barrier against the irrelevant consideration or the problematic inconsideration of facts by an administrative authority. A decision can only be considered reasonable if the administration took into account all factors it ought to take into account.

The use of “reasonableness” in a due diligence sense can also be found sporadically in EU case-law. A good example is the Court of First Instance’s 2001 *Comafrika* judgment,¹²⁰ in which importers of bananas sought compensation for challenged Commission Regulations that fixed reduction coefficients which were

¹¹⁶ *Ibid.*, para. 4.

¹¹⁷ *Ibid.*, para. 41.

¹¹⁸ *Ibid.*, para. 30.

¹¹⁹ *Ibid.*, para. 32.

¹²⁰ Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrika SpA and others v. Commission*, 12 July 2001, ECJ Court of First Instance [2001] *ECR II-1975*.

materially greater than the quantities of bananas which had actually been imported into the Community. Here too, the applicants invoked the principle of reasonableness, arguing that “the margin of error in the calculation of the total Community reference quantity is unreasonable and exceeds the limits of any acceptable administrative error”.¹²¹ The Court of First Instance did not base its reasoning on such a standard, however. It held that, to decide on the compensation for a loss which results from the Commission’s adoption of measures of an administrative character in the course of exercising a limited discretion, it had to examine whether the Commission had “in its adoption of the contested regulations, committed a mistake which would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence”.¹²² Reviewing the regulations, the Court ruled that “the finding of an error or irregularity on the part of an institution is not sufficient in itself to attract the non-contractual liability of the Community unless that error or irregularity is characterised by a lack of diligence or care”.¹²³

International organisations also have to comply with their general due diligence responsibilities towards staff. In a case brought before the ILOAT¹²⁴ it was found that the duty of care and supervision of the European Patent Organisation (EPO) toward the staff member concerned, who had relied on the “principle of reasonableness” to challenge the decision to dismiss him, did not include the entitlement to a transfer to a different department in the organisation before being dismissed in a probation period. The wide discretion of the administration when taking decisions on its internal functioning, which is also to be observed in national legal systems, makes it nearly impossible to successfully challenge such decisions relying on the reasonableness principle. Conversely, in the European Court of Justice 2001 *Connolly* judgment, the reasonableness standard was invoked *against* the applicant, a former Commission official, who had been removed from his post after having published a book in which he critically assessed EU policy without requesting prior permission. Here the Court followed the Commission’s argument that, because he had frequently been refused

¹²¹ *Ibid.*, para. 118.

¹²² *Ibid.*, para. 138.

¹²³ *Ibid.*, para. 144.

¹²⁴ *PG v. European Patent Organisation*, 19 July 2007, ILOAT, 103rd Session, *Judgment No. 2646*, paras. 11-14.

permission to publish, “a reasonably diligent official of his seniority and with his responsibilities could not have been unaware of the nature and gravity of such breaches of his obligations”.¹²⁵

5.3. Reasonableness as Fairness

At the global level in particular, in the practice of UNDT, reasonableness also appears to encompass a review of the fairness of administrative action.¹²⁶ This implies that a reasonable administration should ensure fairness and equity. Fairness as a standard for review is often used in its procedural due process, meaning administrations have to comply with certain assurances such as the right to a fair hearing.¹²⁷ This obviously relates to the substantive part of a fairness standard. As Lord Denning once famously stated: “I go further. Not only must he be given a fair hearing, but the decision itself must be fair and reasonable”.¹²⁸

In the UN Appeals Tribunal’s (UNAT) 2010 *Sanwidi* judgment, review for reasonableness and fairness was considered part of the same judicial test: “In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate”.¹²⁹ Similarly, in ILOAT case-law, administrative action has been reviewed on the basis of fairness and reasonableness simultaneously, without the Tribunal specifying differences in criteria for both concepts.¹³⁰

Fairness, or “natural justice” in common law countries, in essence demands that an administrative actor should never act so unfairly that it amounts to an abuse of its power.¹³¹ A decision has to be made with a fair mind. While the reasonableness standard will scrutinise decisions according to their rationality, the fairness standard focuses on the inherent legitimacy and justifiability of the administrative act. Nonetheless, both

¹²⁵ Case C-274/99 *Connolly v. Commission*, 6 March 2001 [2001] ECR I-1646, paras. 19 and 58-64, referring to the Judgment in Joined cases T-34/96 and T-163/96 *Connolly v. Commission*, 19 May 1999, Court of First Instance [1999] ECR I-0087; II-0463.

¹²⁶ See *Abu Hamda v. Commissioner General UNRWA*, *supra* note 113.

¹²⁷ Della Cananea, *supra* note 102, p. 304.

¹²⁸ *Chief Constable of The North Wales Police v. Evans*, 22 July 1982, House of Lords [1982] 1 W.L.R. 1155, at 1160 and 1174.

¹²⁹ *Sanwidi*, *supra* note 113, para. 42; *Applicant v. UNSG*, *supra* note 113.

¹³⁰ *E.K. L. v. European Patent Organisation*, 2 February 2005, ILOAT, 98th Session, *Judgment No. 2411*, para. 9.

¹³¹ Fordham, *supra* note 98, p. 524.

standards do poach on each other's territory depending on the particular context of a case.

An interesting illustration is offered by the judicial review of disciplinary measures taken by international organisations against their staff. In the UN context, the UNDT has limited powers with respect to its review of the severity of an imposed sanction. In such review, elements of fairness (and proportionality) do find their way. Indeed, the reviewing judicial body will not only judge a disciplinary measure on its rationality, but also on its fairness. Yet, because of the rather low intensity of the test applied, judicial annulment will only be decided when a measure is so outrageously unreasonable or so manifestly unfair that no reasonable administration would have ever considered taking it.

This twofold approach, a review on the basis of both reasonableness and fairness, was taken in the UNDT's 2011 *Yisma* judgment, which decided that the contested disciplinary measure was within the reasonable range of options available to the decision-maker:

[W]hilst the determination of the appropriate sanction is largely within the discretion of the decision-maker, such discretion must be exercised fairly, properly and proportionately. When considering applications challenging the proportionality of the disciplinary measure imposed, the Tribunal will give due deference to the Secretary General unless the decision is manifestly unreasonable, unnecessarily harsh, obviously absurd or flagrantly arbitrary.¹³²

The facts of this case are worth recounting. The applicant, Ms. Yisma, a staff member of the Multi-Donor Trust Fund Office (MDTF) of the United Nations Development Programme (UNDP), contested the imposition of the disciplinary measure of dismissal. The applicant had conceded culpability for having provided a real estate agent with false information on her salary as well as for falsifying a letter in her rental application form in order to get a subsidised apartment in New York City. The UNDT found that the incident had not affected the applicant's job and the mistake was not made out of greed but rather out of desperation. Ms. Yisma had been struck by a personal financial crisis due to the medical expenses of her child and had struggled finding affordable and

¹³² Yisma, *supra* note 113.

conveniently located housing nearby the hospital where the child received treatment. At the time of the UNDT proceedings the extent of her entire personal savings was estimated at USD 2,400. Moreover, losing her job with the MDTF would force her to move back to her home country. Ms. Yisma had withdrawn her application for housing as soon as the disciplinary investigation had started and never received any benefit, nor had the UN incurred any loss based on her actions. The applicant argued that the facts, especially her particular personal situation, had not been fully and fairly considered by the disciplining authority and therefore requested “the Tribunal to find that a reasonable decision-maker, having taken into account all the mitigating factors, would have chosen a less severe disciplinary measure”.¹³³ This argument finds ground because of a reasonable administration having to be not only fair, but also having to fairly consider all facts of a case. Reasonableness, as stated, entails the idea that a decision can only be considered reasonable if the administration took into account all factors it ought to take into account (cf. the *Wasserstrom* judgment, *supra*). A reasonable decision-maker will furthermore take into account facts and evidence in a fair way. In this sense, a certain degree of fairness is one of the requirements for a reasonable administration to take a reasonable disciplinary measure.

The UNDT considered both the elements of fairness and of reasonableness in reviewing the disciplinary measure, which it upheld. Although the Tribunal was sympathetic to the applicant’s personal situation, it did find that the misconduct caused reputational harm to the MDTF, and that mitigating factors had been taken into account in a way that was not manifestly unreasonable, unnecessarily harsh or unfair. Furthermore, it ruled that “[i]f dishonesty is of such a degree as to be considered serious or gross and such that it renders a continued relationship impossible, the cessation of the employment relationship becomes an appropriate and fair sanction” and that “the Applicant’s actions amounted to serious misconduct and it was reasonable for the Respondent to conclude that the relationship of trust and confidence between the parties was no longer present”.¹³⁴ While a hard look reasonable test may not have changed the outcome of the judgment, it may have increased the stress on the reasonable outcome of the rather harsh decision taken by the administration.

¹³³ *Ibid.*, para. 22.

¹³⁴ *Ibid.*, para. 41.

6. The Principle of Reasonableness: Toward a Global Standard of Review?

One of the key elements to the elimination of unreasonable decisions in the transnational and global administrative space is the improvement and refinement of the practice of judicial and quasi-judicial review mechanisms. This is truly a challenge: transnational or global administrations were not founded on the basis of a common legal tradition, nor do they necessarily share a set of predetermined constitutional principles. Nevertheless, a further elaboration of standards of review is crucial, not just for a proper administration of justice for individuals but more broadly for the legitimacy of transnational and international administrative action in general. For this reason, this section attempts to define a reasonableness standard for judicial review at the global level. Such a definition can take different forms. We see two solutions: an abstract and a concrete reasonableness standard.

6.1. An Abstract Standard of Reasonableness

First, at an abstract level, reasonableness can play a role in balancing two opposing perspectives on administrative control by the judiciary, i.e. the need for administrative discretion and the need to control that administrative discretion. There are two clear alternatives to a reasonableness test: one is to have no judicial review and to leave matters in the hands of political processes, the other is to have a merits review. Reasonableness would play an intermediate position. This abstract notion is valuable. Reasonableness can be presented as a gap-filler standard, having a bridging function between other standards of review. As our analysis has shown this is currently exactly how reasonableness has been used in international and transnational practice. The lenient standard covers virtually the whole spectrum of judicial review and other standards of review serve as a specification rather than an alternative for reasonableness.

However, an abstract reasonableness standard does not offer much guidance. For one thing, it would still include all different meanings given to reasonableness in national and international tribunals. As a result, it becomes a catch-all standard. At the international level, an abstract reasonableness standard would most likely give rise to (quasi-) judicial empowerment in global and transnational bodies. The more

reasonableness is pushed as a broad standard, the more causes of action and rights of intervention are given to judicial bodies. At this point, it remains unclear how much judicial empowerment global administrative law is comfortable with. In addition, there are no guarantees that giving an empty check to judges in the usage of reasonableness will benefit individuals seeking justice. Judges having to take into account a plurality of views and interests are entitled to have a set of well-defined, applicable standards of review.

6.2. A Concrete Standard of Reasonableness

Throughout the paper it has become apparent that reasonableness is not the preferred standard when significant discretion is accorded to an administration. The manifest unreasonableness standard, where the court shows the most deference and only overturns decisions that are obviously unreasonable, clashes with rationality and proportionality standards. In its second meaning, reasonableness faces even tougher competition of the proportionality standard. The latter is the preferred standard in a considerable number of national and supranational courts.¹³⁵ This holds true even in those legal orders grounded in the reasonableness tradition, the UK being a prime example. The success of the proportionality standard is undeniable, and probably for good reasons.¹³⁶

One may wonder whether it is even possible to introduce benchmarks to hold the outcome of an administrative process (un)reasonable. If a standard of reasonableness was to be (re-)introduced in global administrative law it should relate to another set of defects in the outcome than those already targeted by the proportionality, fairness and duty of care standards. Rather, reasonableness, in its concrete meaning, should be about the processes (including the rule- or decision-making), not the ends of the process.

From the outset of the paper, it has been argued that, as a minimum, global administrative law-making has to result from a process in which participants offer reasons that others can acknowledge as being reasonable, even if they may still disagree

¹³⁵ In addition to the judicial systems discussed in this paper, the European Court for Human Rights applies a proportionality standard. In investment cases, the “fair and equitable” standard has increasingly been translated by arbitrators into a proportionality standard as well.

¹³⁶ As we have outlined above, the structure of the proportionality standard is its biggest asset for rationalising judicial review. The preference for proportionality is the strongest in cases where a fundamental right is at stake.

with the decision taken.¹³⁷ A demand for reasonableness at the global level is particularly relevant to contemporary institutions operating in an environment of disagreement and uncertainty.¹³⁸ Conceptual support for this has been sought in the theories of Rawls, but also in the writings of other authors analysing contemporary global administrative law.

The aim of reasonableness is to serve as a conductor of consensus. It will do so in two different ways. *First*, reasonableness has a function in actively ensuring that different actors in the multipolar process have been given the opportunity to have their voices heard (dialogical reasonableness) and reflected in the administration's deliberations. In this sense, it is the substantive counterpart to the procedural requirement of the right to be heard. The thought process that precedes the administrative rule or decision-making may or may not include the views of a multitude of actors, whether formally participating or not, and may reflect their interests and values. A distinction has to be made in the application of the reasonableness standard. In cases of civil servants challenging an individual decision, the taking into account of interests and values of the individual has to be applied meticulously. The discussed *Yisma* case offers guidance on how reasonableness is currently applied in this sense. A distinction has to be made with regard to political processes, where participation rules apply. Within reasonable terms, representatives of citizens, national judges and civil society have to be allowed to present their views on decisions or general norms that affect them. The WTO DSB's definition of reasonableness as part of the bias and hearing rules may serve as an example. Here too, reasonableness adds a dimension to the right to be heard. The reasonable organisation keeps record of the views expressed and has to be able to indicate how it has handled and weighed these factors against each other. What is required at the global level is a further organisation of dialogical reasonableness. More specifically, this includes the elaboration of how conflicting claims, interests, beliefs, ideals, backgrounds, traditions can be balanced against each other in optimal terms. This balancing requires a conceptual framework of its own, and

¹³⁷ Cohen and Sabel, *supra* note 5, p. 780.

¹³⁸ A. Buchanan and R.O. Keohane, "The Legitimacy of Global Governance Institutions", 20 *Ethics & International Affairs* (2006) pp. 405-437.

precedes reasonableness which only comes into play as a post-factum standard of judicial review.¹³⁹

Second, pluralism in global administrative law can also be encouraged by other elements of the reasonableness standard. The fact-finding by the administration, including the respect for safeguards of individuals in this process, is crucial. Here, a reasonableness standard can be defined similar to how it has been applied in the *Wasserstrom* case. Not only does a reasonable administration gather facts and evidence, it also must consider these in a careful way. Judicial review would be able to check methodologies used by the organisation in its determination of facts.

To conclude, if accepted, the reasonableness standard assists the transformation of global administrative law from being primarily state-centred, to being State and citizen-oriented. Reasonableness, as we define it, is not a panacea for everything that may go wrong in administrative decision-making. Other standards may be preferred over a reasonableness standard to tackle specific deficits. This does not make reasonableness redundant. Rather, it draws on the plurality of the other standards. Consequently, reasonableness serves as a meta-standard assuring that the outcome of a global administrative process can reasonably be accepted by the *administrés* and the *autorités publiques*. It does so by evaluating the process that has preceded the outcome and more concretely, the considerations made throughout this process.¹⁴⁰ In this light, reasonableness can be defined as the requirement of global and transnational governing bodies to apply or create law and decisions in a reasonable way following a proper judgment of the information at hand and a weighing of the different interests involved.

7. Conclusion

Notwithstanding several attempts to develop a formula which provides a reasonableness test for all cases,¹⁴¹ currently, no such single formula or test is adhered to. Through the analysis of national case-law, we established a threefold typology of reasonableness including manifest unreasonableness, soft look reasonableness and hard look

¹³⁹ Päivänsalo, *supra* note 8, p. 168.

¹⁴⁰ See in similar terms Barak, *supra* note 24, p. 374.

¹⁴¹ See e.g. the reasonableness test applied by the UNDT in *Applicant v. UNSG*, *supra* note 112 and Adinolfi, *supra* note 109.

reasonableness. The study of European and international legal practice revealed the existence of the same three distinct types of reasonableness. Furthermore, the picture that emerges from our review of international and regional cases shows a great deal of flexibility and pragmatism, whereby courts and tribunals develop close linkages between reasonableness and other standards of review, in particular proportionality, due diligence and fairness. Reasonableness clearly is a contextual standard. However, as illustrated by the cases analysed in this paper, the open-endedness of reasonableness specifically may make it fit for use as a standard of review in different layers of governance, in the context of various transnational and global administrations, while also producing a just result in individual cases. Furthermore, a multi-dimensional understanding of the reasonableness principle may make it apt to deal with the ever more important and complex phenomenon of acts and decisions adopted at transnational and global levels.

Nevertheless, the principle of reasonableness has an even greater potential to contribute to the enhancement and further development of global administrative law. When the standard is structured to carefully examine an administration's thought process, it provides (quasi-) judicial bodies the opportunity to review different qualities of global administrative law-making. The discretionary assessment of facts, the finding of evidence and the hearing of arguments by the affected ones all serve as benchmarks for the proper functioning of administering bodies. The reasonableness principle evaluates a broader set of merits as a meta-standard. While each of those may be reviewed by looking at the outcome of administrative action using different substantive and occasionally even procedural standards, the evaluative aspect of reasonableness is crucial. Moreover, improving the reasonableness of the administrative process should also improve the reasonableness of the outcomes. Defined as such, the standard of reasonableness is a promising concept for global administrative law.

