

## The Facts Aside: The Limitation of WTO Appeals to Issues of Law<sup>1</sup>

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### I. INTRODUCTION

This article explores the distinction between law and fact in the context of dispute settlement in the World Trade Organization (WTO) and, in particular, the limitation of appeals to issues of law. This distinction is becoming increasingly important, as WTO appellants more frequently claim that the Panel erred in fulfilling its function<sup>2</sup> (e.g., by failing to make an objective assessment of the facts of the case), and appellees more frequently resort to procedural objections<sup>3</sup> (e.g., on the basis that the appellant is improperly asking the Appellate Body to review the Panel's findings of fact). Although a substantial amount of research has been conducted on the standard of review applicable by WTO Panels or the Appellate Body in reviewing national measures or determinations of national authorities (such as anti-dumping determinations),<sup>4</sup> much less has been said about the distinction between law and fact in the context of appellate review of Panel findings.<sup>5</sup> Yet understanding this fundamental restriction on the scope of WTO appeals is essential to maximizing the chances of success in an appeal,

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<sup>1</sup> The views expressed in this article are personal to the authors and do not necessarily reflect those of the Appellate Body. This article was finalized in September 2005 and is based on material available to the public at that time.

<sup>2</sup> See, e.g., Appellate Body Report, *US—Countervailing Duty Investigation on DRAMS*, para. 31; Appellate Body Report, *Dominican Republic—Import and Sale of Cigarettes*, paras 18, 34; Appellate Body Report, *US—Upland Cotton*, para. 275; Appellate Body Report, *Canada—Wheat Exports and Grain Imports*, para. 36; Appellate Body Report, *Japan—Apples*, para. 46; Appellate Body Report, *US—Steel Safeguards*, para. 21; Appellate Body Report, *EC—Tube or Pipe Fittings*, para. 22.

<sup>3</sup> See, e.g., Appellate Body Report, *EC—Export Subsidies on Sugar*, para. 55; Appellate Body Report, *US—Upland Cotton*, para. 397; Appellate Body Report, *Canada—Wheat Exports and Grain Imports*, para. 50; Appellate Body Report, *US—Softwood Lumber V*, para. 160; Appellate Body Report, *US—Corrosion-Resistant Steel Sunset Review*, para. 71; Appellate Body Report, *US—Offset Act (Byrd Amendment)*, para. 215.

<sup>4</sup> See, e.g., Catherine Button, “The WTO’s ‘Objective Assessment’ Standard of Review and Panel Review of Health Measures”, in Andrew Mitchell (ed.), *Challenges and Prospects for the WTO* (London: Cameron May, 2005), p. 85; Claus-Dieter Ehlermann and Nicolas Lockhart, *Standard of Review in WTO Law*, 7 *Journal of International Economic Law* 3 (2004), p. 491; Holger Spamann, *Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis*, 38 *Journal of World Trade* 3 (June 2004), p. 509; Matthias Oesch, *Standards of Review in WTO Dispute Resolution*, 6 *Journal of International Economic Law* 3 (2003), p. 625; Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (Oxford: Oxford University Press, 2003); James Durling, *Deference, But Only When Due: WTO Review of Anti-Dumping Measures*, 6 *Journal of International Economic Law* 1 (2003), p. 125.

<sup>5</sup> But see, Marco Bronckers and Natalie McNelis, “Fact and Law in Pleadings Before the WTO Appellate Body”, in Friedl Weiss (ed.), *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals* (London: Cameron May, 2000), p. 321.

evaluating proposals in the current negotiations for a remand procedure,<sup>6</sup> and properly conceptualizing the roles of Panels and the Appellate Body.

In section II, we examine the textual basis in the WTO agreements and the rationale for the distinction between factual matters (which are essentially left to Panels) and legal matters (which can be decided by both Panels and the Appellate Body). We then consider the various ways in which the Appellate Body deals with factual findings by Panels. This includes an analysis of the extent to which the Appellate Body is prepared to intervene in Panels' findings, as well as an explanation of the basis on which the Appellate Body may complete a Panel's legal analysis in certain circumstances. We then turn to the difficult question of how to distinguish fact from law, drawing guidance and examples from the 70 Appellate Body reports circulated to date.

## II. THE DIVISION OF LABOUR FORESEEN IN THE DSU

### A. GENERAL RULES AND RATIONALE

The procedures that apply to WTO dispute settlement are set out in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which is one of the agreements negotiated during the Uruguay Round. The DSU introduced important changes to the dispute settlement procedures that had developed under the General Agreement on Tariffs and Trade 1947 (GATT 1947), including the possibility for parties to appeal Panel reports.<sup>7</sup> Parties to WTO disputes may now seek review of Panel reports by the Appellate Body, which "may uphold, modify or reverse the legal findings and conclusions of the Panel".<sup>8</sup> In introducing the appellate stage to WTO dispute settlement, the drafters of the DSU imposed a division of labour between Panels and the Appellate Body, based on a distinction between fact and law.

Article 17.6 of the DSU provides that an "appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel". The Appellate Body has interpreted this provision to mean that, "[f]indings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body".<sup>9</sup> Thus, generally, while Panels may engage

<sup>6</sup> See, e.g., Contribution of the European Communities and its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding: Communication from the European Communities (TN/DS/W/38, 23 January 2003), para. 21; Jordan's Further Contribution Towards the Improvement and Clarification of the Dispute Settlement Understanding (TN/DS/W/56, 19 May 2003), p. 1; *Dispute Settlement Review Focuses on "Package Deal"*, 8 Bridges Weekly Trade News Digest 41 (2004), p. 8. See also David Palmeter, *The WTO Appellate Body Needs Remand Authority*, 32 *Journal of World Trade* (1998), p. 41; Fernando Piérola, "The Question of Remand Authority for the Appellate Body", in Andrew Mitchell (ed.), *Challenges and Prospects for the WTO* (London: Cameron May, 2005), p. 193.

<sup>7</sup> "The introduction of appellate review was a *quid pro quo* for the quasi-automatic adoption of Panel reports": Peter Van den Bossche, "The making of the 'World Trade Court': The origins and development of the Appellate Body of the World Trade Organization", in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge: WTO/Cambridge University Press, 2005), p. 64.

<sup>8</sup> DSU, Article 17.13.

<sup>9</sup> Appellate Body Report, *EC—Hormones*, para. 132.

in fact finding as well as legal analysis, issues of fact cannot be litigated at the appellate stage, and the Appellate Body may not review Panels' findings of fact. Indeed, the Appellate Body has read Article 17.6 of the DSU as indicating that it has "no authority to consider new facts on appeal",<sup>10</sup> even when those facts are a matter of public record, particularly if participants have had no opportunity to comment on these new facts. Accordingly, a party may be precluded from making a new argument on appeal if this would require the Appellate Body to solicit, receive and review facts that were not before the Panel.<sup>11</sup>

The DSU does not state expressly the reasons for limiting appeals to legal issues. However, certain practical aspects of WTO dispute settlement may explain why the drafters imposed such a limitation. To begin with, the DSU envisages that Panel proceedings will be completed in a maximum of nine months,<sup>12</sup> whereas appellate proceedings are to take no more than 90 days.<sup>13</sup> Panels therefore have significantly more time than the Appellate Body to delve into large volumes of factual material and evidence. Factual evidence is also subject to additional scrutiny before Panels, given that they have two substantive meetings with the parties<sup>14</sup> (whereas the Appellate Body typically conducts only one oral hearing in an appeal)<sup>15</sup> and issue an interim report to the parties for their comments<sup>16</sup> (whereas Appellate Body reports are provided to parties and circulated to all WTO Members on the same day). In addition, the DSU grants Panels an express "right to seek information and technical advice from any individual or body which it deems appropriate", including "an expert advisory report in writing from an expert review group" in accordance with Appendix 4 of the DSU.<sup>17</sup> As such, Panels may be better placed to collect and evaluate factual matters.

The drafters of the DSU may also have taken into account the fact that appellate proceedings in several other legal systems are limited to issues of law. For example, parties may appeal to the Court of Justice of the European Communities (ECJ) from most decisions by the Court of First Instance "on points of law only".<sup>18</sup> In the United States, a person appealing from a decision of a trial court to a federal court of appeals:

<sup>10</sup> Appellate Body Report, *US—Offset Act (Byrd Amendment)*, para. 222. See also Appellate Body Report, *US—Softwood Lumber V*, para. 9.

<sup>11</sup> Appellate Body Report, *Canada—Aircraft*, para. 211; Appellate Body Report, *US—FSC*, paras 102–103.

<sup>12</sup> DSU, Article 12.9. In practice, Panel proceedings have often taken longer than nine months.

<sup>13</sup> DSU, Article 17.5. The vast majority of WTO appeals have been completed within this time period. However, in six instances (including two recent appeals), the proceedings took more than 90 days: Appellate Body Report, *EC—Hormones*; Appellate Body Report, *US—Lead and Bismuth II*, para. 8; Appellate Body Report, *EC—Asbestos*, para. 8; Appellate Body Report, *Thailand—H-Beams*, para. 7; Appellate Body Report, *US—Upland Cotton*, para. 8; Appellate Body Report, *EC—Export Subsidies on Sugar*, para. 7.

<sup>14</sup> DSU, Appendix 3, para. 12.

<sup>15</sup> *Working Procedures for Appellate Review*, WT/AB/WP/5 (4 January 2005), Rule 27. An exception arose when a member of the Appellate Body Division hearing an appeal passed away after the oral hearing. In that case, the new Appellate Body Division conducted a second oral hearing: Appellate Body Report, *US—Lead and Bismuth II*, para. 8.

<sup>16</sup> DSU, Article 15.

<sup>17</sup> DSU, Article 13.

<sup>18</sup> Treaty Establishing the European Community, OJ C340, 173 (signed 25 March 1957), Article 313. See also Protocol on the Statute of the Court of Justice (annexed to the Treaty on European Union, to the Treaty Establishing the European Community and to the Treaty Establishing the European Atomic Energy Community), OJ C80, 53 (signed 26 February 2001), Article 58.

“... must show that the trial court ... made a legal error that affected the decision in the case. The court of appeals makes its decision based on the record of the case established by the trial court or agency. It does not receive additional evidence or hear witnesses. The court of appeals also may review the factual findings of the trial court or agency, but typically may only overturn a decision on factual grounds if the findings were ‘clearly erroneous.’”<sup>19</sup>

In the WTO context, this leads to the question of how the Appellate Body deals with factual findings of Panels, and the circumstances in which it might overturn them.

## B. HOW THE APPELLATE BODY DEALS WITH PANELS’ FACTUAL FINDINGS

### 1. *Appellate Body Reliance on and Review of Panels’ Factual Findings*

The Appellate Body frequently refers to and relies on the Panel’s factual findings in deciding the issues appealed. It may also closely scrutinize a Panel’s factual findings in determining whether the Panel correctly applied WTO law to the facts of the case, as discussed further below.<sup>20</sup> In reviewing a Panel’s legal interpretations, findings or conclusions, the Appellate Body typically conducts its own legal analysis without granting any deference to the Panel’s views.<sup>21</sup> In contrast, the Appellate Body “will not interfere lightly with a Panel’s assessment of the facts”,<sup>22</sup> in view of the limitation in Article 17.6 of the DSU. This means that, in general, the Appellate Body will refuse to review Panels’ factual findings and may reject or decline to rule on arguments requiring it to do so.<sup>23</sup> But in some circumstances a Panel’s factual error rises to the level of a legal error reviewable on appeal, as discussed further below.<sup>24</sup> Bronckers and McNelis take the view that “the Appellate Body should not hesitate to examine, and possibly reverse, a factual finding where the error of fact was manifest and critical to the resolution of the dispute”.<sup>25</sup> However, the margin of discretion granted to Panels in fact finding appears to depend on the particular circumstances, the relevant ground for appeal, and the substantive WTO provisions at issue.<sup>26</sup>

<sup>19</sup> Administrative Office of the US Courts, *The Federal Court System in the United States: An Introduction for Judges and Judicial Administrators in Other Countries* (2nd edn: 2001), p. 34. See also Federal Rules of Civil Procedure (2003), Rule 52(a).

<sup>20</sup> See section III.B.2.

<sup>21</sup> See Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (London: Cameron May, 2002), p. 701 (referring to Appellate Body Report, *Canada—Dairy*, para. 138). A different approach could apply in disputes under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), because Article 17.6(ii) of that agreement states that, “[w]here the Panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the Panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations”.

<sup>22</sup> Appellate Body Report, *Softwood Lumber V*, para. 174. See also, e.g., Appellate Body Report, *US—Upland Cotton*, para. 399; Appellate Body Report, *US—Wheat Gluten*, para. 151.

<sup>23</sup> See, e.g., Appellate Body Report, *EC—Bananas III*, para. 239; Appellate Body Report, *Australia—Salmon*, para. 276.

<sup>24</sup> See section III.B.3.

<sup>25</sup> Bronckers and McNelis, as note 4 above, p. 326. See also Jacques Bourgeois, *Some Reflections on the WTO Dispute Settlement System from a Practitioner’s Perspective*, 4 *Journal of International Economic Law* 1 (2001), pp. 145, 153; Maurits Lugard, “*Scope of Appellate Review*”: *Objective Assessment of the Facts and Issues of Law*, 1 *Journal of International Economic Law* 2 (1998), pp. 323, 327.

<sup>26</sup> See Ehlermann and Lockhart, as note 3 above, pp. 495–496, 503.

## 2. Appellate Body Completion of Panels' Analysis

Where the Appellate Body modifies or reverses a legal interpretation or other finding by the Panel, it may need to decide whether to complete the Panel's analysis in order to rule on the consistency of the challenged measure. This will depend on the Appellate Body's assessment of the type and amount of factual material available. In *Australia—Salmon*, for instance, the Appellate Body found that the Panel wrongly identified the Australian measure at issue as the requirement that imports of certain types of salmon be heat-treated, rather than “the import prohibition on fresh, chilled or frozen salmon”.<sup>27</sup> As a result, the Appellate Body reversed the Panel's conclusion that the measure at issue was not based on a risk assessment and that Australia had therefore acted inconsistently with Articles 2.2 and 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).<sup>28</sup> The Appellate Body itself therefore faced the question of whether the measure at issue (properly defined) was based on a risk assessment as required by those provisions. It decided that it should complete the Panel's analysis and answer this question “to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record”.<sup>29</sup> The Appellate Body was able to complete the analysis on this basis, and it found that the measure at issue was in fact inconsistent with Articles 2.2 and 5.1 of the SPS Agreement.<sup>30</sup>

Subsequent Appellate Body reports confirm that the Appellate Body will complete the analysis only if it considers that there are sufficient factual findings by the Panel or uncontested facts in the Panel record to do so.<sup>31</sup> This ensures that the Appellate Body's completion of the analysis does not turn the Appellate Body into a fact-finding organ, contrary to Article 17.6.<sup>32</sup> In some cases, the task of completing the analysis is made easier because the Panel has deliberately made “alternative factual findings that serve to assist the Appellate Body in completing the legal analysis should it disagree with the legal interpretations developed by the Panel”.<sup>33</sup> In the absence of such alternative findings, the difficulty lies in determining what level of factual material of this kind is “sufficient”. The Appellate Body has found the level sufficient in some cases, leading it to rely on and ask further questions about Panel findings and undisputed facts in the Panel record regarding such matters as the effect of “capacity utilization” on the domestic industry<sup>34</sup> and the protection of trade names under US law.<sup>35</sup> However, the

<sup>27</sup> Appellate Body Report, *Australia—Salmon*, paras 103–105, 115.

<sup>28</sup> *Ibid.*, para. 115.

<sup>29</sup> *Ibid.*, para. 118.

<sup>30</sup> *Ibid.*, paras 135–138.

<sup>31</sup> The Appellate Body may decline to complete the analysis for other reasons, even where it has a sufficient factual basis. See, e.g., *EC—Export Subsidies on Sugar*, paras 337–341.

<sup>32</sup> However, some commentators argue that the Appellate Body has made factual findings in completing Panels' analyses. See, e.g., Waincymer, as note 20 above, p. 745 (referring to Appellate Body Report, *EC—Hormones*, paras 223–225, and Appellate Body Report, *Canada—Periodicals*, p. 469).

<sup>33</sup> Appellate Body Report, *US—Softwood Lumber IV*, para. 118. In that case, the Panel had not made alternative factual findings. See also Appellate Body Report, *US—Gambling*, para. 344.

<sup>34</sup> Appellate Body Report, *US—Wheat Gluten*, paras 80–91.

<sup>35</sup> Appellate Body Report, *US—Section 211 Appropriations Act*, paras 345–352.

Appellate Body has found the material insufficient in certain other cases, such as where the parties disagreed on the time frame for analysis of the relevant data,<sup>36</sup> and where the Panel made only limited factual findings about the specific methodology used by a domestic authority in an anti-dumping proceeding.<sup>37</sup>

The “aim of the dispute settlement mechanism is to secure a positive solution to a dispute”.<sup>38</sup> Where the Appellate Body is unable to complete the Panel’s analysis (because a sufficient factual basis is lacking or otherwise),<sup>39</sup> the dispute settlement system may be criticized for failing to achieve such a solution. For example, in *Korea—Dairy*, the Appellate Body was “unable to come to a conclusion on whether or not Korea violated its obligations under Article XIX:1(a) of the GATT 1994”<sup>40</sup> and “on whether or not Korea’s safeguard measure is consistent with the second sentence of Article 5.1 of the Agreement on Safeguards”.<sup>41</sup> Part of the dispute therefore remained unresolved. The European Communities (the complainant) may still have been concerned that the challenged measure was inconsistent with these two provisions, and Korea itself may also have had concerns about its consistency, in the light of the dispute, but neither party had an official answer. Other Members with similar measures or concerns would also not be able to draw inferences from the outcome of this case with regard to their own situations. This might be said to undermine the general goal in WTO dispute settlement of “providing security and predictability to the multilateral trading system”.<sup>42</sup> One way of addressing it would be to enable matters to be remanded from the appellate stage back to the Panel stage for new findings of consistency made in accordance with the Appellate Body reasoning, a possibility that is under discussion in the current negotiations, as mentioned earlier.<sup>43</sup>

### III. DISTINGUISHING LAW FROM FACT

#### A. GENERAL GUIDELINES

Neither the DSU nor the *Working Procedures for Appellate Review*<sup>44</sup> defines issues of law or fact. The Appellate Body has approached this question on a case-by-case basis, refraining from adopting a strict demarcation between law and fact. However, the Appellate Body decision in *EC—Hormones* provides some general guidance. In that case, the Appellate Body explained that the “consistency or inconsistency of a given fact or set

<sup>36</sup> Appellate Body Report, *US—Upland Cotton*, para. 693.

<sup>37</sup> Appellate Body Report, *US—Corrosion-Resistant Steel Sunset Review*, paras 137–138.

<sup>38</sup> DSU, Article 3.7.

<sup>39</sup> See note 30, above.

<sup>40</sup> Appellate Body Report, *Korea—Dairy*, paras 92, 151(b).

<sup>41</sup> *Ibid.*, paras 103, 151(e).

<sup>42</sup> DSU, Article 3.2.

<sup>43</sup> See note 5, above. Some commentators have argued that the Appellate Body has an implicit authority to remand a matter to the original Panel (see, e.g., Bourgeois, as note 24 above, p. 152), but this is not the majority view.

<sup>44</sup> *Working Procedures for Appellate Review*, WT/AB/WP/5 (4 January 2005).

of facts with the requirements of a given treaty provision is . . . a legal characterization issue. It is a legal question”.<sup>45</sup> In contrast, the “determination of whether or not a certain event did occur in time and space is typically a question of fact”.<sup>46</sup> Moreover, the Appellate Body explained that the “[d]etermination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts”.<sup>47</sup> According to the Appellate Body, the “mere assertion by a Panel that its conclusion is a ‘factual matter’ does not make it so”.<sup>48</sup>

These guiding principles are not always easy to apply in determining whether a particular issue is legal (and therefore subject to appellate review) or factual (and therefore in principle not reviewable on appeal). This reflects the inherent difficulty in any legal context of drawing clear lines between fact and law, particularly in the abstract.<sup>49</sup> In order to obtain a better understanding of this distinction in the context of WTO appeals, it is necessary to look to previous appeals for examples. In the following sections, we survey some of the issues that the Appellate Body has expressly or implicitly treated as legal, before describing the types of issues that the Appellate Body has treated as factual. The examples provided are not exhaustive or mutually exclusive. In addition, it is important to keep in mind that a single issue will often involve both legal and factual questions, and an issue that is “factual” in one context may be “legal” in another.

## B. LEGAL MATTERS

The Appellate Body may review three main types of legal matters in an appeal: a Panel’s interpretation of WTO provisions; a Panel’s application of WTO provisions to the facts of the case; and a Panel’s discharge of its duties under WTO law. We discuss these three types of cases in turn.

### 1. *Interpretation of WTO Law*

In *Chile—Price Band System*, the Appellate Body explained that:

“the Panel’s interpretation of the terms ‘variable import levies’, ‘minimum import prices’, and ‘similar border measures other than ordinary customs duties’, as these terms are used in footnote 1, constitutes, not a *factual* determination, but rather a *legal* interpretation of the words of Article 4.2 [of the Agreement on Agriculture]. Hence, these interpretations are within the purview of appellate review under Article 17.6 of the DSU.”<sup>50</sup>

<sup>45</sup> Appellate Body Report, *EC—Hormones*, para. 132.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Appellate Body Report, *Chile—Price Band System*, para. 224.

<sup>49</sup> See, generally, Ronald Allen and Michael Pardo, *The Myth of the Law—Fact Distinction*, 97 *Northwestern University Law Review* 4 (2003), p. 1769; Clarence Morris, *Law and Fact*, 55 *Harvard Law Review* (1941–1942), p. 1303.

<sup>50</sup> Appellate Body Report, *Chile—Price Band System*, para. 224 (original emphasis).

Most, if not all, appeals include a claim that the Panel erred in interpreting a WTO provision. As just two examples, the Appellate Body has reversed a Panel's finding "that the term 'based on' as used in Articles 3.1 and 3.3 has the same meaning as the term 'conform to' as used in Article 3.2 of the *SPS Agreement*",<sup>51</sup> and upheld a Panel's finding "that the notion of 'cost to government' is not relevant to the interpretation and application of the term 'benefit', within the meaning of Article 1.1(b) of the Agreement on Subsidies and Countervailing Measures (SCM) Agreement".<sup>52</sup>

## 2. *Application of WTO Law to Facts*

The purpose of the WTO dispute settlement system is to resolve specific disputes between WTO Members; the DSU does not provide for Panels or the Appellate Body to issue advisory opinions. This means that Panels do not make legal interpretations in the abstract. Rather, in determining whether a challenged measure is consistent with WTO law, a Panel applies its legal interpretation of a particular WTO provision to the specific facts of the case at hand. As already mentioned, the Appellate Body has held that the application of the law to the facts—that is, the "legal characterization" of a given set of facts—is a legal question that is subject to appellate review.<sup>53</sup> For example, the Appellate Body has described the following as involving this kind of legal question:<sup>54</sup> the determination of whether imported split-run periodicals and domestic non-split-run periodicals are "like products" under the first sentence of Article III:2 of the GATT 1994,<sup>55</sup> "the Panel's appraisal of Chile's price band system in the light of its legal interpretation" of Article 4.2 of the Agreement on Agriculture,<sup>56</sup> and whether an investigating authority exercised its discretion under Article 2.2.1.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) in an "even-handed manner".<sup>57</sup>

<sup>51</sup> Appellate Body Report, *EC—Hormones*, para. 253(g).

<sup>52</sup> Appellate Body Report, *Canada—Aircraft*, paras 150, 161.

<sup>53</sup> See, e.g., Appellate Body Report, *EC—Hormones*, para. 132; Appellate Body Report, *US—Upland Cotton*, paras 399, 441, 663. See also Mitsuo Matsushita, "Some Thoughts on the Appellate Body", in Patrick Macrory, Arthur Appleton and Michael Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (New York: Springer, 2005), vol. I, p. 1392; Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 *Journal of World Trade* 4 (August 2002), pp. 605, 621; Bronckers and McNelis, as note 4 above, p. 328. The application of law to fact in other legal contexts is sometimes described as a "mixed question of law and fact": Frederick Green, *Mixed Questions of Law and Fact*, 15 *Harvard Law Review* (1901–1902), p. 275.

<sup>54</sup> See also Appellate Body Report, *US—Countervailing Duty Investigation on DRAMS*, n. 277.

<sup>55</sup> Appellate Body Report, *Canada—Periodicals*, para. 22. See also the discussion of this case in Matsushita, as note 52 above, p. 1391. The characterization of this issue as involving the application of WTO law to facts explains why the Appellate Body was able to address it within the parameters of Article 17.6 of the DSU. Although Canada raised Article 11 of the DSU, the Appellate Body did not address this provision or make any finding regarding whether the Panel made an objective assessment of the facts pursuant to it (cf. Lugard, as note 24 above, p. 324).

<sup>56</sup> Appellate Body Report, *Chile—Price Band System*, para. 224.

<sup>57</sup> Appellate Body Report, *US—Softwood Lumber V*, para. 163. The Appellate Body found the authority subject to a legal obligation to exercise its discretion in an "even-handed" manner, even though this word does not appear in Article 2.2.1.1. The Appellate Body noted that the United States did not dispute the existence of a general requirement of even-handedness. The Appellate Body also pointed out that such a requirement had been identified in a previous appeal: Appellate Body Report, *US—Softwood Lumber V*, paras 161–162 (referring to Appellate Body Report, *US—Hot-Rolled Steel*, para. 148).

### 3. Discharge of Panel's Duties

Article 17.6 of the DSU does not prevent the Appellate Body from considering the legal question of whether a Panel complied with relevant provisions of the WTO agreements in conducting proceedings or making findings (whether legal or factual) or otherwise properly discharged its duties under those agreements. The provision most frequently raised in this context is Article 11 of the DSU, which requires a Panel to:

“make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the [Dispute Settlement Body (DSB)] in making the recommendations or in giving the rulings provided for in the covered agreements . . .”

A claim that a Panel failed to comply with Article 11 of the DSU is distinct from a claim that the Panel wrongly interpreted or applied a WTO provision.<sup>58</sup> Thus, the Appellate Body stated in *US—Steel Safeguards*:

“[N]ot every failure by the Panel in the appreciation of the evidence before it can be characterized as failure to make an objective assessment of the facts.’ Similarly, not every error of law or incorrect legal interpretation attributed to a panel constitutes a failure on the part of the panel to make an objective assessment of the matter before it.”<sup>59</sup>

An appellant claiming that a Panel failed to comply with Article 11 must explicitly articulate this claim in its Notice of Appeal and substantiate it in written and oral submissions to the Appellate Body.<sup>60</sup> Failure to do so will not merely reduce the likelihood of the Appellate Body reversing the Panel’s findings; it may mean that the Appellate Body will not consider the appellant’s arguments on this issue at all—either because they involve factual matters not properly addressed on appeal in accordance with Article 17.6, or because the respondent did not have sufficient notice of them. In *US—Upland Cotton*, Brazil argued that various arguments by the United States as appellant amounted to challenges to the Panel as the trier of facts and should therefore be dismissed, in the absence of a claim under Article 11.<sup>61</sup> However, the Appellate Body disagreed and indicated that it would examine the relevant claims, not pursuant to Article 11 (which the United States had not raised), but solely in connection with the Panel’s application of the law to the facts.<sup>62</sup>

It may be more difficult to establish that a Panel has failed to make an “objective assessment of the facts of the case” than an “objective assessment of the matter before it”, due to the margin of discretion granted to Panels in fact finding, as mentioned earlier. The Appellate Body has explained:

<sup>58</sup> See, e.g., Appellate Body Report, *Japan—Apples*, para. 127; Appellate Body Report, *US—Steel Safeguards*, paras 498–499; Appellate Body Report, *US—Countervailing Measures on Certain EC Products*, para. 74; Appellate Body Report, *Chile—Price Band System*, para. 182.

<sup>59</sup> Appellate Body Report, *US—Steel Safeguards*, para. 497 (quoting Appellate Body Report, *Japan—Agricultural Products II*, para. 141).

<sup>60</sup> *Working Procedures for Appellate Review*, WT/AB/WP/5 (4 January 2005) Rules 20(2)(d), 21(2)(b), 23(2)(c).

<sup>61</sup> Appellate Body Report, *US—Upland Cotton*, paras 397, 660.

<sup>62</sup> *Ibid.*, paras 398–399, 663.

“In assessing the panel’s appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence.”<sup>63</sup>

This approach is confirmed in the Appellate Body’s recent decision in *EC—Chicken Cuts*, where it agreed with the European Communities that the Panel’s reasoning contained certain flaws,<sup>64</sup> which it described as “inconsequential inaccuracies”.<sup>65</sup> The Appellate Body concluded that, overall, the Panel had complied with Article 11 of the DSU.<sup>66</sup>

The threshold at which the Appellate Body will find that a Panel exceeded the bounds of its discretion under Article 11 in the process of fact finding may be quite high. In *EC—Hormones*, the Appellate Body suggested that this would occur if a Panel “deliberately disregard[ed]”, “refus[ed] to consider”, “distort[ed]” or “misrepresent[ed]” evidence.<sup>67</sup> However, former Appellate Body Member Claus-Dieter Ehlermann contends that this description does not “limi[t] the spectrum of possible violations of Article 11 DSU with respect to the determination of the existence of and weight to be attributed to a given fact or set of facts”.<sup>68</sup>

The Appellate Body has read Article 11 of the DSU (and particularly the requirement of an objective assessment of the “facts”),<sup>69</sup> in conjunction with other WTO provisions, as requiring Panels to apply a certain standard of review in assessing investigations or other proceedings conducted by domestic authorities of WTO Members. And, on occasion, the Appellate Body has found that a Panel failed to apply the correct standard of review. For example, in the context of a countervailing duty investigation, the Appellate Body has found that a Panel wrongly conducted a *de novo* review by examining “whether certain pieces of evidence were sufficient to establish certain conclusions” that the investigating authority “did not seek to draw, at least solely on the basis of those pieces of evidence” and by failing “to examine the evidence in its *totality*”.<sup>70</sup> A Panel may wrongly conduct a *de novo* review, for example, by basing its conclusions on evidence provided during the Panel proceedings but not available to the domestic authorities in their investigation.<sup>71</sup> The Appellate Body has also found that a Panel failed to apply the appropriate standard in reviewing a safeguards investigation. By not addressing certain arguments of the complainants, the Panel “failed to examine critically whether the [domestic authority] had, indeed, provided a reasoned and adequate explanation of how the facts supported its determination” of a

<sup>63</sup> Appellate Body Report, *US—Wheat Gluten*, para. 151.

<sup>64</sup> Appellate Body Report, *EC—Chicken Cuts*, paras 184–185.

<sup>65</sup> *Ibid.*, para. 186.

<sup>66</sup> *Ibid.*, paras 186, 347(d).

<sup>67</sup> Appellate Body Report, *EC—Hormones*, para. 133.

<sup>68</sup> Ehlermann, as note 52 above, p. 622.

<sup>69</sup> See Appellate Body Report, *US—Cotton Yam*, paras 68–69.

<sup>70</sup> Appellate Body Report, *US—Countervailing Duty Investigation on DRAMS*, para. 188 (original emphasis).

<sup>71</sup> Appellate Body Report, *US—Wheat Gluten*, para. 162; Appellate Body Report, *US—Countervailing Duty Investigation on DRAMS*, para. 187; Appellate Body Report, *US—Cotton Yam*, paras 78–80.

threat of serious injury under Article 4.2(a) of the Agreement on Safeguards, contrary to Article 11 of the DSU.<sup>72</sup>

In a few appeals, the Appellate Body has found that Panels acted inconsistently with Article 11 of the DSU by failing to “make an objective assessment of the matter before it”. The Appellate Body has suggested that the “matter” in Article 11 comprises both the measure at issue and the claims of the complainant.<sup>73</sup> In *Chile—Price Band System*, the Appellate Body found that the Panel failed to make an objective assessment of the matter before it and “acted *ultra petita*” by making a finding on a claim that no party had made.<sup>74</sup> In *US—Oil Country Tubular Goods Sunset Reviews*, the Panel had to determine whether the United States Department of Commerce (USDOC) perceived the United States Sunset Policy Bulletin as imposing definitive rules for the outcome of sunset reviews of anti-dumping duties in particular circumstances. The Appellate Body found that the Panel failed to make an objective assessment of the matter before it because it based its affirmative conclusion on “overall statistics” rather than a “qualitative analysis” of individual sunset reviews conducted by the USDOC.<sup>75</sup> Finally, in *US—Countervailing Duty Investigation on DRAMS*, the Appellate Body found that the Panel failed to make an objective assessment of the matter before it because it “erroneously concluded that the [United States investigating authorities] should have made a factual inference from evidence on the record that would not reasonably have suggested such an inference”.<sup>76</sup> This last error also related to the standard of review to be applied by Panels in reviewing domestic authorities’ conclusions, as discussed further below.

One other obligation under Article 11 is worth mentioning. In *EC—Export Subsidies on Sugar*, the Appellate Body found that the Panel failed to “make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements” as required by Article 11. This was because the Panel exercised judicial economy in relation to certain claims under the SCM Agreement that, if established, would have required the Panel to make a specific recommendation to the DSB under Article 4.7 of the SCM Agreement. By failing to rule on these claims, the Panel failed to ensure that it made “such other findings” required under Article 11.<sup>77</sup>

Each Panel must also comply with Article 12.7 of the DSU, which requires it to “set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes”. If a party considers that a Panel report is inconsistent with this provision, this is a legal matter that the Appellate Body may determine. Parties in the past have sometimes claimed that a Panel

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<sup>72</sup> Appellate Body Report, *US—Lamb*, paras 148–149.

<sup>73</sup> Appellate Body Report, *Canada—Wheat Exports and Grain Imports*, para. 177.

<sup>74</sup> Appellate Body Report, *Chile—Price Band System*, paras 172–173.

<sup>75</sup> Appellate Body Report, *US—Oil Country Tubular Goods Sunset Reviews*, para. 215.

<sup>76</sup> Appellate Body Report, *US—Countervailing Duty Investigation on DRAMS*, para. 179.

<sup>77</sup> Appellate Body Report, *EC—Export Subsidies on Sugar*, paras 334–345.

failed to set out a “basic rationale” for its findings, but the Appellate Body has never found such a failure.<sup>78</sup>

In several cases, the Appellate Body has suggested that Panels are required to accord due process or procedural fairness in conducting proceedings and deciding disputes. Often, the Appellate Body describes this requirement as deriving from or being incorporated in the DSU,<sup>79</sup> or a specific provision of the DSU such as Article 11<sup>80</sup> or Article 12.7.<sup>81</sup> It seems clear that the question of whether the Panel complied with due process is a legal question that the Appellate Body may properly determine. It is also possible that the Appellate Body could find that a Panel had violated the requirements of due process even if the Panel had not violated a specific WTO provision. In *Australia—Salmon*, the Appellate Body considered whether the Panel had violated Australia’s due process rights by failing to give it an adequate opportunity to respond to certain evidence. This did not involve a claim that the Panel had violated any specific DSU provision. However, the Appellate Body acknowledged the general requirement of due process on the part of the Panel, although it found no violation of that requirement in that case.<sup>82</sup> The need for due process might also require Panels to allow Members to be represented by whomever they choose in Panel proceedings.<sup>83</sup>

In the context of an anti-dumping dispute, an additional provision applies regarding the Panel’s assessment of the facts. Article 17.6(i) of the Anti-Dumping Agreement provides:

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

The Appellate Body has made clear that Article 17.6(i) of the Anti-Dumping Agreement does not conflict with Article 11 of the DSU because “it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* ‘assessment of the facts of the matter’”.<sup>84</sup>

As with Article 11 of the DSU, a party to a dispute could argue on appeal that the Panel failed to comply with Article 17.6(i) of the Anti-Dumping Agreement in assessing the facts of the matter.<sup>85</sup> This is a legal question properly left to the Appellate Body. Similarly, Article 17.6(ii) of the Anti-Dumping Agreement contains specific

<sup>78</sup> See, e.g., Appellate Body Report, *US—Upland Cotton*, paras 275–277.

<sup>79</sup> See, e.g., Appellate Body Report, *India—Patents (US)*, para. 94.

<sup>80</sup> See, e.g., Appellate Body Report, *US—Gambling*, para. 273; Appellate Body Report, *Chile—Price Band System*, paras 174–177; Appellate Body Report, *US—Lamb*, paras 147–149; Appellate Body Report, *EC—Hormones*, para. 133.

<sup>81</sup> Appellate Body Report, *Mexico—Corn Syrup (Article 21.5—US)*, para. 107.

<sup>82</sup> Appellate Body Report, *Australia—Salmon*, paras 272, 278.

<sup>83</sup> Compare Panel Report, *EC—Bananas III*, para 7.11 with Appellate Body Report, *EC—Bananas III*, paras 10–11.

<sup>84</sup> Appellate Body Report, *US—Hot-Rolled Steel*, para. 55.

instructions to Panels regarding the interpretation of WTO provisions. Whether a Panel has complied with Article 17.6(ii) is also a legal question that may be presented to the Appellate Body.<sup>86</sup> However, to date, the Appellate Body has not found that a Panel has violated either paragraph of Article 17.6 of the Anti-Dumping Agreement.

### C. FACTUAL MATTERS

The range of subjects covered by the WTO agreements is very large, and the factual matters that a Panel may be called upon to assess are correspondingly varied. However, in the following sections we have attempted to group together the main questions that the Appellate Body has characterized as factual, as follows: first, certain questions relating to municipal laws and other requirements; second, the effects of challenged measures; third, the operation of particular markets, including the various elements and actors in a market; fourth, international standards; fifth, international negotiations; and, finally, evidence of a scientific or technical nature.

#### 1. *Municipal Law, Regulations, and Administrative Actions*

Municipal laws and actions involve both factual and legal matters. In *India—Patents (US)*, the Appellate Body explained:

“In public international law, an international tribunal may treat municipal law in several ways. Municipal law may serve as evidence of facts and may provide evidence of state practice. However, municipal law may also constitute evidence of compliance or non-compliance with international obligations.”<sup>87</sup>

The Appellate Body may therefore review, as a legal question, whether a particular domestic law or regulation is consistent with WTO law.<sup>88</sup> This involves the application of WTO law to facts as discussed above. Similarly, the WTO-consistency of an administrative action or the application of a domestic law or regulation falls within the scope of appellate review. Particularly where a Panel finds a Member’s municipal laws WTO-inconsistent “as such”, rather than as applied in a particular instance,<sup>89</sup> the Appellate Body may scrutinize carefully the Panel’s explanation of how it applied WTO law to the Member’s municipal law.<sup>90</sup>

Nevertheless, the existence, content, and operation of municipal laws and regulations of WTO Members are factual matters to be determined by Panels within their discretion. In *Chile—Alcoholic Beverages*, the Appellate Body stated:

<sup>85</sup> See, e.g., Appellate Body Report, *EC—Tube or Pipe Fittings*, paras 119–133.

<sup>86</sup> See, e.g., Appellate Body Report, *US—Softwood Lumber V*, paras 113–116.

<sup>87</sup> Appellate Body Report, *India—Patents (US)*, para. 65.

<sup>88</sup> Appellate Body Report, *US—Section 211 Appropriations Act*, para. 105.

<sup>89</sup> On the distinction between “as such” and “as applied” claims, see Alan Yanovich and Tania Voon, “What is the Measure at Issue?”, in Andrew Mitchell (ed), *Challenges and Prospects for the WTO* (London: Cameron May, 2005), pp. 125–127.

<sup>90</sup> See Appellate Body Report, *US—Oil Country Tubular Goods Sunset Reviews*, para. 172.

“The New Chilean System applies a minimum tax rate of 27 per cent *ad valorem* to all distilled alcoholic beverages with an alcoholic content of 35° or less and a maximum rate of 47 per cent *ad valorem* to all such beverages with an alcohol content of more than 39°. The Panel found, *as a factual matter*, that ‘roughly 75% of domestic production will enjoy the lowest rate and ... over 95% of all current (and potential) imports will be taxed at the highest rate ...’<sup>91</sup>

In *EC—Bananas III*, the Appellate Body characterized as “factual” the Panel’s finding that certain “procedural and administrative requirements ... for importing third-country and non-traditional ACP bananas differ from ... those required for importing traditional ACP bananas”.<sup>92</sup> Due to the factual nature of questions regarding the content and operation of domestic laws and regulations, the Appellate Body may be unable to rule on them. Hence, in *EC—Bananas III*, the Appellate Body declined to review the Panel’s “factual finding” that “*de facto* discrimination did continue to exist after the entry into force” of the General Agreement on Trade in Services.<sup>93</sup> Similarly, in *Canada—Autos*, the Appellate Body declared that “[i]t is impossible for us to assess whether the use of domestic over imported goods is a condition ‘in law’ for ... receiving the import duty exemption”.<sup>94</sup>

Several other appeals confirm that the characterization of municipal laws as factual extends to administrative actions. In *EC—Computer Equipment*, the Appellate Body described as factual the Panel’s conclusions regarding the tariff treatment of imports of certain equipment by domestic authorities of Member States of the European Communities.<sup>95</sup> More recently, the Appellate Body in *Japan—Apples* concluded that the Panel’s findings about what happened in a particular Japanese risk assessment process were factual.<sup>96</sup> Finally, in *Dominican Republic—Import and Sale of Cigarettes*, the Appellate Body treated as factual findings the Panel’s statements regarding the powers of the Dominican Republic tax authorities.<sup>97</sup> In the WTO dispute settlement system, trade remedy investigations (anti-dumping, countervailing, or safeguard investigations) are a frequently challenged form of administrative action. The nature of such an investigation and the steps undertaken by domestic authorities are typically factual matters. These include the content of the record of the investigation,<sup>98</sup> whether the investigating authority disclosed a particular document to interested parties,<sup>99</sup> and the methodology used by the investigating authority.<sup>100</sup>

<sup>91</sup> Appellate Body Report, *Chile—Alcoholic Beverages*, para. 50 (quoting Panel Report, *Chile—Alcoholic Beverages*, para. 7.158) (emphasis added).

<sup>92</sup> Appellate Body Report, *EC—Bananas III*, para. 206.

<sup>93</sup> *Ibid.*, para. 237.

<sup>94</sup> Appellate Body Report, *Canada—Autos*, para. 133.

<sup>95</sup> Appellate Body Report, *EC—Computer Equipment*, para. 95.

<sup>96</sup> Appellate Body Report, *Japan—Apples*, para. 209.

<sup>97</sup> Appellate Body Report, *Dominican Republic—Import and Sale of Cigarettes*, paras 94, 95.

<sup>98</sup> Appellate Body Report, *EC—Tube or Pipe Fittings*, paras 122–128; Appellate Body Report, *EC—Bed Linen (Article 21—India)*, para. 171.

<sup>99</sup> Appellate Body Report, *EC—Tube or Pipe Fittings*, para. 141.

<sup>100</sup> Appellate Body Report, *US—Softwood Lumber V*, para. 179.

## 2. *Effects of Challenged Measures*

The effects of a challenged law, regulation, or other measure (e.g. market or trade effects) may also be factual matters. One of the measures challenged in *Dominican Republic—Import and Sale of Cigarettes* was a requirement that “tax stamps be affixed to cigarette packets in the territory of the Dominican Republic under the supervision of the Dominican Republic’s tax authorities”.<sup>101</sup> The Panel found this requirement inconsistent with the national treatment obligation under the GATT 1994 and not justified under Article XX(d) of that agreement. On appeal, the Dominican Republic argued that the requirement was justified under Article XX(d). The Appellate Body considered possible alternatives to the challenged measure in determining whether it complied with the chapeau of Article XX. It stated that the Panel’s conclusion in this regard was based on findings of fact that had not been challenged under Article 11 of the DSU and therefore fell outside the scope of appellate review, namely the Panel’s findings as to the “limited effectiveness of the tax stamp requirement in preventing forgery, smuggling and tax evasion” and the “greater effectiveness and efficiency of measures such as security features incorporated into the tax stamps or police controls”.<sup>102</sup>

Another case in which the Appellate Body characterized the effects of a challenged measure as factual is *US—Upland Cotton*. In that case, the Appellate Body had to consider whether certain US domestic support measures fulfilled the “fundamental requirement” in paragraph 1 of Annex 2 to the Agreement on Agriculture that they “have no, or at most minimal, trade-distorting effects or effects on production”. The Appellate Body found that the measures did not fulfil this requirement because payment was contingent on farmers not producing certain crops. The Appellate Body reached this conclusion in reliance on the Panel’s “factual findings” and findings “as a matter of fact” that this limitation “significantly constrain[ed] production choices”.<sup>103</sup> In *US—Offset Act (Byrd Amendment)*, the Appellate Body accepted as a “factual finding” of the Panel that certain challenged legislation created a financial incentive for domestic producers to file or support an anti-dumping or countervailing duty application.<sup>104</sup> This leads to the issue of the behaviour of economic actors and the operation of markets more generally.

## 3. *Operation of Markets*

The Appellate Body has characterized as factual several issues relating to the operation of markets, including matters regarding economic actors, market shares, costs, prices, and consumer preferences. Determining the nationality and control of a

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<sup>101</sup> Appellate Body Report, *Dominican Republic—Import and Sale of Cigarettes*, para. 57.

<sup>102</sup> *Ibid.*, para. 71.

<sup>103</sup> Appellate Body Report, *US—Upland Cotton*, paras 329, 334.

<sup>104</sup> Appellate Body Report, *US—Offset Act (Byrd Amendment)*, n. 244, para. 293.

company or other entity involves a factual assessment.<sup>105</sup> Predicting or explaining the behaviour of a company may also be a factual issue. In *US—Upland Cotton*, the Appellate Body stated that “[t]he way in which United States upland cotton farmers make decisions relating to the production of upland cotton, and the basis on which they make such decisions, are factual matters that fall within the Panel’s task of weighing and assessing the relevant evidence, and we will not review these matters”.<sup>106</sup> Finally, the Appellate Body has treated as a factual matter the question whether companies involved in an anti-dumping investigation were in “different factual situations”.<sup>107</sup>

Although the meaning of the word “market” in a particular WTO provision is a legal question,<sup>108</sup> the existence of such a market is a factual matter. In *US—Upland Cotton*, the Appellate Body indicated that “whether a world market for upland cotton and a world price for upland cotton exist in the circumstances of this case are factual questions”.<sup>109</sup> The Appellate Body also treated as factual the Panel’s findings that the world price for upland cotton was reflected in a particular index,<sup>110</sup> and that Brazilian and US cotton competed in the world market for upland cotton.<sup>111</sup> In turn, the Appellate Body has held that identifying the market shares of particular companies is a factual matter.<sup>112</sup> Statistics or evidence regarding trade would also be factual matters. Hence, in *Korea—Dairy*, the Appellate Body noted that the Panel “did not make any factual findings on the average level of imports of skimmed milk powder preparations in the last three representative years”.<sup>113</sup>

In several other appeals, the Appellate Body has confirmed the factual nature of the cost, price, and nature of different products. In *US—Lead and Bismuth II*, the Appellate Body indicated that, “the United States acknowledged that the Panel’s findings that fair market value was paid for all productive assets, were *factual findings*”.<sup>114</sup> A subsequent dispute, *EC—Tube or Pipe Fittings*, concerned an anti-dumping investigation by the European Communities covering the period 1 April 1998 to 31 March 1999. Brazil argued that the devaluation of the Brazilian Real by 42 percent in January 1999 eliminated dumping.<sup>115</sup> The Appellate Body described this as a “factual assertion” and “note[d] that neither the Panel nor the European Communities has made a factual finding that the devaluation of the Brazilian Real had eliminated dumping”.<sup>116</sup> In the same appeal, the Appellate Body stated that it would “not inquire into” certain “factual findings of the European Commission [that] were affirmed by the Panel”, namely that

<sup>105</sup> Appellate Body Report, *EC—Bananas III*, para. 239; Appellate Body Report, *Canada—Wheat Exports and Grain Imports*, para. 183.

<sup>106</sup> Appellate Body Report, *US—Upland Cotton*, para. 441.

<sup>107</sup> Appellate Body Report, *US—Softwood Lumber V*, para. 174.

<sup>108</sup> See, e.g., Appellate Body Report, *US—Upland Cotton*, paras 400–410.

<sup>109</sup> *Ibid.*, para. 411.

<sup>110</sup> *Id.*

<sup>111</sup> *Ibid.*, para. 413.

<sup>112</sup> Appellate Body Report, *EC—Bananas III*, para. 239.

<sup>113</sup> Appellate Body Report, *Korea—Dairy*, para. 102.

<sup>114</sup> Appellate Body Report, *US—Lead and Bismuth II*, para. 66 (original emphasis).

<sup>115</sup> Appellate Body Report, *EC—Tube and Pipe Fittings*, paras 66, 82.

<sup>116</sup> *Ibid.*, para. 82.

the costs of production of the relevant Brazilian exporter were not significantly different from those of the European Communities producers.<sup>117</sup> Finally, the nature of a product as reflected in consumers' preferences is generally a factual matter. In *EC—Sardines*, the Appellate Body referred to the Panel's "factual finding that 'it has not been established that consumers in most Member States of the European Communities have always associated the common name 'sardines' exclusively with *Sardina pilchardus*'".<sup>118</sup>

#### 4. *International Standards*

In most cases, the existence of international standards will be a factual matter for the Panel. The SPS Agreement contains various rules relating to international standards. For example, Article 3.1 requires Members to "base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement". Annex A to this agreement defines international standards, guidelines and recommendations regarding food safety as those established by the Codex Alimentarius Commission, an international body created in 1963 by the World Health Organization and the Food and Agriculture Organization of the United Nations. In *EC—Hormones*, the Appellate Body held that the question "whether or not Codex has adopted an international standard, guideline or recommendation on [melengestrol acetate] is a factual question".<sup>119</sup>

The Agreement on Technical Barriers to Trade (TBT Agreement) also refers to international standards. For example, Article 2.4 usually requires Members to use "relevant international standards . . . as a basis for their technical regulations". Annex 1 to the TBT Agreement defines a standard as a "[d]ocument approved by a recognized body, that provides . . . rules, guidelines or characteristics for products . . . with which compliance is not mandatory". In *EC—Sardines*, in the course of reviewing the Panel's interpretation of this definition, the Appellate Body noted that, "the European Communities and Peru agreed that the Panel's conclusion that the record does not demonstrate that Codex Stan 94 was not adopted by consensus is a factual finding, which is beyond the purview of appellate review".<sup>120</sup> This suggests that, just as the existence of a standard is a factual matter, so too is the question of how the standard came into existence within the relevant body.

#### 5. *International Negotiations*

Certain aspects of GATT/WTO negotiations may also involve factual considerations. In *EC—Export Subsidies on Sugar*, the European Communities argued

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<sup>117</sup> *Ibid.*, para. 177.

<sup>118</sup> Appellate Body Report, *EC—Sardines*, para. 290.

<sup>119</sup> Appellate Body Report, *EC—Hormones*, para. 132.

<sup>120</sup> Appellate Body Report, *EC—Sardines*, n. 145.

that the complainants (Australia, Brazil and Thailand) were estopped from challenging certain measures because their behaviour during the Uruguay Round negotiations indicated their acceptance of those measures. According to the Appellate Body, the Panel's finding that the complainants had neither admitted that the measures were WTO-consistent nor promised not to take legal action against them was "based on the Panel's weighing and appreciation of the evidence".<sup>121</sup> The Appellate Body also appeared to accept as a factual matter the Panel's finding that there was no evidence of a "shared understanding" between the participants of the Uruguay Round about the consistency of the measures in question.<sup>122</sup> In *US—Upland Cotton*, although the Appellate Body did not need to address whether negotiating history is a factual or legal matter, it is interesting to note that the Appellate Body stated that the Panel had "identified the drafting history in the record"<sup>123</sup> and then relied on the history as identified by the Panel.<sup>124</sup>

International or bilateral negotiations in other contexts may also raise factual questions. For example, in *US—Shrimp*, the Appellate Body described as "factual" the Panel's finding of "no evidence that the United States actually undertook negotiations on an agreement on sea turtle conservation techniques . . . before the imposition of an import ban".<sup>125</sup>

## 6. Scientific Evidence

The SPS Agreement and the TBT Agreement frequently raise issues of a scientific or technical nature. In general, the Appellate Body leaves to the Panel the identification of relevant scientific or technical evidence, as well as its credibility and weight. In *Australia—Salmon*, Canada argued that Australia's prohibition on certain salmon imports was not based on a risk assessment as required by Article 5.1 of the SPS Agreement. Australia contended that the "1996 Final Report" was the necessary risk assessment. In rejecting this argument, the Appellate Body relied on the Panel's "factual findin[g] . . . 'that the 1996 Final Report does not substantively evaluate the relative risks associated with these different options.'" <sup>126</sup> Canada also argued that the Australian prohibition was inconsistent with Article 5.6 of the SPS Agreement, which requires Members to ensure that their sanitary or phytosanitary (SPS) measures "are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility". The Appellate Body found that the first element Canada had to establish in

<sup>121</sup> Appellate Body Report, *EC—Export Subsidies on Sugar*, para. 315.

<sup>122</sup> *Ibid.*, para. 316.

<sup>123</sup> Appellate Body Report, *US—Upland Cotton*, para. 620.

<sup>124</sup> *Ibid.*, para. 623.

<sup>125</sup> Appellate Body Report, *US—Shrimp*, para. 166 (quoting Panel Report, *US—Shrimp*, para. 7.56) (emphasis omitted).

<sup>126</sup> Appellate Body Report, *Australia—Salmon*, para. 133 (quoting Panel Report, *Australia—Salmon*, para. 8.90) (emphasis omitted).

demonstrating a violation of Article 5.6 was that an alternative SPS measure was reasonably available, taking into account technical and economic feasibility. The Appellate Body “note[d] the Panel’s factual finding that there are alternative SPS measures that are reasonably available, taking into account technical and economic feasibility”, and it found on this basis that the first element was met.<sup>127</sup>

More recently, in *Japan—Apples*, the United States contended that certain Japanese measures regarding the import of apples were inconsistent with Article 2.2 of the SPS Agreement, which requires Members to ensure that their SPS measures are “not maintained without sufficient scientific evidence, except as provided for in” Article 5.7, which applies “[i]n cases where relevant scientific evidence is insufficient”. The Appellate Body upheld the Panel’s finding that the challenged measures were maintained “without sufficient scientific evidence”, contrary to Article 2.2.<sup>128</sup> In doing so, the Appellate Body relied on the Panel’s conclusion “as a matter of fact that it is not likely that apple fruit would serve as a pathway for the entry, establishment or spread of fire blight in Japan”,<sup>129</sup> which was based on several other “findings of fact” by the Panel, such as its findings that “[s]cientific evidence does not support the conclusion that infested or infected cargo crates could operate as a vector for fire blight transmission”, and that “the introduction of fire blight would require the transmission of fire blight from imported apples to a host plant through an additional sequence of events that is deemed unlikely, and that has not been experimentally established to date”.<sup>130</sup>

Scientific and technical matters may also arise in disputes concerning other WTO agreements. In *EC—Asbestos*, the Appellate Body had to consider whether a French Decree prohibiting asbestos was “necessary to protect human, animal or plant life or health” within the meaning of Article XX(b) of the GATT 1994. In maintaining that this prohibition was not necessary, Canada argued that “controlled use” was a reasonably available alternative measure that could have achieved the same objectives.<sup>131</sup> The Appellate Body disagreed, based on what it described as “factual findings” of the Panel, namely that the available scientific evidence raised doubts about the efficacy of controlled use.<sup>132</sup>

#### IV. CONCLUSION

Article 17.6 of the DSU establishes a general rule that leaves to Panels the role of finding facts and applying WTO law to those facts, while the Appellate Body reviews only legal issues. The distinction between law and fact in the abstract is fraught with difficulty. For example, the existence of an international standard, or the assessment of

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<sup>127</sup> Appellate Body Report, *Australia—Salmon*, para. 195.

<sup>128</sup> Appellate Body Report, *Japan—Apples*, para. 168.

<sup>129</sup> *Ibid.*, para. 163.

<sup>130</sup> *Ibid.*, para. 145.

<sup>131</sup> Appellate Body Report, *EC—Asbestos*, para. 173.

<sup>132</sup> *Ibid.*, para. 174.

scientific and technical evidence, are generally characterized as factual, but this may depend on the circumstances of the case and the evidence available. The significance and operation of a challenged law or regulation, and its effects on the marketplace, may also involve factual questions. At the same time, any assessment of such matters is likely to involve legal issues as well.

Even assuming that law can be cleanly separated from fact in every instance, the Appellate Body frequently has to confront factual issues, notwithstanding Article 17.6. Due to the fact-intensive nature of most WTO disputes, the Appellate Body routinely relies on intricate factual findings of Panels in assessing the consistency of challenged measures with WTO laws. This is true both at the initial stage of reviewing the Panel's conclusions, and at the subsequent stage of completing the Panel's analysis, if necessary and appropriate. Moreover, the application of the law to the facts is a legal question that is properly the subject of appellate review. This too may require the Appellate Body to conduct a detailed analysis of the Panel's factual findings. Finally, the limits of Panels' discretion in making factual findings are reached where the Panel itself commits a legal error, such as a failure to comply with Article 11 of the DSU. Therefore, Article 17.6 of the DSU should not be misunderstood as suggesting that appeals have nothing to do with facts or that the Appellate Body does not deal with facts at all.