

U.S. Statement at the Meeting of the WTO Dispute Settlement Body Under Item 4

Geneva, August 27, 2018

4. STATEMENT BY THE UNITED STATES CONCERNING ARTICLE 17.6 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES AND APPELLATE REVIEW OF PANEL FINDINGS OF FACT, INCLUDING DOMESTIC LAW
- The United States requested this agenda item to draw Members' attention to an important systemic issue with significant implications for the operation of the dispute settlement system: Article 17.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and appellate review of panel findings of fact, including domestic (or municipal) law.
 - The DSU reflects Members' agreement on the functions assigned to panels and the Appellate Body. In DSU Article 11, WTO Members agreed that "a panel should make an objective assessment of the matter before it, including an objective *assessment of the facts of the case* and the applicability of and conformity with the relevant covered agreements". In other words, "the matter" in a dispute consists of the facts and the legal claims, and WTO panels are to make factual and legal findings.
 - In Article 17.6 of the DSU, Members agreed that the Appellate Body would have a significantly more limited role than panels. The DSU explicitly provides that "[a]n appeal *shall be limited to* issues of law covered in the panel report and legal interpretations developed by the panel."
 - Yet, despite this clear, unambiguous text of Article 17.6, the Appellate Body has consistently reviewed and even reversed panel fact-finding. It has done so under different legal standards that it has had to invent, and it has reached conclusions that are not based on panel factual findings or undisputed facts.
 - Through this statement today, the United States will discuss two particular issues of concern relating to the Appellate Body's review of panel findings of fact. First, we review the relevant provisions of the DSU to explain the Appellate Body's lack of authority to review a panel's findings of facts. The invention of an authority to review panel fact-finding, contrary to the DSU, has added complexity, duplication, and delay to every WTO dispute. Second, we explain that the Appellate Body has compounded the error by asserting that it can review panel findings concerning the meaning of a Member's municipal law, which is the key fact to be demonstrated in any dispute.

1. Appellate Review of Facts is Contrary to the Appellate Body's Limited Authority Under the DSU

- The concerns involving appellate review of municipal law are just one symptom of a broader departure by the Appellate Body from the terms agreed by Members in the DSU. The fundamental issue is that the DSU explicitly limits the scope of an appeal, and there is no basis in the DSU for the Appellate Body to review a panel's findings of facts.
- Members agreed in the DSU to expressly limit the authority of the Appellate Body to legal findings by a panel, not factual ones. Indeed, it is difficult to see how Article 17.6 of the DSU could be any clearer: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."
- In fact, in an early report, the Appellate Body conceded as much. It stated that: "Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body."¹
- However, the Appellate Body at the same time asserted that there was a "standard of review" applicable for panels in respect of "the ascertainment of facts" under the relevant covered agreements.²
- The Appellate Body's approach skipped over the key threshold question: how, in light of the limitation of appeals in Article 17.6 of the DSU to "issues of law and legal interpretations" was the Appellate Body authorized to "review" a panel's "ascertainment of facts"? This question needed to be addressed and resolved before moving on to determine what would be the "standard" for any such review.
- But the Appellate Body did not engage on this threshold question. It did not explain the basis for its assumption that it could review a panel's findings of fact when the DSU expressly limits the Appellate Body's review to "issues of law and legal interpretations."³

¹ *EC – Measures Concerning Meat And Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS27/AB/R, para. 132.

² *EC – Measures Concerning Meat And Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS27/AB/R, para. 116.

³ *EC – Measures Concerning Meat And Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS27/AB/R, para. 61 (Canada: claims relating to the panel's alleged failure to make an objective assessment of the facts were, in reality, claims alleging errors of fact and "factual findings are, pursuant to Article 17.6 of the DSU, beyond review by the Appellate Body"); *id.*, para. 44 (United States: party "improperly requests" appellate review of panel fact-finding because "according to Article 17.6 of the DSU, factual findings are clearly beyond review by the Appellate Body").

- Then, even aside from the lack of any basis for the Appellate Body to review a panel’s factual findings, there is a real question about what the Appellate Body considered to be the “standard of review” for a panel’s factual findings.
- Not surprisingly, there is no provision in the DSU that refers to a “standard of review” for a panel’s factual findings, since the DSU does not provide for the Appellate Body to conduct any such review.
- Faced with this lack of any agreed “standard of review,” the Appellate Body asserted that Article 11 of the DSU provided such a standard. In so doing, however, the Appellate Body again ignored the text of the DSU and simply asserted that the DSU text said something different from what Members agreed.
- The language in Article 11 of the DSU that the Appellate Body relied upon is: “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case.” Key to this text is the word “should.”
- Members are all familiar with the difference between “should” and “shall” and choose carefully whether to use “should” or “shall” in particular parts of the agreements they negotiate. In fact, Members have been known to spend weeks or even longer negotiating over exactly this point – whether to use “should” or “shall.”
- And in the DSU, Members chose to use “should” in 21 instances, and to use the word “shall” in 259 instances.
- Yet, in describing the text of Article 11, the Appellate Body did not engage on this important textual issue. Instead, the Appellate Body simply referred to this “should make” language as a “mandate” and a “requirement” for panels. To the contrary, the decision of WTO Members to use the term “should” indicates that Members did not intend to create a legal obligation subject to review, a conclusion that is directly reinforced by the limitation on appeals to issues of law in Article 17.6.
- From its assertion that “should make” sets out a “mandate” and a “requirement”, the Appellate Body proceeded to state: “Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review.”⁴

⁴ *EC – Measures Concerning Meat And Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS27/AB/R, para. 132.

- Over a year later, the Appellate Body confirmed that it had failed to engage in a textual analysis of “should” in Article 11, when it stated simply that: “The word ‘should’ has, for instance, previously been interpreted by us as expressing a ‘duty’ of panels in the context of Article 11 of the DSU.”⁵
- But there was no interpretation in the *EC – Hormones* report on the term “should make” or how it could be understood as expressing a “duty”, or legal obligation.⁶ The Appellate Body did not explain how asserting that, contrary to the plain text, the language in Article 11 was a “requirement” could transform this “requirement” into a “standard of review.”
- The Appellate Body had correctly explained just prior to this erroneous statement that: “The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question.”
- The United States agrees. But it does not follow that a panel’s assessment of the facts became a “legal question” just because a party to the dispute disagreed with it. It would still be an issue of “facts” and “factual findings” and would not become an “issue of law or legal interpretation.”
- The Appellate Body’s decision to undertake a review of panels’ findings of fact therefore has no basis in the DSU. And the decision to review panel fact finding has had a number of adverse effects on the dispute settlement system.
- For instance, the Appellate Body has itself repeatedly complained about the increased workload due to appeals under Article 11 of the DSU.⁷ The Appellate Body has complained that the number of Article 11 appeals has increased over time, and that Article 11 appeals have in turn increased the complexity of appeals, the length of submissions, and the need for the Appellate Body to devote time and resources to become familiar with the basis for a panel’s factual findings.

⁵ *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, para. 187.

⁶ See *EC – Measures Concerning Meat And Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS27/AB/R, paras. 131-133 (no interpretation of the term “should” or the phrase “should make”).

⁷ See, e.g., Appellate Body Report for 2013 (WT/AB/20), pp. 36 and 38, reproducing the May 30, 2018, communication from the Appellate Body to the DSB concerning the Workload of the Appellate Body.

- The opportunity for Article 11 appeals of the facts has also meant that a party to a dispute may try to re-litigate the entire case it presented to the panel. That is, it may challenge all the panel findings, or at least the key findings, under DSU Article 11, and then all the panel legal interpretations and legal conclusions under the relevant provisions of the covered agreements.
- These developments in turn are then cited as reasons explaining the difficulties of the Appellate Body to meet the 90-day deadline mandated under Article 17.5 of the DSU. But these difficulties are, as we have explained, significantly of the Appellate Body's own creation, and another source of serious concern with the functioning of the Appellate Body.
- Appellate Body review of facts also undermines the value of the interim review of panel reports and can make the panel process significantly less efficient. A party may consider that the availability of Appellate Body review of the facts means that the party should refrain from providing corrections or clarifications of the factual section of a panel's interim report. The party could consider that it is better off reserving its criticisms of a panel's factual findings for an appeal since that could result in reversing the ultimate findings of the panel. This means that a panel does not benefit from the party's comments, and the panel's final report does not present factual findings of as high quality as it otherwise could.
- The Appellate Body's approach to the standard of review under Article 11 has also been inconsistent. Initially, the Appellate Body set a very high threshold and explained that for an Article 11 appeal to succeed, the party needed to demonstrate that the panel had committed "egregious error that calls into question the good faith of the panel."⁸
- However, over time, the Appellate Body has altered its approach. For instance, more recently the Appellate Body has explained that "for a claim under Article 11 to succeed, we must be satisfied that the panel has exceeded its authority as the trier of facts."
- The Appellate Body went on to explain this means that "a panel must provide a 'reasoned and adequate' explanation for its findings and coherent reasoning. It has to base its findings on a sufficient evidentiary basis on the record, may not apply a double standard of proof, and a panel's treatment of the evidence must not lack 'even-handedness.'"⁹

⁸ *EC – Measures Concerning Meat And Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS27/AB/R, para. 133.

⁹ *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, para. 881.

- This would appear to be a much lower threshold that is significantly different from an “egregious error that calls into question the good faith of the panel.”
- The shifting nature of the Appellate Body’s approach under Article 11 would appear to be a result of the fact that Members never agreed that the Appellate Body would review a panel’s factual findings and therefore Members never negotiated the basis or standard for such a review. Instead, the Appellate Body has struggled to formulate its own approach, without the benefit of guidance from Members.

2. The Meaning of a Member’s Municipal Law is an Issue of Fact

- Following its assertion that it has the authority to review and even reverse panel findings of fact, the Appellate Body has also asserted that it has the authority to review panel findings on the meaning of a WTO Member’s challenged domestic law. This is another serious error. First, the United States will explain that the meaning of domestic law is an issue of fact while the issue of law in a WTO dispute is whether that fact is consistent or not with WTO obligations. Second, we will explain how the Appellate Body’s justification for its review on appeal of a Member’s domestic law has no basis in the DSU and is logically flawed.
- In the WTO system, as in any international law dispute settlement system, *the meaning of municipal law is an issue of fact*. In a WTO dispute, the interpretation of the WTO Agreement or relevant covered agreements is the issue of law for the WTO dispute settlement system.
- The relevant provisions of the DSU reflect this straightforward division between issues of fact and law. As Members know, DSU Article 6.2 requires a complaining party to set out “the matter” in its panel request comprised of “the specific measures at issue” – that is, *the core issue of fact* – and to “provide a brief summary of the legal basis of the complaint” – that is, *the issue of law*. DSU Article 11 similarly distinguishes between the panel’s “objective assessment of the facts of the case” and its assessment of “the applicability of and conformity with the covered agreements” – that is, the issue of law. And DSU Article 12.7 makes the same distinction in relation to the findings of fact and law in a panel’s report.
- Thus, the DSU makes clear that the measure at issue is the core fact to be established by a complaining party, and the WTO consistency of that measure is the issue of law.

- This proposition – that municipal law is an issue of fact – is not unique to the WTO dispute settlement system. In fact, it is well-recognized in international law generally. For example, one of the standard treatises on international law (Brownlie) states that “*municipal laws are merely facts* which express the will and constitute the activities of States.”¹⁰
- Not surprisingly, WTO panels have routinely repeated this proposition in a number of reports. For example:
 - *US – Section 301 Trade Act*: “In this case, too, we have to examine aspects of municipal law, namely Sections 301-310 of the US Trade Act of 1974. Our mandate is to examine Sections 301-310 solely for the purpose of determining whether the US meets its WTO obligations. In doing so, we do not, as noted by the Appellate Body in *India – Patents (US)*, interpret US law “as such”, the way we would, say, interpret provisions of the covered agreements. We are, instead, called upon *to establish the meaning of Sections 301-310 as factual elements* and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations.”¹¹
 - *US – Section 129(c)(1) URAA*: “As a preliminary matter, we note that an assessment of whether section 129(c)(1) is inconsistent with any of the aforementioned WTO provisions will inevitably involve us in a close examination of the meaning and scope of that section. It should be recalled, in this regard, that panels are entitled (indeed, even obliged) to conduct a detailed examination of the domestic law of a Member, to the extent that doing so is necessary for the purposes of determining the WTO-conformity of that Member’s domestic law. For the purposes of such an examination, *the meaning and scope of relevant provisions of domestic law are questions of fact.*”¹²

¹⁰ Brownlie, *Principles of Public International Law*, at 39 (5th ed. 1998) (italics added) (quoting *Certain German Interests in Polish Upper Silesia*, PCIJ, Series A, No. 7, p. 19.).

¹¹ Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.18 (citations omitted) (emphasis added). See also para. 7.19 (“It follows that in making factual findings concerning the meaning of Sections 301-310 we are not bound to accept the interpretation presented by the US.”) (emphasis added).

¹² Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002, para. 6.28 (citations omitted) (emphasis added).

- *Mexico – Olive Oil*: “As noted above, we see the issue . . . as one of municipal law, which is a matter of fact.”¹³¹⁴
- *Colombia – Ports of Entry*: “WTO jurisprudence has established that *municipal law* is to be approached as a ‘*factual issue*’.”¹⁵
- *EC – Fasteners*: “Thus, we consider that it falls upon us to clarify *the scope/operation* of Article 9(5) of the Basic AD Regulation as a *factual matter* before engaging in a substantive analysis of China’s claims.”¹⁶
- *US – Countervailing Measures on Certain EC Products*: “[T]he Panel maintains that it was correct for it to examine the relevant aspects of the United States’ law and to *establish the meaning of the legislation as a factual element*.”¹⁷; “When analysing municipal law, a Panel should not interpret the law ‘as such’, but rather establish *the meaning of the disputed legislation as a factual element* and determine whether the factual element constitutes conduct by the respondent Member contrary to its WTO obligations.”¹⁸

¹³ Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, para. 7.29 (emphasis added); id., para. 7.30 (“We therefore find, as a matter of fact, that under Mexican law, the procedural act by which an investigation is formally commenced in the Mexican system is the publication of the Initiation Resolution, which takes legal effect the following day.”).

¹⁴ Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, para. 7.30 (emphasis added).

¹⁵ Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr. 1, adopted 20 May 2009, para. 7.93 (citing Appellate Body Report, *India – Patents (US)*, para. 66, and referencing Panel Report on *US – Section 301 Trade Act*, para. 7.18, and PCIJ, *Certain German Interests in Polish Upper Silesia*, PCIJ, 1926, Rep., Series A, No. 7, p. 19.) (emphasis added).

¹⁶ Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, para. 7.68 (emphasis added).

¹⁷ Panel Report, *United States - Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, adopted 8 January 2003, as modified by Appellate Body Report WT/DS212/AB/R, para. 6.38 (emphasis added).

¹⁸ Panel Report, *United States - Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, adopted 8 January 2003, as modified by Appellate Body Report WT/DS212/AB/R, para. 7.125 (emphasis added).

- *EC – Bed Linen (Article 21.5 – India)*: “We note that *questions of municipal law are treated as matters of fact.*”¹⁹
- *US – Zeroing (EC)*: “WTO panels and the Appellate Body have applied the principle, articulated by the Permanent Court of International Justice, that *municipal laws are facts* before international tribunals.”; “*The meaning of municipal law in a WTO dispute settlement proceeding is a fact* to be established by relevant evidence.”²⁰
- *US – Poultry (China)*: “As explained by the panel in *Colombia – Ports of Entry*, municipal law is to be approached as a ‘*factual issue*’.”²¹
- *US – Countervailing and Anti-Dumping Measures (China)*: “[W]hen ascertaining the meaning of United States law, . . . practice [by an administering authority] would need to be given due weight in our factual analysis. This would be required to *correctly establish the meaning of United States law as a matter of fact.*”²²
- Thus, the United States is aware of at least 10 times that WTO panels have disagreed with the Appellate Body, and instead found that the meaning or operation of a WTO Member’s domestic law is an issue of fact, and not an issue of WTO law.
- That so many WTO panels have come to this conclusion in light of the clear text of the DSU is not surprising. Nor is it surprising that numerous WTO Members have also come to the same conclusion in their disputes. For example:
 - **Canada in China – Auto Parts**: “Canada expressed a similar view at the oral hearing in this appeal, stating that a panel’s interpretation of *municipal law is a matter of fact* and is subject to the standard of review to be accorded to factual findings.”²³

¹⁹ Panel Report, *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India - Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, fn 213 (emphasis added).

²⁰ Panel Report, *United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, paras. 7.53, 7.64 (emphasis added).

²¹ Panel Report, *United States - Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, paras. 7.104 and 7.381 (emphasis added).

²² Panel Report, *United States - Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/R and Add.1, adopted 22 July 2014, as modified by Appellate Body Report WT/DS449/AB/R, para. 7.163 (emphasis added).

²³ Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB, adopted 12 January 2009, n. 306 (emphasis added).

- **China**, in *EC – Fasteners*: “China submits that the issue of the ‘meaning’ or ‘scope’ of Article 9(5) of the Basic AD Regulation *is an issue of fact* Therefore, it rejects the European Union's argument that the scope of Article 9(5) of the Basic AD Regulation is a legal issue and hence subject to appellate review pursuant to Article 17.6 of the DSU.”²⁴
- **China**, in *US – Countervailing and Anti-Dumping Measures (China)*: “The meaning of prior municipal law *must be determined as a matter of fact*, by reference to the laws themselves and the manner in which those laws have been interpreted by domestic courts.”²⁵
- **Colombia** in *Colombia – Ports of Entry*: “Colombia recalls that from the standpoint of international law, *“municipal laws are merely facts”*.”²⁶
- **Dominican Republic** in *Dominican Republic – Import and Sale of Cigarettes*: “Honduras' claim thus focuses on the meaning of a municipal law of the Dominican Republic. In addressing the meaning of municipal law, panels must examine the [municipal] law *as a matter of fact*, taking into account the evidence as to the meaning of the law presented by the parties.”²⁷; “In this case, the Panel *correctly treated the meaning of the Dominican Republic's municipal law as a fact* whose meaning was to be proved by evidence.”²⁸

²⁴ Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, para. 74 (emphasis added).

²⁵ Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/R and Add.1, as modified by Appellate Body Report WT/DS449/AB/R, para. 7.142 (emphasis added). See also para. 7.160 (“China argues that in evaluating whether Section 1 effected an advance in a rate of duty on imports under an established and uniform USDOC practice, the relevant baseline of comparison is the prior municipal law of the United States, properly determined as a question of fact. According to China, it is by reference to the relevant United States laws themselves and the manner in which those laws have been interpreted by United States courts that we should determine whether there has been an advance in a rate of duty.”) and para. 7.228 (“China considers the relevant baseline to be prior municipal law of the importing Member, properly determined as a question of fact.”).

²⁶ Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009, para. 4.145.

²⁷ Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, para. 45.

²⁸ Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, para. 46.

- **EU**, in *US – Large Civil Aircraft (21.5 – EU)*: “Because the meaning of domestic law, including of the US Constitution, is a *question of fact for a WTO panel*, the United States must rebut the EU's interpretation with actual evidence and argument regarding US law.”²⁹
- **EU**, in *United States – Conditional Tax Incentives for Large Civil Aircraft*: “The interpretation of Washington State law is a *question of fact* before this Panel that must be considered objectively”³⁰
- **EU** in *European Communities – Trademarks and Geographical Indications (Australia)*: “[The European Communities] submits that the Panel must take due account of the fact that the Regulation is a measure of EC domestic law and establish its meaning *as a factual element*.” “[I]n making an objective assessment of the facts, and in particular of the meaning of Regulation 2081/92, the Panel must take due account of the fact that Regulation 2081/92 is a measure of EC domestic law. It can therefore not “interpret” Regulation 2081/92, but rather *must establish the meaning of its provisions as factual elements*.”³¹
- **EU** in *EU – Fatty Alcohols*: “Many of the arguments, submitted by Indonesia, are matters of EU, rather than WTO law. . . . The EU law characterisation of a particular fact pattern as consistent or not with the Basic Regulation is a *question of fact*, while the consistency of the contested measure with Article 2.4 of the ADA is a question of both law and fact.”³²

²⁹ Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) – Recourse to article 21.5 of the DSU by the European Union*, WT/DS353/RW and Add.1, at Annex B-4, para. 2.

³⁰ See also Panel Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/R and Add.1, adopted 22 September 2017, as modified by Appellate Body Report WT/DS487/AB/R, at Annex B-1, para. 45 (emphasis added).

³¹ Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs – Complaint by the United States*, WT/DS174/R, adopted 20 April 2005, para. 7.43 (emphasis added); *id.*, WT/DS174/Add.2, Annex B-4, p. B-121 (Replies by the European Communities to Questions posed by the Panel following the First Substantive Meeting), para. 3 (“However, the EC would like to underline that in making an objective assessment of the facts, and in particular of the meaning of Regulation 2081/92, the Panel must take due account of the fact that Regulation 2081/92 is a measure of EC domestic law. It can therefore not “interpret” Regulation 2081/92, but rather must establish the meaning of its provisions as factual elements.”).

³² Appellate Body Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/AB/R and Add.1, adopted 29 September 2017, at Annex B-3, para. 28 (emphasis added).

- **Guatemala** in *Guatemala – Cement (Panel)*: “This evidence is fatal to Mexico's claim because it is an accepted principle of international law that *municipal law (and practice) is a fact* which must be proven before an international dispute settlement body such as this Panel.”³³
- **Hong Kong** in *US – Shrimp*: “With respect to the judgment of the CIT in the Turtle Island case, Hong Kong, China, notes that in the absence of a clear mandate given to international adjudicating bodies, they commonly interpret only international law and *treat domestic law*, whenever warranted, *as a factual matter*.”³⁴
- **India** in *India – Patents (US)*: “India asserts that the Panel erred in its treatment of India's municipal law because *municipal law is a fact* that must be established before an international tribunal by the party relying on it.”³⁵
- **Mexico**, in *US – Anti-Dumping Measures on Oil Country Tubular Goods*: “The[] [panel’s] findings relate to the *meaning and scope of a Member's municipal law . . . [which] is a question of fact* falling outside the scope of appellate review.”³⁶
- **Peru** in *EC – Sardines*: “Peru thus contends that, *like municipal law*, the Codex standard must be treated by an international tribunal *as a fact to be examined*, not as law to be interpreted.”³⁷

³³ Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, para. 6.440 (emphasis added).

³⁴ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, para. 62.

³⁵ Appellate Body Report, *India – Patents (US)*, para. 64 (emphasis added).

³⁶ Appellate Body Report, *United States – Anti-Dumping Measures on Oil - Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, para. 80 (emphasis added).

³⁷ Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, para. 75 (emphasis added).

- **Philippines in Thailand – Cigarettes:** “The Philippines relies on the Appellate Body US – Carbon Steel decision to argue that *the meaning of municipal law has to be determined by panels as a question of fact*, taking into account not only the assertions of the regulating country, but also, necessarily, evidence provided as grounds for those assertions (typically including judicial rulings, opinions of legal experts, writings of recognized scholars)”.³⁸
- Thus, in at least 15 instances of which we are aware, other WTO Members too have disagreed with the Appellate Body’s assertion that it has the authority to review a panel’s factual findings on the meaning of a WTO Member’s domestic law. Despite this repeated disagreement with its approach, over many years, however, the Appellate Body has not reconsidered its view. Nor, as we will explain, has it ever engaged with the DSU text that demonstrates that its approach is erroneous and contrary to that text.
- The Appellate Body has not treated panel findings concerning the meaning of municipal law as a factual issue. Instead, it has treated the meaning of municipal law as a matter of WTO law, to be decided by the Appellate Body *de novo* in an appeal under Article 17.6 of the DSU.
- The Appellate Body has given no interpretation of the text of the DSU for its statement that the meaning of domestic law is an issue of law in the WTO dispute settlement system. Despite its occasional citation to other international law authorities, the Appellate Body has also failed to point to any other source that would explain its departure from the approach followed generally in international dispute settlement.
- The only basis the Appellate Body has given for its proposition that the meaning of municipal law is an issue of law under Article 17.6 of the DSU is a citation to its own reports, most often the Appellate Body report in *India – Patents (US)*.³⁹
- The appellate report in that dispute, however, provides no meaningful explanation for this proposition. In that appeal, India had asserted that the panel erred in its treatment of India’s municipal law.⁴⁰ Ironically, the Appellate Body began its examination of this issue by citing the very same international law treatise quoted above.

³⁸ Panel Report, *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, para. 6.155 (emphasis added).

³⁹ See, e.g., Appellate Body Report, *EU – Biodiesel*, para. 6.155 (citing *India – Patents (US)*).

⁴⁰ Appellate Body Report, *India – Patents (US)*, para. 64.

- As noted, that treatise states: “[M]unicipal laws are merely facts which express the will and constitute the activities of States.” That is, the treatise states that municipal law is an issue of fact for the purpose of international dispute settlement.⁴¹ Ironically, then, the *India – Patents* appellate report cites a treatise that stands for the opposite of what the Appellate Body cites it for.
- In discussing the panel’s examination of India’s domestic law in that dispute, the Appellate Body noted that “[p]revious GATT/WTO panels also have conducted a detailed examination of the domestic law of a Member in assessing the conformity of that domestic law with the relevant GATT/WTO obligations.”⁴² To be clear, this statement refers to a detailed examination of domestic law by *panels*. But from this reference to the detailed examination of domestic law by panels, the Appellate Body makes the following leap:

And, just as it was necessary for the Panel in this case to seek a detailed understanding of the operation of the Patents Act as it relates to the "administrative instructions" in order to assess whether India had complied with Article 70.8(a), so, too, is it necessary for us in this appeal to review the Panel's examination of the same Indian domestic law.⁴³

- In other words, the Appellate Body reasoned that, because the panel was required to undertake a detailed examination of the meaning of a domestic law (as a factual issue) to determine whether that domestic law complied with the WTO Agreements (as a legal issue), the Appellate Body could also conduct a detailed examination of the meaning of that domestic law (the factual issue) in reviewing the legal conclusions of the panel.
- There is no coherent logic in that statement. The authority to review a panel’s legal conclusion implies no authority to also review a panel’s factual findings. Those factual findings can simply be taken as a given.

⁴¹ Appellate Body Report, *India – Patents (US)*, para. 65 and n. 52.

⁴² Appellate Body Report, *India – Patents (US)*, paras. 66 and 67.

⁴³ Appellate Body Report, *India – Patents (US)*, para. 68.

- The Appellate Body in fact provides no explanation of how its “detailed examination” of domestic law is consistent with the limits of appellate review imposed by Members in Article 17.6 of the DSU. The stated rationale – that a “detailed understanding” is important – says nothing about the proper role of the Appellate Body in reviewing a panel’s findings.
- Indeed, many factual issues in WTO dispute settlement require “detailed understanding.” But that provides no basis for treating those factual issues as issues of law to be decided *de novo* by the Appellate Body on appeal.
- Unfortunately, in subsequent disputes, the Appellate Body repeated and expanded on its flawed approach in *India – Patents (US)*. For example, in *US – Section 211 Appropriations Act*, the Appellate Body quoted from its report in *India – Patents*, and then found that “[t]o address the legal issues raised in this appeal, we must, therefore, necessarily examine the Panel’s interpretation of the meaning of Section 211 under United States law” and “[t]he meaning given by the Panel to Section 211 is, thus, clearly within the scope of our review as set out in Article 17.6 of the DSU.”⁴⁴ Again, the Appellate Body was saying that the meaning of a municipal law – a factual issue – is within the scope of its review, notwithstanding the express limitations imposed by Article 17.6 of the DSU.
- At DSB meeting on March 6, 2002, when this report was adopted – over 16 years ago – the United States expressed its serious concerns with this approach as follows:

⁴⁴ Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, para. 106.

Under Article 17.6 of the DSU, the Appellate Body's review was limited to issues of law and legal interpretation, not issues of fact. In this dispute, the Appellate Body had blurred this distinction by concluding that an examination of the meaning of municipal law – in this case Section 211 – was within its mandate. The Appellate Body had reached this conclusion based on a logical misstep. In paragraph 105 of its Report, the Appellate Body had correctly noted that a panel's assessment of whether a municipal law was consistent with WTO obligations was a legal characterization that was within the scope of appellate review. However, from this it had incorrectly concluded in the following paragraph that the Panel's finding as to the meaning and operation of the municipal law was also within the scope of appellate review. This did not follow logically. It was one thing to determine what a municipal law meant and how it operated. It was an entirely different matter to determine whether – given a particular meaning and operation – the municipal law was consistent with WTO obligations. The meaning and operation of municipal law fell within the panel's role as finder of fact, and was outside the scope of appellate review unless the finding was inconsistent with the obligation to make an objective assessment of the facts, in accordance with Article 11 of the DSU. Once the panel had made these factual findings, its legal findings as to whether the municipal law was consistent with a WTO agreement were subject to appellate review. In the US view, the Appellate Body Report had not sufficiently distinguished between these factual and legal findings of a panel and thus risked encroaching on a panel's fact-finding role.⁴⁵

- And, unfortunately, this same criticism remains valid today as the Appellate Body has continued to follow the same flawed approach in subsequent appeals. For example:

⁴⁵ WT/DSB/M/119, para. 27 (statement of the United States); *see also id.* (“A better approach, according to the United States, was that of the International Court of Justice (ICJ) which was cited by the Appellate Body in its earlier report in the India – Mailbox dispute (WT/DS50). The ICJ has noted that from the standpoint of international law “municipal laws are merely facts”. The Appellate Body had a special role with respect to the interpretation of WTO Agreements, and Appellate Body proceedings – which were expedited and permitted only limited briefing and hearings – reflected this. In the US view, this special role did not extend to ascertaining the meaning and operation of municipal laws, and Appellate Body proceedings were ill-suited to such fact-finding.”). The United States raised questions about this in March 2005 (TN/DS/W/74) and submitted proposed guidance that: “The question of whether a measure does *x* is a factual question because at that point it is not a question of the interpretation of a provision of a covered agreement or of whether a provision applies to the measure.” (TN/DS/W/82/Add.2.)

- *China – Auto Parts (AB)*: “When a panel examines the municipal law of a WTO Member for purposes of determining whether the Member has complied with its WTO obligations, that determination is a legal characterization by a panel, and is therefore subject to appellate review under Article 17.6 of the DSU....”⁴⁶
- *China – Publications and Audiovisual Products*: “We recall that a panel's assessment of the meaning and content of a Member's municipal law is subject to appellate review in order to determine whether the panel erred in its finding regarding the consistency of the Member's municipal law with the WTO agreements.”⁴⁷
- *EC – Fasteners (China)*: “Therefore, we conclude that the Panel's assessment of the meaning and scope of Article 9(5) of the Basic AD Regulation, which is based on the text of the provision, its context within the structure of the other relevant provisions of the Regulation, and its operation is not a "factual matter" and is not excluded from appellate review. Rather, the Panel examined Article 9(5) for the purpose of determining its consistency with a number of provisions of the Anti-Dumping Agreement and the GATT 1994, which, as a matter of legal characterization, is subject to appellate review according to Article 17.6 of the DSU.”⁴⁸

⁴⁶ Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009, para. 225 (citations omitted).

⁴⁷ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, para. 117.

⁴⁸ Appellate Body Report, *European Communities – Definitive – Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, para. 297. See also para. 295 (“We begin by addressing China's preliminary objection that the Panel's finding concerning the meaning and scope of Article 9(5) of the Basic AD Regulation is a matter of fact that is not subject to appellate review pursuant to Article 17.6 of the DSU. We disagree with China and the Panel. On several occasions, the Appellate Body has clarified that municipal law may serve both as evidence of facts and evidence of a Member's compliance or non-compliance with its international obligations. In particular, in *US – Section 211 Appropriations Act*, the Appellate Body stated that, when a panel examines the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its WTO obligations, that examination is a legal characterization by a panel and is therefore subject to appellate review under Article 17.6 of the DSU.”).

- *US – Countervailing and Anti-Dumping Measures (China)*: “Although factual aspects may be involved in the individuation of the text and of some associated circumstances, an assessment of the meaning of a text of municipal law for purposes of determining whether it complies with a provision of the covered agreements is a legal characterization.”⁴⁹
- These examples repeatedly exhibit the same flawed logic. In short, the Appellate Body reasons that when a panel examines a municipal law to assess compliance with the WTO Agreements, examination of that municipal law becomes a legal question. This approach eliminates the lines explicitly drawn by Members in the DSU between factual and legal issues. As the United States noted in the excerpt above, the fact that the question of whether a particular municipal law is consistent with the WTO Agreements is a legal question does not change the nature of the factual determination of the meaning and content of that municipal law.
- For a more recent example, Members will recall that at the DSB meeting on October 26, 2016, the United States explained how the Appellate Body’s flawed approach was highlighted by the appeal in *EU – Biodiesel (Argentina)*. In that dispute, one of Argentina’s claims was that a provision of EU law, the Basic Regulation, was inconsistent “as such” with the AD Agreement. On appeal, Argentina claimed that the panel erroneously construed that EU law. Argentina’s argument was based on the text of the EU provision, legislative history, a supposed EU practice in several other investigations, and certain EU court decisions.
- On appeal, Argentina claimed both that the Panel’s interpretation of EU law was wrong as a matter of law (although under what provision of the AD Agreement or the DSU remains unclear) and that the Panel failed to make an “objective assessment of the matter” under Article 11 of the DSU.

⁴⁹ Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, para. 4.101. See also para. 4.99 (“In *India – Patents (US)* and *US – Section 211 Appropriations Act*, the Appellate Body stated that municipal law may constitute evidence of facts as well as evidence of compliance or non-compliance with international obligations, and that a panel’s examination of the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement is a legal characterization by a panel subject to appellate review under Article 17.6 of the DSU.”).

- At a minimum, in light of the Appellate Body’s conception of a different and higher standard to review findings of fact (which we discussed earlier), the panel’s factual findings would be subject to review under that higher or more restrictive standard. The Appellate Body examined the meaning of the EU law as a *de novo* legal issue, and then proceeded to conduct a separate examination of whether the Panel made an objective assessment.⁵⁰
- The lack of coherence in the Appellate Body’s approach has been noted by other commentators. For example, an entry in The Oxford Handbook of International Trade Law states: “[T]he logic of the Appellate Body’s finding [that panel findings on municipal law are issues of law under DSU Article 17.6] is *difficult to understand*. Just because a panel assesses whether a domestic legal act – which represents a fact from the perspective of WTO law – is consistent or inconsistent with WTO law *does not suddenly turn the meaning of the domestic legal act into a question of WTO law*. . . . [T]here must . . . be a discernable line between issues of fact and issues of law. After all, *the Appellate Body’s jurisdiction is circumscribed precisely by this distinction*.”⁵¹
- Another set of commentators has similarly critiqued the Appellate Body’s approach, noting that “maybe that limitation [of appellate review to the application of WTO law to the facts as found by the panel] was *precisely* what Article 17.6 DSU intended to impose on the Appellate Body. The arguments offered by the Appellate Body for a more expansive review authority *are not very convincing*, as the determination of the implications of a Member’s municipal law are not more “legal interpretations” than is the determination of the implications of any other measure. It seems that the Appellate Body is simply keen to review a Panel’s interpretation of the meaning of municipal law”⁵²

⁵⁰ The United States explained to Members why this approach did not make sense, and departed from the Appellate Body’s frequent admonition that a party should present an issue as an error of law or an error under Article 11, but not both types of claims with respect to the same issue. See, e.g., *EC – Fasteners (China) (AB)*, para. 442; *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 238. Furthermore, it raised the prospect that the Appellate Body might find that the Panel made an objective assessment of a complex factual record, and at the same time might find that precisely the same panel finding was incorrect simply because the Appellate Body made a different factual determination based on its own *de novo* review.

⁵¹ Bohanes and Lockhart, “Standard of Review in WTO Law”, *The Oxford Handbook of International Trade Law* (2009), at 42 (emphasis added).

⁵² Wauters and Vandebussche, *China – Measures Affecting Imports of Automobile Parts*, American Law Institute Project, at n. 60 (emphasis added).

- The Appellate Body’s approach in conducting its own *de novo* review of the meaning of domestic law is inconsistent with the appropriate functioning of the dispute settlement system. It departs from the basic division of responsibilities where panels determine issues of fact and law, and the Appellate Body may be asked to review specific legal interpretations and legal conclusions.
- It also represents a serious waste of the limited resources of the WTO dispute settlement system, adding complexity and delay to the process. No purpose is served by having a panel engage in a detailed review of a factual record related to the meaning of a domestic measure, and then to have the Appellate Body engage in its own *de novo* review of the exact same factual issues, so that the parties have to argue all the same factual issues a second time.

3. Conclusion

- The United States has for many years been concerned with the Appellate Body’s approach to review of findings of fact by WTO panels. In this statement, for the benefit of WTO Members’ reflection, we have drawn together an analysis of the DSU text, a critique of the Appellate Body’s erroneous rationale, and a review of panel and WTO Member statements.
- As we have noted in this statement, DSU Article 17.6 expressly limits appellate review to issues of law and legal interpretation covered in a panel’s report. On its face, this would not include panel fact-finding. When we look back to the appellate report in which the Appellate Body asserted it could review panel fact-finding under the “duty” or “requirement” in DSU Article 11 to make an objective assessment of the facts, we find that there was no interpretation by the Appellate Body of the text of DSU Article 11, which states that a panel “should make” an objective assessment. And because the DSU text does not support any appellate review of the facts, it also does not suggest any particular standard for that review.
- By recasting panel fact-finding as, instead, an issue of law subject to review, the Appellate Body has further asserted that it can review the meaning of a Member’s domestic law on appeal. And it conducts that review *de novo* – that is, without any deference to the panel’s findings on appeal. But the meaning of a Member’s domestic law – what a measure means or does – is simply the key fact in a dispute while the issue of law is whether that fact is consistent or inconsistent with WTO obligations. The Appellate Body’s expansion of its review authority, contrary to the DSU text, has added complexity, duplication, and delay to almost every dispute, as a party to the dispute can now challenge on appeal every aspect of the panel’s findings.

- The United States does not consider this a desirable outcome. But more importantly, it does not reflect the WTO dispute settlement system as agreed by Members in the text of the DSU. Therefore, whether or not a WTO Member considers appellate review of facts desirable, that review is neither legal nor legitimate under our agreed WTO rules.

Second Intervention

- The United States would like to thank the delegations that intervened for their comments and we look forward to further discussing this issue with Members.
- With respect to Brazil's intervention, the statement would seem to overly complicate what is a relatively straightforward issue. We would again refer to our past DSB statement on this issue highlighting the straightforward distinction between issues of fact and issues of law: "It was one thing to determine what a municipal law meant and how it operated."⁵³ That is the issue of fact. "It was an entirely different matter to determine whether – given a particular meaning and operation – the municipal law was consistent with WTO obligations."⁵⁴ That is the issue of law.
- And so we would agree with Australia's statement that this is an important distinction to maintain, and it's a distinction Members agreed to in the DSU.
- Second, the United States would appear to have a different understanding from Brazil and China with respect to the purpose of the Appellate Body. China's intervention suggested that the purpose of the Appellate Body is to provide a second, independent review of panel reports. And Brazil suggested the purpose is to review the consistency of domestic laws with the WTO Agreement. We disagree. The limited role of the Appellate Body, as set out in Article 17.6 of the DSU, is to review issues of law and legal interpretations in panel reports.

⁵³ WT/DSB/M/119, para. 27 (statement of the United States).

⁵⁴ WT/DSB/M/119, para. 27 (statement of the United States).