9. EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

A. REPORT OF THE APPELLATE BODY (WT/DS473/AB/R AND WT/DS473/AB/R/ADD.1) AND REPORT OF THE PANEL (WT/DS473/R AND WT/DS473/R/ADD.1)

- The reports of the Panel and Appellate Body in this dispute make findings on a number of matters regarding the interpretation and application of the *Agreement on the Implementation of Article VI of the GATT 1994*. The United States understands from those reports that those findings turn on the facts and circumstances of the specific antidumping investigation at issue in this dispute. The United States will not comment on those facts and circumstances, and related findings, at today's meeting.

- The United States, however, would like to draw the DSB's attention to an important systemic issue with implications for the operation of the dispute settlement system.

- The issue is how the Appellate Body should approach appeals from panel findings on the meaning of municipal law, as well as how the Appellate Body approached Argentina's particular appeal in this dispute on the meaning of the EU law being challenged.

- In the WTO system, or in any international law dispute settlement system, the meaning of municipal law is an issue of fact. In contrast, the interpretation of the WTO Agreement, or other relevant international law, is the issue of law for that system.

- This proposition is not controversial. 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."[2]

- The Appellate Body, however, has treated panel findings on 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 rationale – based in the text of the DSU or in *any other source* -- for this fundamental departure from the principle that the meaning of municipal law is an issue of fact in international dispute settlement.

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[2] Brownlie, Principles of Public International Law, at 39 (5th ed. 1998) (italics added).

- In its report in this dispute, the Appellate Body's explanation for the proposition that the meaning of municipal law is an issue of law under DSU 17.6 is a single sentence: "Just as it is necessary for the panel to seek a detailed understanding of the municipal law at issue, so too is it necessary for the Appellate Body to review the panel's examination of that municipal law."[3]

- The only basis given for this assertion is a citation to the Appellate Body's own report in *India – Patents (US)*. That report, however, provides no meaningful explanation for this proposition. Ironically, *India – Patents* cites the very same international law treatise quoted above, which states that municipal law is an *issue of fact* for the purpose of international dispute settlement.[4] That is, the *India – Patents* report cites a treatise that stands for *the opposite* of what the Appellate Body cites it for.

- Further, the Appellate Body's 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.

- 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 the 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.

- 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*

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[3] Appellate Body Report, *EU-Biodiesel*, para. 6.155 (citing *India=Patents (US)*).
[4] Appellate Body Report, *India – Patents (US)*, para. 65 and n. 52.

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.**"[5]

- The problems with the Appellate Body's approach is highlighted by this very appeal. 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.

- Especially given the panel's alleged error in examining all of the different types of evidence introduced by Argentina, the Appellate Body could have, and should have, handled this matter as an appeal under Article 11 of the DSU. In an Article 11 appeal, of course, the Appellate Body would not have conducted a *de novo* review of EU law, but rather would have examined whether the panel had exceeded its "margin of appreciation" as the trier of fact.

- The Appellate Body, however, examined the meaning of the EU law **both** as a *de novo* legal issue, and then proceeded to conduct a separate examination of whether the Panel made an objective assessment.

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[5] Jan Bohanes and Nick Lockhart, "Standard of Review in WTO Law", *The Oxford Handbook of International Trade Law* (2009), at 42 (emphasis added).

- Frankly, this approach does not make sense. It departs 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.[6] Furthermore, it raises 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.

- This type of outcome – which follows from the Appellate Body's finding that it can conduct 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.

- We look forward to discussing these important issues with other Members to enhance the effectiveness and efficiency of the dispute settlement system.

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[6] *See .e.g., EC – Fasteners (China) (AB),* para. 442; *Chile – Price Band System (Article 21.5 – Argentina) (AB),* para. 238.