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THE DEVELOPMENT OF STANDARDS OF APPELLATE REVIEW FOR FACTUAL, LEGAL AND LAW APPLICATION QUESTIONS IN WTO DISPUTE SETTLEMENT

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This paper discusses the development of standards of appellate review for factual, legal and law application questions in appeals before the WTO's Appellate Body. After explaining the distinctions between these kinds of issues, it traces the history of each in WTO dispute settlement. It also provides comparisons with certain national and regional legal systems. It concludes with some criticisms of Appellate Body jurisprudence, and calls on WTO Members to consider how the current approach is working.

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I. INTRODUCTION

A fundamental feature of most judicial systems is an appellate review mechanism, under which a 'lower' court's decision can be examined by a 'higher' court. The 'standard' for the higher court's review typically varies depending on the type of issue being appealed.[1] Generally speaking, the higher court must show a significant degree of deference to *factual* findings made by the lower courts. By contrast, for *legal* issues it may conduct a *de novo* review, that is, it need not give any deference to the lower court's view on the legal issues.

These same principles apply to WTO dispute settlement. While the GATT did not provide for a mechanism for appeals, the system of appellate review was added as part of the Uruguay Round.[2] Appeals now play an integral role in WTO dispute settlement system, both in terms of resolving individual disputes, and in establishing legal clarifications of the WTO Agreement which, to some extent, are to be applied in future disputes.[3]

The scope of appellate review is set out in DSU Article 17.6, under which appeals to the Appellate Body "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". Thus, appeals are formally limited to "issues of law" and "legal interpretation", i.e. legal issues.[4] However, as discussed in further detail hereinafter, the Appellate Body has clarified through its jurisprudence that both *factual issues* and *issues of applying the law to the facts* can be appealed as well. As Tania Voon and Alan Yanovich have put it: "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".[5]

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[1] The phrase "standard of review", when used in domestic law, normally refers to the aggressiveness with which an appellate court will review a lower court's ruling. *See* Martha S. Davis, *A Basic Guide to Standards of Judicial Review,* 33 S.D. L. REV. 469, 470 (1988).

[2] *See generally*, 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* KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 64 (Rufus Yerxa & Bruce Wilson eds., 2005).

[3] The role of precedent in the WTO legal system is somewhat controversial, but the Appellate Body has made clear that past cases play an important role. *See, e.g.*, Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (*adopted* May 20, 2008), DSR 2008:II, 51, ¶ 161.

[4] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, ¶ 222.

[5] Tania Voon & Alan Yanovich, *The Facts Aside: The Limitation of WTO Appeals to Issues of Law*, 40(2) J. WORLD TRADE 239, 258 (2006) [hereinafter Voon & Yanovich].

In this article, the historical development of standards of review for legal, factual and law application issues at the WTO will be discussed, specifically focusing on two points: (1) the development and evolution of the "objective assessment" standard of Article 11 of the DSU as the basis for appeals on factual issues, and (2) the standard of review that relates to issues where *the law is applied to the facts* (also referred to as *legal characterization of the facts* or *mixed questions of law and fact*).

Standards of appellate review are of great importance for the functioning of the appeal process. While it may not have been anticipated at the time the DSU was negotiated, since there was no prior experience with appeals under the GATT, and it was not clear how often the appellate mechanism would be used, the subsequent practice under the DSU has shown that appellate review is now a core feature of WTO dispute settlement. As a result, the manner of construction of appeals for different types of issues can be a crucial part of the appellate process. In a recent case, even after sixteen years of WTO dispute settlement practice, governments have seemed uncertain as to how certain appeals should be made, because either (1) the Panel incorrectly applied the law to the facts, or (2) the Panel did not make an objective assessment of the facts under DSU Article 11.[6] The existence of such continued uncertainty suggests that additional clarification of this issue is in order. The Appellate Body has emphasized the importance of governments properly identifying the type of appeal that they wish to undertake. In part, this is due to the different standards of review that are applicable.[7] However, in order to identify these issues properly, clear distinctions need to be drawn.

This article begins with a general discussion of the three elements to a case: the law, the facts, and the application of the law to the facts. This is followed by a review of the development of the Appellate Body's jurisprudence on these issues, focusing on the appeal of factual and law application issues. (The article does not provide a comprehensive overview of all the cases touching upon these issues, but rather tries to select a few illustrative cases which show the evolution of the Appellate Body's reasoning.) Next, I consider briefly how U.S. and EU law have addressed these issues. Finally, in conclusion, I raise several matters for future discussion.

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[6] Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R (*adopted* June 1, 2011), ¶¶ 1313-1316 [hereinafter *EC – Aircraft*].

[7] *Id.* ¶ 1314.

II. ISSUES OF LAW, FACT AND LAW APPLICATION

While the problem is sometimes posed as distinguishing between questions of law and fact,[8] there are actually three categories of questions to be answered. First, there must be a declaration of the law, in which the judge makes "a formulation in general terms of the relevant law to be applied".[9] Law declaration involves "formulating a proposition which affects not only the [immediate] case . . . but all others that fall within its terms",[10] leading to conclusions about legal rules, standards and principles.

Second, the facts must be identified. This involves a "determination and statement of the relevant characteristics of the particular matter before the judge" – that is, a case-specific inquiry into "what happened here".[11] Answering these questions "affects only the particular case at hand", and the relevant characteristics must be "identified without using any of the terms" of the general legal principle which are to be applied.[12]

Third, the law must be applied to the facts, sometimes referred to as 'law application' (also referred to as 'legal characterization' or 'legal categorization' of the facts or a 'mixed question of law and fact'). This involves linking the general legal principle to the specific set of facts, which is often a complex process. If legal propositions could be set out in sufficient detail so as to cover all situations, the process would be easy. For example, a zoning law which says that buildings must not be more than 1,000 feet tall is easy to apply – any buildings of more than 1,000 feet violate the law. In practice, however, legal principles are stated more generally, and applying principles to specific facts involves elaborating on these principles.[13]

While the review of pure law and pure fact questions is fairly straightforward, the issue becomes complicated in the case of the third category, which is, questions of law application. In many instances, applying the law requires a substantial factual analysis, and the fact identification and law application determinations are closely linked. One source of confusion is the attempt to classify these questions into categories of either 'law' or 'fact', thus changing the three-pronged analysis into a two-pronged one. Along the same lines, it would also be problematic to state the

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[8] *See generally*, Ronald J. Allen & Michael S. Pardo, *The Myth of the Law – Fact Distinction*, 97 NW. U.L. REV. 1769 (2003).

[9] HARRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 350 (Foundation Press 1994).

[10] *Id.* at 350.

[11] *Id.*

[12] *Id.* at 350-51

[13] *Id.* at 351

question as whether an issue is one of law, or fact.[14]

III. DEFINING STANDARDS FOR APPELLATE REVIEW AT THE WTO

As noted under DSU Article 17.6, appeals to the Appellate Body "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". In the abstract, the terms of the DSU are clear: legal questions may be appealed, whereas factual questions may not. However, the question arises as to whether there are some circumstances possible where factual issues can be appealed? If so, what standard applies to such appeals?

As discussed above, there are actually three categories of questions. While pure legal and pure factual questions are easy to identify, the situation is more difficult with regard to law application questions, which contain elements of both law and fact. As noted by Professor Petersmann, "[e]xperience with domestic and international appellate review proceedings confirms that distinguishing law from fact, [is] notoriously difficult".[15] Similarly, Professor Jackson points out that: "... the DSU requirement that appeals be on issues of law will sometimes prove difficult (but is not an unknown difficulty in national legal systems). The line between 'law' and 'fact' is often very murky, especially in cases where a judgment is applying the 'law' to a set of complex 'facts' . . ."[16] More recently, Tania Voon and Alan Yanovich have discussed the relevance of this issue: "[The law-fact] distinction is becoming increasingly important, as WTO appellants more frequently claim that the Panel erred in fulfilling its function (e.g., by failing to make an objective assessment of the facts of the case), and appellees more frequently resort to procedural objections (e.g., on the basis that the appellant is improperly asking the Appellate Body to review the Panel's findings of fact)."[17] They refer to "the inherent difficulty in any legal context of drawing clear lines between fact and law, particularly in the abstract",[18] and further note that "understanding this fundamental restriction on the scope of WTO appeals is essential to maximizing the chances of success in an appeal, evaluating proposals in the current

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[14] *Id.* at 351-52.

[15] ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 190 (Martinus Nijhoff Publishers, 1st ed., 1997) [hereinafter PETERSMANN]. *See also*, Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L. L. 193, 195 (1996) (noting with regard to Article 17.6 that "[t]he difficult question will be how to distinguish questions of law from other questions (fact?).").

[16] JOHN JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE (Routledge 1998).

[17] Voon & Yanovich, *supra* note 5, at 239.

[18] *Id.* at 245.

negotiations for a remand procedure, and properly conceptualizing the roles of Panels, and the Appellate Body".[19]

In this section, each type of issue in the context of appeals under the DSU will be examined, looking briefly at legal issues before focusing on the more complex factual and law application issues. As we will see, with factual issues, there is a specific DSU provision that mentions 'facts', thereby allowing for the identification of a legal standard. This standard, however, still remains to be defined. In addition, factual issues must be distinguished from law application issues. As regards law application issues, they must be distinguished from both factual and legal issues, and the applicable standard of review must also be determined.

A. Legal Issues

The situation of pure legal questions is clear. The interpretation of a legal provision by a panel can be appealed, and the Appellate Body can examine the issue *de novo*. No deference needs to be shown to a Panel's legal interpretation. As the highest court in the WTO legal system, the Appellate Body has the final say in clarifying the WTO legal texts in WTO dispute settlement. (Of course, the WTO Members may offer their own interpretation under WTO Agreement Article IX:2, which will necessarily take precedence.)

B. Factual Issues

The language of DSU Article 17.6 may seem clear on its face. It provides that "issues of law covered in the panel report and legal interpretations developed by the panel" can be appealed. Implicitly, therefore, appeals are limited to such issues, and factual issues that cannot be appealed. However, as described in this section, early on in WTO appellate practice, a mechanism was developed to provide for a limited appeal of factual issues. The basis of this mechanism is DSU Article 11, which provides:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreement. …

[19] *Id.* at 240.

The Appellate Body seems to view this provision as the general "standard of review" to be applied to panel reports.[20] It is noteworthy that this provision contains three requirements for panels (and thus three avenues of appeal). Panels are to make (1) "an objective assessment of the matter before it", (2) which includes "an objective assessment of the facts of the case", and (3) "an objective assessment of…the applicability of and conformity with the relevant covered agreements". The first and third requirements are quite broad and open-ended. In a sense, these are general, catch-all provisions that allow for an allegation that the panel committed some sort of error. Any time a party has a concern regarding an insufficiency or flaw in a panel's reasoning or an approach which is difficult to fit within a specific legal obligation, the party may try to fit its claim into these three aspects of DSU Article 11. For example, it may be that the Panel made a finding on a claim that was not before it.[21] The focus of this paper, though, is on issues related to "objective assessment of the facts", not the more general provisions.

It is worth noting at the outset, when thinking about DSU Article 11 as a mechanism for appeal, that the language of Article 11 was carried over from the Tokyo Round 1979 Understanding. Paragraph 16 of this Understanding states:

> The function of panels is to assist the CONTRACTING PARTIES in discharging their responsibilities under Article XXIII:2. Accordingly, 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 General Agreement …[22]

Thus, paragraph 16 mirrors closely the language of Article 11. Arguably, this language was not designed as the appellate standard of review for factual questions, as it existed prior to there being an appeal mechanism. As to the actual purpose of the original language, during the Tokyo Round negotiations, it was noted that an "objective assessment" was something that could only be provided by a neutral panel of experts, as distinguished from an assessment given by a working party:

> Since 1952, however, the CONTRACTING PARTIES have normally established a panel rather than a working party to assist them in the

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[20] *See for example,* Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R (*adopted* Oct. 5, 2011) which reads at paragraph 123 "Article 11 of the DSU sets out the standard of review applicable in WTO panel proceedings".

[21] Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R (*adopted* Oct. 23, 2002), DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473), ¶¶ 145-77 [hereinafter *Chile – Price Band*].

[22] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, L/4907 (*adopted* Nov. 28, 1979).

> examinations of matters raised under paragraph 2 of Article XXIII. A panel is more likely to arrive at an objective assessment of the facts than a working party since the parties to the dispute are normally members of a working party but are not represented on a panel, which is composed of individuals appointed in their personal capacity and not as representatives of their governments.[23]

Regardless of its origins, however, Article 11 soon came to play an important role in WTO appeals. In the first few appeals of panel reports after the conclusion of the Uruguay Round, no mention was made of DSU Article 11 or the 'objective assessment' standard. 'Objective assessment' was first mentioned in *U.S. – Wool Shirts*, the fifth appeal to be filed, where India stated: "By defining its task solely in terms of the measure to be brought into conformity with the ATC, the Panel curtailed India's right to an objective assessment of all legal claims set out in the Panel's terms-of-reference".[24] However, this issue is of the more general kind and not particularly relevant to this paper since it relates to a panel's fulfilment of its task, and is not directly related to appeals of *factual* issues.

The issue of the appeal of factual findings came up in the sixth appeal, *Canada – Periodicals*, which concerned several measures related to the sale of imported magazines in Canada. Of relevance here was the 'likeness' of different editions of the magazines. Although no mention of the issue was made in the notice of appeal, in its submission to the Appellate Body, Canada argued that:

> The Panel disregarded the evidence before it, and based its finding on a speculative hypothesis, thus failing to make "an objective assessment of the facts of the case" as required by Article 11 of the DSU. In Canada's view, the 'like product' test under Article III:2, first sentence, requires a comparison of an imported product with a domestic product. While the Panel acknowledged the correctness of this test, the Panel failed to apply it by using a hypothetical example for its comparison rather than actual examples of split-run and non-split-run magazines provided by Canada. Canada notes that the Panel asserted that its hypothetical example was necessary because there were no imported split-run periodicals in Canada due to the import prohibition under Tariff Code 9958. However, Canada argues that there are certain 'grandfathered' split-run magazines produced in Canada, and that those magazines provide an accurate representation of the content and properties of a split-run edition based

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[23] Negotiations on the General Agreement on Tariffs and Trade, *Factual Note by the Secretariat: Group 3(d) – Safeguards for Maintenance of Access*, MTN/3D/2 (Aug. 30, 1974), ¶ 16.

[24] *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India,* Notification of an Appeal by India, WT/DS33/3, (Feb. 24, 1997). *See also*, Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (*adopted* May 23, 1997), and Corr.1, DSR 1997:I, 323, at 6.

> on a non-Canadian parent magazine. The Panel did not consider the evidence which had been filed by Canada, it did not provide any reason why that evidence was not relevant, and instead based its analysis upon an hypothetical scenario. Therefore, Canada argues, the Panel followed an approach which is inconsistent with the letter and spirit of Article 11 of the DSU.[25]

The Appellate Body's findings make no mention of Article 11 or the 'objective assessment' requirement. However, the Appellate Body did reach the following conclusion:

> We therefore conclude that, as a result of the lack of proper legal reasoning based on inadequate factual analysis in paragraphs 5.25 and 5.26 of the Panel Report, the Panel could not logically arrive at the conclusion that imported split-run periodicals and domestic non-split-run periodicals are like products.
>
> We are mindful of the limitation of our mandate in Articles 17.6 and 17.13 of the DSU. According to Article 17.6, an appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the Panel. The determination of whether imported and domestic products are 'like products' is a process by which legal rules have to be applied to facts. In any analysis of Article III:2, first sentence, this process is particularly delicate, since 'likeness' must be construed narrowly and on a case-by-case basis . . .[26]

Thus, the Appellate Body did refer to facts, when it mentioned an 'inadequate factual analysis' and legal rules being 'applied to facts'. Although the Appellate Body did not explicitly refer to this as a finding based on Article 11, at least one commentator considered the failure to make an 'objective assessment of the facts' to be an 'issue of law,' which could thus be the subject of an appeal.[27]

An appeal related to a panel's factual findings was also made in *EC – Hormones* (which dealt with an EC ban on certain hormone treated meat), the eighth appeal, where the EC argued the following in its notice of appeal:

> The panel failed to examine the applicability of the precautionary principle to all hormones in dispute, it distorted and interpreted erroneously the scientific and factual evidence submitted or referred to it

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[25] Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R (*adopted* July 30, 1997), at 5 [hereinafter *Canada – Periodicals*].

[26] *Id.* at 22.

[27] Maurits Lugard, *Scope of Appellate Review: Objective Assessment of the Facts and Issues of Law*, 1 J INT'L ECO. L. 2 (1998), 323- 24.

> by the European Communities, and it failed to make an objective assessment (as required by the DSU) of the scientific evidence presented to it by some of the scientific experts it has chosen.[28]

The Appellate Body rejected the EC's argument. In doing so, it seemed to impose a high standard for the reversal of a panel's findings based on DSU Article 11, stating:

> The question which then arises is this: when may a panel be regarded as having failed to discharge its duty under Article 11 of the DSU to make an objective assessment of the facts before it? Clearly, not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts. In the present appeal, the European Communities repeatedly claims that the Panel disregarded or distorted or misrepresented the evidence submitted by the European Communities and even the opinions expressed by the Panel's own expert advisors. The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts.[29]

The *EC–Hormones* Appellate Body report was circulated in 1998. The first Appellate Body finding of a violation of DSU Article 11 came in *U.S. – Wheat Gluten*, in 2001.[30] However, that case involved a panel's application of the standard of review to the determination made by a domestic trade remedy authority. Outside of the trade remedy review context, in *Chile – Price Band* in 2002, the Appellate Body concluded that, by making a finding that the duties resulting from Chile's price band system are inconsistent with Article II:1(b) of the GATT, second sentence (which was not part of the matter before the Panel), and also by thereby denying Chile the due process of a fair right of response, the Panel acted inconsistently with Article 11.[31]

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[28] *EC – Measures Concerning Meat and Meat Products (Hormones)*, Notification of an Appeal by the European Communities, WT/DS26/9 (Sept. 25, 1997).

[29] Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (*adopted* Feb. 13, 1998), DSR 1998:I, 135, ¶ 133 [hereinafter *EC – Hormones*].

[30] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (*adopted* Jan. 19, 2001), DSR 2001:II, 717, ¶¶ 156-63.

[31] *Chile – Price Band*, *supra* note 21, ¶¶ 145-77.

In the ensuing years, appeals based on DSU Article 11 have become increasingly common. While reversals based on such an appeal are rare, parties continue to make such arguments. Recently, in *EC* – Aircraft, the Appellate Body has emphasized the importance of distinguishing between types of claims, perhaps recognizing that some confusion exists as to when an allegation that the panel erred should be based on Article 11, and when it should be characterized as a claim that the law has been applied to the facts incorrectly and thus violates a substantive legal provision. In the *EC – Aircraft* decision in May 2011, the Appellate Body noted the following overlap in the claims made by the European Union:

> 1313. For each aspect of the Panel's assessment that it challenges, the European Union makes a claim under Articles 5(c) and 6.3(c) of the SCM Agreement, alleging an error of application, as well as a claim under Article 11 of the DSU, alleging a failure by the Panel to make an objective assessment of the facts. At the oral hearing, the European Union suggested that an appellant was entitled to make both claims and that it would be for the Appellate Body to determine which was the proper characterization of those claims.[32]

According to the Appellate Body however, generally speaking, a claim can only be of one or the other type. This has implications for the standard of review:

> As noted earlier, the Appellate Body has stated that "an appellant is free to determine how to characterize its claims on appeal", and it is often difficult to clearly distinguish between issues that are purely legal, purely factual, or are mixed issues of law and fact. We also recall that the characterization of a claim as one relating to the application of law to facts or as one relating to a failure to make an objective assessment of the facts under Article 11 of the DSU has consequences for the standard of review that the Appellate Body will apply because of the limitations on the scope of appellate review. In most cases, however, an issue will either be one of application of the law to the facts or an issue of the objective assessment of facts, and not both.[33]

Here, the Appellate Body concluded that the issues were factual in nature:

> In order to determine whether the issues raised by the European Union are more properly characterized as relating to application of law to facts or to an objective assessment of the facts, it is first necessary to recall the requirements of Article 6.3(c) of the SCM Agreement, which establishes that 'serious prejudice' in the sense of Article 5(c) 'may arise' where 'the effect of the subsidy' is, among others, '{significant} lost sales in the

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[32] *EC – Aircraft*, *supra* note 6, ¶ 1313.
[33] *Id.* ¶ 1314.

> same market'. In this part of its appeal, the European Union is not alleging that the Panel applied an incorrect legal standard in determining whether the 'effect of' the subsidies was 'significant lost sales' under Article 6.3(c) of the SCM Agreement in relation to the sales of the A380 to Emirates Airlines, Qantas, and Singapore Airlines. During the oral hearing, the European Union also clarified that it did not challenge the Panel's interpretation of the phrase 'lost sales in the same market' in Article 6.3(c).
>
> The European Union's claim that the Panel erred in the application of Articles 5(c) and 6.3(c) of the SCM Agreement is directed at three particular aspects of the Panel's analysis. First, the European Union challenges the Panel's assessment of "the financial viability and credibility of Airbus' business case for the A380". In our view, the financial viability of Airbus is essentially a factual matter and the Appellate Body has held that the assessment of the weight and credibility of evidence, such as the A380 business case, falls in principle within the discretion of panels as triers of fact. Second, the European Union asserts that "the Panel erred in its assessment of the ability of a nonsubsidised Airbus to raise the financing necessary to launch the A380". We do not see that this raises a legal issue; rather, the assessment of a company's ability to raise financing is a factual matter. Finally, the European Union argues that "the Panel erred in its assessment of a non-subsidised Airbus' technological experience to develop and produce the A380" if prior models had been launched without LA/MSF. We see the technological abilities of a company as being an issue that is primarily factual in nature. Thus, in our view, the European Union's challenges against these three aspects of the Panel's analysis are more properly characterized as claims under Article 11 of the DSU because they are directed at the alleged lack of objectivity of the Panel's assessment of the facts. Consequently, we will examine them under Article 11 of the DSU.[34]

This discussion by the Appellate Body provides some useful guidance on issues that are purely factual in nature and thus subject to appeal only through DSU Article 11.

In terms of substantive findings relating to an appeal based on DSU Article 11, the following example from the *EC – Aircraft* case is instructive as to how the Appellate Body might find a violation based on such an appeal and thus reverse the Panel's finding. This case dealt with a U.S. challenge to various alleged subsidies to the aircraft industry. Of particular relevance here is the Appellate Body's consideration of the European Union's challenge of the quantification of the level of project risk in relation to one of the subsidies. According to the Appellate Body, the choice of relevant factors for quantification, and the reasoning

[34] *Id.* ¶¶ 1315-16.

of the Panel, relate to "the objectivity of the Panel's assessment of factual determinations within the meaning Article 11 of the DSU". Because the EU allegations "concern how the Panel reasoned over disputed facts", the Appellate Body said that these allegations appear to be claims about the objectivity of the Panel's assessment of the facts and thus are more in the nature of claims made under DSU Article 11.[35] Reviewing the Panel's reasoning in relation to the United States' proposed project-specific risk premium, the Appellate Body concluded that this reasoning is 'internally inconsistent'. In this regard, it noted that the Panel had dismissed venture capital financing as a source from which to derive the project risk of the projects financed with LA/MSF because it considered venture capital financing to be "inherently more risky than LA/MSF". At the same time, the Panel had used the project-specific risk premium proposed by the United States as a boundary for the ranges of project-specific risk premia that it established for the three groupings of LCA projects. According to the Appellate Body, the Panel's error was compounded in the case of certain aircraft types because it left the upper limit of the range of the project-specific risk premium unbounded, thus potentially going beyond the level of the risk premium associated with venture capital financing. As a result, the Appellate Body found that there are 'clear inconsistencies' in the Panel's reasoning.[36] It concluded:

> This type of internally inconsistent reasoning cannot be reconciled with the Panel's duty to make an objective assessment of the facts under Article 11 of the DSU. The Panel also failed to comply with its duties under Article 11 of the DSU by not engaging with the European Communities' argument as to the inconsistency between the project-specific risk premium proposed by the United States and the discount rate used in the Dorman Report.

C. Law Application Issues

Law application issues have presented difficulties for appellate courts, as they combine elements of both the law and the facts. In this section, two early WTO cases have been discussed that illustrate the confusion and uncertainty on the part of Members involved in WTO dispute settlement and the Appellate Body in how to address these issues. Thereafter, two recent cases have been considered which arguably take an overly expansive view of the scope of law application issues.

The first case is *Canada – Periodicals*, noted above in section III.B on 'factual issues'. In this case, the panel was asked to make a determination as to whether imported 'split-run' periodicals and domestic non 'split-run' periodicals are like products under Article III:2 of GATT. The panel found that they were. Canada

[35] *Id.* ¶¶ 879-81.
[36] *Id.* ¶¶ 883-94.

appealed this issue, stating briefly in its notice of appeal that the panel "erred in law in finding that imported U.S. split-run periodicals and Canadian non split-run periodicals are like products". In more detail, Canada argued that the Panel followed an approach inconsistent with DSU Article 11, thereby focusing on Article 11 and objective assessment:

> The Panel disregarded the evidence before it, and based its finding on a speculative hypothesis, thus failing to make "an objective assessment of the facts of the case" as required by Article 11 of the DSU. In Canada's view, the 'like product' test under Article III:2, first sentence, requires a comparison of an imported product with a domestic product. While the Panel acknowledged the correctness of this test, the Panel failed to apply it by using a hypothetical example for its comparison rather than actual examples of split-run and non-split-run magazines provided by Canada. Canada notes that the Panel asserted that its hypothetical example was necessary because there were no imported split-run periodicals in Canada due to the import prohibition under Tariff Code 9958. However, Canada argues that there are certain 'grandfathered' split-run magazines produced in Canada, and that those magazines provide an accurate representation of the content and properties of a split-run edition based on a non-Canadian parent magazine. The Panel did not consider the evidence which had been filed by Canada, it did not provide any reason why that evidence was not relevant, and instead based its analysis upon an hypothetical scenario. Therefore, Canada argues, the Panel followed an approach which is inconsistent with the letter and spirit of Article 11 of the DSU.[37]

In addressing this issue, the Appellate Body concluded that the panel's findings ignored the evidence before it, and instead the panel based these findings on a single hypothetical example using comparisons between two editions of a Canadian-owned magazine. This example was incorrect – the panel should have compared the evidence on record from imported 'split-run' periodicals and domestic non 'split-run' periodicals. As a result, the Appellate Body concluded that due to legal reasoning based on an inadequate factual analysis, the panel could not logically arrive at the conclusion that imported 'split-run' periodicals and domestic non 'split-run' periodicals are like products. Specifically, the Appellate Body stated:

> It is not obvious to us how the Panel came to the conclusion that it had 'sufficient grounds' to find the two products at issue are like products from an examination of an incorrect example which led to a conclusion that imported split-run periodicals and domestic non-split-run periodicals can be 'like'. We therefore conclude that, as a result of the lack of proper legal reasoning based on inadequate factual analysis in

[37] *Canada – Periodicals*, *supra* note 25.

> paragraphs 5.25 and 5.26 of the Panel Report, the Panel could not logically arrive at the conclusion that imported split-run periodicals and domestic non-split-run periodicals are like products.[38]

The Appellate Body clarified that the process of applying the legal standard of 'like products' to the facts of the case was reviewable:

> According to Article 17.6, an appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the Panel. The determination of whether imported and domestic products are 'like products' is a process by which legal rules have to be applied to facts. In any analysis of Article III:2, first sentence, this process is particularly delicate, since 'likeness' must be construed narrowly and on a case-by-case basis. We note that, due to the absence of adequate analysis in the Panel Report in this respect, it is not possible to proceed to a determination of like products.[39]

Based on its conclusion that a proper analysis had not been made, the Appellate Body reversed the legal findings of the panel on the like product issue. The Appellate Body found that the law on like products had not been properly applied to the facts – the legal reasoning undertaken by the panel was inadequate to decide the question of whether like products existed. The Appellate Body then proceeded to make its own findings on the like product issue, thereby affirming its right to review this issue as a question of law application.[40]

The second case is *EC – Bananas*, where the EC made the following argument on appeal:

> 54. The European Communities maintains, first, that the Panel misapplied this standard of burden of proof in deciding which companies are a "juridical person of another Member" and are 'owned', 'controlled' by or 'affiliated' with a juridical person of another Member within the meaning of Articles XXVIII(m) and (n) of the GATS. The

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[38] *Id.* at 21.

[39] *Id.* at 22 (emphasis added).

[40] *Id.* Similarly, in the *Japan – Alcoholic Beverages* case, the European Communities argued that the panel's decision to identify only vodka and shochu as 'like products' for purposes of Article III:2 primarily involved the assessment of facts and, therefore, was not reviewable by the Appellate Body. Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8, 10, and 11/AB/R (*adopted* Nov. 1, 1996), at 6. Although the Appellate Body did not make an explicit ruling on this issue, it did review the panel's findings and ruled that the panel's determination in this regard was basically correct. *Id.* at 21. By making this judgement, the Appellate Body was asserting its right to review panels' like product determinations, thereby implying that it considered these law application questions to be legal issues subject to review.

> absolute minimum for any claim under the third mode of service supply is showing that these conditions are fulfilled. The European Communities argues that the Panel, in fact, relied exclusively on the list of alleged "banana wholesaling companies established in the European Communities that were owned or controlled by the Complainants' service suppliers, 1992" and that this list as such gave no clear indications about ownership or control. In this respect, the European Communities contends that, in particular, there are doubts that Del Monte was owned by Mexican persons at the time the complaint was brought and that, for this reason, it is impossible to argue that the Complaining Parties had satisfied the requirement of proving their claim in respect of companies from Mexico.
>
> 55. Second, the European Communities asserts that the burden of proof has not been discharged with respect to the distribution of the market for wholesale services for bananas between Category A and Category B Operators. The European Communities contends that the Panel's conclusion is based on alleged market shares for imports and production, and that it is not clear how the distribution of market shares in the services market can be based completely on shares in the import and production markets, unless one assumes that service providers supply services only in respect of their own bananas and that there is no independent market for services in bananas in general. Finally, the European Communities maintains that, with respect to hurricane licences, the Panel posited an unproved identity of the class of Category B operators and of the class of "operators who include or represent EC producers" as well as the group of "operators who include or represent ACP producers".[41]

In response, the complainants argued:

> 85. With respect to the issue of the burden of proof, the Complaining Parties argue that, to the extent the Appellate Body can consider the claims raised by the European Communities to constitute an issue of law within its mandate under Article 17.6 of the DSU, the European Communities does not show how the Panel's rendering of its factual findings constitutes a legal error that the Appellate Body should reverse. The Complaining Parties observe that the Appellate Body in *United States – Shirts and Blouses from India* declined to define a uniform set of facts needed to create the presumption of a violation, let alone the quantum of support needed to establish any particular fact given in the case. . .

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[41] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (*adopted* Sept. 25, 1997), ¶¶ 54-55 [hereinafter *EC – Bananas*].

There were a number of issues raised together, some which seemed more 'legal' (such as the meaning of 'juridical person' in GATS Article XXVIII) and some which seemed more factual (such as the operation of the bananas distribution market). In its findings on these issues, the Appellate Body stated:

> 238. The European Communities argues that the Panel has not followed the ruling by the Appellate Body in *United States – Shirts and Blouses from India*, as it relates to the burden of proof, in deciding the following issues:
>
> - which companies are a 'juridical person of another Member' within the meaning of Article XXVIII(m) of the GATS and are 'owned', 'controlled' by or 'affiliated' with such a juridical person of another Member within the meaning of Article XXVIII(n) of the GATS and are providing wholesale trade services through commercial presence within the European Communities;
> - the market shares of the respective companies engaged in wholesale trade in bananas within the European Communities; and
> - the category of 'operators' that include or directly represent EC (or ACP) producers who have suffered damage from hurricanes.[42]

The Appellate Body rejected the EC appeal and held as follows:

> In our view, the conclusions by the Panel on whether Del Monte is a Mexican company, the ownership and control of companies established in the European Communities that provide wholesale trade services in bananas, the market shares of suppliers of Complaining Parties' origin as compared with suppliers of EC (or ACP) origin, and the nationality of the majority of operators that 'include or directly represent' EC (or ACP) producers, are all factual conclusions. Therefore, we decline to rule on these arguments made by the European Communities.[43]

Thus, the Appellate Body explicitly held that none of the above listed questions were 'issues of law' or 'legal interpretations' for the purposes of Article 17.6. Most notably, implicitly at least, the Appellate Body held that the questions of whether a company is a "juridical person of another Member" under Article XXVIII(m) or is owned, controlled, or affiliated under Article XXVIII(m) were factual. These questions clearly involve applying legal provisions to a specific set of facts. Nonetheless, the Appellate Body held that they were factual, and therefore not reviewable. In truth, it may be that the Appellate Body had not considered that it was looking at an issue of the application of the law of Article XXVIII. Rather, it may only have had in mind various factual issues related to corporate relationships and nationality. Nonetheless, the manner in which it phrased the issue on appeal,

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[42] *Id.* ¶ 238.

[43] *Id.* ¶ 239 (footnotes omitted).

with an explicit reference made to this provision, gives the appearance that it was stating that such an issue was indeed, a factual one.

Soon after these cases, the Appellate Body in *EC – Hormones* offered a fairly definite statement on the issue of how law applications issues should be dealt with. In that case, the Appellate Body seemed to indicate that law application questions (or 'legal characterization', which was the term it used) are questions of law, and are therefore freely reviewable. The Appellate Body noted that:

> [t]he determination of whether or not a certain event did occur in time and space is typically a question of fact; . . . Determination 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. 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.[44]

Recently, the Appellate Body has asked for more precision from the parties on this issue. In the *EC – Aircraft* case noted in the previous section, the Appellate Body spelled out the distinction between factual and law application issues.[45]

Of course, stating the principle in the abstract is one thing. Applying it to specific cases can be more difficult. In this regard, two recent cases shall now be focused upon, which dealt with the issue of whether a panel's examination of the measures at issue is a law application question.

In *China – Auto Parts* in 2008*,* which concerned various Chinese measures related to imports of automobile parts, in the context of claims regarding the tariff treatment of certain products, the participants disagreed as to the standard of review that the Appellate Body was to apply to the panel's findings regarding the

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[44] *EC – Hormones*, *supra* note 29, ¶ 132. However, it should be noted that earlier in the decision, the Appellate Body said:

> "We do not mean, however, to suggest that there is at present no standard of review applicable to the determination and assessment of the facts in proceedings under the *SPS Agreement* or under other covered agreements. In our view, Article 11 of the DSU bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements." (¶ 116)

It is not entirely clear what the Appellate Body meant in this passage, but subsequent case law seems clear that law application questions are issues of law that may be appealed pursuant to DSU Article 17.6.

[45] *EC – Aircraft*, *supra* note 6, ¶ 1314.

scope and meaning of the Chinese laws at issue – Articles 2(2) and 21(1) of Decree 125.[46] China asserted that the Panel's finding as to the applicability of 'charge' imposed under the measures is a matter of 'legal interpretation'. By contrast, the United States considered that a panel's "constructions of municipal law are factual determinations in WTO dispute settlement", and that the Appellate Body "may not review such findings *de novo*, but must accord them the 'same deference as other types of factual findings made by panels in WTO dispute settlement proceedings"'.[47]

In response, the Appellate Body stated, "[w]hen 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". Citing paragraph 106 of its report in *U.S. – Section 211*,[48] the Appellate Body observed that it has "reviewed the meaning of a Member's municipal law, on its face, to determine whether the legal characterization by the panel was in error, in particular when the claim before the panel concerned whether a specific instrument of municipal law was, as such, inconsistent with a Member's obligations". On the other hand, recognizing that "there may be instances in which a panel's assessment of municipal law will go beyond the text of an instrument on its face, in which case further examination may be required, and may involve factual elements", the Appellate Body explained that "[w]ith respect to such elements", it would "not lightly interfere with a Panel's finding on appeal".[49]

Along the same lines, in *EC – Fasteners* in 2011, which dealt with a challenge to specific EU anti-dumping duties as well as a provision of EU anti-dumping law, China contended that the Panel's finding on the 'meaning' and 'scope' of Article 9(5) of the Basic EU Anti-Dumping Regulation[50] is an issue of fact that the Appellate Body is not competent to review, pursuant to DSU Article 17.6.[51] On this issue, the Appellate Body noted that, on several occasions, it has clarified that "municipal law may serve both as evidence of facts and evidence of a Member's

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[46] Administrative Rules on Importation of Automobile Parts Characterized as Complete Vehicles (Decree of the People's Republic of China, No. 125).

[47] Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (*adopted* Jan. 12, 2009), ¶ 224 [hereinafter *China – Auto Parts*].

[48] Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (*adopted* Feb. 1, 2002), DSR 2002:II, 589.

[49] *Id.* ¶ 225.

[50] Council Regulation (EC) No. 1225/2009.

[51] Appellate Body Report, *European Communities – Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R (*adopted* July 28, 2011).

compliance or non-compliance with its international obligations".[52] Therefore, it concluded 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 had 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".[53]

Arguably, the Appellate Body's findings are overly broad, in the sense of treating a clear factual question as a law application question, and thus expanding the scope of appellate review. The implications of such an expansive approach on the scope of law application questions is further discussed in the conclusion.

IV. COMPARISONS WITH NATIONAL AND REGIONAL LEGAL SYSTEMS

While national and regional legal systems do not provide binding precedent to apply in the WTO dispute settlement system, they provide an obvious place to look for guidance on general legal principles. In this section, I look briefly at how issues of appellate review for factual, legal and law application questions have been addressed in the U.S. and EU legal systems.

A. United States

In the United States, federal appellate courts generally address questions of law and questions of fact under different standards of review. Factual questions are looked at under a 'clearly erroneous' standard.[54] This standard has been codified under the Federal Rule of Civil Procedure, and currently reads as follows in Rule 52(a): "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous…"[55] Defining this standard has been difficult. One early formulation was: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[56] Another court held that clear error may be found when (1) the findings are unsupported by substantial evidence, (2) the court 'misapprehended the effect' of the evidence, or

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[52] *Id.* ¶ 295.

[53] *Id.* ¶¶ 294-297.

[54] STEVEN A. CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW, VOLUME I, § 2.02 (2010) [hereinafter CHILDRESS & DAVIS].

[55] Fed. R. Civ. P. 52(a).

[56] United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

(3) although evidence exists "which if credible would be substantial, the force and effect of the testimony considered as a whole convinces that the finding is so against the preponderance of the credible testimony that it does not reflect or represent the truth and right of the case".[57]

By contrast, errors of law are freely reviewable. A question of law may be decided by an appellate court *de novo*. Although the Federal Rules of Civil Procedure do not state this explicitly, it is inferred from Rule 52's "deference on facts and the historical role of appellate courts".

As to law application questions, characterizing the question presented on appeal as factual or legal has long been a problem for U.S. courts.[58] At its outer limit the line between legal and factual questions is clear. As explained by Childress & Davis:

> [W]hen the appeals court is examining a "purely legal" conclusion, such as whether the First Amendment can broadly protect gestures or applies to the states, it is not hard to recognize the court acting in a law-making role, free from lower court opinion … The other end may also be neat: what Alice did yesterday is regarded as a pure fact and is usually delegated to the trial court.[59]

However, "the area in between these 'pure' examples gets increasingly sticky".[60] There has been discussion of 'literal' and 'policy-oriented' approaches to the question, but the varied approaches in different areas of the law means there is no single and straightforward approach.[61] Nonetheless, Childress & Davis note that "most courts agree that mixed questions are freely reviewed".[62] Comparisons between the U.S. and WTO legal systems are difficult, because U.S. judicial law making is dispersed over many courts, but nonetheless there are clear parallels between the operation of both systems.

B. European Union

In the EU legal system, the European Court of Justice (ECJ) is the appellate court, with the Court of First Instance (CFI) acting as the lower court. As with the

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[57] Sanders v. Leech, 158 F.2d 486 (5th Cir. 1946), as described in CHILDRESS & DAVIS, *supra* note 52, § 2.06.

[58] The U.S. Supreme Court has noted the "vexing nature of the distinction between questions of fact and questions of law". Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

[59] CHILDRESS & DAVIS, *supra* note 54, § 2.13.

[60] *Id.*

[61] *Id.*

[62] *Id.* § 2.18.

DSU, EU law makes it clear that appeals to the ECJ are limited to questions of law: "A Court of First Instance shall be attached to the Court of Justice with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only. . ."[63] Thus, on the face of this language, legal questions are freely reviewable, whereas factual questions may not be reviewed. Nonetheless, the ECJ has been confronted with the law/fact distinction as part of its appeal process, in relation to both factual and law application questions. As with the WTO and the United States, the difficulty of the law-fact distinction has been noted in the EU as well: "It is not always straightforward to distinguish between 'points of law' in relation to the interpretation and application of Community law and questions of fact which come solely within the purview of the Court of first instance."

With regard to factual questions, in practice, the case law has established that in exceptional circumstances, "a wrong finding of fact by the Court of First Instance may nevertheless produce a point of law which can be reviewed by the Court of Justice on appeal". This will be the case "where it is manifest from the documents in the case remitted to the Court of First Instance that it made a wrong finding of fact".[64] For example, "it may be apparent from the presentation of evidence in the decision of the Court of First Instance that the Court of First Instance interpreted the evidence adduced in a way that is at odds with its wording". [65] Where the Court of First Instance thus "wrongly presents the evidence adduced or distorts it, this will constitute a question of law which the Court of Justice may review".[66] In this way, along the same lines as DSU Article 11 at the WTO, EU law provides for appeals of factual issues, inspite of a formal restriction that appeals be limited to legal issues.

As to the application of the law to the facts, "it has been noted that the fact that appeals are confined to points of law does not preclude the Court of Justice from reviewing the legal categorization of facts found by the Court of First Instance". A "wrong categorisation of a given situation of fact" is just as much a legal issue as an incorrect legal interpretation. For example, it has been noted that "the identification of the relevant product market for the purpose of determining whether a given undertaking is in a dominant position within the meaning of Art. 82 of the EC treaty is a conclusion of law".[67] Thus, as with WTO law, under EU law "law application" questions are reviewable in appeals.

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[63] EC Treaty, Art. 225(1) (emphasis added).

[64] KOEN LENAERTS *et. al.*, PROCEDURAL LAW OF THE EUROPEAN UNION 455 (Sweet & Maxwell 2006).

[65] *Id.* at 456.

[66] *Id.* at 456.

[67] *Id.* at 457.

V. CONCLUSION

When drafting the DSU, the government negotiators may not have thought too much about how appeals of factual questions and law application questions would work. Most likely, those drafters with experience in domestic legal systems probably assumed that appeals of such issues would be permitted in some way. However, they did not see a need to spell this out in the rules in detail. It is not out of the question that perhaps they envisioned DSU Article 11 playing a role in such appeals, but this was not made explicit.

Regardless of the origins of the DSU rules on the scope of appellate review, and whatever the drafters may have been thinking, over the years the Appellate Body has developed some guiding jurisprudence. Based on this practical experience with the issue, it may now be useful for WTO Members to consider how they view the rules that have been created by the Appellate Body. Are the rules for appeal of factual, legal and law application questions clear and sensible? What should the standard of appellate review be for each category of questions? In this concluding section, I raise several issues for possible future discussion.

A. The Interaction of the Various Legal Provisions that go beyond DSU Article 17.6

Article 17.6 sets out the basic limitation that appeals are limited to legal issues. As noted, however, there are additional provisions indicating that appeals can go beyond pure legal issues. The focus here has been on DSU Article 11, but DSU Article 12.7 must also be considered, which states in relevant part: "Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. …"[68] Several appeals have been made under this provision, but all have been rejected.

Taking Articles 11 and 12.7 together, there are a number of requirements which are imposed on a panel. It must: (1) make "an objective assessment of the matter before it"; (2) make "an objective assessment of the facts of the case"; (3) make "an objective assessment of … the applicability of and conformity with the relevant covered agreements"; (4) make "such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements"; and (5) it must "set out the findings of fact, the applicability

[68] Like Article 11, this provision was also carried over from the Tokyo Round Dispute Settlement Understanding. *See* ¶ 6(v).

of relevant provisions and the basic rationale behind any findings and recommendations that it makes".

These requirements seem to overlap to a considerable degree. In order to provide clear guidance to panels on how they should perform their functions, and to parties on how they may appeal issues related to panels' performance of their functions, it may be worth reviewing these provisions in light of their increased importance in WTO appeals. These provisions were originally drafted as part of a system without appeals. Making use of them as part of an appeal process may require some refinements to ensure they function cooperatively and serve their new purpose effectively.

B. The Appropriate Consideration of Factual Appeals

With regard to the problem of appeal of factual issues generally, EU law provides for this kind of appeal without a DSU Article 11 equivalent. Perhaps then, relying on Article 11 was unnecessary in this regard. It is possible that by latching on to Article 11, the Appellate Body has made this type of appeal too expansive, with too many opportunities for challenging panel findings, and with a confusing set of principles to be followed. Because of the textual reference to the "objective assessment of the facts", and the strongly text-based interpretive approach often seen in WTO dispute settlement, parties may have been encouraged to use this as a basis for appeals. The frequency of Article 11 appeals in recent cases, and the apparent difficulty in characterizing appeals as based on Article 11 or based on the application of the law to the facts, may suggest that this is the case. On the other hand, looking at the experience of domestic legal systems, the scope for appeals seems similarly broad, and just as confusing, if not more so.[69]

C. The Scope of Appellate Review for Issues Related to Examination of a Measure

As to the distinction between factual and law application questions, and in particular the problem of whether a panel's examination of a measure is factual (as noted above), the Appellate Body's statements in *China – Auto Parts* and *EC – Fasteners* appear to draw the line between factual and law application issues in a way that puts some issues with a high factual component and with little or no connection to WTO law into the law application category. In particular, the Appellate Body may be blurring two issues in relation to the application of the law to the facts. First, there is the examination of municipal law, which involves understanding the wording of the measure and how it operates. Second, there is the evaluation of whether that measure violates WTO obligations. The latter is clearly the application of the law to the facts. However, the former seems more

[69] CHILDRESS & DAVIS, *supra* note 52.

factual in nature, as it involves only the examination of the measures themselves, outside the context of any WTO obligations. The Appellate Body's apparent inclusion of the examination of measures outside the context of WTO law, as being part of the application of the law to the facts, constitutes a broad scope for this category. Similarly, its view that factual questions are those which go "beyond the text of an instrument on its face" seems quite narrow, especially if these are the only issues that could be considered factual. Indeed, there may be cases where there is no examination of the measures beyond their text, in which case there would seem to be no factual issues at all if this approach is followed.

Applying these concepts to *China – Auto Parts*, where this issue arose, much of the Appellate Body's review of the measures at issue seems very factual in nature. Many of the questions it addressed involve the operation of the measures themselves, outside the context of whether these measures are consistent with the WTO legal obligations. As the Appellate Body itself put it, it would examine the Panel's "construction of certain provisions of Decree 125".[70] It is easy to understand how the evaluation of the consistency of provisions of Decree 125 with WTO obligations would constitute the legal characterization of the facts. However, the consideration of Decree 125 provisions on their own, outside the context of the WTO obligations in question, appears to be more of a factual question. In this regard, the Appellate Body's analysis in paragraph 227 through paragraph 238, following which it concludes that "the Panel's construction of Article 2(2), read together with Article 21(1), amounts in our view to legal error",[71] does not even make reference to WTO obligations.

As a matter of policy, it may be desirable to give the Appellate Body a good deal of leeway in reviewing a panel's examination of the measures that are being challenged. However, Article 17.6 explicitly narrows the scope of appellate review to 'issues of law' and 'legal interpretations'. Arguably, the Appellate Body's decision to consider the panel's construction of the challenged measures, outside the context of WTO obligations, as a law application issue stretches the boundaries of this provision, as the Appellate Body seems to have taken a very broad view of what constitutes a law application question. The result of this interpretation is an expansion of the scope of issues over which the Appellate Body can exercise a review. For those who think that appellate review is a good idea, this development may be a positive one. On the other hand, to the extent that the Appellate Body's interpretation goes in a direction different than what the drafters intended, it may cause concerns.

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[70] *China – Auto Parts*, *supra* note 47, ¶ 220.
[71] *Id.* ¶ 238.