

“OBJECTIVE ASSESSMENT OF THE FACTS”: A PRINCIPLED APPROACH TO WTO APPELLATE BODY REVIEW OF PANEL FACT-FINDING

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I. INTRODUCTION

When a dispute resolution system allows for a right of appeal, there is a corresponding need for clarity regarding the scope and limits of the appeal court’s ability to overturn a lower court decision. In domestic systems, these limits are often compartmentalized into questions of law and questions of fact. For example, courts of first instance are generally given authority to consider evidence and make findings of fact. Correspondingly, courts of appeal will grant deference to the lower court’s factual determinations. However, on questions of law, an appellate court will not show deference. Only correct legal interpretations will be upheld on appeal. The question therefore arises: If appellate review is limited to questions of law, when, if ever, can findings of fact be overturned?

The World Trade Organization’s [“WTO”] Appellate Body has found itself no exception to the challenges posed by treating findings of fact differently from legal interpretations.¹ Even in the recently released *EC – Seal*

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¹ See generally Simon Lester, “The Development of Standards of Appellate Review for Factual, Legal and Law Application Questions in WTO Dispute Settlement” (2012) 4:1 Trade, L & Development 125; Tania

Products decision, the Appellate Body was faced with claims alleging failures in the Panel's fact-finding function.² In this and previous decisions, the Appellate Body has had to ascertain the limits of its ability to review panel fact-finding. In doing so, it has had to consider its own scope of review, as articulated in Articles 17.6 and 17.13 of the *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes*³. Further, it also had to carefully consider the responsibilities of panels as set out in Article 11 of the *DSU*. In accordance with Article 11 of the *DSU*, it is the Panel's responsibility to "make an *objective assessment* of the matter before it, including an *objective assessment* of the facts of the case and the applicability of and conformity with the relevant covered agreements".⁴

This requirement for an "objective assessment" resulted in an early standard premised on finding panel impropriety or egregious conduct before findings of fact could be reviewed. Fortunately, the Appellate Body's interpretation of "objective assessment of the facts" has developed over time to include a greater ability to review the substantive and procedural adequacy of panel fact-finding and correct manifest errors in interpretation. While the Appellate Body continues to adopt a very deferential standard of review to panel found facts, it has done so by looking at a panel's determination of sufficiency in the evidence and explanation of its factual-findings.⁵

Voon & Alan Yanovich, "The Facts Aside: The Limitation of WTO Appeals to Issues of Law" (2006) 40:2 *J World Trade* 239; Ross Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (Northampton, MA: Edward Elgar Publishing, 2012) at 47-65; Michelle T Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford: Oxford University Press, 2009) at 58-67.

² In *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (Complaint by Canada and Norway)*, the Appellate Body responded to Norway's claims that because "the Panel provides an inadequate statement on how it weighed, balanced, and reconciled the competing evidence of positive and negative contributions" and "failed to explain and reconcile the evidence in arriving at its conclusion, including making intermediate factual findings" that the Panel's overall conclusion is "bereft of any objective and coherent basis" (*European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (Complaint by Canada and Norway)* (2014), WTO Doc WT/DS400/AB/R, WT/DS401/AB/R at para 5.229 (Appellate Body Report), online: WTO <docsonline.wto.org> [EC – Seal Products]). The Appellate Body, at para 5.243, ultimately rejected these claims, finding no grounds to disturb the Panel's assessment of the evidence and factual findings.

³ WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc LT/UR/A-2/DS/U/1 (1994), arts 17.6, 17.13, online: WTO <docsonline.wto.org> [DSU].

⁴ *Ibid*, art 11 [emphasis added].

⁵ The Appellate Body may also not interfere if the Panel adopts an interpretation of the evidence that was represented by a party to the dispute to be the appropriate interpretation, even where this party later argues on appeal that such an interpretation "mischaracterizes" the evidence. See *China – Countervailing and Anti-dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States (Complaint by the United States)* (2012), WTO Doc WT/DS414/AB/R at paras 182-85, 195, 202 (Appellate Body Report), online: WTO <docsonline.wto.org> [China – GOES].

In developing this approach to the review of facts, the WTO Appellate Body has faced various challenges including a lack of textual treaty guidance as to the scope of review for findings of fact, the need to address findings of fact in the context of contested mixed fact and law appeals, and the desire to promptly resolve disputes in the face of a lack of factual findings. The Appellate Body has responded to these challenges through filling gaps and inconsistencies in drafting with a principled extra-textual interpretation of its jurisdiction.

In this paper, we have reviewed the extensive jurisprudence relating to Appellate Body review of fact-finding. In this review we have identified three factors influencing the development of an increasingly consistent and coherent approach to Appellate Body interventions with the fact-finding function of panels. First, we have observed that the Appellate Body's approach to factual review has evolved from a "bad faith only" standard to a more principled approach to reviewing the adequacy of fact-finding assessments. Second, we observe that in overcoming deficiencies in the express articulation of a consistent standard of review to be applied in the context of disputes alleging violations of the *AD Agreement*⁶, the *SCM Agreement*⁷, and the *Safeguards Agreement*⁸, the Appellate Body has striven for a consistent interpretation of the scope of panel review in Article 11. This consistency in Article 11 interpretation has required the Appellate Body to carefully consider the meaning of "objective assessment of the matter before it, including an objective assessment of the facts"⁹, resulting in an expanded yet principled approach to reviewing and overturning findings of fact, even in the absence of an articulated standard of review set out in the text of these covered agreements. Third, we observe that in response to the inability of the Appellate Body to remand matters back to panels when there has been an insufficient factual analysis, it has filled this procedural gap by making decisions on whether to "complete the analysis" in order to meet the expediency objective of the dispute settlement system. These decisions on whether or not to "complete the analysis" have contributed to recognizing and respecting the importance of the panel's fact-finding function.

⁶ WTO, *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, WTO Doc LT/UR/A-1A/3 (1994), online: WTO <docsonline.wto.org> [*AD Agreement*].

⁷ WTO, *Agreement on Subsidies and Countervailing Measures*, WTO Doc LT/UR/A-1A/9 (1994), online: WTO <docsonline.wto.org> [*SCM Agreement*].

⁸ WTO, *Agreement on Safeguards*, WTO Doc LT/UR/A-1A/8 (1994), online: WTO <docsonline.wto.org> [*Safeguards Agreement*].

⁹ DSU, *supra* note 3, art 11.

Following this introduction section, Part II of this article turns to two background considerations relevant to the Appellate Body's approach to review of panel fact-finding. Namely, Part II discusses gaps in the drafting of the text of the *DSU* and other covered agreements as well as the complex status of domestic law under international law. Part III considers three factors that we identify as having influenced the development of a principled approach to Appellate Body review of panel fact-finding, namely the adoption of a "bad faith-only" standard in early decisions; the need for a consistent approach to the review of trade remedy disputes in the face of inconsistent drafting of the covered agreements; and, the lack of Appellate Body remand authority resulting in the development of an approach to "completing the analysis" that confirms a deference to panel found facts.

II. BACKGROUND CONSIDERATIONS

A. Lack of Textual Guidance

At the outset, a review of the capacity of the WTO Appellate Body to overturn findings of fact requires an understanding of the provisions articulating the scope of Appellate review and the function and procedures of WTO Panels. The text of the *DSU* and other provisions in the covered agreements are somewhat sparsely drafted, containing both gaps¹⁰ and inconsistencies.¹¹ This phenomenon is not surprising given that the WTO

¹⁰ For example, some gap filling has been achieved through the drafting of Working Procedures for Appellate Review (Working Procedures). These Working Procedures have been developed by the Appellate Body in consultation with the Director-General of the WTO and Chairman on the DSB. The Working Procedures have been amended six (6) times since 1995, see: WTO, *Working Procedures for Appellate Review*, WTO Doc WT/AB/WP/1 (1996), online: WTO <docsonline.wto.org>; WTO, *Working Procedures for Appellate Review*, WTO Doc WT/AB/WP/W/3 (1997), online: WTO <docsonline.wto.org>; WTO, *Working Procedures for Appellate Review*, WTO Doc WT/AB/WP/3 (2002), online: WTO <docsonline.wto.org>; WTO, *Working Procedures for Appellate Review*, WTO Doc WT/AB/WP/4 (2003), online: WTO <docsonline.wto.org>; WTO, *Working Procedures for Appellate Review*, WTO Doc WT/AB/WP/5 (2005), online: <docsonline.wto.org>; WTO, *Working Procedures for Appellate Review*, WTO Doc WT/AB/WP/6 (2010), online: WTO <docsonline.wto.org>; the most recent consolidated version came into effect on September 15, 2010, WTO, *Working Procedures for Appellate Review*, WTO Doc WT/AB/WP/W/11 (2010), online: <docsonline.wto.org>.

¹¹ For example, there is a no uniform articulation of a standard of review in all domestic trade remedies decisions. Rather, only the *AD Agreement* (*supra* note 6) expressly sets out a standard of review in Article 17.6, while both the *SCM Agreement* (*supra* note 7) and the *Safeguards Agreement* (*supra* note 8) are notably silent. Other procedural inconsistencies include the "sequencing" problem in the context of articles 21.5, 22.2, and 22.6 of the *DSU* (*supra* note 3). Where there is an allegation of non-implementation of a panel or Appellate Body report, article 22.6 of the *DSU* grants authority to the DSB to authorize retaliation within 30 days of the expiration of the reasonable period of time required for implementation, or, in the case of a

agreements were the product of a diplomatic negotiation, and tactical pressures shaped the final product.¹² The record of Uruguay Round negotiations further suggests that states were more concerned with the prospect of an interventionist Appellate Body - one that would make dispute settlement more lengthy, cumbersome and complicated - than they were with creating a comprehensive and complete set of litigation procedures.¹³ While due process was clearly a concern of the drafters, so too were questions of timeliness of dispute resolution. It is therefore not surprising that the final text emerged with somewhat sparsely outlined dispute resolution procedures, including procedural gaps and drafting inconsistencies. With these limitations in mind, the provisions articulating the Appellate Body's review capacity are set forth in Articles 17.6 and 17.13 of the *DSU*.

Article 17.6 limits the scope of Appellate review as follows:

An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.¹⁴

Under the heading "Procedures for Appellate Review", Article 17.13 supports that Appellate jurisdiction is limited to "issues of law" by specifying that:

contested level of proposed suspension, to have an arbitration completed within 60 days (*ibid*, art 22.6). Alternatively, *DSU* Article 21.5 sets a 90 day time frame for a compliance panel to investigate and issue a report into whether there has been full implementation of a panel or Appellate Body report (*ibid*, art 21.5). This issue of these inconsistent time frames was first demonstrated in *European Communities - Regime for the Importation, Sale and Distribution of Bananas [EC - Bananas III]*. See *EC - Bananas III - Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* (1999), WTO Doc WT/DS27/ARB, online: WTO <docsonline.wto.org>; *EC - Bananas III - Recourse to Article 21.5 by Ecuador* (1999), WTO Doc WT/DS27/RW/EUCU (Panel Report), online: WTO <docsonline.wto.org>; *EC - Bananas III - Recourse to Article 21.5 by the European Communities* (1999), WTO Doc WT/DS27/RW/ECC (Panel Report), online: WTO <docsonline.wto.org>. In subsequent cases, the sequencing problem has been resolved only through *ad hoc* agreement by the parties, see e.g. WTO, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products - Understanding Between Canada and the United States Regarding Procedures under Articles 21 and 22 of the DSU*, WTO Doc WT/DS103/14 (2001), online: WTO <docsonline.wto.org>; WTO, *United States - Tax Treatment for "Foreign Sales Corporations" - Understanding between the European Communities and the United States Regarding Procedures under Articles 21 and 22 of the DSU*, WTO Doc WT/DS108/12 (2000), online: WTO <docsonline.wto.org>; WTO, *United States - Measures relating to Zeroing and Sunset Reviews - Understanding between the United States and Japan Regarding Procedures under Articles 21.5 and 22 of the DSU*, WTO Doc WT/DS322/26 (2008), online: WTO <docsonline.wto.org>.

¹² The creation of an Appellate Body itself was in part a compromise in exchange for the adoption of the reverse consensus rule for Panel report adoption. See: Debra P Steger & Susan M Hainsworth, "World Trade Organization Dispute Settlement: The First Three Years" (1998) 1 J Intl Econ L 199 at 208.

¹³ See Terence P Stewart, *The GATT Uruguay Round: A Negotiating History (1986-1992)* (Boston, MA: Kluwer Law, 1993) vol 2 at 2724-2811.

¹⁴ *DSU*, *supra* note 3, art 17.6.

The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.¹⁵

A textual reading of DSU Articles 17.6 and 17.13 would appear to limit the Appellate Body's scope of review to "issues of law" or "legal interpretations" and, in so doing, to uphold, reverse or modify a panel's "legal findings".

Article 11 of the DSU defines the "Function of Panels" as follows:

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 agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.¹⁶

Article 12.7 sets out further "Panel Procedures" requiring panels to submit a written report to the DSB, setting out "*the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.*"¹⁷ Articles 13.1 and 13.2 expressly identify the right of panels to "seek information", "technical advice" or expert "reports", all with a view to supplementing their fact-finding function.¹⁸

The DSU text does not provide any express link between a panel's legal duty to "make an objective assessment of the matter, including an objective assessment of the facts"¹⁹ under DSU Article 11 and the Appellate Body's scope of review under Article 17.6. As a result, it would appear that the Appellate Body has no jurisdiction to modify or reverse a factual determination made by a panel.²⁰

¹⁵ *Ibid.*, art 17.13.

¹⁶ *Ibid.*, art 11 [emphasis added].

¹⁷ *Ibid.*, art 12.7 [emphasis added].

¹⁸ *Ibid.*, arts 13.1-13.2.

¹⁹ *Ibid.*, art 11.

²⁰ The development of successful dispute resolution practice, existing in excess of the guidance provided in treaty, is not wholly new to WTO Members and adjudicators. GATT dispute resolution was quite successful, and such dispute resolution evolved through state practice based on the limited guidance offered by GATT Articles XXII and XXIII. See generally Robert E Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem, NH: Butterworth Legal Publishers, 1993).

Various covered agreements also contain special and additional rules or procedures that define and enhance a panel's fact-finding function.²¹ In many cases, these special and additional rules enable or require the panel to consult with different forms of technical expertise to aid in the panel's fact-finding role.²² However, in the case of Article 17.6 of the *AD Agreement*, a more prescriptive methodology is set out for panels to follow when making their "assessment of the facts".²³ *AD Agreement* Article 17.6(i) is reproduced as follows:

17.6 In examining the matter referred to in paragraph 5:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned [...].²⁴

Other agreements, such as the *SCM Agreement* and the *Safeguards Agreement*, do not contain a standard of review provision. It should be noted that while Article 1.2 of the *DSU* resolves conflicts between additional rules

²¹ See *DSU*, *supra* note 3, arts 1.1-1.2, Appendix 2.

²² WTO, *Agreement on the Application of Sanitary and Phytosanitary Measures*, WTO Doc LT/UR/A-1A/12 (1994), art 11.2, online: WTO <docsonline.wto.org> [SPS Agreement]; WTO, *Agreement on Technical Barriers to Trade*, WTO Doc LT/UR/A-1A/10 (1994), arts 14.2-14.3 and Annex 2, online: WTO <docsonline.wto.org> [TBT Agreement]; WTO, *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*, WTO Doc LT/UR/A-1A/4 (1994), arts 19.3-19.5, Annex II, online: WTO <docsonline.wto.org> [Customs Valuation Agreement]; *SCM Agreement*, *supra* note 7, arts 24.3-24.4, Annex V. In the *SCM Agreement*, the initiation of Annex V "Procedures for Developing Information Concerning Serious Prejudice" by a complaining member imposes an information gathering obligation on the DSB, a function recognized by the Appellate Body in *United States – Measures Affecting Trade in Large Civilian Aircraft (second complaint)* as a contrast to its other more deliberative responsibilities assigned to this body (*United States – Measures Affecting Trade in Large Civilian Aircraft (second complaint) (Complaint by the European Communities)* (2012), WTO Doc WT/DS353/AB/R at para 511 (Appellate Body Report), online: WTO <docsonline.wto.org> [US – Large Civil Aircraft (2nd complaint)]).

²³ *AD Agreement*, *supra* note 6, art. 17.6(i).

²⁴ *Ibid*, art. 17.6(i). Art 17.5 of the *AD Agreement* is reproduced as follows:

17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

- (i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and
- (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

set out in the covered agreements and the general rules of the *DSU* in favour of the additional rules in the covered agreements²⁵, there is again the absence of textual guidance on the scope of the Appellate Body to review the factual assessment undertaken by a panel in the context of a dumping investigation. Such textual guidance is also absent in the context of safeguards or subsidies disputes. Because of the inconsistency in drafting standard of review provisions in these covered agreements and textual “gaps” in connecting Appellate review to panel function, the Appellate Body has crafted its own approach to panel review. This has resulted in the Appellate Body clearly characterizing questions of mixed fact and law as legal questions, thereby allowing an inquiry into the sufficiency of the factual assessment.²⁶

B. Domestic Law as Fact or Legal Interpretation

Differential review of fact as compared to law is further complicated by the customary international law treatment of domestic law as either a question of fact or a question of legal interpretation, depending on the purpose of the inquiry.²⁷ Since it developed in WTO jurisprudence that Members could challenge appellate level claims on the basis that they involved questions of fact, and thus were outside of the Appellate Body’s “law only” jurisdiction, Members began to claim that the function of their domestic law was a question of fact and that the Appellate Body must accord the same deference to a panel’s construction of the domestic law as other factual findings made by the panel.²⁸

²⁵ *DSU*, *supra* note 3, art 1.2.

²⁶ See *European Communities – Measures Concerning Meat and Meat Products (Hormones) (Complaint by the United States and Canada)* (1998), WTO Doc WT/DS26/AB/R, WT/DS48/AB/R at para 132 (Appellate Body Report), online: WTO <docsonline.wto.org> [EC – Hormones].

²⁷ See e.g. *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v Poland)* (1926), PCIJ (Ser A) No 7 at 19:

From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court’s giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.

²⁸ See e.g. *United States – Section 211 Omnibus Appropriations Act of 1998 (Complaint by the European Communities)* (2002), WTO Doc WT/DS176/AB/R at para 101 (Appellate Body Report), online: WTO <docsonline.wto.org> [US – Section 211 Appropriations Act]. Also see *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complaint by the United States)* (1998), WTO Doc WT/DS50/AB/R at paras 64-68 (Appellate Body Report), online: WTO <docsonline.wto.org> [India – Patents (US)], where India claimed that its domestic law was a question of fact.

The Appellate Body appropriately recognized the possibility of domestic law being either evidence of fact, or evidence of compliance or non-compliance with a member's WTO obligations.²⁹ This latter characterization was described as a question of legal interpretation (law) falling within the Appellate Body's *DSU* Article 17.6 scope of review.³⁰ This important distinction requires a panel, and as a result, the Appellate Body, to clearly articulate the purpose for which the review of domestic law is being undertaken in the context of the dispute.³¹ Trade disputes that require WTO panels to review the decisions of domestic authorities may require both an interpretation of the domestic law of a member and a review of the factual basis upon which the domestic agency has applied the law. The two common situations where panels are called upon to undertake such a review are in disputes concerning dumping and subsidies determinations made by domestic authorities.³² In both contexts panels must assess the fact-finding undertaken by the relevant domestic authority, as well as the domestic authority's interpretation and application of its own domestic law and determine whether the domestic action meets the legal standard set out in the applicable WTO agreements.

III. APPELLATE BODY REVIEW OF PANEL FACT-FINDING

²⁹ *US – Section 211 Appropriations Act*, *supra* note 28 at para 105.

³⁰ *Ibid.*

³¹ For example, in *China – Measures Affecting Imports of Automobile Parts (Complaints by the European Communities, United States and Canada)*, the Appellate Body had clearly noted the contexts in which domestic law may be considered by a panel and the limited scope of appellate review on questions of fact: The Appellate Body 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. We recognize 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. With respect to such elements, the Appellate Body will not lightly interfere with a panel's finding on appeal.

(*China – Measures Affecting Imports of Automobile Parts (Complaints by the European Communities, United States and Canada)* (2008), WTO Doc WT/DS339/AB/R, WT/DS340/R, WT/DS342/AB/R at para 225 (Appellate Body Report), online: WTO <docsonline.wto.org> [*China – Auto Parts*]).

See also: *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (Complaint by China)* (2011), WTO Doc WT/DS397/AB/R (2011) at paras 294-97 (Appellate Body Report), online: WTO <docsonline.wto.org> [*EC – Fasteners (China)*].

³² In Canada, dumping and subsidies investigations are undertaken pursuant to the authority provided by the *Special Import Measures Act*, RSC, 1985, c S-15 (*SIMA*). The President of the Canadian Border Services Agency is vested with the authority to initiate and investigate complaints into allegations of dumping or subsidization (*SIMA*, ss 31-35), while the Canadian International Trade Tribunal has the jurisdiction to order the imposition of an anti-dumping or countervailing duty if the dumping or subsidy has caused injury or retardation (*SIMA*, ss 37-43).

There is extensive jurisprudence considering the appropriate standard of review to be applied by the Appellate Body to panel decisions. In this article, our review is confined to an examination of the jurisprudence as it relates to the Appellate Body's jurisdiction to interfere with the fact-finding function of the panel. As mentioned, in the absence of express textual guidance on the scope of the Appellate Body's ability to overturn findings of fact, the Appellate Body has had to develop its own approach as to when a fact-finding intervention will be warranted. We contend that three factors, each explored in the subsection below, influenced the development of a principled and consistent approach to Appellate Body factual review. This principled approach allows the Appellate Body to review panel fact-finding on the basis of: panel impropriety, manifest errors and insufficient factual analysis.

Panel impropriety is a due process failure.³³ If the Appellate Body concludes that the panel has carried out its fact-finding function in "bad faith" by acting so egregiously that the panel has abused the exercise of its fact-finding discretion, the Appellate Body will be justified in overturning factual findings made by such a panel.³⁴

A less common cause for Appellate Body intervention is when there is a manifest error committed by the panel in the interpretation of the evidence. The ability of appellate review to correct clear errors in the interpretation of the factual record is not new to most legal systems. For example, while the European Court of Justice provides for a right of appeal from the Court of First Instance on matter of law only (under treaty article 225), in practice the court will "review manifest errors of fact and misinterpretation of evidence."³⁵ Similarly, the text of the *DSU* does not

³³ In Canada, due process violations are identified as breaches of "natural justice". Natural justice, *inter alia*, demands that decision-makers make decisions based on evidence. Lord Diplock in *R v Deputy Industrial Injuries Commissioners, Ex parte Moore* described this reliance on evidence in decision-making as follows: "It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above." (*R v Deputy Industrial Injuries Commissioners, Ex parte Moore*, [1965] 1 QB 456 at 488 (Lexis and QL) (CA)). See also David J Mullan, *Natural Justice and Fairness – Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?* (1982), 27 McGill LJ 250 at 263-264. For a thorough examination of abuse of discretion through arbitrary decision-making, see David Phillip Jones & Anne S de Villars, *The Principles of Administrative Law*, 6th ed (Toronto: Carswell, 2014) at 181-197.

³⁴ *EC – Hormones*, *infra* note 49.

³⁵ Marco Bronckers & Natalie McNelis, "Fact and Law in Pleadings Before the WTO Appellate Body" in Friedl Weiss, ed, *Improving WTO Dispute Settlement Procedures: Issues & Lessons From the Practice of Other International Courts & Tribunals* (London: Cameron May Ltd, 1999) 321 at 342; Silvia Sonelli,

expressly grant jurisdiction to the Appellate Body to overturn clearly erroneous factual findings. Manifest errors in factual interpretation are infrequent in WTO jurisprudence, but when they have arisen, the Appellate Body has found jurisdiction and corrected them.³⁶

Claims of insufficient factual analysis are based on the alleged absence or inadequacy of evidence to support a particular conclusion. Allegations of insufficient factual analysis often arise in conjunction with “application” or mixed fact and law questions. While both the proper interpretation of a WTO provision and the assessment of whether there is sufficient evidence to meet that legal test articulated are questions of law, the “application” of the facts to the law requires an assessment of the adequacy of the evidence to support the ultimate conclusion. When the Appellate Body’s legal interpretation of a WTO provision differs from a panel’s, the evidence and factual findings must be reviewed in order to determine whether the law can be applied to these facts. In this situation, the fact-finding of the panels will be assessed in order to determine whether the Appellate Body can “complete the analysis” and determine whether the legal standard has been met.

A. Impropriety in Panel Fact-Finding: the Early “Bad Faith” Standard

The first factor which has shaped the Appellate Body’s approach to panel fact-finding is its initial adoption of an early “bad faith only” standard that constituted an extremely high (almost absolute) level of deference being according to the panel’s fact-finding function. This eventually resulted in recognition that such a standard was too deferential and too focused on improper fact-finding, excluding other legitimate fact-finding errors such as manifest errors or insufficient factual analysis. Claims of improper fact-finding alleging “bad faith” by a panel were thus an early pre-occupation of the Appellate Body, although the “bad faith” element of a claim of improper fact-finding diminished in importance as the case law progressed to a review for a misappreciation or misapplication of the evidence.

“Appeal on Points of Law in the Community System – A Review” (1998) 35 Common Market Law Rev 871 at 887.

³⁶ In *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, the Panel erred by using the wrong base year to calculate Korea’s current aggregate measure of support for beef, contrary to Annex III paragraph 9 of the *Agreement on Agriculture, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Complaint by the United States)* (2000), WTO Doc WT/DS161/AB/R, WT/DS169/AB/R at paras 124-127 (Appellate Body Report), online: WTO <docsonline.wto.org> [*Korea – Various Measures on Beef*].

The earliest articulation of improper fact-finding is found in the Appellate Body decision of *EC – Hormones*.³⁷ This dispute arose as a result of the decision of the European Community to prohibit the use of “growth” hormones in beef production and impose an import ban on hormone-treated beef.³⁸ This decision, and its subsequent interpretation, had a significant impact in limiting the Appellate Body’s scope of review for several years to come. In this dispute, the Appellate Body resolved several fundamental questions about both the function of panels and the level of deference they must give to domestic decision-makers. The Appellate Body also made a critical decision to reject the EC’s argument that the standard review set out in Article 17.6(i) of the *AD Agreement* should apply generally to all determinations made by any domestic authority.³⁹ Instead, the Appellate Body looked for direction from Article 11 of the *DSU* to articulate the function of the panel.⁴⁰

This decision articulated that panels reviewing a decision made by a domestic agency did not have the ability to engage in *de novo* review; nor were panels required to totally defer to a domestic agency’s assessment of evidence.⁴¹ Rather, Article 11 vested in panels the ability to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case”.⁴² The requirement of *objectivity* in Article 11 was critical in this case and provided the basis to assess the EC’s allegations that the Panel “disregarded or distorted the evidence submitted”.⁴³

In responding to the EC’s claims, the Appellate Body opined its first thorough statement⁴⁴ on the difference between questions of law and questions of fact:

³⁷ *EC – Hormones*, *supra* note 26.

³⁸ *Ibid* at para 2.

³⁹ *Ibid* at paras 114-115, 118. This critical decision will be revisited in Part III.B of this article.

⁴⁰ *Ibid* at paras 116, 118.

⁴¹ *Ibid* at para 117.

⁴² *Ibid* at paras 118-119.

⁴³ *Ibid* at para 131.

⁴⁴ In *European Communities–Regime for the Importation, Sale and Distribution of Bananas (Complaint by Ecuador et al)*, a case decided three months earlier, the Appellate Body had declared several issues to be “factual conclusions” without lengthy reasoning at para 239:

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*.

Findings of fact, as distinguished from legal interpretation or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body. The determination of whether or not a certain event did occur in time and space is typically a question of fact; for example, the question of whether or not Codex has adopted an international standard, guideline or recommendation on MGA is a factual question. 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. 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.⁴⁵

This description of the law versus fact distinction was quoted in numerous later cases. In its “Codex” example, the passage presents what is clearly an example of a “pure” fact. It also offers an illuminating description of questions of law as including those inquiries into the consistency or inconsistency of a given fact or set of facts with a given treaty provision. This legal question will include whether the functions articulated in Article 11 of the *DSU* have been complied with by a panel. The paragraph further identifies the *weighing* or *appreciation* of evidence as being the domain of questions of fact, as such questions rely on the panel exercising its discretion in ascribing credibility or weight.⁴⁶

In the report’s subsequent paragraph, the Appellate Body considered a panel’s duty to make an objective assessment of the facts in the context of an allegation of wilful disregard and distortion of the evidence.⁴⁷ The Appellate Body noted, “[c]learly, not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized

(*European Communities—Regime for the Importation, Sale and Distribution of Bananas (Complaint by Ecuador et al)*) (1997), WTO Doc WT/DS27/AB/R at para 239 (Appellate Body Report), online: WTO <docsonline.wto.org> [emphasis added and footnotes excluded].

⁴⁵ *EC – Hormones*, *supra* note 26 at para 132.

⁴⁶ In “Procedural Issues in WTO Dispute Resolution”, Peter Lichtenbaum recognized that “[a] decision regarding the “weight” or “appreciation” of evidence is likely to dictate, in many cases, whether the underlying facts are consistent with the ‘requirements of a given treaty provision.’” (Peter Lichtenbaum, “Procedural Issues in WTO Dispute Resolution” (1998) 19:4 *Mich J Intl L* 1195 at 1267 (footnote omitted)).

⁴⁷ *EC – Hormones*, *supra* note 26 at para 133.

as a failure to make an objective assessment of the facts.”⁴⁸ The Appellate Body went on to write:

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 willful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. “Disregard” and “distortion” and “misrepresentation” of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of the panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.⁴⁹

This paragraph makes it clear that the Appellate Body was discussing the claims specific to this particular dispute and not Article 11 generally. These specific claims made by the EC were that the Panel engaged in manifest or willful “distortion” and “disregard” of the evidence.⁵⁰ A claim of willful or manifest distortion or disregard is a claim of “bad faith”. This is alleging not just an error in fact-finding (such as a misappreciation of the evidence), but egregious conduct that has resulted in a breach of due process or natural justice. A finding of “bad faith” in the fact-finding function would result in

⁴⁸ *Ibid.*

⁴⁹ *Ibid* [footnote omitted]. In footnote 101 at page 52 of the report, the Appellate Body disapproved of such a strong criticism of the Panel:

It might be asked whether the European Communities did not merely intend to use “disregard” and “distortion” as unusually forceful synonyms for “misapprehend” or “misappreciation”. It is not, however, clear that the European Communities did so intend, considering among other things the marked frequency with which “disregard” and “distortion” were used.

⁵⁰ *Ibid.* The Appellate Body took the European Communities up on their claims. At paragraphs 135-145, it reviewed the factual findings for willful, egregious or manifest distortion or disregard of the evidence by the Panel. The Appellate Body addressed each point of contention specifically, thoroughly exploring the Panel’s reflection of the evidence. Not surprisingly, the Appellate Body found no bad faith on the part of the Panel, nor did it find any egregious distortion or disregard of the evidence.

no-deference being accorded to the fact-finding function of the panel. Rather, as a matter of law, the panel would have acted outside the scope of its authority, and undermined the dispute resolution process generally.

While the Appellate Body report in *EC – Hormones* was one of the first and most influential cases in interpreting Article 11, it did not state that egregious and improper fact-finding conduct by the panel was the only standard which must be met before the Appellate Body can overturn a finding of fact. As Ross Becroft notes in critique of *EC – Hormones*, “It is arguable that the methodology of assessing facts and questions of good faith are conceptually distinct.”⁵¹ However, it appears as though subsequent application of the *EC – Hormones* decision fails to make that distinction.

The next *DSU* Article 11 dispute, with its Appellate Body report circulated just three months after *EC – Hormones*, did not apply the standard of review set out in *EC – Hormones*. *Argentina – Textiles and Apparel* involved a challenge to the consistency of Argentina’s imposition of certain duties and taxes on textiles and apparel with its commitments under, *inter alia*, Articles II-VIII of the GATT.⁵² On appeal, issues were raised both as to whether the panel had sufficient evidence upon which to base its conclusions and whether it should have admitted certain evidence presented by the Complainant or, in addition, sought technical information from the IMF.⁵³ In that appeal, there was no claim of manifest or willful distortion or disregard of the evidence. Rather, at issue was a challenge to the sufficiency of the evidence before the Panel and the Panel’s chosen fact-finding procedures. The factual findings of the Panel *per se* were not at issue. Regarding the sufficiency of the evidence, the Appellate Body gave deference to the assessments undertaken by the Panel in reaching its conclusions.⁵⁴ Regarding the fact-finding procedures, the Appellate Body wrote the following: “while another panel could well have exercised its discretion differently, we do not believe that the Panel here committed an abuse of discretion amounting to a failure to render an objective assessment of the matter as mandated by Article 11 of the *DSU*.”⁵⁵

⁵¹ Becroft, *supra* note 1 at 52.

⁵² *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items (Complaint by the United States)* (1997), WTO Doc WT/DS56/R at paras 1.1, 3.1-3.3 (Panel Report), online: WTO <docsonline.wto.org>; *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items (Complaint by the United States)* (1998), WTO Doc WT/DS56/AB/R at paras 1-3 (Appellate Body Report), online: WTO <docsonline.wto.org> [*Argentina – Textiles and Apparel*].

⁵³ *Ibid* at paras 5-17.

⁵⁴ *Ibid* at para 61-63.

⁵⁵ *Ibid* at para 81.

The Appellate Body also intimated that an abuse of discretion would amount to “a failure to render an objective assessment of the matter as mandated by Article 11”⁵⁶ (i.e., an error of law). After *Argentina – Textile and Apparel*, however, paragraph 133 of *EC – Hormones* was cited as the authority on Article 11 claims in several cases. In *EC – Poultry*, the Appellate Body echoed the language it had used when it received the EC’s claims in *EC – Hormones*: “An allegation that a panel has failed to conduct the ‘objective assessment of the matter before it’ required by Article 11 of the *DSU* is a very serious allegation. Such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself.”⁵⁷

In *EC – Poultry*, the Appellate Body went on to quote paragraph 133 of *EC – Hormones*, but took out the sentence of paragraph 133 that tied the Appellate Body’s analysis to that specific case.⁵⁸ By taking out this crucial sentence, the Appellate Body in *EC – Poultry* presented its report from *EC – Hormones* as creating a very deferential standard of review for facts – requiring bad faith fact-finding. *EC – Poultry* cited *EC – Hormones* and italicized the phrase “egregious error that calls into question the good faith of a panel”⁵⁹, purporting it to be the test used for an Article 11 claim, when in *EC – Hormones* that phrase was clearly a specific comment on the EC’s claims, and not a general comment.

In *Australia – Salmon*, the Appellate Body held steadfastly to its interpretation of the *Hormones* paragraph 133 “test” for an Article 11 claim as it had set out in *EC – Poultry*.⁶⁰ In *Australia – Salmon*, it quoted *EC – Poultry* as standing for the fact that a claim under Article 11 was an allegation going to the very core of the WTO dispute settlement process itself.⁶¹ The Appellate Body applied the Panel’s conduct to the Article 11 test:

⁵⁶ *Ibid.*

⁵⁷ *Communities–Measures Affecting Importation of Certain Poultry Products (Complaint by Brazil)* (1998), WTO Doc WT/DS69/AB/R at paras 133 (Appellate Body Report), online: WTO <docsonline.wto.org> [*EC – Poultry*].

⁵⁸ In *Poultry* at paragraph 133, the Appellate Body quoted *EC – Hormones*’ paragraph 133, and excluded this sentence, “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.” (*EC – Hormones*, *supra* note 26 at para 133).

⁵⁹ *EC – Poultry*, *supra* note 57 at para 133.

⁶⁰ *Australia – Measures Affecting Importation of Salmon (Complaint by Canada)* (1998), WTO Doc WT/DS18/AB/R at para 264 (Appellate Body Report), online: WTO <docsonline.wto.org> [*Australia – Salmon*].

⁶¹ *Ibid.* at para 265.

In our view, the Panel did not “deliberately disregard”, “refuse to consider”, “willfully distort” or “misrepresent” the evidence in this case; nor has Australia demonstrated in any way that the Panel committed an “egregious error that calls into question the good faith” of the Panel. We, therefore, conclude that the Panel did not abuse its discretion in a manner which even comes close to attaining the level of gravity required for a claim under Article 11 of the *DSU* to prevail.⁶²

The Appellate Body’s reading of *EC – Hormones* in *EC – Poultry* puzzlingly made the test for an Article 11 violation to be whether or not a party could meet the type of claim alleged by the EC in *EC – Hormones*. This reinterpretation created a standard of extreme deference to panel decisions, which climaxed with *Australia – Salmon*. In *Australia – Salmon*, Australia’s claim under Article 11 fell because it failed to prove that the Panel deliberately disregarded, refused to consider, willfully distorted, misrepresented or committed an egregious error which called the Panel’s good faith into question.⁶³ This stance of extreme deference was not an accurate application of *EC – Hormones*, and an untenable legal standard in the long run, drawing some criticism from commentators as employing an unduly strict standard.⁶⁴

After *Australia – Salmon*, the Appellate Body gradually widened the scope of review available to it regarding facts. In January 1999, the Appellate Body circulated its report on *Korea – Alcoholic Beverages*, in which it reiterated much of the earlier cases’ strictness, and quoted the segment from *EC – Hormones*’ paragraph 133, which had been cited in earlier cases.⁶⁵ This case was significant, however, because the Appellate Body accepted Korea’s claim as a claim under Article 11, “notwithstanding Korea’s express disclaimer that it ... [was] not challenging the good faith of the Panel”.⁶⁶

The acceptance of an Article 11 claim that expressly excluded any allegation of bad faith on the Panel’s part showed the beginnings of the Appellate Body’s willingness to pull back from the strong stand taken in *Australia – Salmon*. However, the test remained tough, and Korea’s claim

⁶² *Ibid* at para 266.

⁶³ *Ibid*.

⁶⁴ Bronckers & McNelis, *supra* note 35 at 322-323; See also Maurits Lugard, “Scope of Appellate Review: Objective Assessment of the Facts and Issues of Law” (1998) 1 J Intl Econ L 323.

⁶⁵ *Korea – Taxes on Alcoholic Beverages (Complaint by the European Communities and the United States)* (1999), WTO Doc WT/DS75/AB/R, WT/DS84/AB/R at para 162 (Appellate Body Report), online: WTO <docsonline.wto.org> [*Korea – Alcoholic Beverages*].

⁶⁶ *Ibid* at para 163.

under Article 11 fell because the Appellate Body concluded that Korea had not shown that the Panel “committed any egregious errors ... [which could] be characterized as a failure to make an objective assessment of the matter before it.”⁶⁷

The next case of discussion is *Japan – Agricultural Products II*.⁶⁸ The Appellate Body did not engage in a thorough discussion of the scope of Article 11 review, but recited the notion of “egregiousness” mentioned in *Korea – Alcoholic Beverages* (among other cases), and linked it to the concept of a panel’s abuse of discretion.⁶⁹

The second Appellate Body decision (after *Argentina – Textiles and Apparel*⁷⁰) to consider an Article 11 claim without mentioning *EC – Hormones* nor the notion of “egregiousness” was released in August 1999.⁷¹ In *India – Quantitative Restrictions*, India claimed that the Panel had wrongly delegated its fact-finding authority to the IMF.⁷² The Appellate Body examined the record and found that the Panel had not simply accepted the IMF’s views, thereby completing an objective assessment of the matter.⁷³ This claim was different than most of the preceding Article 11 cases in that it did not directly challenge the substance of a panel’s fact-finding, but rather the *process* of the panel’s fact-finding. This challenge of a panel’s procedures in fact-finding is similar to that seen in the earlier *Argentina – Textiles and Apparel* decision.⁷⁴ However, it was *India – Quantitative Restrictions* that appears to have caused the Appellate Body to take a step back from its established jurisprudence on Article 11, and permitted a report which made no mention of a bad faith standard.

Similarly, in *Argentina – Footwear (EC)*, a dispute involving the imposition of a domestic trade remedy (in this case a safeguards measure), there was no mention of the “egregious error” standard articulated in *EC –*

⁶⁷ *Ibid* at para 164.

⁶⁸ *Japan – Measures Affecting Agricultural Products (Complaint by the United States)* (1999), WTO Doc WT/DS76/AB/R (Appellate Body Report), online: WTO <docsonline.wto.org> [*Japan – Agricultural Products II*].

⁶⁹ *Ibid* at paras 141-142.

⁷⁰ *Argentina – Textiles and Apparel*, *supra* note 52.

⁷¹ *India – Quantitative Restriction on Imports of Agricultural, Textile and Industrial Products (Complaint by the United States)* (1999), WTO Doc WT/DS90/AB/R (Appellate Body Report), online: WTO <docsonline.wto.org> [*India – Quantitative Restrictions*].

⁷² *Ibid* at para 149.

⁷³ *Ibid*.

⁷⁴ *Argentina – Textiles and Apparel*, *supra* note 52.

Hormones.⁷⁵ However, as the *Safeguards Agreement* did not articulate an express standard of review to be applied to decisions made by domestic agencies, Article 11 of the *DSU* applied to define the Appellate Body and Panel's applicable standard of review.⁷⁶

December of 2000 saw the Appellate Body's most pronounced departure from the extreme deference granted to panels through the application of the *EC – Hormones* decision - first in *Korea – Various Beef Measures*⁷⁷ and then in *US – Wheat Gluten*.⁷⁸ These decisions clearly marked the end of the “egregious error” test and the extreme deference to a panel's fact-finding function.⁷⁹

In *Korea – Various Measures on Beef*, the Appellate Body found itself obliged to reverse the Panel's fact-finding because it had misinterpreted the information contained in Korea's Schedules showing values for domestic support.⁸⁰ The Panel had then erroneously calculated Korea's levels of domestic support using a methodology inconsistent with Article 1(a)(ii) and paragraph 9 of Annex 3 of the *Agreement on Agriculture*.⁸¹ The application of Article 11 was not disputed in this case. Rather, the Appellate Body was concerned with the correct interpretation of the domestic support Schedules in the context of the *Agreement on Agriculture*. In this case, the Appellate Body found itself facing a manifestly incorrect finding of fact and reversed it. While manifest errors of fact are infrequent in the history of WTO jurisprudence, the Appellate Body found a capacity to rectify such an error.⁸²

⁷⁵ *Argentina – Safeguard Measures on Imports of Footwear (Complaint by European Communities)* (1999), WTO Doc WT/DS121/AB/R (Appellate Body Report), online: WTO <docsonline.wto.org> [*Argentina – Footwear (EC)*].

⁷⁶ *Ibid* at paras 116-121.

⁷⁷ *Korea – Various Measures on Beef*, *supra* note 36.

⁷⁸ *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (Complaint by European Communities)* (2000), WTO Doc WT/DS166/AB/R (Appellate Body Report), online: WTO <docsonline.wto.org> [*US – Wheat Gluten*].

⁷⁹ *US – Wheat Gluten*, like *Argentina – Footwear (EC)*, was a review of the imposition of a domestic trade remedy – a safeguard measure. The *Safeguards Agreement* has no express standard of review to be applied by a panel reviewing factual assessments made by a domestic agency. *Ibid*; *Argentina – Footwear (EC)*, *supra* note 75.

⁸⁰ *Korea – Various Measures on Beef*, *supra* note 36 at paras 97-105.

⁸¹ *Ibid* at paras 124-127, 186.

⁸² *Ibid*. At paragraphs 96 and 97, the Appellate Body cited s. 31(1) of the *Vienna Convention (Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980))* as well as *EC – Computer Equipment (European Communities – Customs Classification of Certain Computer Equipment (Complaint by United States))* (1998), WTO Doc WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R at para 84 (Appellate Body Report), online: WTO <docsonline.wto.org> [*EC – Computer*

US – Wheat Gluten, like *Argentina – Footwear (EC)* before it, was a dispute involving a domestic safeguards determination. The Panel in *US – Wheat Gluten* articulated that the standard of review on the facts is neither *de novo* nor total deference, but rather an “objective assessment”⁸³ Citing *Korea – Alcoholic Beverages*, the Appellate Body held that the panel’s appreciation of the dispute’s evidence “falls, in principle, ‘within the scope of the panel’s discretion as the trier of facts’.”⁸⁴ It explained further:

In assessing the panel’s appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence.⁸⁵

Importantly, the report presents a process for determining whether or not a panel has exceeded the bounds of its discretion:

In reviewing the inferences the Panel drew from the facts of record, our task on appeal is not to redo afresh the Panel’s assessment of those facts, and decide for ourselves what inferences we would draw from them. Rather, we must determine whether the Panel improperly exercised its discretion, under Article 11, by failing to draw certain inferences from the facts before it. In asking us to conduct such a review, an appellant must indicate clearly the manner in which a panel has improperly exercised its discretion. Taking into account the full *ensemble* of the facts, the appellant should, at least: identify the facts on the record from which the Panel should have drawn inferences; indicate the factual or legal inferences that the panel should have drawn from those facts; and, finally, explain why the failure of the

Equipment) for the proposition that it could interpret Korea’s Schedules “in their context and in the light of the object and purpose of the treaty”.

European Communities – Customs Classification of Certain Computer Equipment (Complaint by United States) (1998), WTO Doc WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R at para 84 (Appellate Body Report), online: WTO <docsonline.wto.org> [*EC – Computer Equipment*].

⁸³ *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (Complaint by European Communities)* (1999), WTO Doc WT/DS166/R at paras 8.4-8.5 (Panel Report), online: WTO <docsonline.wto.org>, as reproduced in the Appellate Body Report, *supra* note 78 at para 147. This is consistent with the interpretation given by the Appellate Body in *EC–Hormones*, *supra* note 26 at para 117.1.

⁸⁴ *US – Wheat Gluten*, *supra* note 78 at para 151 [emphasis in original].

⁸⁵ *Ibid.*

panel to exercise its discretion by drawing these inferences amounts to an error of law under Article 11 of the *DSU*.⁸⁶

The concept of a panel having the discretion to draw inferences from the evidence was echoed in *EC – Asbestos*⁸⁷ and then supported in *EC – Sardines*.⁸⁸ The latter provided a concise summary of the existing law on review of fact, reiterating the ideas of not interfering lightly and not intervening solely because the Appellate Body might have reached a different factual conclusion.⁸⁹ It furthermore held that the EC's claim in this case fell because the claimant had failed to prove that the Panel failed to "examine and consider all the evidence properly put before it".⁹⁰

EC – Sardines' implementation of the *US – Wheat Gluten* test thus shows the evolution of the law on the review of facts as it developed over only a short period of approximately five years. While the test for review of a finding of fact was still strict, it was not unachievable. Moreover, the onus was clearly on the claimant to show that a panel had exceeded its discretion, rather than to show "egregious error" or "willful disregard" of the evidence. The Appellate Body had overcome the narrowness of its earlier approach in order to develop a more nuanced standard of review for panel findings of fact.

The method of fact review presented in *US – Wheat Gluten*, whereby an appellant must persuade the Appellate Body with compelling reasons that a panel exceeded its discretion, was also followed later in *EC – Tube or Pipe Fittings*,⁹¹ *Japan – Apples*⁹², and *US – Softwood Lumber V*⁹³. Even though they

⁸⁶ *Ibid* at para 175 [emphasis in original].

⁸⁷ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)* (2001), WTO Doc WT/DS135/AB/R at paras 160-61 (Appellate Body Report), online: WTO <docsonline.wto.org> [EC – Asbestos].

⁸⁸ *European Communities – Trade Description of Sardines (Complaint by Peru)* (2002), WTO Doc WT/DS231/AB/R at paras 299-300 (Appellate Body Report), online: WTO <docsonline.wto.org> [EC – Sardines].

⁸⁹ *Ibid* at para 299.

⁹⁰ *Ibid* at para 300.

⁹¹ *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil (Complaint by Brazil)* (2003), WTO Doc WT/DS219/AB/R at paras 122-123, 125 (Appellate Body Report), online: WTO <docsonline.wto.org> [EC – Tube or Pipe Fittings].

⁹² *Japan – Measures Affecting the Importation of Apples (Complaint by the United States)* (2003), WTO Doc WT/DS245/AB/R at para 222 (Appellate Body Report), online: WTO <docsonline.wto.org> [Japan – Apples].

⁹³ *United States – Final Dumping Determination on Softwood Lumber from Canada (Complaint by Canada)* (2004), WTO Doc WT/DS264/AB/R at para 174 (Appellate Body Report), online: WTO <docsonline.wto.org> [US – Softwood Lumber V].

applied a standard of review that was less narrow than the standard applied in the early WTO cases, the cases following *US – Wheat Gluten* continued to apply a rigorous standard with most Article 11 claims failing. What is evident from these cases is that the Appellate Body’s approach to giving deference to the fact-finding function of the panel includes a reluctance to interfere with its inferences drawn from the evidence or panel appreciation of the evidence.

With the rejection of the extreme form of deference the early “bad faith-only” standard created, the Appellate Body has recognized a greater ability to review panel factual determinations. While panel impropriety will continue as a ground upon which panel found facts can be overturned, Appellate Body review of fact-finding is not confined to only this type of review. As will be observed in the following sections, other influences post-*US – Wheat Gluten*, have also contributed to a more principled approach to fact-finding review.

B. The Influence of Art. 17.6(i) of the AD Agreement on Appellate Body Factual Review

A second factor which has influenced the Appellate Body’s approach to panel fact-finding is the need for a consistent interpretation of the scope of panel review under *DSU* Article 11, particularly in light of drafting inconsistencies in the review provisions of the *AD Agreement*, *SCM Agreement* and *Safeguards Agreement*. While the standard articulated in the *AD Agreement* could not be expressly applied to the other covered agreements, the Appellate Body has interpreted panel function under Article 11 (and thus Appellate Body review of that function) as consistent with what is demanded by the *AD Agreement*.

The proper interpretation of the law and the adequacy of the fact-finding process is commonly brought into review in the context of trade remedy disputes. Such disputes invoke the special and additional rules contained in the “covered agreements”. As previously mentioned, Article 11 of the *DSU* requires panels to make “an objective assessment of the matter before it, including an objective assessment of the facts”.⁹⁴ However, in the case of the various covered agreements, special and additional rules or procedures may also define a panel’s function.⁹⁵ Many of these additional rules or procedures facilitate the fact-finding process by directing the panel to

⁹⁴ *DSU*, *supra* note 3, art 11.

⁹⁵ *DSU*, *supra* note 3, arts 1.1, 1.2, Appendix 2.

sources of expert and technical information.⁹⁶ However, Article 17.6(i) of the *AD Agreement* expressly sets out a prescriptive methodology that panels are to apply when they are reviewing factual findings made by a domestic agency.⁹⁷ In its review of a domestic agency decision, the panel must make an assessment of whether the authority's "establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective."⁹⁸ If it was, then even if the panel would have made a different assessment, the agency's fact-finding cannot be overturned.

As noted previously, the Appellate Body in *EC – Hormones* had expressly rejected the argument that the standard of review set out in Article 17.6(i) of the *AD Agreement* should apply generally to any review by a WTO panel of a domestic decision-maker tasked with assessing "highly complex factual situations."⁹⁹ Specifically, the Appellate Body in *EC – Hormones* rejected this generalized application of the *AD Agreement* standard to disputes involving the *SPS Agreement*.¹⁰⁰

However, the Appellate Body later signaled a preference in favour of a coherent and consistent approach to factual review in the trade remedy context. It achieved this consistency by narrowly interpreting the definition of "conflict" between covered agreements and the *DSU*,¹⁰¹ and by interpreting Article 11 as applying a deferential standard of review to factual assessments made by panels.

⁹⁶ *Supra* note 22.

⁹⁷ *AD Agreement*, *supra* note 6, art 17.6(i).

⁹⁸ *Ibid.*

⁹⁹ *EC – Hormones*, *supra* note 26 at paras 113-115.

¹⁰⁰ *Ibid* at paras 113-118. In the subsequent decision of *Australia – Salmon*, the Appellate Body confirmed the application of *DSU* articles 17.6 and 11 as supplying the appropriate standard of review applicable to a review of domestic SPS measures (*Australia – Salmon*, *supra* note 60 at paras 116-117, 267). In *Argentina – Footwear (EC)*, the Appellate Body refused to apply s. 17.6 of the *AD Agreement* to a review of domestic safeguard measures (*Argentina – Footwear (EC)*, *supra* note 75 at paras 118-120).

¹⁰¹ *DSU*, *supra* note 3. Article 1.2 resolves conflicts between additional rules set out in the covered agreements and the general rules of the *DSU* in favour of the additional rules in the covered agreements. By narrowly defining "conflict", the Appellate Body has limited the situations in which the special and additional dispute settlement rules in the covered agreements will prevail over the general *DSU* provisions. Specifically, the Appellate Body in *Guatemala–Anti-Dumping Investigation Regarding Portland Cement from Mexico (Complaint by Mexico)* stated the following: "only where the provisions of the *DSU* and the special or additional rules and procedures of a covered agreement cannot be read as complementing each other that the special or additional provisions are to prevail" (*Guatemala–Anti-Dumping Investigation Regarding Portland Cement from Mexico (Complaint by Mexico)* (1998), WTO Doc WT/DS60/AB/R at para 65 (Appellate Body Report) [*Guatemala – Cement I*]). As a result, actual conflict between the *DSU* and the covered agreements would be required before the Article 1.2 resolution would be applied to give precedent to the additional rules in the covered agreements.

In the 2001 decision of *US – Hot-Rolled Steel*, an anti-dumping dispute, the Appellate Body carefully considered the language used in both Article 17.6(i) of the *AD Agreement* and Article 11 of the *DSU* finding consistency in a panel’s fact-finding function under both provisions.¹⁰² The Appellate Body stated:

Article 11 of the *DSU* imposes upon panels a comprehensive obligation to make an “objective assessment of the matter”, an obligation which embraces all aspects of a panel’s examination of the “matter”, both factual and legal. Thus, panels make an “objective assessment of the facts”, of the “applicability” of the covered agreements, and of the “conformity” of the measure at stake with those covered agreements. Article 17.6 is divided into two separate sub-paragraphs, each applying to different aspects of the panel’s examination of the matter. The first sub-paragraph covers the *panel’s* “assessment of the facts of the matter”, whereas the second covers its “interpretation of] the *relevant provisions*”. (emphasis added) The structure of Article 17.6, therefore, involves a clear distinction between a panel’s assessment of the facts and its legal interpretation of the *Anti-Dumping Agreement*.¹⁰³

In considering the textual differences and similarities, the Appellate Body concluded that both Article 17.6(i) of the *AD Agreement* and Article 11 of the *DSU* “requires panels to ‘assess’ the facts and this clearly necessitates an active review or examination of the pertinent facts.”¹⁰⁴ Furthermore, the Appellate Body found that no difference in approach was demanded of a panel pursuant to *DSU* Article 11 when tasked to make an “objective assessment of the facts”, or when tasked pursuant to the *AD Agreement* to make an “assessment of the facts of the matter”, concluding it was “inconceivable that Article 17.6(i) should require anything other than that panels make an objective ‘assessment of the facts of the matter’.”¹⁰⁵

This consistency in approach also applies when undertaking fact-finding reviews in disputes invoking the *AD Agreement* and other trade-remedy agreements such as the *SCM Agreement* or *Safeguards Agreement*. In fact, many anti-dumping investigations are accompanied by a subsidies investigation or

¹⁰² *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (Complaint by Japan) (2001), WTO Doc WT/DS184/AB/R at paras 50-54 (Appellate Body Report), online: WTO <docsonline.wto.org> [US – Hot-Rolled Steel].

¹⁰³ *Ibid* at para 54 [emphasis in original].

¹⁰⁴ *Ibid* at para 55.

¹⁰⁵ *Ibid*.

are undertaken by the same domestic authorities. In particular, a determination of injury to a domestic industry is required in either context and the obligation of domestic authorities to support the injury determination on the basis of “positive evidence” and “objective evaluation” is identical in both the *SCM Agreement* and the *AD Agreement*.¹⁰⁶ However, as previously noted, neither the *SCM Agreement* nor the *Safeguards Agreement* contains any provision equivalent to Article 17.6(i) of the *AD Agreement*.

The 2002 Declaration of Ministers relating to Dispute Settlement under the *AD Agreement* and *SCM Agreement* recognized the need for consistency in the “resolution of disputes arising from anti-dumping and countervailing measures”¹⁰⁷, but did not go so far as to declare that the *AD Agreement*’s Article 17.6(i) articulation of this standard would apply in countervailing measures disputes.¹⁰⁸ Instead, the Appellate Body has relied on Article 11 of the *DSU* to set out the standard of deference panels must apply in their review of domestic authorities’ factual determinations in non-anti-dumping disputes.¹⁰⁹ This has resulted in some questioning of whether the standard of review applied to fact-finding under *DSU*’s Article 11 (applicable in *SCM* investigations) could result in a different outcome from a fact-finding review conducted under *AD Agreement* Article 17.6.¹¹⁰ At least one Panel has concluded that it will not, stating:

7.17 In light of Canada's clarification of its position, and based on our understanding of the applicable standards of review under Article 11 of the *DSU* and Article 17.6 of the *AD Agreement*, we do not consider that it is either necessary or appropriate to conduct separate analyses of the USITC determination under the two Agreements.

7.18 We consider this result appropriate in view of the guidance in the Declaration of Ministers relating to Dispute Settlement

¹⁰⁶ See *AD Agreement*, *supra* note 6, arts 3.1-3.2; *SCM Agreement*, *supra* note 7, arts 15.1-15.2.

¹⁰⁷ WTO, *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*, (2002), online: WTO <http://www.wto.org/english/docs_e/legal_e/41-dadp3.doc>.

¹⁰⁸ *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (Complaint by the European Communities)* (2000), WTO Doc WT/DS138/AB/R at para 49 (Appellate Body Report), online: WTO <docsonline.wto.org> [US – *Lead and Bismuth II*].

¹⁰⁹ *Ibid* at para 51.

¹¹⁰ *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada (Complaint by Canada)* (2006), WTO Doc WT/DS277/AB/RW at paras 91 and 92 (Appellate Body Report), online: WTO <docsonline.wto.org> [US – *Softwood Lumber VI (Appellate Body Report)*].

under the AD and SCM Agreements. While the Appellate Body has clearly stated that the Ministerial Declaration does not require the application of the Article 17.6 standard of review in countervailing duty investigations, it nonetheless seems to us that in a case such as this one, involving a single injury determination with respect to both subsidized and dumped imports, and where most of Canada's claims involve identical or almost identical provisions of the AD and SCM Agreements, we should seek to avoid inconsistent conclusions.¹¹¹

While this conclusion was, in part, reliant on Canada clarifying its position that it did not consider the standard of review under Article 11 of the *DSU* as requiring a stricter approach than Article 17.6(i) of the *AD Agreement*, even in the absence of such a submission, the recognized need for a consistent approach to the resolution of anti-dumping and countervailing duty investigations support this interpretation.

In the context of countervailing duty disputes, Article 11 has also been interpreted as not imposing an obligation on a panel to “conduct their own fact-finding exercise, or to fill in gaps in the arguments made by parties.”¹¹² Rather, the Appellate Body in *US – Carbon Steel* recognized the freedom panels have to seek additional information from relevant sources, but that panels are not acting inconsistently with Article 11 if they refrain from doing so.¹¹³

The Appellate Body has continued to provide direction on how panels must conduct their “objective assessment” when tasked with reviewing findings made by domestic authorities. The Appellate Body requires panels to undertake reviews that are both reasoned, adequate, and based on sufficient evidence.¹¹⁴ A good example of this principled approach is found in *US –*

¹¹¹ *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada (Complaint by Canada)* (2004), WTO Doc WT/DS277/R at paras 7.17-7.18 (Panel Report), online: WTO <docsonline.wto.org> [*US – Softwood Lumber VI (Panel Report)*] [footnote omitted].

¹¹² *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (Complaint of the European Communities)* (2002), WTO Doc WT/DS213/AB/R at para 153 (Appellate Body Report), online: WTO <docsonline.wto.org> [*US – Carbon Steel*].

¹¹³ *Ibid* at para 153.

¹¹⁴ See *US – Softwood Lumber VI (Appellate Body Report)*, *supra* note 110 at paras 93-99; *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea (Complaint by Republic of Korea)* (2005), WTO Doc WT/DS296/AB/R at paras 186-190 (Appellate Body Report), online: WTO <docsonline.wto.org> [*US – Countervailing Duty Investigation on DRAMs*].

Oil Country Tubular Goods Sunset Reviews.¹¹⁵ The Appellate Body overturned an interpretation of the evidence given by the panel on the basis that it did not have the probative value the panel said it had.¹¹⁶ In that case, the statistical evidence presented by Argentina did not prove what it said it proved.¹¹⁷ The Appellate Body interpreted this error as a failure to make an objective assessment of the matter and overturned its finding.¹¹⁸

The need for consistency in approach to factual review is of particular importance in the context of a review of a domestic agency's "injury" or "serious prejudice" determinations – particularly as it relates to whether there is sufficient causal relationship between the alleged dumping or subsidization and the alleged injurious effects. In the 2011 decision of *EC and certain member States – Large Civil Aircraft*, the Appellate Body considered all of the challenges to the Panel's causation analysis to be "primarily factual in nature...because they are directed at the alleged lack of objectivity of the Panel's assessment of the facts."¹¹⁹ In this case, the Appellate Body concluded that not every error in the appreciation of evidence would give rise to a failure to comply with Article 11 of the DSU.¹²⁰ Rather, the Appellate Body held that it would "have to be satisfied that the Panel's errors, taken together or singly, undermine the objectivity of the Panel's assessment".¹²¹

In this respect the Appellate Body summarized its approach to fact-finding when reviewing pursuant to Article 11 as follows:

The Appellate Body has repeatedly emphasized that Article 11 of the DSU requires a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence." Within these parameters, "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings", and panels "are not required to accord to factual evidence of the parties the same meaning and weight as do the parties". In this regard, the Appellate Body has stated that it will

¹¹⁵ *United States – Sunset Reviews of Anti-dumping Measures in Oil Country Tubular Goods from Argentina (Complaint by Argentina)* (2004), WTO Doc WT/DS268/AB/R (Appellate Body Report), online: WTO <docsonline.wto.org> [US – Oil Country Tubular Goods Sunset Reviews].

¹¹⁶ *Ibid* at paras 209-212, 215.

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid*.

¹¹⁹ *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (Complaint by the United States)* (2011), WTO Doc WT/DS316/AB/R at para 1316 (Appellate Body Report), online: WTO <docsonline.wto.org> [EC and certain member States – Large Civil Aircraft].

¹²⁰ *Ibid* at para 1318.

¹²¹ *Ibid*.

not “interfere lightly” with a panel’s fact-finding authority, and has also emphasized that it “cannot base a finding of inconsistency under Article 11 simply on the conclusion that {it} might have reached a different factual finding from the one the panel reached”. Instead, for a claim under Article 11 to succeed, the Appellate Body must be satisfied that the panel has exceeded its authority as the trier of facts. As an initial trier of facts, a panel must provide “reasoned and adequate explanations 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 evenhandedness”.¹²²

This articulation of the standard clearly mandates the Appellate Body to assess whether a panel has a “sufficient evidentiary basis” for its factual conclusions and whether it has provided “sufficiently reasoned and adequate explanation” for its findings.¹²³

Although this scope of Article 11 factual review has been developed in the trade remedy context, its application extends beyond that limited scope. There is no evidence in the jurisprudence of a differing interpretation of Article 11 being applied due to the nature of the issues in dispute, or the WTO provisions that are invoked. The *EC – Seal Products* decision demonstrated this assertion, as the Appellate Body cited exclusively two subsidies disputes for the articulation of the “objective assessment” standard of Article 11 factual review, even though this dispute only involved the *TBT Agreement* and GATT 1994 provisions.¹²⁴

The principled approach to fact-finding review, first intimated at in the early jurisprudence of *Argentina – Textiles and Apparel*, has evolved over time. The ability to consider the adequacy of the factual analysis has been strengthened by the Appellate Body seeking to reconcile Articles 11 and 17.6 of the *DSU* with Article 17.6(i) of the *AD Agreement* and with attempting to bring a coherent approach to panel review in light of inconsistencies in drafting between the *AD Agreement* with other covered agreements. Trade remedy disputes have also enabled the Appellate Body to continue to address difficult causation questions as questions of mixed fact and law by

¹²² *Ibid* at para 1317 (footnotes omitted).

¹²³ *Ibid* at para 1400.

¹²⁴ *EC – Seal Products*, *supra* note 2 at para 5.232. The Appellate Body in *EC – Seal Products* at para 5.232, footnote 1342, referenced only *US – Large Civil Aircraft (Second Complaint)*, *supra* note 22 and *EC and certain member States – Large Civil Aircraft* *supra* note 119 for its articulation of the “objective assessment” requirement for factual review.

interpreting its jurisdiction to include a review of the adequacy of the fact-finding analysis of panels, and not limiting itself to only overturning improper or egregious errors.

C. Insufficient Factual Analysis and Completing the Analysis

A third factor influencing the Appellate Body's approach to panel findings of fact is the way that the *DSU* does not grant the Appellate Body remand authority, resulting in the Appellate Body having developed the limited practice of "completing the analysis". Through developing its jurisprudence on when it will decide to intervene in the face of insufficient factual analysis, the Appellate Body has recognized and striven to respect the importance of the panel's fact-finding function.

Early in its jurisprudence, the Appellate Body struggled to achieve the laudable objective of "prompt settlement" of disputes as mandated by Article 3.3 of the *DSU* and engage in a process of "completing the analysis".¹²⁵ This practice arose in response to the notable absence in the text of the *DSU* of an authority to "remand" a matter back to a panel for a further determination. Although some writers have suggested the power to remand does exist,¹²⁶ it is generally accepted that the Appellate Body does not have that capacity.¹²⁷ "Completing the analysis" decisions arise as a possible response to remedying a panel's unfulfilled fact-finding function and/or failure to decide an important issue.¹²⁸ Completing the analysis is controversial as a matter of due process if a critical or determinative issue has not been fully canvassed by the panel. Further, if the panel has engaged in an insufficient factual analysis and there is insufficient evidence on the record, will the Appellate Body engage in the fact-finding process in order to promptly resolve a dispute?

¹²⁵ *DSU*, *supra* note 3, art 3.3.

¹²⁶ See Jacques HJ Bourgeois, "Some Reflections on the WTO Dispute Settlement System from a Practitioner's Perspective" (2001) 4:1 *J Intl Econ L* 145 at 152.

¹²⁷ David Palmeter, "The WTO Appellate Body Needs Remand Authority" (1998), 32:1 *J World Trade* 41 at 41; Fernando Pierola, "The Questions of Remand Authority for the Appellate Body" in Andrew D Mitchell, ed, *Challenges and Prospects for the WTO* (London: Cameron May Ltd, 2005) 193 at 193; Alan Yanovich & Tania Voon, "Completing the Analysis in WTO Appeals: the Practice and its Limitations" (2006), 9:4 *J Intl Econ L* 933 at 933, 937. The ability to remit a matter back to a panel to undertake additional factual findings has been considered by the Trade Negotiations Committee. For proposals and a draft text on a proposed remand power, see WTO, Dispute Settlement Body – Special session – Report by the Chairman, Ambassador Ronald Saborio Soto, to the Trade Negotiations Committee, WTO Doc TN/DS/25 (2011) at A-12, A-34 – A-35.

¹²⁸ See Yanovich & Voon, *supra* note 127 at 934.

The Appellate Body faced these problems early in its jurisprudence as is reflected in *Canada – Periodicals*.¹²⁹ The Appellate Body reversed the Panel’s “like product” determination, “a process by which legal rules have to be applied to facts.”¹³⁰ The Appellate Body cited the Panel’s lack of proper legal reasoning and an “absence of adequate analysis” for its refusal to proceed with a like product determination.¹³¹ However, it did proceed to determine whether imported and domestic products were directly competitive or substitutable products.¹³² In completing this analysis, the Appellate Body relied on the evidentiary arguments of the parties, as well as the factual findings of the Panel.¹³³

The simple language used by the Appellate Body in reversing the Panel’s fact-finding avoided any reference to the legal justification for its interference. Observing commentators, however, clearly *did* interpret Appellate Body action in *Canada – Periodicals* as constituting a reversal of Panel fact-finding.¹³⁴ *Canada – Periodicals* was also an important case as the Appellate Body, following its previous practice in *US – Gasoline*, decided to “complete the analysis”.¹³⁵

In its *EC – Hormones* ruling a few months later, the Appellate Body made no mention of its holding in *Canada – Periodicals*. However, the Appellate Body again engaged in completing the analysis by assessing the evidence presented in relation to the EC’s differential treatment of natural hormones used for growth purposes, and those endogenous, or used for therapeutic or zoological treatment.¹³⁶

¹²⁹ *Canada – Certain Measures Concerning Periodicals (Complaint by the United States)* (1997), WTO Doc WT/DS31/AB/R (Appellate Body Report), online: WTO <docsonline.wto.org> [*Canada – Periodicals*].

¹³⁰ *Ibid* at 22.

¹³¹ *Ibid*.

¹³² *Ibid* at 25-32.

¹³³ *Ibid*.

¹³⁴ Bronckers & McNelis, *supra* note 35 at 324-325, 331; Robert Howse, “Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence” in JHH Weiler, ed, *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?* (Oxford: Oxford University Press, 2000) 35 at 46.

¹³⁵ *Canada – Periodicals*, *supra* note 129 at 24. In *United States – Standards for Reformulated and Conventional Gasoline (Complaints by the Bolivarian Republic of Venezuela and Brazil)* (1997), WTO Doc WT/DS2/AB/R, WT/DS4/AB/R (Appellate Body Report), online: WTO <docsonline.wto.org> [*US – Gasoline*], a decision rendered a few months earlier, the Appellate Body, at 22-29, completed the analysis in relation to the legal requirements of whether the chapeaux of art XX had been met, when the Panel had considered such an analysis unnecessary in light of its legal interpretation of art XX(b).

¹³⁶ *EC – Hormones*, *supra* note 26 at para 222.

Less than a year later, the Appellate Body again reversed a panel's fact-finding without characterizing it as such and without mention of the *EC – Hormones* ruling. In a similar fashion to its comportment in *Canada – Periodicals* above, the Appellate Body in *EC – Computer Equipment* held:

On the basis of the erroneous legal reasoning developed and the *selective evidence considered*, the Panel was not justified in coming to the conclusion that the United States was entitled to “legitimate expectations” that LAN equipment would be accorded tariff treatment as ADP machines in the European Communities and, therefore, that the European Communities acted inconsistently with the requirements of Article II:1 of the GATT 1994 by failing to accord imports of LAN equipment from the United States no less favourable than that provided for in Schedule LXXX.¹³⁷

The Appellate Body went so far as to suggest which evidence the Panel should have considered, declaring that a proper interpretation “would have included an examination of the existence and relevance of subsequent practice.”¹³⁸ In *US – Shrimp*, rendered shortly after *EC – Computer Equipment*, the Appellate Body once again engaged in applying facts to its own legal interpretation of Article XX of GATT 1994.¹³⁹ Yanovich and Voon identified subsequent decisions where the Appellate Body reversed panels' legal interpretations of WTO provisions and applied facts, but did not expressly indicate that it was “completing the analysis”.¹⁴⁰

These early decisions suggest a trend whereby the Appellate Body, in the interest of expediently resolving disputes appeared comfortable in engaging in evidentiary examinations and drawing its own factual conclusions from evidence presented by the parties either at the panel hearing or on appeal. This trend, however, has not been sustained. Rather, *Korea – Dairy* demonstrated a clear movement by the Appellate Body towards developing a more consistent approach to when it would “complete the analysis”, particularly in situations where the Appellate Body has reversed or modified a

¹³⁷ *EC – Computer Equipment*, *supra* note 82 at para 98 [footnotes excluded and emphasis added].

¹³⁸ *Ibid* at para 90.

¹³⁹ *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Complaints by India, Malaysia, Pakistan, and Thailand)* (1998), WTO Doc WT/DS58/AB/R, at paras 114-124 (Appellate Body Report), online: WTO <docsonline.wto.org> [*US – Shrimp*].

¹⁴⁰ Yanovich & Voon, *supra* note 127 at 940 and footnote 40. See also *EC – Asbestos*, *supra* note 87 at 29-30, footnote 48.

panel's legal interpretation of a WTO provision.¹⁴¹ In *Korea – Dairy*, the Panel's failure to make factual findings on levels of skim milk powder preparations importation along with the contested evidence on the average level of imports during the time period in question resulted in a refusal by the Appellate Body to “complete the analysis”.¹⁴² Rather, the Appellate Body stated that:

[i]n the absence of any factual findings by the Panel or undisputed facts in the Panel record relating to whether the alleged increase in imports was, indeed, “a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions...”, we are not in a position, within the scope of our mandate set forth in Article 17 of the *DSU*, to complete the analysis [...].¹⁴³

Having a sufficient factual basis upon which to complete the analysis is now a determinative factor in the Appellate Body's decision-making.¹⁴⁴ The sufficiency may be in the panel's findings of fact, or in the form of undisputed evidence in the panel record. While earlier jurisprudence intimated a greater appetite by the Appellate Body to intervene in the fact-finding exercise,¹⁴⁵ subsequent case law confirms an unwillingness to do so, and a desire to leave the fact-finding function to panels even if critical aspects of the dispute may be left unresolved.¹⁴⁶

¹⁴¹ *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products (Complaint by the European Communities)* (2000), WTO Doc WT/DS98/AB/R at paras 92, 102 (Appellate Body Report) [*Korea – Dairy*].

¹⁴² *Ibid* at para 102.

¹⁴³ *Ibid* at para 92.

¹⁴⁴ *US – Section 211 Appropriations Act*, *supra* note 28 at paras 343, 352.

¹⁴⁵ *Canada – Periodicals*, *supra* note 129 at 24; *EC – Hormones*, *supra* note 26 at para 222; *EC – Computer Equipment*, *supra* note 82 at para 98; *US – Shrimp*, *supra* note 139 at paras 114-124.

¹⁴⁶ *Korea – Dairy*, *supra* note 141 at para 102; *EC – Asbestos*, *supra* note 87 paras 78, 82; *US – Hot-Rolled Steel*, *supra* note 102 at para 180; *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (Complaint by Canada)* (2004), WT/DS257/AB/R at para 118 (Appellate Body Report), online: WTO <docsonline.wto.org> [US – *Softwood Lumber IV*]; *United States – Subsidies on Upland Cotton (Complaint by Brazil)* (2005), WTO Doc WT/DS267/AB/R at paras 693-694 (Appellate Body Report), online: WTO <docsonline.wto.org> [US – *Upland Cotton*]; *European Communities – Export Subsidies on Sugar (Complaints by Australia, Brazil, and Thailand)* (2005), WTO Doc WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R at para 340 (Appellate Body Report), online: WTO <docsonline.wto.org> [EC – *Export Subsidies on Sugar*]; *US – Countervailing Duty Investigation on DRAMS*, *supra* note 114 at para 208; *US – Softwood Lumber VI (Appellate Body Report)*, *supra* note 110 at paras 157-161; *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”) (Complaint by the European Communities)* (2005), WTO Doc WT/DS294/AB/R at paras 228, 243 (Appellate Body Report), online: WTO <docsonline.wto.org> [US – *Zeroing (EC)*]; *European Communities – Selected Customs Matters*

IV. CONCLUSION

Inquiry into the development of the Appellate Body's standard of review for a panel's finding of fact has revealed a distinct shift in approach from the early years until the present day. The Appellate Body had to overcome the challenge of a lack of direct textual guidance on the standard of review for facts in the text of the *DSU*, as well as overcome the challenge posed by the nuanced status of domestic law under international law.

A review of the jurisprudence reveals three factors influencing the development of the Appellate Body's approach to fact-finding review. First, the Appellate Body adopted and subsequently rejected its early "bad faith-only" standard, as identified through the post-*EC-Hormones* decisions. While the Appellate Body will intervene and overturn findings of fact when the panel has engaged in "egregious" conduct, evidence of such conduct is not the exclusive basis for Appellate Body intervention. Second, the Appellate Body has increasingly adopted a consistent approach to panel factual review in the context of trade remedy disputes. This consistency in approach has evolved in the face of inconsistent drafting the standard of review provisions in the covered agreements. The Appellate Body has respected the fact-finding function of panels by thoughtfully considering its appellate jurisdiction and in particular, interpreting Articles 11 and 17.6 of the *DSU* consistently with Article 17.6(i) of the *AD Agreement*. Third, the lack of Appellate Body remand authority has resulted in the development of an approach to "completing the analysis" that confirms deference to panel found facts.

On review, the Appellate Body will confine itself to considering whether the panel has a sufficient evidentiary basis to make its findings. It will consider whether the panel has demonstrated even-handedness in approach by not ignoring evidence, but assessing its credibility and assigning appropriate weight to the evidence. The Appellate Body will not intervene, even if another panel would have reached a different assessment of the evidence. This approach is comprehensive and flexible enough to address a

(*Complaint by the United States*) (2006), WTO Doc WT/DS315/AB/R at paras 278,286 (Appellate Body Report), online: WTO <docsonline.wto.org> [EC - Selected Customs Matters]; *United States - Continued Existence and Application of Zeroing Methodology (Complaint by the European Communities)* (2009), WTO Doc WT/DS350/AB/R at paras 194-196 (Appellate Body Report), online: WTO <docsonline.wto.org> [US - Continued Zeroing]; *Canada - Certain Measures Affecting the Renewable Energy Generation Sector (Complaint by Japan) - Canada - Measures Relating to the Feed-in Tariff Program (Complaint by the European Union)* (2013), WTO Doc WT/DS412/AB/R, WT/DS426/AB/R at para 5.243 (Appellate Body Report) [*Canada - Renewable Energy & Canada - Feed-In Tariff Program*].

range of possible errors, including claims of improper fact-finding, manifest errors of fact and insufficient factual analysis.