

Neither Fact Nor Law: Domestic Law, the Standard-Of-Review Deficit, and the Misdiagnosis of the Article 17.6 Controversy in Wto Dispute Settlement

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Abstract

The charge that the World Trade Organization Appellate Body exceeded its mandate under Article 17.6 of the Dispute Settlement Understanding by “making determinations under domestic law” has become a fixed point in the literature on the dispute settlement crisis and a recurring item in the United States’ indictment of the institution. This article argues that the charge rests on a category error. It conflates a jurisdictional question, whether the meaning of municipal law is an “issue of law” reviewable on appeal, with a standard-of-review question concerning the intensity of that review and the deference owed to the respondent’s own authoritative institutions. The jurisdictional question is largely a red herring: reviewing a panel’s characterisation of municipal law for treaty-consistency is ordinary legal interpretation and is consistent with the practice of the International Court of Justice, investment tribunals and human rights courts, which routinely examine domestic law without surrendering jurisdiction over it. The real and neglected problem is a standard-of-review deficit. By assimilating the ascertainment of municipal law’s meaning to the *de novo* interpretation of treaty text, the Appellate Body left a deference vacuum that became indefensible only where a treaty provision, Article 17.6 (ii) of the Anti-Dumping Agreement, expressly mandated deference and was then read out of existence. Reframing the controversy from jurisdiction to standard of review dissolves the overreach charge in its strong form, isolates a genuine but narrow failing, and exposes the misdirection of a reform agenda preoccupied with jurisdictional carve-outs. The article develops a calibrated standard of review for municipal law, deference in ascertainment, independence in consistency assessment, and contends that the Appellate Body crisis was sustained, in part, because a standard-of-review grievance was misdescribed as a jurisdictional violation, rendering it rhetorically potent yet impervious to the Appellate Body’s otherwise sound jurisdictional defence.

Keywords: WTO Appellate Body; Article 17.6 DSU; standard of review; municipal law as fact; judicial overreach; Anti-Dumping Agreement Article 17.6(ii); dispute settlement reform.

1. Introduction

Few accusations have shaped the recent history of the World Trade Organization (“WTO”) as decisively as the claim that its Appellate Body (“AB”) strayed beyond the boundaries fixed by the Members who created it. Among the many counts in the indictment compiled by the United States and crystallised in its 2020 Report on the Appellate Body of the WTO, one has proved peculiarly durable: that the Appellate

Body, in reviewing and pronouncing upon Members' domestic law, exceeded the appellate competence conferred by Article 17.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), which confines appeals to "issues of law covered in the panel report and legal interpretations developed by the panel."¹ The grievance is now woven into the standard account of how the world's most admired international adjudicatory mechanism came to be paralysed.²

This article contends that the charge, in the form in which it is usually advanced, is misconceived, not because the underlying anxiety is baseless, but because it has been pressed in the wrong register. The question "did the Appellate Body violate Article 17.6 by making determinations under domestic law?" bundles together two analytically distinct enquiries that ought to be kept apart. The first is **jurisdictional**: is the meaning or effect of municipal law an "issue of law" that falls within the appellate competence at all, or is it a matter of fact insulated from appellate review? The second is a question of the **standard of review**: assuming such matters may be reached on appeal, with what intensity should they be examined, and how much weight should be given to the interpretations placed on domestic law by the very institutions, legislatures, agencies and courts, that produced and administer it? The literature, the Members' submissions, and even the Appellate Body's defenders have largely fought over the first question. The argument advanced here is that the first question is comparatively easy and largely a distraction, while the second, where the real normative action lies, has been neglected.

Stated compactly, the thesis is this. In its jurisdictional sense, the overreach charge fails. Reviewing a panel's characterisation of domestic law for the purpose of determining treaty-consistency is quintessential legal interpretation, and an international tribunal that examines municipal law to decide whether a State has complied with its international obligations does nothing exceptional; the International Court of Justice ("ICJ"), investment tribunals and human rights courts do so routinely. What the Appellate Body did wrong, to the extent it did anything wrong, was not to review domestic law but to review it without a calibrated standard. By assimilating the ascertainment of what municipal law means to the *de novo* interpretation of treaty text, it produced a deference vacuum. That vacuum became an identifiable failing only in the one corner of the system where a treaty provision expressly required deference, Article 17.6(ii) of the Anti-Dumping Agreement ("Agreement"), and was nonetheless hollowed out. Elsewhere, the absence of deference was a gap in the DSU rather than a violation by the Appellate Body.

If that reframing is correct, two consequences follow that the existing scholarship has not adequately drawn. First, the United States' most rhetorically potent claim, that the Appellate Body broke the rules, was misdescribed: a complaint about the standard of review and the locus of interpretive authority was dressed in the language of jurisdictional transgression. That misdescription was strategically effective, because "the court exceeded its jurisdiction" sounds like rule-breaking in a way that "the court applied too searching a standard of review" does not; but it was also intellectually disabling, because the Appellate Body could and did answer the jurisdictional charge convincingly, leaving the parties speaking past one another. Second, the reform agenda has chased the wrong fix. Proposals to amend Article 17.6 of the DSU, whether to carve domestic law out of appellate review or to instruct the Appellate Body to "rely

¹ Understanding on Rules and Procedures Governing the Settlement of Disputes (signed 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401 ('DSU') art 17.6; Office of the United States Trade Representative, *Report on the Appellate Body of the World Trade Organization* (February 2020) 89–95.

² On the paralysis and its aftermath see Kristen Hopewell, 'Unravelling of the Trade Legal Order: Enforcement, Defection and the Crisis of the WTO Dispute Settlement System' (2025) 101 *International Affairs* 1103.

primarily” on the respondent’s reading of its own law, misdiagnose a standard-of-review problem as a jurisdictional one. The corrective belongs at the level of intensity of review, not competence.³

1.1 Statement of the Research Problem

The problem this article addresses is therefore not the familiar one of whether the Appellate Body “added to or diminished” Members’ rights and obligations within the meaning of Article 3.2 of the DSU when it engaged with domestic law. It is the prior, structural problem that the dominant framing of the controversy obscures the question that actually matters. So long as the debate is conducted as a contest over the fact–law boundary, it will remain irresolvable, because municipal law in WTO proceedings is neither cleanly “fact” nor cleanly “law” and the binary cannot bear the analytical weight placed on it. The research problem is to identify what the controversy is really about, to locate the Appellate Body’s defensible and indefensible conduct precisely, and to show how a standard-of-review lens both vindicates the institution against the strong overreach charge and isolates the narrow, treaty-grounded failing that remains.

1.2 Research Questions

The article pursues five questions:

- Does the Appellate Body’s engagement with the meaning of domestic law fall within its competence under Article 17.6 of the DSU, or does it intrude upon the factual findings reserved to panels?
- Is the conventional characterisation of municipal law as “fact” in international proceedings adequate to the work the WTO dispute settlement system asks of it, or is municipal law better theorised as a *tertium quid* calling for a calibrated standard of review?
- Is the Appellate Body’s treatment of domestic law internally consistent across the leading disputes, and how does it compare with the practice of other international courts and tribunals?
- Are the criticisms levelled at the Appellate Body legally well founded, institutionally self-interested, or politically motivated, and does the answer differ as between general DSU review and the special standard under Article 17.6(ii) of the Anti-Dumping Agreement?
- What follows, for the legitimacy of WTO adjudication and for the design of any reformed appellate mechanism, from re-describing the controversy as one about standards of review rather than jurisdiction?

1.3 Research Methodology

The methodology is doctrinal and analytical, supplemented by a comparative-institutional dimension. The doctrinal component reads the relevant treaty texts, Articles 3.2, 11 and 17.6 of the DSU and Article 17.6 of the Agreement, against the canons codified in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (“VCLT”),⁴ and traces the line of Appellate Body and panel reports in which the characterisation of domestic law was contested. The analytical component subjects the fact–law distinction itself to critique, treating it not as a datum but as a construct whose limits explain the persistence of the dispute. The comparative component asks whether the Appellate Body’s approach is an outlier by setting it against the ICJ, investor–State tribunals, the European Court of Human Rights and the Court of Justice

³For the proposal of a new art 17.6bis requiring the Appellate Body to rely primarily on the respondent State’s submissions in interpreting its own law, see Task Force 6, T20 India, *A Framework for a Reformed WTO Appellate Body* (T20 Policy Brief, May 2023), Recommendation 4.

⁴Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (‘VCLT’) arts 31–33. The Appellate Body confirmed the customary status of arts 31 and 32 at the outset: Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline* (29 April 1996) WT/DS2/AB/R, 17.

of the European Union (“CJEU”). Throughout, the aim is criticism rather than exposition: the object is to evaluate competing positions and to defend an original one, not to summarise the field.

2. Literature Review and the Research Gap

The scholarship on the Appellate Body’s treatment of domestic law sits at the intersection of three larger literatures, on the standard of review in WTO law, on the law–fact distinction in international adjudication, and on the legitimacy of the dispute settlement system, yet it has rarely integrated them. Mapping these strands reveals not a settled consensus but a set of crossed wires, and it is in the gap between them that this article situates its contribution.

2.1 The Standard-of-Review Literature

The standard-of-review debate is the oldest of the three. Writing soon after the WTO’s establishment, Croley and Jackson framed the central choice as one between *de novo* review and deference to national authorities, and warned that the answer would determine how much sovereignty Members had in fact ceded.⁵ Oesch’s monograph remains the most systematic treatment, distinguishing the review of facts from the review of legal interpretation and identifying Article 17.6 of the Agreement as the singular instance in which the covered agreements prescribe deference on questions of law.⁶ Petersmann, by contrast, approached the standard of review as a constitutional question about the allocation of authority between international and national institutions, urging that deference be understood as a structural feature of a multilevel legal order rather than a mere evidentiary rule.⁷ What unites this literature is its near-exclusive focus on the review of administrative determinations, chiefly in trade-remedy cases, and its corresponding inattention to the distinct question of how the meaning of domestic law, as opposed to the wisdom of an agency’s factual findings, should be ascertained on appeal.

2.2 The Law–Fact Distinction and Municipal Law

A second body of work examines the law–fact line that Article 17.6 of the DSU makes jurisdictionally decisive. Voon’s study is the fullest, demonstrating that the line is porous and that the Appellate Body has repeatedly recharacterised what panels treated as factual as “legal” in order to bring it within reach.⁸ Underlying the discussion is the classical position of the Permanent Court of International Justice in the *Serbian Loans* case, that municipal laws are “merely facts” from the standpoint of international law,⁹ a dictum the Appellate Body itself invoked in *India - Patents (US)*. The difficulty, as Jennings and Watts long ago observed and as the modern commentary acknowledges, is that the *Serbian Loans* formula was never meant to deny that a tribunal must understand municipal law in order to apply international law to it; it meant only that domestic law does not bind the international tribunal as law.¹⁰ The literature has

⁵Steven P Croley and John H Jackson, ‘WTO Dispute Procedures, Standard of Review, and Deference to National Governments’ (1996) 90 *American Journal of International Law* 193.

⁶Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (OUP 2003); see also Matthias Oesch, ‘Standards of Review in WTO Dispute Resolution’ (2003) 6 *Journal of International Economic Law* 635.

⁷Ernst-Ulrich Petersmann, ‘The Standard of Review in WTO Law’ (2002) 6 *European Integration online Papers (EIoP)* No 17.

⁸Tania Voon, ‘The Facts Aside: The Limitation of WTO Appeals to Issues of Law’ (2011) 12 *Melbourne Journal of International Law* 1.

⁹Case Concerning the Payment of Various Serbian Loans Issued in France (*France v Kingdom of the Serbs, Croats and Slovenes*) (Judgment) PCIJ Rep Series A No 20, 41; the Appellate Body also drew on *Certain German Interests in Polish Upper Silesia* (*Germany v Poland*) (Merits) PCIJ Rep Series A No 7, 19 for the same proposition.

¹⁰See Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law* (9th edn, Longman 1992) vol 1, 82–83, on the sense in which municipal law is ‘fact’ before international tribunals.

noticed the porosity of the line but has tended to treat it as a problem to be deplored rather than as a signal that the binary is the wrong tool.

2.3 The Legitimacy and Overreach Literature

The third strand, swollen by the crisis, concerns legitimacy. Howse's influential reading casts the Appellate Body's early jurisprudence as a deliberate "declaration of independence" from the trade-policy insiders, a posture he regards as the source of its authority.¹¹ Pauwelyn's reply contests that account, arguing that the system's success owed less to Herculean independence than to a "judicial minimalism" and a quiet symbiosis with Members' evolving preferences.¹² Van den Bossche, himself a former Division member, dismisses the overreach allegations as "persistent and unfounded" and locates the danger precisely in their corrosive effect on the institution.¹³ From the bench and its margins, Ehlermann, Sacerdoti and Steger have variously defended the Appellate Body's interpretive method and its cautious use of precedent,¹⁴ while Roessler, from a GATT-era vantage, has been among the more pointed internal critics of the Appellate Body's expansive reasoning.¹⁵ McRae situates the contest within the broader place of the WTO in international law, and Mavroidis has repeatedly pressed the narrower point that the Appellate Body's trade-remedy jurisprudence, above all on zeroing, strained the deference the Members had bargained for.¹⁶

2.4 The Gap

Three deficiencies emerge. First, the strands run in parallel: the standard-of-review writers analyse deference to administrative findings, the law - fact writers analyse appellate competence, and the legitimacy writers analyse the institution's political authority, but none asks how the standard-of-review question bears on the law-fact question in the specific context of ascertaining the meaning of domestic law. Second, the debate is trapped in a binary, activism versus restraint, fact versus law, that flattens the relevant distinctions; the more interesting question is not whether the Appellate Body may reach domestic law but how it should. Third, and most importantly, the literature has not noticed that the overreach charge equivocates between a jurisdictional and a standard-of-review claim, and that this equivocation is doing significant work in sustaining the crisis. The present article addresses each deficiency: it connects the standard-of-review and law-fact literatures through the concept of a calibrated standard for municipal law; it abandons the activism/restraint binary for an enquiry into intensity and locus of authority; and it diagnoses the equivocation at the heart of the overreach charge.

¹¹Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 *European Journal of International Law* 9.

¹²Joost Pauwelyn, 'The WTO 20 Years On: "Global Governance by Judiciary" or, Rather, Member-driven Settlement of (Some) Trade Disputes between (Some) WTO Members?' (2016) 27 *European Journal of International Law* 1119.

¹³Peter Van den Bossche, 'The Demise of the WTO Appellate Body: Lessons for Governance of International Law' (WTI Working Paper No 02/2021) 18–20.

¹⁴See Claus-Dieter Ehlermann, 'Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body' (2002) 36 *Journal of World Trade* 605; Giorgio Sacerdoti, 'The WTO Dispute Settlement System: Consolidating Success and Confronting New Challenges' in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (CUP 2015); Debra P Steger, 'The Founding of the Appellate Body' in the same volume.

¹⁵Frieder Roessler, 'Changes in the Jurisprudence of the WTO Appellate Body during the Past Twenty Years', in Marceau (ed) (n above), expressing reservations about aspects of the Appellate Body's reasoning.

¹⁶Donald McRae, 'Measuring the Effectiveness of the WTO Dispute Settlement System' (2008) 3 *Asian Journal of WTO and International Health Law and Policy* 1; on zeroing and deference see Petros C Mavroidis, *The Regulation of International Trade, Volume 2: The WTO Agreements on Trade in Goods* (MIT Press 2016) chs on anti-dumping.

3. Conceptual and Legal Framework: Municipal Law as Neither Fact nor Law

The orthodox question, is municipal law fact or law?, presupposes that the two categories are exhaustive and mutually exclusive and that everything an adjudicator does with a domestic statute falls neatly into one or the other. Neither premise survives scrutiny. The thesis of this section is that municipal law before an international tribunal is better understood as a *tertium quid*, a normative object that the tribunal must ascertain (an operation with a strong factual character) before it can appraise its conformity with international law (an operation that is purely legal), and that the failure to keep these two operations apart, each with its own standard of review, is the conceptual source of the entire controversy.

3.1 The Two Operations Distinguished

When a panel confronts a Member's domestic measure, it performs, often without saying so, two sequential operations. The first is **ascertainment**: establishing what the domestic law provides, its text, its authoritative construction by domestic courts and agencies, its operation in practice. This is an epistemic exercise directed at the content of a normative system external to the tribunal; it resembles fact-finding because its object is a state of affairs in the world and because the tribunal is not the authentic interpreter of the norm. The second is **appraisal**: measuring the law so ascertained against the relevant treaty obligation. This is not fact-finding at all; it is the application of international law, and the tribunal is the authentic interpreter of the treaty. The Serbian Loans dictum speaks to the first operation, municipal law does not bind the international tribunal as law, so the tribunal ascertains it as it would a fact, and says nothing to license treating the second operation as factual. Conversely, the truth that appraisal is legal says nothing to license treating ascertainment as a pure question of law to be resolved *de novo*, as though the tribunal were the supreme court of the respondent State.

Once the two operations are separated, the law–fact binary dissolves into a more tractable question about standard of review applied to each operation. Ascertainment, because its object is an external normative system administered by institutions with superior competence over it, calls for deference: the tribunal should give substantial weight to the respondent's authoritative sources and should not lightly substitute its own reading of a foreign statute for that of the State's own courts. Appraisal, because its object is the treaty over which the tribunal has authentic interpretive authority, calls for independence: no deference is owed on the question whether the ascertained law conforms to the covered agreements. The error that has fuelled the controversy is the collapse of this two-step structure into a single undifferentiated enquiry conducted at a uniform, non-deferential intensity.

3.2 Why “Legal Fact” Is More Than a Label

Treating municipal law as a *tertium quid* is not a verbal sleight that splits the difference. It has determinate consequences. It explains why the Appellate Body was right, jurisdictionally, to insist that it could examine domestic law: appraisal is legal, and a panel's appraisal is reviewable as a “legal interpretation developed by the panel” under Article 17.6 of the DSU. It equally explains why the United States was not simply wrong to feel that something had gone awry: when the Appellate Body re-opened a panel's ascertainment of what a complex federal statute meant, displacing the reading adopted by the respondent's own courts and agencies, it conducted, in substance, a *de novo* review of a matter on which deference was due, even if it labelled the exercise “legal interpretation.” The *tertium quid* framework thus accommodates the valid intuition on each side while exposing the equivocation that has prevented the two sides from meeting: the Members complained about the standard applied to ascertainment, and the Appellate Body answered about its jurisdiction over appraisal.

3.3 The Framework and the Vienna Convention

Nothing in this framework is in tension with the VCLT; it is an application of it. Article 31 directs the interpreter to the treaty's terms in their context and in light of its object and purpose. Article 17.6 of the DSU, read with Articles 3.2 and 11, fixes the object of appellate review as the panel's legal interpretations and its objective assessment of the matter, not the facts "as such."¹⁷ A faithful reading honours both the appraisal that the treaty commits to the adjudicator and the deference that the treaty's allocation of competence implies on ascertainment. The point is sharpened, not contradicted, by Article 17.6(ii) of the Anti-Dumping Agreement, which makes explicit, for one agreement, a deference that the general structure leaves implicit; the section that follows shows how the Appellate Body's handling of that express provision became the clearest instance of the standard-of-review deficit.

4. Article 17.6 DSU and Article 17.6(ii) of the Anti-Dumping Agreement: Text, Context, and Purpose

Two provisions share the number 17.6, and their conflation is itself a minor source of confusion in the literature. Article 17.6 of the DSU is jurisdictional: it confines the appeal to issues of law and to the panel's legal interpretations. Article 17.6 of the -Dumping Agreement is a standard-of-review provision: it tells the panel how intensely to scrutinise an investigating authority's establishment of the facts (sub-paragraph (i)) and its interpretation of the Agreement (sub-paragraph (ii)). The first governs the vertical relationship between panel and Appellate Body; the second governs the horizontal relationship between adjudicator and national authority. The argument of this article turns on keeping them distinct, and on noticing that the overreach charge illegitimately borrows the gravity of the first while voicing a grievance that belongs to the family of the second.

4.1 Article 17.6 DSU as a Jurisdictional Filter

The text of Article 17.6 of the DSU is spare: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."¹⁸ Its purpose, read with Article 3.2, is to confer security and predictability while withholding from the Appellate Body the power to retry the facts. The provision presupposes a workable law–fact line, yet it does not define one, and the drafters left no guidance on the recurrent hard case of municipal law. The Appellate Body filled the silence in *India - Patents (US)*, holding that examining the relevant provisions of Indian law was "essential" to determining compliance with the TRIPS Agreement and that such examination was a legal exercise within its competence, while affirming, in the same breath, the *Serbian Loans* proposition that municipal law is a fact to be established by the party relying on it.¹⁹ That the examination is necessary at all follows from Article XVI:4 of the Marrakesh Agreement, which obliges each Member to ensure the conformity of its laws, regulations and administrative procedures with the covered agreements; a tribunal that could not look behind a Member's self-description of its own law could not police that obligation.²⁰ The tension in that pairing, municipal law is fact, yet its examination is law, is precisely the tension the *tertium quid*

¹⁷DSU (n above) arts 3.2, 11, 17.6; on the limits of art 11 review see Appellate Body Report, *European Communities - Measures Concerning Meat and Meat Products (Hormones)* (16 January 1998) WT/DS26/AB/R, WT/DS48/AB/R [132].

¹⁸DSU (n above) art 17.6.

¹⁹Appellate Body Report, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* (19 December 1997) WT/DS50/AB/R [65]–[66].

²⁰Marrakesh Agreement Establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154, art XVI:4; on the positive duty of conformity see Panel Report, *United States - Sections 301–310 of the Trade Act of 1974* (22 December 1999) WT/DS152/R [7.41]–[7.78].

framework resolves: ascertainment is fact-like, appraisal is law, and the “essential” examination the Appellate Body had in mind was appraisal.

4.2 Article 11 DSU and the “Objective Assessment” Bridge

Article 11 of the DSU, requiring panels to make an “objective assessment of the matter,” supplies the bridge by which the Appellate Body reaches a panel’s handling of domestic law without, in form, reviewing facts. In *EC - Hormones* the Appellate Body held that it could examine whether a panel had made such an assessment, but that this was “not a review of the facts as such.”²¹ The device is doctrinally elegant and substantively double-edged. It allows the Appellate Body to correct a panel’s egregious mishandling of evidence about domestic law; it also allows it, by characterising an ascertainment question as an “objective assessment” question, to re-open the meaning of a statute under the guise of process review. The provision is thus neither a licence nor a prohibition but a control whose exercise depends on the standard of review the Appellate Body chooses to apply, which returns the analysis to intensity, not competence.

4.3 Article 17.6(ii) of the Anti-Dumping Agreement: An Orphaned Deference Rule

Article 17.6(ii) of the Agreement is the only provision in the covered agreements that prescribes deference on a question of law. Its second sentence directs that where a relevant provision “admits of more than one permissible interpretation,” the panel “shall find the authorities’ measure to be in conformity” if it rests upon one of them.²² Its drafting history is candid: the provision was inserted at the insistence of the United States and was modelled on the deference that Chevron then required of United States courts reviewing agency interpretations of statutes they administer.²³ The Appellate Body construed the provision in *US - Hot-Rolled Steel*, holding that it operates only after the customary rules of interpretation have been applied, and that a “permissible” interpretation is one that the VCLT methodology admits.²⁴ Formally orthodox, the construction proved fateful: by routing the deference enquiry through a VCLT analysis that almost always yields a single “correct” meaning, the Appellate Body left scarcely any room for the multiplicity of permissible interpretations the provision presupposes. As one recent study puts it, the deferential standard became Chekhov’s gun, introduced with ceremony, never fired.²⁵

This is the cleanest case of the standard-of-review deficit, and it matters that it is the cleanest. Here, uniquely, deference was not a structural implication to be teased out of the system but an express treaty command. The Appellate Body’s failure to give it operative effect is therefore not merely a contestable choice of intensity; it is, at least arguably, a failure to apply a covered agreement, a breach internal to the law it administers, rather than the jurisdictional transgression of which it stands accused. The distinction is consequential for the assessment in Part 8: the strong overreach charge fails, but a narrow, treaty-anchored failing survives, and it is located here.

²¹*EC - Hormones* (n above) [132].

²²Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) art 17.6(ii).

²³*Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984). On the negotiating intent see Daniel K Tarullo, ‘The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions’ (2002) 34 *Law and Policy in International Business* 109; Isabelle Van Damme, ‘Treaty Interpretation by the WTO Appellate Body’ (2010) 21 *European Journal of International Law* 605, 615–617.

²⁴Appellate Body Report, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (24 July 2001) WT/DS184/AB/R [57]–[62].

²⁵Yury Rovnov, ‘Article 17.6(ii) of the WTO Anti-Dumping Agreement: Waiting for Chekhov’s Gun to Go Off’ (2024) 15 *Journal of International Dispute Settlement* 106.

5. WTO Jurisprudence on Domestic Law: A Critical Reconstruction

Read through the two-operation lens, the leading disputes display more coherence than the critics allow on the jurisdictional question and more drift than the defenders concede on the standard-of-review question. What follows is not a catalogue but a reconstruction organised around the analytical fault line.

5.1 India - Patents and US - Section 211: The Two Operations in the Appellate Body's Own Words

In India - Patents (US), India argued that the panel should defer to its own reading of the administrative instructions said to constitute a TRIPS-compliant “mailbox,” and that it should receive the benefit of the doubt on the meaning of its municipal law.²⁶ The Appellate Body declined, but the holding is narrower than it is often read to be. It did not assert authority to construe Indian law authoritatively for Indian purposes; it held that the panel had to examine Indian law to decide TRIPS-consistency and that this examination was reviewable as legal analysis.²⁷ In the present vocabulary, the Appellate Body affirmed its competence over appraisal and treated ascertainment as a matter to be established on the record, indeed it faulted neither party's factual presentation. The decision is therefore better cited for the proposition that appraisal is legal than for any claim that ascertainment is to be conducted *de novo*; the latter reading, common in the critical literature, over-reads the case.

If India - Patents planted the distinction, US - Section 211 Appropriations Act stated it outright, and in terms that anticipate the framework defended here. The Appellate Body held that the municipal law of a Member “may serve not only as evidence of facts, but also as evidence of compliance or non-compliance” with WTO obligations; that a panel may examine municipal law to determine compliance; and that this examination “is a legal characterization by a panel” and so “subject to appellate review under Article 17.6 of the DSU.”²⁸ From this it followed, the Appellate Body reasoned, that “the meaning given by the Panel to Section 211 is ... clearly within the scope of our review as set out in Article 17.6 of the DSU.”²⁹ The passage is doubly significant. First, it shows that the two-operation structure, municipal law as evidence of facts (ascertainment) and as evidence of compliance (appraisal), is not an external imposition on the jurisprudence but the Appellate Body's own analytical vocabulary. Second, it exposes the precise weakness in the United States' rejoinder.

The USTR Report's central complaint on this front is that the Appellate Body “provided no interpretation of the text of the DSU” to justify treating the meaning of municipal law as a legal issue, and that the only support ever offered was the bare assertion of India - Patents, repeated without reasons.³⁰ The criticism, however, mislocates the gap. The textual warrant for reviewing the appraisal of municipal law is Article 17.6 itself: the appraisal is a “legal interpretation developed by the panel,” and the Appellate Body said precisely this in Section 211. What lacks a textual mandate is not appraisal but the *de novo* ascertainment of meaning into which the Appellate Body slid without acknowledging the slide. The United States was thus right that something in the practice wanted justification; it was wrong about what. Read with care, Section 211 is less the smoking gun of overreach than the clearest proof that the Appellate Body possessed

²⁶India - Patents (US) (n above) [64]–[65].

²⁷*ibid* [66]–[68].

²⁸Appellate Body Report, *United States - Section 211 Omnibus Appropriations Act of 1998* (2 January 2002) WT/DS176/AB/R [105]–[106].

²⁹*ibid* [106].

³⁰USTR, *Report on the Appellate Body* (n above) 89–95; the same complaint runs through the United States' DSB statements, eg WT/DSB/M/348.

the conceptual apparatus to do the job correctly, and simply failed to attach a standard of review to the first half of it.

5.2 US - Countervailing and Anti-Dumping Measures (China) (DS449): The Equivocation in Open Court

DS449 is the dispute in which the equivocation surfaced explicitly. The question was whether United States law, as construed by the Court of Appeals for the Federal Circuit in GPX, precluded the simultaneous imposition of countervailing duties on non-market-economy imports, a reading Congress then legislated to override.³¹ The United States objected, in the Dispute Settlement Body and on appeal, that the Appellate Body was reviewing panel findings of fact about the meaning of United States law, a matter requiring expertise in a complex domestic system that international adjudicators lack.³² The Appellate Body answered that it was reviewing the panel's legal characterisation of how the measure, as implemented, related to WTO obligations.³³ Both sides were, in their own registers, correct, and that is the point. The United States voiced an ascertainment grievance (the meaning of a domestic statute, on which deference was due, was being re-opened); the Appellate Body gave an appraisal answer (treaty-consistency is legal and reviewable). The dispute could not be resolved because the parties were not answering the same question. DS449 is thus the empirical heart of this article's claim: the controversy is a standard-of-review disagreement misdescribed as a jurisdictional one.

Notably, the Appellate Body had by this point developed, in the public-body line of cases, a more explicit account of how the meaning of municipal law is to be handled. In US - Anti-Dumping and Countervailing Duties (China) and US - Carbon Steel (India), it treated the meaning of domestic legal instruments as something a panel ascertains on the evidence, while reserving to itself the legal question whether the ascertained meaning satisfied the SCM Agreement.³⁴ This is the two-operation structure in embryo. The criticism is not that the Appellate Body lacked the structure but that it applied no deference at the ascertainment stage, so that the structure collapsed in practice into uniform de novo review.

5.3 The Municipal-Law-as-Fact Line: Softwood Lumber IV and China - Auto Parts

A distinct line of authority confirms that the Appellate Body does not regard a Member's characterisation of its own measure as controlling. In US - Softwood Lumber IV (Article 21.5), it observed that municipal-law classifications are not determinative of the issues raised in WTO proceedings;³⁵ in China - Auto Parts, it likewise refused to be bound by a domestic label in determining whether a charge was an internal charge or a customs duty.³⁶ This line is sound and, properly understood, supports rather than undermines the framework defended here. Refusing to be bound by a domestic label is an appraisal move: the treaty term governs the classification, and the respondent cannot escape an obligation by re-naming a measure. Deference at the ascertainment stage does not entail acceptance of the respondent's characterisation for

³¹Appellate Body Report, *United States - Countervailing and Anti-Dumping Measures on Certain Products from China* (18 December 2014) WT/DS449/AB/R [4.100]–[4.133]. The relevant domestic decision is *GPX International Tire Corp v United States* 666 F 3d 732 (Fed Cir 2011).

³²Statement by the United States at the DSB Meeting of 22 July 2014, WT/DSB/M/348.

³³US - Countervailing and Anti-Dumping Measures (China) (n above) [4.119]–[4.133].

³⁴Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (11 March 2011) WT/DS379/AB/R; Appellate Body Report, *United States - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (8 December 2014) WT/DS436/AB/R.

³⁵Appellate Body Report, *United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (Recourse by Canada to Article 21.5)* (5 December 2005) WT/DS257/AB/RW [82].

³⁶Appellate Body Report, *China - Measures Affecting Imports of Automobile Parts* (15 December 2008) WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R.

treaty purposes; it entails giving weight to the respondent's authoritative account of what the measure provides. The two are routinely run together, by the Appellate Body and its critics alike, and disentangling them is part of the contribution this article seeks to make.

5.4 The Zeroing Saga: EC - Bed Linen, US - Stainless Steel (Mexico), and the Byrd Amendment

The zeroing jurisprudence supplies the strongest case for the critics, because it is where the orphaned deference rule of Article 17.6(ii) was most conspicuously inert. From EC - Bed Linen onward,³⁷ the Appellate Body progressively condemned zeroing across methodologies and proceedings, treating the Agreement as admitting only one permissible reading. In US - Stainless Steel (Mexico) it went further, rebuking a panel for declining to follow its prior reports and insisting that, absent cogent reasons, adjudicators should resolve the same legal question the same way.³⁸ The Byrd Amendment dispute, though not a zeroing case, reflects the same disposition: the Appellate Body refused to accept the United States' characterisation of the offset scheme as a mere budgetary measure where the law's operation told otherwise.³⁹ Here the critics are on their firmest ground, but the firmness is treaty-specific: in the anti-dumping context a deference command existed and was not honoured. To generalise from zeroing to a global jurisdictional overreach is to mistake the part for the whole, the very slide this article resists.

5.5 The Ascertainment Toolkit and Its Missing Standard

If the Appellate Body never adopted a standard of review for the meaning of municipal law, it did assemble a toolkit for ascertaining it, and the toolkit is more deferential in form than the critics allow. In US - Carbon Steel (India) the Appellate Body confirmed that a Member's law is presumed consistent with its obligations until the contrary is shown, and that the party alleging inconsistency bears the burden of adducing evidence of the scope and meaning of that law.⁴⁰ It catalogued the admissible evidence, the text of the instrument, evidence of its consistent application, the pronouncements of domestic courts, the opinions of legal experts and the writings of recognised scholars, adding that the quantum required varies from case to case.⁴¹ And in DS449 it described the interpretation of municipal law as "a comprehensive review of all relevant factors, commencing with the text of the law and including, but not limited to, relevant practices of administering agencies."⁴²

These devices, a presumption of consistency, an allocated burden, an evidentiary hierarchy that privileges the respondent's own courts and agencies, are deference of a kind. But they operate at the level of proof, not at the level of the standard of review applied to the result. Once the evidence is in, nothing in the Appellate Body's method obliges it to defer to the respondent's authoritative reading of its own statute; it ascertains the meaning afresh and reviews the panel's ascertainment as though it were a question of treaty interpretation. The gap is visible in EC - Fasteners (China), where China argued that the panel's findings on the "meaning" and "scope" of a provision of the European Union's Basic Anti-Dumping Regulation

³⁷Appellate Body Report, *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (1 March 2001) WT/DS141/AB/R.

³⁸Appellate Body Report, *United States - Final Anti-Dumping Measures on Stainless Steel from Mexico* (30 April 2008) WT/DS344/AB/R [160]–[162].

³⁹Appellate Body Report, *United States - Continued Dumping and Subsidy Offset Act of 2000* (16 January 2003) WT/DS217/AB/R, WT/DS234/AB/R [259]–[263].

⁴⁰Appellate Body Report, *United States - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (8 December 2014) WT/DS436/AB/R [157].

⁴¹*ibid.* The Appellate Body had earlier accepted, in *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* (15 December 2003) WT/DS244/AB/R [168], that where the language and content of a measure are clear, its consistency may be assessed on the text alone.

⁴²US - Countervailing and Anti-Dumping Measures (China) (n above) [4.101].

were factual and beyond appellate reach. The Appellate Body disagreed and held them reviewable.⁴³ That holding is right as to appraisal and unremarkable as to the reviewability of a panel's legal characterisation; what it again leaves unaddressed is the intensity with which the antecedent meaning of the foreign regulation should be ascertained, and how far the respondent's own construction should bind.

That the system never settled the question is plain from its own divergences. The panel in *US - Sections 301 - 310* announced that a Member could "reasonably expect considerable deference to be given to its views on the meaning of its laws,"⁴⁴ while the panel and Appellate Body in *India - Patents* proceeded with conspicuously less deference to India's account of its own administrative instructions. The inconsistency is not, as the critics frame it, a vacillation between treating municipal law as fact and as law; it is the absence of any agreed standard of review for ascertainment, so that the degree of deference floated free, case to case, with no doctrinal anchor. The Appellate Body's readiness on collateral matters, its acceptance in *Canada - Aircraft* that genuinely new legal arguments are not excluded from appeal merely because they are new⁴⁵, only underscores that the missing discipline was specific to the ascertainment of domestic law, not a general failure of method. The same may be said of the objective-assessment line: that a panel's objective assessment of the facts is itself "a question of law" reviewable on appeal⁴⁶ gives the Appellate Body a lawful route into a panel's handling of evidence, but says nothing about the deference owed once that route is taken.

5.6 The Remand Gap and the Structural Pull Toward De Novo Ascertainment

There is a structural reason the Appellate Body drifted into ascertaining domestic law for itself, and it has been underweighted in a literature fixated on motive. The Appellate Body has no power to remand. Article 17.13 of the DSU permits it to uphold, modify or reverse a panel's legal findings and conclusions, but not to send a matter back to the panel for further fact-finding.⁴⁷ When the Appellate Body reverses a panel's legal interpretation, it therefore confronts a dilemma: leave the dispute unresolved for want of findings, or "complete the legal analysis" itself on the existing record. Section 211 is itself an illustration, having reversed the panel on the coverage of trade names, the Appellate Body proceeded to complete the analysis rather than remand.⁴⁸ Completing the analysis frequently requires the Appellate Body to determine what a domestic measure means, because the meaning was the predicate the reversed interpretation had bypassed.

This is the mechanism that turned a defensible jurisdictional position into a contestable standard-of-review practice. A court empowered to remand can confine itself to appraisal and return ascertainment to the body better placed to take evidence; a court that cannot remand is pushed, by the very imperative to resolve the dispute, into ascertaining domestic law de novo on a record compiled for another purpose. The remand gap thus supplies the institutional explanation that the activism-versus-restraint debate lacks: the Appellate

⁴³Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (15 July 2011) WT/DS397/AB/R [294]–[296].

⁴⁴Panel Report, *US - Sections 301–310 of the Trade Act of 1974* (n above) [7.18]–[7.19].

⁴⁵Appellate Body Report, *Canada - Measures Affecting the Export of Civilian Aircraft* (2 August 1999) WT/DS70/AB/R [211]–[212].

⁴⁶Appellate Body Report, *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* (22 December 2000) WT/DS166/AB/R [151]; *Australia - Measures Affecting Importation of Salmon* (20 October 1998) WT/DS18/AB/R [261]–[267].

⁴⁷DSU (n above) art 17.13. On the absence and proposed restoration of remand authority see Task Force 6, T20 India (n above), and the reform submissions discussed in Part 7 below.

⁴⁸*US - Section 211* (n above) [the Appellate Body, having reversed the Panel on trade names, considered whether to complete the legal analysis on the consistency of Section 211].

Body's deepest forays into the meaning of municipal law were less a land-grab than the predictable consequence of a design that forced it to choose between overreaching and abdicating. It is no accident that the restoration of remand authority recurs in reform proposals; on the present analysis it is not a peripheral adjustment but a remedy directed at one of the true engines of the controversy.

5.7 The Verdict on Consistency

Assessed against the two-operation framework, the jurisprudence is consistent on the question the Appellate Body actually decided, that appraisal of domestic measures for treaty-consistency is legal and reviewable, and inconsistent only in the sense that it never settled, and largely never articulated, a standard of review for ascertainment. That is not the inconsistency the critics allege (a wavering between treating domestic law as fact and as law); it is a deeper and more interesting one (a failure to recognise that the right answer was a calibrated standard rather than a classification). The Appellate Body's sin, if it is one, was conceptual under-specification, not jurisdictional usurpation.

6. Comparative Perspectives: Is the Appellate Body an Outlier?

If reviewing municipal law to determine international-law compliance were itself an overreach, the charge would lie against most of the international judiciary. The comparative survey that follows is analytical rather than descriptive: its purpose is to test whether the Appellate Body's practice is exceptional and, if not, to identify what the comparators do that the WTO system omits. The answer is that the Appellate Body is wholly orthodox in examining domestic law and conspicuously under-equipped in the apparatus of deference that every comparator deploys to calibrate that examination.

6.1 The International Court of Justice

The ICJ has examined municipal law since the Permanent Court, and the Serbian Loans formula is its own. Yet the Court has never taken "municipal law is fact" to mean that it may not construe a domestic statute; it means only that the Court is not bound by the State's reading and applies international law to the law as ascertained. In Brazilian Loans the Court expressly stated that it would give to municipal law the meaning given by the courts of the State concerned, and would not put upon it a construction of its own, a deference rule on ascertainment that the WTO system never adopted.⁴⁹ The contrast is exact: the ICJ pairs jurisdiction over appraisal with deference on ascertainment; the Appellate Body asserted the former without the latter.

6.2 Investor-State Tribunals

Investment tribunals routinely determine the content and effect of host-State law, on the legality of an investment, on property rights, on the scope of a licence, as a step in applying the treaty standard. The prevailing practice, codified in the much-cited reasoning on the role of domestic law, is to ascertain that law as a question of fact, informed by the host State's own courts, while reserving the treaty appraisal to the tribunal.⁵⁰ The standard-of-review debate in investment law is, tellingly, conducted almost entirely in terms of intensity and deference, the margin to be accorded a regulator's judgment, rather than in terms of whether the tribunal may look at domestic law at all. That is the debate the WTO system has lacked.

⁴⁹Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France (France v Brazil) (Judgment) PCIJ Rep Series A No 21, 124 (the Court should follow 'the jurisprudence of the national courts' in ascertaining the meaning of municipal law).

⁵⁰See, on the distinct roles of municipal and international law in investment arbitration, Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) ch 2; and the analysis in Alain Pellet, 'The Case Law of the ICJ in Investment Arbitration' (2013) 28 ICSID Review 223.

6.3 The European Court of Human Rights and the Margin of Appreciation

The European Court of Human Rights examines national law in nearly every case, for an interference must be “prescribed by law” before its proportionality can be assessed. The Court’s margin of appreciation is the most developed deference doctrine in international adjudication, varying its intensity with the subject matter and the presence or absence of European consensus.⁵¹ The doctrine is the institutional form of precisely the calibration this article urges: jurisdiction over the international standard, graduated deference on the national application. Its absence from WTO law is not a virtue of restraint but a gap in design.

6.4 The Court of Justice of the European Union

The CJEU offers the limiting case in the opposite direction. Through the preliminary-reference procedure it allocates the interpretation of national law to the national court and reserves to itself the interpretation of Union law, an institutional division that avoids the ascertainment problem by refusing to perform the operation at all.⁵² The WTO system cannot replicate this division, it has no referring national courts, but the comparison is instructive: where an international court must ascertain domestic law itself, the disciplined response is a deference doctrine, not a denial of competence.

6.5 Domestic Administrative Law as the Disowned Template

The sharpest comparative irony lies at home. Article 17.6(ii) was built on Chevron deference at the United States’ own insistence. In June 2024, in *Loper Bright Enterprises v Raimondo*, the Supreme Court overruled Chevron, repudiating the very deference template that the United States had exported into the Anti-Dumping Agreement.⁵³ The position now is striking: the United States demands of the Appellate Body a deference to administrative interpretation that it has abandoned for its own courts, while the Appellate Body, having never delivered that deference, is blamed for the gap. The episode does not resolve the doctrinal question, but it powerfully informs the assessment of motive in Part 7: a critique that survives the abandonment of its own premise has come unmoored from principle.

7. Judicial Activism, Judicial Restraint, and the Misdiagnosed Crisis

The domestic-law grievance did not bring down the Appellate Body by itself; it was one entry in a longer indictment that also charged gap-filling, the manufacture of de facto precedent, obiter “advisory opinions,” and disregard of the ninety-day deadline.⁵⁴ But it occupied a special place, because it was the count that most directly implicated sovereignty over the domestic legal order, and because it was framed as a breach of an express jurisdictional limit rather than as a contestable interpretive choice. That framing is the subject of this Part.

7.1 Why the Framing Was Effective

“The Appellate Body exceeded its mandate under Article 17.6” is a charge of ultra vires action; it carries the moral charge of rule-breaking and invites the remedy of withdrawal of consent. “The Appellate Body

⁵¹See, eg, *Handyside v United Kingdom* (1976) Series A no 24 [48]–[49]; for analysis, George Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26 *Oxford Journal of Legal Studies* 705.

⁵²Treaty on the Functioning of the European Union, art 267; the Court interprets EU law and leaves the construction and application of national law to the referring court.

⁵³*Loper Bright Enterprises v Raimondo* 603 US 369 (2024), overruling *Chevron* (n above). On the implications for art 17.6(ii) see Xin Li, ‘Who Determines the “Permissibility” of an Interpretation Within the Meaning of Article 17.6(ii) of the Anti-Dumping Agreement?: A Constructive Commentary on the Colombia - Frozen Fries Approach’ (2025) 59 *Journal of World Trade* 225.

⁵⁴USTR, *Report on the Appellate Body* (n above), summarising the United States’ systemic concerns; for the precedent point see *US - Stainless Steel (Mexico)* (n above) [160].

applied an insufficiently deferential standard of review to the meaning of domestic law” is a charge of error within jurisdiction; it invites argument, not rupture. The United States’ achievement, whether by design or by the natural gravity of grievance, was to translate a standard-of-review complaint into the idiom of jurisdictional transgression. The translation was rhetorically devastating and analytically self-defeating, for it allowed the Appellate Body and its defenders to win the argument actually joined (the institution did have competence over appraisal) while the underlying dissatisfaction (the absence of deference on ascertainment) went unaddressed because it was never squarely put.

7.2 The Activism/Restraint Binary Is the Wrong Frame

The scholarly contest between Howse’s “declaration of independence” and Pauwelyn’s “judicial minimalism”⁵⁵ reproduces, at the level of theory, the same binary that disables the doctrinal debate. Both ask whether the Appellate Body was too bold or too cautious; neither asks the more precise question of where, along the ascertainment–appraisal axis, boldness was warranted and where deference was due. The Appellate Body could be, and on the present analysis was, perfectly orthodox on the jurisdictional question (appraisal is legal) and insufficiently deferential on the standard-of-review question (ascertainment was conducted *de novo*). “Activist” and “restrained” are too coarse to capture a body that was correct about its competence and under-specified about its intensity. Replacing the binary with the two-operation analysis is what allows the assessment to be both fair to the institution and responsive to the Members’ unease.

7.3 Are the Criticisms Legally Justified, Institutional, or Political?

The three diagnoses can now be separated. The criticism is **legally justified** in one narrow domain: the inert application of Article 17.6(ii) of the Anti-Dumping Agreement, where a treaty deference command went unfulfilled. It is **institutional**, a structural complaint about the allocation of authority between international adjudicators and national institutions, across the broader field of ascertainment, where no treaty rule was breached but a deference doctrine was wanting; this is a legitimate grievance about design, properly directed at the Members who drafted the DSU as much as at the body that applied it. It is **political** to the extent that the United States generalised a defensible narrow point into an indictment of the institution as such, deployed it to justify the disabling of the Appellate Body by blockage of appointments, and persisted in demanding a deference it has since renounced at home. The Loper Bright volte-face is the clearest evidence that, by 2024, the critique had outrun its principled foundation.⁵⁶

7.4 From Crisis to Void

The consequences are now familiar and, five years on, measurable. Since December 2019 the Appellate Body has been unable to hear appeals; losing parties have “appealed into the void,” parking adverse panel reports beyond adoption, and the practice has spread well beyond the United States.⁵⁷ The Multi-Party Interim Appeal Arbitration Arrangement (“MPIA”), launched in 2020 under Article 25 of the DSU, has grown to roughly thirty participants but conspicuously excludes the United States, India and others, and has decided only a handful of matters.⁵⁸ The deeper lesson for present purposes is that a grievance which could have been met by a calibrated standard of review, a soluble problem of intensity, was instead allowed to present as an irreparable breach of jurisdiction, for which the only proportionate response

⁵⁵Howse (n above); Pauwelyn (n above).

⁵⁶Loper Bright (n above); and see the continuation of the appointments blockage under successive United States administrations, including after January 2025: Hopewell (n above) 1106–1108.

⁵⁷By late 2025 some three dozen appeals had been lodged ‘into the void’; on the diffusion of the tactic see Hopewell (n above) 1108–1112.

⁵⁸On the MPIA’s membership and limited caseload, European Parliamentary Research Service, *International Trade Dispute Settlement: WTO Appellate Body Crisis and the Multi-Party Interim Appeal Arbitration Arrangement* (Briefing, June 2024).

appeared to be dismantling the court. The misdiagnosis was not merely an academic infelicity; it shaped the menu of remedies.

8. Research Gap and Original Contribution

The originality of the argument can now be stated against the literature mapped in Part 2. Three claims are advanced as contributions.

First, a re-description. The article re-describes the Article 17.6 controversy as a standard-of-review problem masquerading as a jurisdictional one. The existing literature treats the question as a contest over the fact-law boundary (Voon), over administrative deference (Oesch, Petersmann, Croley and Jackson), or over institutional legitimacy (Howse, Pauwelyn, Van den Bossche), but it does not connect these registers or notice the equivocation that allows the overreach charge to borrow the gravity of jurisdiction while voicing a complaint about intensity. The re-description is not a reconciliation of the existing positions; it shows that they have been answering different questions.

Second, a conceptual instrument. The article offers the two-operation framework, ascertainment (deferential) and appraisal (de novo), and the associated re-theorisation of municipal law as a *tertium quid* rather than as fact or law. This dissolves the binary that has trapped the debate and yields determinate guidance: it explains why the Appellate Body was right on competence and wrong on intensity, and it specifies where deference is owed (ascertaining content) and where it is not (assessing conformity). No existing account, to the author's knowledge, develops a calibrated standard of review specific to the ascertainment of domestic law in WTO proceedings.

Third, a corrective to reform. Because the problem is standard-of-review and not jurisdictional, the article shows that the reform proposals oriented to Article 17.6 of the DSU, carve-outs or instructions to "rely primarily" on the respondent's submission, are aimed at the wrong target and risk over-correction (immunising domestic-law-based evasion of obligations). The corrective belongs in a deference doctrine on ascertainment and in the resuscitation of the orphaned Article 17.6(ii) standard, not in a curtailment of appellate competence. This reframes the reform debate around intensity and locus of authority, the very issues the comparators (ICJ, ECtHR, investment tribunals) address through deference rather than jurisdiction.

The contribution also speaks to a literature beyond the immediate controversy, on the fragmentation of international adjudication and on systemic integration under Article 31(3)(c) of the VCLT. If the WTO is the international tribunal least equipped with a deference doctrine despite facing the ascertainment problem as squarely as any, then its difficulties are not idiosyncratic but a case study in what happens when an adjudicatory body assumes (correctly) jurisdiction over the application of international law to domestic law without developing (as its peers have) the calibration that responsible exercise of that jurisdiction requires.

9. Findings and Discussion

The analysis supports five findings, stated here and then drawn together.

1. **The jurisdictional charge fails.** Reviewing a panel's appraisal of domestic law for treaty-consistency is a "legal interpretation" within Article 17.6 of the DSU, and is consistent with the practice of the ICJ, investment tribunals and the European Court of Human Rights. The Appellate Body did not exceed its competence by engaging with domestic law.

2. **The fact–law binary is the wrong frame.** Municipal law before the Appellate Body is neither pure fact nor pure law; it must be ascertained (a deference-attracting, fact-like operation) before it is appraised (a de novo legal operation). The persistence of the controversy is a symptom of forcing a tertium quid into a binary.
3. **The real failing is a standard-of-review deficit.** By conducting ascertainment de novo, the Appellate Body left a deference vacuum. This became an identifiable, treaty-grounded failing only under Article 17.6(ii) of the Anti-Dumping Agreement, where an express deference command was read out through a VCLT analysis that admits only one “correct” meaning.
4. **The criticism is part-justified, part-institutional, part-political.** It is legally sound on Article 17.6(ii); it is a legitimate design grievance on ascertainment generally, properly addressed to the drafters; and it became political when generalised into an existential indictment and pressed after the United States abandoned its own Chevron premise in *Loper Bright*.
5. **The misdiagnosis shaped the remedy.** Re-describing a soluble standard-of-review problem as an irreparable jurisdictional breach made dismantling the court appear proportionate, and steered reform toward jurisdictional carve-outs that miss the target and risk over-correction.

Taken together, these findings answer the title’s question with a precision the orthodox framing cannot achieve. Did the Appellate Body violate Article 17.6 of the DSU by making determinations under domestic law? In the jurisdictional sense the question is built on a category error and the answer is no. In the standard-of-review sense the answer is a qualified yes, but only within the four corners of Article 17.6 (ii) of the Anti-Dumping Agreement; everywhere else, what the critics call a violation is a gap in the treaty for which the Members, not the adjudicator, bear responsibility. The strong overreach thesis collapses; a narrow, treaty-anchored failing survives; and the institutional grievance is recognised as legitimate but mis-channelled.

10. Recommendations for Reform

If the diagnosis is standard-of-review rather than jurisdiction, the prescriptions follow. They are offered not as a blueprint for the politically fraught task of restoring a standing appellate organ but as design principles for any reformed mechanism, whether a revived Appellate Body, a multilateralised MPIA, or something new.

1. **Adopt a calibrated standard of review by authoritative interpretation.** Rather than amending Article 17.6 of the DSU to curtail competence, the Members should adopt, under Article IX:2 of the WTO Agreement, an authoritative interpretation distinguishing the ascertainment of domestic law (substantial deference to the respondent’s authoritative sources, including its courts and agencies) from the appraisal of treaty-consistency (independent review). This addresses the grievance at its true location without immunising evasion.
2. **Resuscitate, do not amend, Article 17.6(ii) of the Anti-Dumping Agreement.** The deference command already exists; it has merely been read out. The Colombia - Frozen Fries approach, holding that a permissible interpretation need not be the single “correct” one, should be endorsed and generalised, so that the provision’s second sentence is given operative effect rather than collapsed into the first.
3. **Borrow the comparators’ deference apparatus.** The Brazilian Loans rule (follow the national courts in ascertaining municipal law) and the graduated logic of the margin of appreciation supply ready

models. Their adoption would align the WTO with, rather than isolate it from, general international adjudicatory practice.

4. **Restore a remand power.** Because the absence of remand authority under Article 17.13 is a principal driver of the Appellate Body's descent into de novo ascertainment, any reformed mechanism should be empowered to return matters to the panel for further findings. A remand power would let the appellate tier confine itself to appraisal, the operation it is authorised to perform, instead of completing the analysis by ascertaining domestic law on an inadequate record.
5. **Resist jurisdictional carve-outs.** Proposals to remove domestic law from appellate review, or to compel reliance on the respondent's own reading regardless of contrary evidence, over-correct: they would let Members shield treaty-inconsistent conduct behind self-serving characterisations. The objection to the Appellate Body was never that it looked at domestic law; it was that it looked without deference. Reform should supply the deference, not blind the court.
6. **Decouple the precedent grievance from the domestic-law grievance.** The complaint about de facto precedent is analytically separate and should be handled on its own terms (for example, by clarifying the persuasive rather than binding status of prior reports), rather than bundled into the domestic-law charge where it has lent spurious weight.

11. Conclusion

The question that has organised a generation of commentary, whether the WTO Appellate Body violated Article 17.6 of the DSU by making determinations under domestic law, turns out to be the wrong question, or at least a question that conceals the one that matters. The controversy has been litigated as a dispute about jurisdiction, about the fact-law boundary, about whether an international court may look at a domestic statute at all. On that terrain the Appellate Body wins, and deservedly: appraising domestic measures for treaty-consistency is legal interpretation, and the international judiciary as a whole does it without apology. The error was never that the Appellate Body reviewed domestic law. The error, to the extent there was one, was that it reviewed domestic law without the calibrated standard that the operation demands, conducting the ascertainment of foreign statutes with the same de novo confidence it brought to the treaty text it was actually authorised to construe.

Recognising this transforms the assessment. The strong overreach thesis, which casts the Appellate Body as a runaway court that broke the rules, cannot be sustained. A narrower thesis can: in the one place where the Members wrote a deference command into the law, Article 17.6(ii) of the Agreement, the Appellate Body failed to give it effect, and that failure is properly described as an error in the application of a covered agreement rather than as a usurpation of jurisdiction. Beyond that corner, the absence of deference on the ascertainment of domestic law was a gap in the DSU's design, a deficiency for which the drafting Members are at least as answerable as the body that lived within their text.

The practical stakes of getting the description right are not academic. A standard-of-review problem is soluble by an authoritative interpretation and a more disciplined deference doctrine; a jurisdictional violation invites the conclusion that the court must be disempowered. By allowing a grievance of the first kind to be voiced in the language of the second, the system steered itself toward the most destructive available remedy and away from the most proportionate one. The Loper Bright repudiation of the deference model the United States itself exported is a fitting coda: it suggests that by the end the critique had detached from the principle that once anchored it, and had become a position in search of a rationale.

If the WTO's appellate function is to be rebuilt, it will not be rebuilt by deciding, once more, that municipal law is "fact" or "law." It will be rebuilt by recognising that municipal law is neither, and by equipping whatever body succeeds the Appellate Body with what every comparable tribunal already has and the WTO never did: a standard of review calibrated to the difference between understanding a State's law and judging its conformity with the law the State agreed to keep.

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