

A CRITICAL ANALYSIS OF WTO TRIBUNALS' CHARACTERIZATION OF NATIONAL LAW INTERPRETATION

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In WTO dispute settlement, the issue about the characterization of national law interpretation is concerned with judicial deference and the allocation of power between the WTO and Member States. This article examines WTO tribunals' claim about their characterization of national law interpretation and their practice. On the one hand, WTO tribunals have claimed to characterize national law interpretation as a question of law; on the other hand, they have applied the same rule on the burden of proof for national law interpretation with that for other facts and provided deference to the legislating states especially in the circumstances where there is any suspicion or uncertainty about the meaning of national law. Therefore, WTO tribunals' claim about the characterization is not consistent with their practice. WTO tribunals' national law interpretation, in essence, is reinterpretation of national law, and should be characterized as a mixed question of law and fact.

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INTRODUCTION

It is quite often that WTO tribunals¹ are requested and required to examine the meaning of national law², due to frequent occurrence of the disputes about the WTO-consistency of a Member's national law. Proper characterization of national law interpretation³ is concerned with proper allocation of power between WTO tribunals and national sovereignty. Because if national law interpretation is characterized as a question of fact, it means WTO tribunals should attribute more deference to the legislating states. However, if national law interpretation is characterized as a question of law, it means that WTO tribunals may interpret national law by themselves and conduct a de novo review of the meaning of national law. Since national law is commonly believed as within the domain of a state's internal sovereignty⁴, how could WTO members tolerate WTO tribunals' intrusion into their backyard and interpreting their national law? Thus the issue of characterization of national law interpretation is not only important but also sovereignty-sensitive.

WTO law does not provide how WTO tribunals should assess the meaning of national law. Article 11 of the Understanding on Rules and Procedures Governing the Settlement of disputes (DSU) requires WTO panels to "make an objective assessment of the matter before it", however, it remains unclear what kind of assessment is qualified as "an objective assessment". The literature on the characterization of national law interpretation is scant. Cottier, Schefer and Oesch, who prefer to characterize national law interpretation as a question of fact, either consider WTO tribunals have no authority to interpret national law or insist that

¹ "WTO Tribunals" refers to the panels and the Appellate Body in the World Trade Organization (WTO).

² "National law" refers to a WTO Member's laws, rules, and regulations that are applicable in the jurisdiction of the Member. It is noted that WTO Members do not only include states, but also include independent customs unions that are not qualified as states, e.g., Hong Kong and the EU are also WTO members. Since the EU is a WTO Member, national law in the context of the WTO dispute settlement, includes the EU treaties, directives, and regulations.

³ "National law interpretation" refers to WTO tribunals' assessment of the meaning of national law.

⁴ MALCOLM N. SHAW, INTERNATIONAL LAW 130 (6th ed., Cambridge University Press 2008).

national authorities are more familiar with national law.⁵ Bhuiyan, who inclines to characterize national law interpretation as a question of law, states that WTO tribunals fail to recognize the nature of national law, which is a question of fact with legal character.⁶ Howse, who points out the inconsistency of WTO jurisprudence on the characterization of national law interpretation, does not explicitly express whether national law interpretation should be characterized as fact or law, or something else.⁷ A weak point in their theory is that they do not distinguish the issue of national law from that of national law interpretation.

In WTO dispute settlement, the issue of national law is more concerned with national law's physical existence in the form of legal elements such as the text, the legislative history, the legislative object and purpose, the legislature, the case law about national law interpretation, and so on. In contrast, national law interpretation is more related with mental activity in the form of legal reasoning and legal assessment made on the basis of legal elements. WTO tribunals' interpretation of national law, in essence, is reinterpretation of national law, and is never the same as the interpretation of national law made by national authorities.

This article argues that the characterization of national law interpretation in WTO dispute settlement is neither a pure question of fact nor a question of law, but rather a mixed question of law and fact. Such an intermediate approach is not because the middle way is easy to beg the sympathy or agreement from the left and the right, but because national law interpretation, on the one hand, requires the proof in the form of legal elements to prove the meaning of national law, and on the other hand, requires the judges' application of their legal knowledge and skills to assess the meaning of national law. In addition, the characterization of national law interpretation boils down to the benchmark that is used to distinguish a question of law from a question of fact.

Therefore, the structure of the paper is as follows. Section I elaborates the theory about the distinction between a question of law and a question of fact, which provides an analytic tool to analyze the characterization of

⁵ Thomas Cottier & Krista Nadakavukaren Schefer, *The Relationship between World Trade Organization Law, National and Regional Law*, 1 J. INT'L ECON. L. 83, 86 (1998); MATTHIAS OESCH, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION 205—206 (Oxford University Press 2003).

⁶ SHARIF BHUIYAN, NATIONAL LAW IN WTO LAW: EFFECTIVENESS AND GOOD GOVERNANCE IN THE WORLD TRADING SYSTEM 242 (Cambridge University Press 2007).

⁷ Robert Howse, *The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power* in THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION: EXPERIENCE AND LESSONS FOR THE WTO 21 (Thomas Cottier, Petros Constantinos Mavroidis & Patrick Blatter eds., University of Michigan Press 2003).

national law interpretation in WTO dispute settlement. Section II examines WTO tribunals' claim about the characterization of national law interpretation and concludes they have claimed to characterize national law interpretation as a question of law. Section III examines the proof of national law. About national law interpretation, WTO tribunals have applied the same rule on the burden of proof as that of other facts, and they are open to accept different forms of evidence such as the text, the legislative history, and domestic case-law. Section IV analyzes the deference provided by WTO tribunals to the legislating states, and points out that to a certain extent, deference has been attributed to the legislating states especially in the circumstances where there is any suspicion or uncertainty about the meaning of national law. However, the provision of deference does not mean WTO tribunals are passive or independent. The last Section is the conclusions and comments. Considering that WTO tribunals' national law interpretation is a mixture of their independent assessment and their dependence on the evidence provided by the parties, national law interpretation should be characterized as a mixed question of law and fact. Such characterization does not only reflect WTO tribunals' practice, but also legalize the Appellate Body's review of national law interpretation.

I. DISTINCTIONS BETWEEN QUESTIONS OF LAW AND QUESTIONS OF FACT

A. *Rationales and Elements as to Law/Fact Distinction*

In order to understand the law/fact distinction, it is primarily important to make clear the rationales underlying it, and those rationales will further clarify the criteria used to distinguish law from fact. First, the law/fact distinction helps to clarify the institutional framework of courts.⁸ In a jury trial, the judges decide the questions of law and the jury decides the questions of fact.⁹ That is due to our traditional belief that judges are experts in law, and they have possessed the skill and expertise in matters of legal reasoning.¹⁰ Likewise, twelve lay jurors are believed better qualified to determine the fact as to whether their peers are telling the truth, given our

⁸ Kim Lane Scheppele, *Facing Facts in Legal Interpretation*, 30 REPRESENTATIONS 42 (1990).

⁹ It is noted that not every case goes to the jury trial at the first instance. As for the first non-jury instance, it is the judge that decides the facts as well as the law. In addition, some countries do not have jury trials at all. For example, China does not have jury trials.

¹⁰ See Scheppele, *supra* n. 8, at 42; Ray A Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 921 (1943); Richard B Bilder, *The Fact/Law Distinction in International Adjudication* in FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS: ELEVENTH SOKOL COLLOQUIUM 96 (Richard B Lillich ed., Transnational Publishers 1992).

deeply-rooted traditional holding of peer-review.¹¹ Furthermore, the law/fact distinction serves to clarify different functions of trial courts and appellate courts, as well as the scope of review by appellate courts.¹² Usually questions of fact are determined and fixed by trial courts, which are not allowed to appeal.¹³ Appellate courts are authorized only to review and examine the legal issues. That is due to the fact that appellate courts do not have the parties or witnesses present, so that they do not have the chance to hear oral arguments or first-hand testimony, not to mention making eye contact with the parties or witnesses.¹⁴ In addition, the division of the functions between trial courts and appellate courts contributes to the efficiency of dispute settlement. If appellate courts are allowed to take the procedures the same as the trial courts, it means repetitive work will be done and as the saying goes "justice delayed is justice denied". Second, questions of law and questions of fact carry different weight for future cases.¹⁵ It is obvious that questions of fact are particular to individual cases and judgments of fact do not have precedential value for future cases. In contrast, questions of law may transcend particular cases, and judgments of law may become precedents that are binding for recurring cases.¹⁶ Therefore, legal judgments contribute to "the corpus of what is called law, while factual judgments simply sort out what happened in individual cases".¹⁷ Conversely, we may infer from the perspective of precedential effect to identify whether it is a question of law or fact. For example, if the judgment of a matter will be respected and followed in the subsequent cases, this matter should be a question of law.

Therefore, according to the rationales underlying the law/fact distinction, the following elements should be taken into account when examining whether a matter is law or fact: (1) Whether the matter is within the judicial notice. As the judges decide the questions of law, if a matter is within the judicial notice and requires the application of legal skills and legal expertise, it is a question of law. Otherwise it is a question of fact. (2) Whether the matter is pleaded and proved like a fact.¹⁸ As for the matter at issue, if a certain standard of proof is required to initiate a case or the rule

¹¹ Randall H Warner, *All Mixed Up About Mixed Questions*, 7 J. APP PRAC & PROCESS 101, 104 (2005).

¹² Bilder, *supra* n. 10.

¹³ Scheppele, *supra* n. 8.

¹⁴ Warner, *supra* n. 11, at 104. Warner pointed out the advent of video trial records challenged this assumption.

¹⁵ Bilder, *supra* n. 10.

¹⁶ *Ibid.*

¹⁷ Scheppele, *supra* n. 8, at 43.

¹⁸ See William B Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CAL L. REV 23, 25 (1957).

on burden of proof for the establishment of facts is required to follow at the process of the dispute settlement¹⁹, it is a question of fact. (3) If a matter is allowed to appeal, it is probably a question of law. However, if the trial courts' assessment of facts is so wrong that inappropriate assessment of facts may result in appellate review.²⁰ (4) Whether a court's decision on a matter has the force of stare decisis in recurring cases.²¹ If the decision has the force of stare decisis, that decision is about a question of law.²²

B. Limitations of Law/Fact Distinction

Although the rationales and elements as to the law/fact distinction have been elaborated as above, the reality of distinguishing law from fact is much more complicated. On the one hand, whether a matter is characterized as a question of law or a question of fact is in itself an artificial question of law, and the characterization is based more on the history of the problem or the psychology of the judge than on the logic or nature of things.²³ A case in point is the characterization of foreign law in civil litigation. Regarding the same issue of characterization of foreign law in domestic context, English courts tend to consider foreign law as a question of fact, but in contrast, the US courts may take it as a question of law.²⁴ Their different approaches to foreign law are only explainable by their different historical and psychological judicial culture. On the other hand, under certain circumstances, law and fact are interchangeable, which means that fact may go upward into law and law may go downward into fact. Take the doctrine of negligence for example. At the very beginning, whether one was guilty of negligence due to his/her omitting to look or listen for an approaching train when crossing a railroad track, was a question of fact. However, frequent occurrence of the same event under similar circumstances enabled the courts to apply a rule of law as to negligence per se. It is in this manner that negligence as a question of fact was upraised as a question of law.²⁵ Conversely, the United Nations Declaration on the Rights of Indigenous

¹⁹ See Panel Report *US-Sections 301*, WT/DS152/R, para. 7.18.

²⁰ See Article 11 of the DSU.

²¹ See Stern, *supra* n. 18.

²² It depends on the characteristics of a country's legal system. Some countries, like China, they do not have the rule of stare decisis at all. Even in common law systems, not every decision on a question of law will become a precedent.

²³ Nathan Isaacs, *The Law and the Facts*, 22 Colum. L. Rev. 1, 12 (1992); Scheppele, *supra* n. 8, at 43.

²⁴ SOFIE GEEROMS, *FOREIGN LAW IN CIVIL LITIGATION: A COMPARATIVE AND FUNCTIONAL ANALYSIS* 89 (Oxford University Press 2004).

²⁵ See JOHN PROFFATT, *A TREATISE ON TRIAL BY JURY: INCLUDING QUESTIONS OF LAW AND FACT* 356 (Hurd and Houghton 1876).

People, which is usually considered as the sources of international law, was taken as factual evidence in WTO dispute settlement.²⁶ Therefore, depending on different circumstances under which a matter is raised, a question of law may become a question of fact.

It is not always easy to neatly classify a matter as law or fact. As a borderline between law and fact, the concept of “mixed questions of law and fact” is applied to characterize the matter which simultaneously bears the characteristics of both law and fact. Some scholars seem to disagree with so-called “mixed questions of law and fact”.²⁷ They claim that the term of “mixed questions of law and fact” lacks clarity and coherence, and law and fact never mix but intermingle possibly.²⁸ The author agrees with them that law comes from the sovereign and fact comes from the subject, therefore, law and fact are at different altitudes and unable to form a completely new compound.²⁹ However, the author insists on using the already accepted term of “mixed questions of law and fact” to describe the hybrid of law and fact. It is noted that mixed questions of law and fact are possible to be unmixed³⁰. The core element that distinguishes a question of law from a question of fact is whether a matter requires the analysis by means of legal skills and legal knowledge, which distinguishes a legal professional’s work from a layperson’s work.

II. CLAIM ABOUT THE CHARACTERIZATION OF NATIONAL LAW INTERPRETATION: A QUESTION OF LAW

This section examines the trajectory of WTO jurisprudence about the characterization of national law interpretation. At the very beginning of the WTO judicial history, the Appellate Body took an ambiguous view about the characterization. With an increase of judicial experience, the Appellate Body has firmly claimed that the issue of national law interpretation is a question of law.

A. *India—Patents (US)*

It is the first relevant case about national law interpretation in WTO

²⁶ See Panel Report *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, paras. 2.292-2.295.

²⁷ See Warner, *supra* n. 11, at 101; JL Clark, *A Mixed Question of Law and Fact*, 18 YALE L.J. 404, 405 (1909).

²⁸ *Ibid.*

²⁹ See Warner, *supra* n. 11, at 101.

³⁰ Warner unmixed the mixed questions of law and fact. Warner, *supra* n. 11.

dispute settlement.³¹ In this case, India argued on appeal that the Panel erred in its treatment of Indian national law, because the Panel did not assess Indian law as a fact, but took it as a question of law and interpreted it.³² The Appellate Body referred to Brownlie's proposition that national law might be treated by an international tribunal in several ways, and stated that national law might serve as evidence of facts and also as evidence of compliance or non-compliance.³³ As to the difference between the evidence of facts and the evidence of compliance or non-compliance, the Appellate Body did not give any explanation, but quoted the Permanent Court of International Justice's (PCIJ's) jurisprudence to support its point. The question is: What is the Appellate Body's point as to its statement that national law might serve as evidence of facts and also as evidence of compliance or non-compliance? The visible fact was that the Appellate Body confirmed the Panel's assessment of Indian law and copied the PCIJ's expression that "the Panel was not interpreting Indian law 'as such'".³⁴ Specifically, the Appellate Body's statement is as follows:

It is clear that an examination of the relevant aspects of Indian municipal law ... is essential to determining whether India has complied with its obligations under Article 70.8(a). There was simply no way for the Panel to make this determination without engaging in an examination of Indian law. But, as in the case cited above before the Permanent Court of International Justice, in this case, the Panel was not interpreting Indian law "as such"; rather, the Panel was examining Indian law solely for the purpose of determining whether India had met its obligations under the *TRIPS Agreement*.³⁵

There was a flaw in the Appellate Body's statement. It was the method of the Panel's assessment of Indian law that was accused by India. However, from the words of "solely for the purpose of", it is from the perspective of purpose that the Appellate Body defended the Panel's approach. Therefore, the Appellate Body did not actually address Indian accusation. In addition, the Appellate Body copied the PCIJ's expression of "not ... interpret Polish law as such"³⁶ and stated "the Panel was not interpreting Indian law 'as such'". However, the Appellate Body did not analyze the meaning of the PCIJ's expression or whether the PCIJ's proposition held water. Therefore,

³¹ Oesch, *supra* n. 5, at 200.

³² Appellate Body Report, *India—Patents (US)*, WT/DS50/AB/R, para. 64.

³³ *Ibid.*, para. 65.

³⁴ *Ibid.*, para. 66. The Appellate Body quoted the PCIJ's words, which are: "The Court is certainly not called upon to interpret 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 conforming with its obligations towards Germany under Geneva Convention."

³⁵ *Ibid.*

³⁶ *Ibid.*

the Appellate Body mechanically referred to the PCIJ's proposition and took it as a convenient refuge to refute India's accusation. The only conclusion that can be drawn is that the Appellate Body did not agree with Indian accusation, nor did it properly illustrate its disagreement. So the question was not solved by the Appellate Body about whether the Panel actually interpreted Indian law. Considering the Appellate Body did review the Panel's assessment of Indian law, it could be inferred that the Appellate Body did not take the Panel's assessment of Indian law as a question of fact.³⁷

B. *US—Section 301 Trade Act*

The Appellate Body's jurisprudence in *India—Patents (US)* was quoted by the subsequent WTO tribunals. In *US—Section 301 Trade Act*, when the Panel was examining the US national law, it stated as follows:

In this case, too, we have to examine aspects of municipal law, namely Sections 301-310 of the US Trade Act of 1974. Our mandate is to examine Sections 301-310 solely for the purpose of determining whether the US meets its WTO obligations. In doing so, we do not, as noted by the Appellate Body in *India—Patents (US)*, interpret US law "as such", the way we would, say, interpret provisions of the covered agreements. We are, instead, called upon to establish the meaning of Sections 301-310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations³⁸... It follows that in making factual findings concerning the meaning of Sections 301-310 we are not bound to accept the interpretation presented by the US.³⁹

In this case, the Panel did not only refer to the Appellate Body's jurisprudence, but also developed and extended the Appellate Body's proposition. The Panel pointed out that its examination of US law was done by the way of interpreting provisions of the covered agreement, which, to some extent, illuminated the meaning of "not ... interpret US law 'as such'". Furthermore, the Panel opined that they would establish the meaning of US law as factual elements and their conclusion about the meaning of US law was factual findings. So the Panel clearly took national law and national law interpretation as questions of facts. However, the Panel's characterization of national law interpretation as a question of fact was not supported by the Appellate Body in subsequent cases.

³⁷ According Article 17.6 of the DSU, the Appellate Body has no authority to review a question of fact.

³⁸ Panel Report, *US—Section 301 Trade Act*, WT/DS152/R, para. 7.18.

³⁹ *Ibid*, para. 7.19.

C. *US—Section 211 Appropriations Act*

The Appellate Body in subsequent cases clearly opined that an assessment of national law as to its consistency with WTO obligations is a question of law and subject to appellate review. In *US—Section 211 Appropriations Act*, the United States argued that a panel's review of a Member's domestic law was a question of fact, and thus the Appellate Body was not mandated to review the Panel's conclusions about the meaning of US law.⁴⁰ The Appellate Body quoted its ruling in *India—Patents (US)* and concluded its previous rulings as follows:

[T]he municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or noncompliance with international obligations. Under the DSU, a panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement. Such an assessment is a legal characterization by a panel. And, therefore, a panel's assessment of municipal law as to its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU.⁴¹

In this case, the Appellate Body distinguished the scenarios when national law served as evidence of facts and as evidence of compliance or noncompliance with international obligations. In the second scenario, an assessment of national law, including an appreciation of the meaning of national law, was a legal characterization. Although the Appellate Body quoted its ruling in *India—Patents (US)*, however, different from its reference to the PCIJ's jurisprudence in *India—Patents (US)*,⁴² the Appellate Body directly addressed the issue of national law interpretation and characterized it as a question of law. That characterization was further confirmed in subsequent cases.⁴³

Furthermore, the Appellate Body distinguished the characterization of legal elements that are used to assess the meaning of national law, from the characterization of national law interpretation. In *China—Publications and*

⁴⁰ Appellate Body Report, *US—Section 211 Appropriations Act*, WT/DS176/AB/R, para. 101.

⁴¹ *Ibid.*, paras.105-106.

⁴² See the text associated with Note 34.

⁴³ For example, in *China—Auto Parts*, regarding the US claim that a panel's interpretation of national law was a factual determination in WTO dispute settlement, the Appellate Body quoted its jurisprudence in *US—Section 211 Appropriations Act* and restated that national law interpretation was a question of law. Appellate Body Report, *US—Auto Parts*, WT/DS339/AB/R, paras. 224-225 and footnote 308. In *US—Countervailing and Anti-Dumping Measures (China)*, the Appellate Body stated "an assessment of the meaning of a text of municipal law for purposes of determining whether it complies with a provision of the covered agreements is a legal characterization." Appellate Body Report, *US—Countervailing and Anti-Dumping Measures (China)*, WT/DS449/AB/R, para. 4.101.

Audiovisual Products, on the one hand, the Appellate Body restated that national law interpretation was subject to appellate review;⁴⁴ on the other hand, it stated that the evidence about the meaning of national law, such as how a national law was applied, experts' opinions, administrative practice, and pronouncements of domestic courts, was a factual matter.⁴⁵

In conclusion, in the early period of WTO dispute settlement, WTO tribunals were cautious in dealing with the issue of national law. For example, in *India—Patents (US)*, the Appellate Body did not explicitly state whether it characterized national law interpretation as a question of law or fact, and referred to the PCIJ's jurisprudence to confirm the Panel's approach and support its appellate review. In *US—Section 301 Trade Act*, the Panel characterized national law interpretation as a question of fact; however, its characterization was not quoted or confirmed by the Appellate Body. In the later period of WTO dispute settlement, WTO tribunals were experienced in dealing with the issue of national law. The Appellate Body not only expressly characterized national law interpretation as a question of law, which resolved the legality of its appellate review,⁴⁶ but also distinguished the characterization of national law interpretation from the characterization of legal elements that were used to assess the meaning of national law. So, now, WTO tribunals' attitude towards the characterization of national law interpretation is firm and radical, which is to characterize it as a question of law.

III. METHOD OF NATIONAL LAW INTERPRETATION: A HOLISTIC ASSESSMENT

The Appellate Body has explicitly stated that the method of national law interpretation is "a holistic assessment of all relevant elements, starting with the text of the law and including, but not limited to, relevant practices of administering agencies."⁴⁷ Three issues are important for analysis of the method: (1) Who bears the burden of proof about legal elements of national law? (2) What types of legal elements are acceptable for national law interpretation? And (3) how to understand "holistic assessment"? Is there any hierarchy among the legal elements that are used to assess the meaning of national law? The following text will address these three issues.

⁴⁴ Appellate Body Report, *China—Publications and Audiovisual Products*, para. 177.

⁴⁵ *Ibid.*

⁴⁶ According to Article 17.6 of the DSU, the appellate review is limited to the questions of law. So if national law interpretation is characterized as a question of fact, the Appellate Body will not have the authority to review it.

⁴⁷ Appellate Body Report, *US—Countervailing and Anti-Dumping Measures (China)*, WT/DS449/AB/R, para. 4.101.

Firstly, although WTO tribunals have characterized national law interpretation as a question of law, they do not take the initiative to investigate legal elements of national law. It is the party that who accuses a member's national law is inconsistent WTO law bears the burden of proof. That is consistent with the basic rule of burden of proof in WTO dispute settlement that "the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof."⁴⁸ The Appellate Body in *US—Carbon Steel* specifically stated as follows:

The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion.⁴⁹

This statement was confirmed by the Appellate Body in *Dominican Republic—Cigarettes*.⁵⁰ When the claimant accuses that the respondent's national law is inconsistent with WTO agreements, the claimant bears the burden of proving its accusation. The respondent may claim its national law provides something different from what the claimant accuses. However, the respondent may wait and watch until the claimant has furnished adequate evidence to raise a presumption that its accusation about the respondent's national law is sound.⁵¹ If the claimant is successful in raising the presumption, the respondent bears the burden to prove its national law means something else. Thus, any party is responsible to prove what it claims.

Secondly, legal elements are evidence of the meaning of national law. WTO tribunals accept different types of evidence, which include the text of national law, legislative intent, relevant laws, statements of the representatives, decisions of domestic courts, and so on. In *US—Carbon Steel*, as to the types of legal elements as regards national law interpretation, the Appellate Body stated:

Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.⁵²

The above statement about the forms of proof was confirmed and

⁴⁸ Appellate Body Report, *US—Wool Shirts and Blouses*, WT/DS33/AB/R, 14.

⁴⁹ Appellate Body Report, *US—Carbon Steel*, WT/DS213/AB/R, para. 157.

⁵⁰ See Appellate Body Report, *Dominican Republic—Import and Sale of Cigarettes*, WT/DS302/AB/R, para. 111.

⁵¹ Bhuiyan, *supra* n. 6, 210—211.

⁵² Appellate Body Report, *US—Carbon Steel*, WT/DS213/AB/R, para. 157.

quoted by the Appellate Body in subsequent cases.⁵³ Thus WTO tribunals are open to accept different types of legal elements.

Thirdly, among those types of legal elements, the text of national law is an important element for national law interpretation; however, it is difficult to say whether the text alone can decide the meaning of national law. On the one hand, the Appellate Body in *US—Corrosion-Resistant Steel Sunset Review* stated that if the meaning and content of national law were clear on its face, then the consistency of national law as such could be assessed on that basis alone.⁵⁴ On the other hand, the Appellate Body in *Dominican Republic—Cigarettes* stated:

[W]e agree with Honduras that consideration of the express wording of the text of legislation establishing a measure is a fundamental element of an assessment of that legislation. That said, however, we see no merit in the proposition advanced by Honduras that a panel must limit itself, in considering a claim against legislation as such, *exclusively* to the wording of legislation itself. Indeed, in *US—Carbon Steel*, the Appellate Body recognized that different types of evidence may support assertions as to the meaning and scope of an impugned measure. A panel enjoys a margin of discretion in weighing such evidence, commensurate with its role as trier of fact.⁵⁵

Therefore, it seems the Appellate Body's views about the weight of the text are contradictory. In fact, the Appellate Body has never based the issue of WTO-consistency of national law solely on the text. For example, in *US—1916 Act*, when assessing whether the US 1916 Anti-Dumping Act fell within the scope of Article VI of the GATT 1994 and Anti-Dumping Agreement, the Panel examined the text of the 1916 Act, the historical context and legislative history, and the US case law.⁵⁶ In this case, the Appellate Body agreed with the Panel's conclusions, but it only examined the text and intent of 1916 Act.⁵⁷ Thus, the text is not the determinant element in deciding the meaning of national law, and usually all the types of legal elements about national law are taken into account by WTO tribunals.⁵⁸ As to the weight of different types of legal elements, it is

⁵³ For example, that statement was quoted by the Appellate Body in *US—Corrosion-Resistant Steel Sunset Review* and *Dominican Republic—Import and Sale of Cigarettes*. See WT/DS244/AB/R, para. 168 and WT/DS302/AB/R, para. 112.

⁵⁴ Appellate Body Report, *US—Corrosion-Resistant Steel Sunset Review*, WT/DS244/AB/R, para. 168.

⁵⁵ Appellate Body Report, *Dominican Republic—Import and Sale of Cigarettes*, WT/DS302/AB/R, para. 112.

⁵⁶ See Panel Report, *US—1916 Act*, WT/DS136/R, paras. 6.108-6.164.

⁵⁷ See Appellate Body Report, *US—1916 Act*, WT/DS136/AB/R, paras. 126-132.

⁵⁸ See Appellate Body Report, *Dominican Republic—Import and Sale of Cigarettes*, WT/DS302/AB/R, para. 114.

difficult to conclude whether there is a hierarchy among them, and it is better to conclude that it is within the WTO tribunals' discretion to make a balanced assessment of all the evidence.

In conclusion, WTO tribunals' assessment of the meaning of national law is based on party-led documentary evidence and the written and oral submissions and arguments.⁵⁹ As to the types of legal elements, the WTO tribunals are open to accept different forms of evidence about national law, such as the text, legislative history, relevant laws, domestic courts' decisions, and so on. However, it is not specified which form of proof is of most weight. Considering all the evidence to make a holistic and an objective assessment of the meaning of national law is primarily important.

IV. DEFERENCE PROVIDED TO THE LEGISLATING STATES

It is difficult to summarize whether WTO tribunals have adopted a deferential approach to the issue of national law interpretation,⁶⁰ not to mention calibrating the degree of deference provided to the legislating states. This section will try to disclose the issue of deference concerned with national law interpretation. For analysis, six cases are selected and divided into two categories: One category is about the cases in which the legislating states won on the points about their own interpretation of national law, and the other category of the cases are those in which the legislating states lost on their interpretation of national law. By such division, the issue about whether the legislating states' win was due to the deference provided by the WTO tribunals will be disclosed, which will further uncover WTO tribunals' approach to national law interpretation.

A. *Deference Involved in the Cases that the Legislating States Won*

In *US—Section 301 Trade Act*, the EC accused Section 304 of the US Trade Act of 1974 mandated the US Trade Representative (USTR) to make a “unilateral” determination on whether another WTO Member had violated US rights under the WTO prior to exhaustion of DSU proceedings, which was against Article 23.2(a) of the DSU.⁶¹ The Panel examined the language of Section 304, a Statement of Administrative Action (SAA), the US statements before the Panel, and the USTR practice under Section 304. It concluded that Section 304 was discretionary and might create the

⁵⁹ Bhuiyan, *supra* n. 6, 211.

⁶⁰ See Jan Bohanes and Nicolas Lockhart, *Standard of Review in WTO Law*, in *THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW* 417 (D. L. Bethlehem ed., Oxford University Press 2009).

⁶¹ Panel Report, *US—Section 301 Trade Act*, WT/DS309/R, para. 7.29.

presumption of violation;⁶² however, the SAA, as an important interpretative element in the construction of the statutory language of Section 304, together with the statements made by the US, could curtail the discretion under Section 304 so as to remedy any inconsistency with the DSU.⁶³ Thus the Panel found that Section 304 was not inconsistent with Article 23.2(a) of the DSU. In this case, the Panel relied significantly on the US representations and stated:

The representations and statements by the representatives of the US appearing before us were solemnly made, in a deliberative manner, for the record, repeated in writing and confirmed in the Panel's second hearing. There was nothing casual about these statements nor were they made in the heat of argument. There was ample opportunity to retract. Rather than retract, the US even sought to deepen its legal commitment in this respect.

We are satisfied that the representatives appearing before us had full powers to make such legal representations and that they were acting within the authority bestowed on them. Panel proceedings are part of the DSB dispute resolution process. It is inconceivable except in extreme circumstances that a panel would reject the power of the legal representatives of a Member to state before a panel, and through the panel to the DSB, the legal position of a Member as regards its domestic law read in the light of its WTO obligations. The panel system would not function if such a power could be presumed.⁶⁴

It is noted that before the Panel's examination of Section 304, the Panel stated "any Member can reasonably expect that considerable deference be given to its views on the meaning of its own law."⁶⁵ In this case, if the Panel had not given deference to the US representations, the discretion under Section of 304 might have been found inconsistent with the DSU.⁶⁶ However, the Panel was discreet in deciding to give deference to the US' representations, because the Panel took into account that the representations were "solemnly made" and the representatives "had full powers to make such representations". Therefore, the Panel did not blandly provide deference to the US.

In *Canada—Pharmaceutical Patents*,⁶⁷ the EC argued that Section 55.2(1) of the Canadian Patent Act imposed de jure discrimination against pharmaceuticals.⁶⁸ The Panel considered the EC failed to present sufficient

⁶² *Ibid.*, paras. 7.31-7.61.

⁶³ *Ibid.*, paras. 7.109, 7.133-7.134.

⁶⁴ *Ibid.*, paras. 7.122-7.123.

⁶⁵ *Ibid.*, para. 7.19.

⁶⁶ The parties did not appeal the Panel's findings, so the Panel's findings were final for this case.

⁶⁷ Neither party appealed the Panel's findings.

⁶⁸ Panel Report, *Canada—Pharmaceutical Patents*, WT/DS114/R, para. 7.96.

evidence to establish its claim,⁶⁹ and stated:

[T]he Panel took note that its finding of conformity on this point was based on a finding as to the meaning of the Canadian law that was in turn based on Canada's representations as to the meaning of that law, and this finding of conformity would no longer be warranted if, and to the extent that, Canada's representations as to the meaning of that law were to prove wrong.⁷⁰

In this case, the Panel also provided deference to the Canadian representations about the meaning of the Canadian law. However, the reason that the Panel gave deference to Canada was also due to the failure of the EC to establish its claim. According to the basic rule of burden of proof that any party is responsible for providing proof as to its claim,⁷¹ there was nothing wrong for the Panel to refute the EC's claim. It is inferred from this case that if there is any suspicion or uncertainty about the meaning of national law at issue, the suspicion or uncertainty should be resolved in favor of the sovereignty of the legislating state.

In *US—Hot-Rolled Steel*, Japan claimed that the captive production provision of Section 711(7)(C)(iv) of the US Tariff Act of 1930 was, on its face, inconsistent with relevant articles of the Anti-Dumping Agreement (ADA).⁷² The issue was whether the US could require the US International Trade Commission (USITC) to “focus primarily” on the merchant market in its analysis of market share and of factors involving financial performance, and thus the interpretation of “shall focus primarily” in the US law was the key to this issue.⁷³ The Panel examined the ordinary meaning of “focus” and “primarily”, and the context of the provision.⁷⁴ In addition, it also took into account the Statement of Administrative Action (SAA) as to the interpretation of the provision.⁷⁵ The Panel concluded that the captive production provision was not as such inconsistent with the ADA.⁷⁶

The Appellate Body noted that the US explained the meaning of the words “shall focus primarily” in a variety of ways and the interpretation of the captive production provision was not definite as a matter of US law.⁷⁷ It further noted that the captive production provision was discretionary and did not mandate the USITC to attach special weight to the state of the merchant

⁶⁹ *Ibid.*, para. 7.99.

⁷⁰ *Ibid.*

⁷¹ *See supra* n. 48.

⁷² Appellate Body Report, *US—Hot-Rolled Steel*, WT/DS184/AB/R, paras. 181-183.

⁷³ *Ibid.*, paras. 199-200.

⁷⁴ *Ibid.*, paras. 184-185.

⁷⁵ *Ibid.*, para. 186.

⁷⁶ *Ibid.*, para. 187.

⁷⁷ *Ibid.*, paras. 200-201.

market in the final determination.⁷⁸ The Appellate Body reviewed the explanations made by the US as to the interpretation of the provision and concluded “if and to the extent that it is interpreted with our reasoning”, the captive production provision was as such consistent with the Anti-Dumping Agreement.⁷⁹ In this case, the Appellate Body relied explicitly on the responses and statements given by the US to the questions posed by the Panel and the Appellate Body,⁸⁰ and provided deference to the US. It seems the Appellate Body was not confident of its conclusion about the assessment of the meaning of the provision, considering its statement of “if and to the extent that it is interpreted with our reasoning”. The Appellate Body’s approach to national law interpretation in this case is consistent with the Panel’s approach in *Canada—Pharmaceutical Patents*, in the aspect that the suspicion or uncertainty about the meaning of national law was resolved in favor of the sovereignty of the legislating state.

In conclusion, as for the cases in which the legislating states won on the points of their interpretations of national law, WTO tribunals did provide deference to the legislating states. However, national laws at issue in those cases were not mandatory, but rather discretionary. Thus those national laws left room for WTO-consistent interpretation. According to the rule on the burden of proof that any party bears the burden to provide proof as to its claims, it is not the legislating states’ burden to prove WTO-inconsistency of their national law. When the counterparts of the legislating states fail to establish the accusations of national law, there is nothing wrong for the WTO tribunals to let the legislating states win.

B. *Deference Involved in the Cases that the Legislating States Lost*

In *India—Patents (US)*, the US argued that the current Indian system for the receipt of mailbox applications for pharmaceutical and agricultural patents was not adequate to implement its obligations under Article 70.8(a) of the TRIPS.⁸¹ The Panel examined the Indian legal regime, and pointed out that Indian current administrative practice about mailbox applications created a certain degree of legal insecurity, because it required Indian officials to ignore mandatory provisions of the Indian Patents Act 1970.⁸² In addition, the Panel did not consider that two Indian Supreme Court rulings provided by India upheld the validity of Indian current administrative

⁷⁸ *Ibid.*, para. 203.

⁷⁹ *Ibid.*, paras. 203–208.

⁸⁰ Bohanes & Lockhart, *supra* n. 15, 418.

⁸¹ Panel Report, *India—Patents (US)*, WT/DS50/R, para. 2.3.

⁸² *Ibid.*, para. 7.35.

practice, nor did it opine that Indian commitment to seek legislative changes before the expiry of transitional period could remedy legal insecurity during the transitional period.⁸³ Thus the Panel concluded Indian current mailbox system was inconsistent with Article 70.8 of the TRIPS. The Appellate Body agreed with the Panel's approach to Indian law and confirmed the Panel's finding.⁸⁴

Two points are worthy of attention for this case. The first point is the mandatory character of Indian Patent Act that was, on its face, inconsistent with WTO obligations. Both the Panel and the Appellate Body stressed that Indian administrative practice about mailbox application could not cure WTO-inconsistency of Indian Patent Act, thus they refused to give the benefit of doubt regarding the status of Indian mailbox system under Indian law. The second point is that India appealed the Panel's application of the burden of proof in assessing Indian national law.⁸⁵ India argued the US merely raised "reasonable doubts" about a violation of the TRIPS before the burden shifted to India.⁸⁶ The Appellate Body turned to the mandatory character of Indian Patent Act to confirm that the US had provided adequate evidence as to the lack of legal security about Indian administrative practice.⁸⁷ Therefore, the mandatory character of Indian Patent Act was critical for WTO tribunals' refusal of providing deference to Indian interpretation of its own law.

In *EC—Trademarks and Geographical Indications (Australia)*,⁸⁸ Australia claimed that geographical indicates (GIs) for products originating in a third country could not be registered in the EC unless that third country met the conditions in Article 12(1) of Council Regulation (EEC) No. 2081/92 of 14 July 1992 (Regulation), which required the third country to have adopted a system equivalent to that in the EC and this was contrary to WTO obligations.⁸⁹ The Panel examined the text of Article 12,⁹⁰ the relative provisions in the Regulation,⁹¹ and the preamble to the Regulation and the April 2003 amending Regulation,⁹² and concluded that the meaning and content of the Regulation, together with the amending Regulation, on their

⁸³ *Ibid.*, paras.7.36-7.38.

⁸⁴ Appellate Body Report, *India—Patents (US)*, WT/DS50/AB/R, para. 70.

⁸⁵ *Ibid.*, para. 72.

⁸⁶ *Ibid.*, para. 73.

⁸⁷ *Ibid.*, para. 74.

⁸⁸ This case was not appealed.

⁸⁹ Panel Report, *EC—Trademarks and Geographical Indications (Australia)*, WT/DS290/R, para. 7.89.

⁹⁰ *Ibid.*, para. 7.113.

⁹¹ *Ibid.*, paras. 7.117-7.118.

⁹² *Ibid.*, paras. 7.119-7.124.

face, supported Australian claim.⁹³ The Panel noted there was no supporting evidence of the meaning of the Regulation in the form of an interpretation of the relevant provisions made by the European Court of Justice or any other domestic court.⁹⁴ In addition, the Panel took into account the statements made by executive authorities of the EC which contained interpretations of the Regulation.⁹⁵ Finally, the Panel supported Australian claim.

One interesting point in this case is about the EC statements. On the one hand, Australia presented various EC statements about interpretations of the Regulation, and one of them was weighed by the Panel.⁹⁶ The Panel considered the statement made by the EC in September 2002 to the Council for TRIPS (2002 Statement) was clear in its contents and official in the way it was delivered, and supported Australian interpretation of the Regulation.⁹⁷ The EC did not agree with the weight given to the 2002 Statement, because the EC opined that the intention of the 2002 Statement was not primarily to explain the EC system for the protection of geographical indications and this Statement did not take into account the amendments made in April 2003.⁹⁸ The Panel pointed out that the 2002 Statement was clear in its interpretation of the Regulation and was not incompatible with the April 2003 amending Regulation.⁹⁹ On the other hand, the EC referred to a statement that was made by the EC to the Council for TRIPS in June 2004 (2004 Statement) in the days before the first substantive meeting of this Panel.¹⁰⁰ By such reference, the EC tried to interpret the words of "[w]ithout prejudice to international agreements" of the introductory phrase of Article 12(1) to reclassify the applicability of the conditions in Article 12(1), so as to rebut Australian interpretation of the Regulation.¹⁰¹ The Panel considered even if the EC's reference to 2004 Statement was successful in subjecting the conditions in Article 12(1) to the terms of GATT 1994 and the TRIPS Agreement, Article 12(1) still applied to the WTO Members who did not have equivalent protecting systems for GIs as that in the EC.¹⁰² Thus the Panel was not persuaded by the EC's interpretation. Although the EC failed to rebut Australian claim, the Panel did provide weight to the EC's 2002 Statement. In fact, the EC's 2004 Statement was not coherent with its

⁹³ *Ibid.*, para. 7.125.

⁹⁴ *Ibid.*, para. 7.126.

⁹⁵ *Ibid.*, paras. 7.127-7.137.

⁹⁶ *Ibid.*, para. 7.127.

⁹⁷ *Ibid.*, paras. 7.127-7.130.

⁹⁸ *Ibid.*, para. 7.131.

⁹⁹ *Ibid.*, para. 7.132.

¹⁰⁰ *Ibid.*, para. 7.134.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, para. 7.135.

previous 2002 Statement. It cannot be concluded that the EC's failure was due to the Panel's refusal of providing deference to the EC's interpretation of its own law.

In *China—Intellectual Property Rights*,¹⁰³ the parties disagreed on the proper interpretation of Article 4(1) of Chinese Copyright Law, and the US claimed that Article 4(1), on its face, denied immediate and automatic protection to certain works of creative authorship.¹⁰⁴ The Panel stated it was mindful that, “objectively, a Member [wa]s normally well-placed to explain the meaning of its own law”.¹⁰⁵ Then, the Panel examined the text of Article 4(1), the relative articles of the Copyright Law, a letter sent from Chinese Supreme People's Court to a provincial High People's Court about the *Inside Story* case, and a written reply from the National Copyright Administration of China to the Supreme People's Court about the *Inside Story* case,¹⁰⁶ and supported the US claim.¹⁰⁷ It is noted that China was not coherent in its statements about the meaning of Article 4(1).¹⁰⁸ Thus China's failure on the point of the interpretation of its own law was not due to the Panel's refusal of providing deference to China.

In conclusion, as for the cases that the legislating states lost, it cannot be concluded that the legislating states' failure on the points of the interpretations of their own laws was due to WTO tribunals' reluctance to provide deference. Their failure should be analyzed according to specific scenarios of the cases. In *India—Patents (US)*, it was the mandatory character of Indian Patents Act that resulted in Indian failure. In *EC—Trademarks and Geographical Indications (Australia)* and *China—Intellectual Property Rights*, the same scenario occurred that the legislating states' own statements about the meaning of national laws were not coherent. Thus WTO tribunals are not passive in deferring to the legislating states' interpretation of their own law, but rather make an independent assessment of national law on the basis of Article 11 of the DSU.

By comparing the WTO jurisprudence concerned with the two categories of the cases, it is inferred that the WTO tribunals tend to provide deference to the legislating states if the national law at issue is discretionary. As for the mandatory WTO-inconsistency of national law, the WTO tribunals are strict in requiring the legislating states to provide paramount evidence to remedy the inconsistency. Although WTO tribunals are

¹⁰³ This case was not appealed.

¹⁰⁴ Panel Report, *China—Intellectual Property Rights*, WT/DS362/R, paras. 7.28-7.29.

¹⁰⁵ *Ibid*, para. 7.28

¹⁰⁶ *Ibid*, paras. 7.34-7.51, 7.54.

¹⁰⁷ *Ibid*, para. 7.50.

¹⁰⁸ *Ibid*, paras. 7.55-7.56.

generous to show their respect for the sovereignty of the legislating states when resolving the suspect or uncertainty about the meaning of national law, it does not mean their assessment on the meaning of national law is dependent on the legislating states, but only means that they follow the rule on the burden of proof and the complainants have failed to establish the accusations of the legislating states' national law. WTO tribunals' interpretation of national law is dependent on the parties' provision of evidence; however, their interpretation is independently made on the basis of their own assessment of the evidence.

CONCLUSION

From the above analysis, the issue of national law interpretation in WTO dispute settlement bears the characteristic of a question of law, not because WTO tribunals have claimed to characterize national law interpretation as a question of law, but because the Appellate Body has reviewed the issue of national law interpretation. Meanwhile, national law interpretation also bears the characteristic of a question of fact, because WTO tribunals have applied the same rule on burden of proof for national law with that for other facts and attributed deference to the legislating states especially in the circumstances where there is any suspicion or uncertainty about the meaning of national law. Therefore, it seems national law interpretation should be characterized as a mixed question of law and fact. However, the following questions arise. Has the Appellate Body manipulated the law/fact distinction in order to justify its appellate review?¹⁰⁹ Does national law interpretation really bear the characteristic of a question of law?

A comparison of national law interpretation with WTO law interpretation will enlighten the answer to above questions. According to Article 3.2 of the DSU, WTO law interpretation is within the authority of WTO tribunals, which is characterized as a question of law. WTO tribunals are supposed to know WTO law, and their knowledge about WTO law is internal to them. In contrast, as for national law interpretation, WTO tribunals are not supposed to have judicial notice of national law, so their knowledge about national law depends on the evidence provided by the parties, which is external to them. However, as for legal interpretation, no matter whether the object of interpretation is WTO law or national law, a precondition is that the meaning of the law at issue is not straightforward, which causes different or contradictory understandings on the meaning.

¹⁰⁹ According to Article 17.6 of the DSU, the Appellate Body is only authorized to review legal issues.

Under this circumstance, WTO tribunals' knowledge about the law at issue is limited, even for the scenario of their interpretation of WTO law. In addition, no matter whether WTO tribunals are interpreting WTO law or national law, they are, usually, not the drafters of that law, so they are neutral assessors for either WTO law or national law. There is something common between WTO law interpretation and national law interpretation, in terms of the application of judges' inherent legal skills, legal expertise, legal sense and legal instincts.¹¹⁰ Therefore, the issue of national law interpretation bears the same characteristic of WTO law interpretation as a question of law.

Thus it is appropriate to characterize national law interpretation as a mixed question of law and fact. Such characterization does not only reflect its legal character as something common with WTO law interpretation, but also reflects its factual character that the proof of national law is beyond the judges' control. Meanwhile, it also legalizes the Appellate Body's review of national law interpretation. In fact, the Appellate Body may be more capable of dealing with national law interpretation than the panels, especially when a panel member is a non-lawyer.¹¹¹

A serious problem about WTO tribunals' interpretation of national law is the accusation of lack of legitimacy. No provision of WTO law has explicitly authorized WTO tribunals' interpretation of national law, and national law is commonly believed as within the domain of a state's internal sovereignty.¹¹² However, as the Appellate Body stated in *India—Patents (US)*, WTO tribunals cannot deal with the disputes about national law, if they are not allowed to interpret national law.¹¹³ Two theories, "justiciability" and "implied power", are helpful to justify WTO tribunals' interpretation of national law. According to Article 16.4 of the Marrakesh Agreement, each Member is required to ensure its laws and regulations consistent with WTO law. Therefore, any Member that considers its rights are infringed by other Members' WTO-inconsistent legislations, should be provided with a forum where it can raise the arguments and a guarantee that

¹¹⁰ The author does not mean the methods of WTO law interpretation are the same as the methods of national law interpretation. Regarding WTO law interpretation, WTO tribunals predominantly apply Article 31 and Article 32 of the Vienna Convention as the rules of interpretation. Regarding national law interpretation, WTO tribunals should follow domestic rules of interpretation applied by the legislating states, and respect the legal framework and legal hierarchy of the legislating states.

¹¹¹ Howse, *Supra* n. 7.

¹¹² Shaw, *supra* n. 4, 130.

¹¹³ The Appellate Body in *India—Patents (US)* stated "[t]here was simply no way for the Panel to make this determination without engaging in an examination of Indian law." Appellate Body Report, *India—Patents (US)*, WT/DS50/AB/R, para. 66.

the arguments be objectively and seriously examined.¹¹⁴ WTO tribunals' national law interpretation is related with the (real or imaginary) aggrieved Member's right to be heard.¹¹⁵ In addition, considering that WTO tribunals have been authorized to adjudicate the disputes about national law, in order to perform their function and effectively solve the dispute, it should be implied that they have been granted the power to interpret national law. As to the problem that no provision has authorized the WTO tribunals to interpret national law, it may be due to the flaw that when the founding Members of the WTO were negotiating WTO agreements and authorized WTO tribunals to examine WTO-consistency of the Members' national law, they ignored that such examination inherently required WTO tribunals' interpretation of national law, or they noted the issue of national law interpretation was so sensitive that the only way of concluding the WTO agreements was to tacitly ignore it.

Anyway, WTO tribunals' interpretation of national law is a challenge to the legislating states' sovereignty. Considering that WTO tribunals are not accountable to the Members' parliaments or citizens, their interpretation of national law should be limited in both purpose and scope.¹¹⁶ Specifically, their interpretation is for the WTO dispute settlement only and of no direct effect in domestic legal context.¹¹⁷ Meanwhile, deference should be provided to the legislating states when the meaning of national law is in suspicion or uncertainty. WTO tribunals' interpretation of national law, in essence, is reinterpretation of national law, on the basis of the evidence provided by the parties. To clarify WTO tribunals' characterization of national law interpretation as a mixed question of law and fact, will not only reflect WTO tribunals' practice about national law interpretation, but also make clear the roles of the parties and WTO tribunals. Therefore, the parties are clearer about how to make use of their roles of providing evidence and their complaining skills, and WTO tribunals are more comfortable to handle the issue of national law interpretation. At last, the transparency of WTO tribunals' decisions on the meaning of national law will be improved.

¹¹⁴ See Alon Harel & Adam Shinar, *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review*, 10 INT'L J CONST L 950, 968 (2012).

¹¹⁵ *Ibid.*

¹¹⁶ Bhuiyan, *supra* n. 6, 217.

¹¹⁷ *Ibid.*