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## Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System

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# DUE PROCESS IN THE WORLD TRADE ORGANIZATION: THE NEED FOR PROCEDURAL JUSTICE IN THE DISPUTE SETTLEMENT SYSTEM

JOHN P. GAFFNEY\*

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## INTRODUCTION

The issue of due process in the World Trade Organization ("WTO") dispute settlement system has received increased attention as of late, and is likely to receive even more attention in the future as the dispute system evolves.<sup>1</sup> This is not surprising when one considers what scholars call the "judicialization" of the dispute settlement procedure, which occurred after the conclusion of the Uruguay Round.<sup>2</sup> Because due process is a matter dear to the heart of lawyers, it is not surprising that practicing lawyers in the world trade arena have led the calls for due process in WTO proceedings.<sup>3</sup> To date, the

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1. See, e.g., President's Remarks at the World Trade Organization in Geneva, Switzerland, 34 WEEKLY COMP. PRES. DOC. 926 (May 18, 1998) [hereinafter President's Remarks] (proposing that WTO rules be changed to permit dispute proceedings that are open to the public).

2. See P.J. Kuijper, *The New WTO Dispute Settlement System: The Impact on the Community*, in THE URUGUAY ROUND RESULTS: A EUROPEAN LAWYERS' PERSPECTIVE 87, 87-88 (Jacques H.J. Bourgeois et al. eds., 1995).

3. See, e.g., Rutsel Silvestre Martha, *Representation of Parties in World Trade Disputes*, 31 J. WORLD TRADE, Apr. 1997, at 83 (arguing that parties to disputes submitted to the Dispute Settlement Body of the WTO cannot rightfully oppose the fact that any other party to the dispute has appointed a private practitioner as one of its representatives); David Palmeter, *The Need for Due Process in WTO Proceedings*, 31 J. WORLD TRADE, Feb. 1997, at 51 (advocating for a change in WTO procedural rules to permit open hearings and the right of Members to be represented by counsel of their choice); J.C. Thomas, *The Need for Due Process in WTO Proceedings*, 31 J. WORLD TRADE, Feb. 1997, at 45 (illustrating procedural

literature on due process has been mainly of prescriptive value with relatively little conceptual analysis. This may be explained to some extent by the intuitive understanding of due process that lawyers share.<sup>4</sup> While most lawyers think they know what due process is, a conceptual analysis cannot assume a subordinate position to the seemingly more practical reflection on how to apply due process to the WTO dispute settlement system. Part I of this paper addresses two basic philosophical, but no less important, questions—that is, what do we mean by due process and where can we find its sources? Part II examines the need for due process in the WTO and why it should be applied to the dispute settlement system. Part III explores which principles of due process are or indeed should be applied in the context of the WTO and gives more detailed attention to the expression of a number of due process principles in the rules governing WTO dispute settlement. Part IV identifies the most important of the fundamental principles of procedural justice in international adjudicative and arbitral practice and attempts to analyze the extent to which the WTO applies these principles in dispute settlement. Finally, Part V considers the important and related questions concerning the limits of procedural due process principles and the consequences of their non-observance in the WTO system. This paper concludes that the answers to these questions determine to what extent the normative content of due process principles exercise a real influence on WTO proceedings.

## I. THE MEANING OF DUE PROCESS

Although legal scholars trace its origins to the English Magna Carta of 1215, it is fair to say that due process is a predominantly

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fairness concerns in WTO dispute proceedings through a discussion of the WTO fact-finding process and the use of negotiating history to interpret GATT provisions); John H. Jackson, *Due Process in the WTO Dispute Settlement Body*, in *LIBERALIZATION AND PROTECTIONISM IN THE WORLD TRADE SYSTEM* (Cameron May publisher, forthcoming 1999) (paper presented and remarks at the second annual conference of the World Trade Law Association, May 15, 1998, Inner Temple, London).

4. See Palmetier, *supra* note 3, at 51 (suggesting that lawyers are correct in their belief that due process means fundamental and notably procedural fairness and discussing the concept in the English and American legal systems).

American concept.<sup>5</sup> The right to due process is expressly provided by the Fifth Amendment to the United States Constitution, which states that: "[n]o person shall be [...] deprived of life, liberty or property, without due process of law. . . ."<sup>6</sup> The answer to the question of what process is due under the laws of the United States is complex, to say the very least. As attested to by the large number of judicial rulings and legal literature generated by this subject, there are many possible answers depending on the context of a given situation.<sup>7</sup> While a review of due process jurisprudence is beyond the scope of this paper; the observations set forth below serve to illustrate the difficulties in defining the contours of due process in American law. First, due process is expressed in different forms; there are rules safeguarding procedural and substantive due process,<sup>8</sup> as well as what prominent constitutional law scholar Laurence Tribe calls "structural due process."<sup>9</sup> Second, the United States Supreme Court supports the view that due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."<sup>10</sup> The Court acknowledged the flexibility of the concept, noting that its protections are required only when the "particular situation de-

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5. See generally John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 507 (1997) (providing that although due process has its roots in the Magna Carta, in the United States such guarantees have become bulwarks in the protection of liberties); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 948-63 (1990) (tracing the development of the due process clause from Chapter 39 of the Magna Carta, which reads that "[n]o freeman shall be taken . . . except by the lawful judgment of his peers or the law of the land"); WILLIAM S. MCKECHNIE, *MAGNA CARTA* (2d ed. 1914).

6. U.S. CONST. amend. V.

7. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* secs. 10-7 - 10-19 (1978) (providing an in-depth discussion on procedural due process).

8. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992) (finding that the Due Process Clause applies to both procedural matters and substantive law).

9. See Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975) (introducing the concept of structural due process as a category of constitutional limitations). Professor Tribe describes the concept as focusing on "the structures through which policies are both formed and applied, and formed in the very process of being applied." *Id.* at 269 (emphasis omitted).

10. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1975) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)) (describing the flexibility of due process).

mands.”<sup>11</sup> Third, and with most relevance to WTO dispute settlement, the types of procedures that are required by the dictates of due process where a government action would deprive an individual of a constitutionally protected liberty or property interest—even in the specific field of procedural due process—must be determined on the basis of a balancing test.<sup>12</sup> On the side of the individual, a court must assess the importance of the individual liberty or property interest at stake and the extent to which the requested procedure may reduce the possibility of an erroneous deprivation of rights.<sup>13</sup> On the other hand, the court must assess the governmental interest in avoiding the increased administrative and fiscal burdens that result from increased procedural requirements.<sup>14</sup>

Given the difficulty inherent in determining what process is due, let alone defining what due process is, it is understandable that the concept of due process is an unfamiliar and difficult one for non-American lawyers to understand.<sup>15</sup> Moreover, and perhaps of greater fundamental importance, is the notion that a “legal doctrine or concept that forbids government from depriving citizens of their life, liberty, or property is one that has little direct relationship to the legal regime that governs most international trade, embodied now in the WTO, and formerly embodied in its predecessor . . . the General

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11. *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

12. *See id.* (utilizing an interest-balancing test to support the Court’s holding that an evidentiary hearing was not required before disability benefits could be terminated); *TRIBE*, *supra* note 7, sec. 10-13, at 540 (detailing the interest-balancing formula applied by the Supreme Court in *Matthews v. Eldridge*).

13. *See Matthews*, 424 U.S. at 334.

14. *See id.*

15. *See* Christopher Schreuer, International Civil Litigation-Preliminary Relief, Taking Evidence and Enforcing Judgments, Remarks at the Proceedings of the American Society of International Law/Nederlandse Vereniging voor Internationaal Recht (“ASIL/NVIR”) Joint Conference held in The Hague, The Netherlands (July 4-6, 1991), in *CONTEMPORARY INTERNATIONAL LAW ISSUES: SHARING PAN-EUROPEAN AND AMERICAN PERSPECTIVES* 99, 100 (Dean C. Alexander ed., 1992) [hereinafter *Joint ASIL/NVIR Conference*] (acknowledging that non-American lawyers have great difficulty comprehending the concept of due process and opining that non-American courts will not use the “uniquely American concept” in the way that the American courts do). *But see* Catherine Kessedjian, *Joint ASIL/NVIR Conference* at 97, 98 (finding that the approach of some civil law countries to due process is not “dramatically different” from the American approach).

Agreement on Tariffs and Trade [("GATT")]."<sup>16</sup> Hence, any attempt to compare the way that the question of due process is considered in the WTO with methods in WTO Member States' judicial systems is not particularly meaningful.<sup>17</sup>

These two criticisms of the concept of due process are not, of course, unique to the American legal system and may be directed at those principles in other legal systems that perform an equivalent or similar function. The principle of "natural justice" in the English common law system and the *droit de la defence* in the *droit civil* or *droit administrative* may not be capable of conveying a generally acceptable meaning or content, nor may these principles be suited to direct application in an international adjudicatory system. The content of what, at this stage, one can conveniently describe as due process varies from legal system to legal system according to the political, cultural, and other influences that condition each particular system.<sup>18</sup> It is evident, therefore, that the answer to the question regarding the meaning of due process in WTO dispute settlement will be largely influenced by the sources—both within and without the WTO system—from which this principle is drawn. Before embarking on a critical analysis of whether, or to what extent, due process applies in the WTO dispute settlement, it is essential to first find a generally accepted meaning of due process that is free of the particularities of an individual system and suited to the WTO system. The repeated calls for due process in WTO dispute system indicate that such a general meaning already exists outside the framework of the WTO.

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16. Palmetier, *supra* note 3, at 51. See generally General Agreements on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947] amended by Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter GATT 1994].

Note that the content of municipal rules of procedural justice is not necessarily identical to or suitable for application to international law because "[t]he operability of a general principle of law depends upon its degree of congruity and harmony with the inherent peculiarities of contemporary international law." V.S. MANI, INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS 36 (1980).

17. See *id.* at 52 (reasoning that WTO Members can exercise a great deal of control in shaping the process that governs them, while individual citizens of WTO Members have little or no direct control in selecting the process that affects them).

18. See Thomas, *supra* note 3, at 45.

## A. GENERAL PRINCIPLES OF PROCEDURAL DUE PROCESS

Leading scholarly works on international adjudication<sup>19</sup> have identified general principles that came to be accepted as the cardinal precepts underlying the adjudicative processes in the legal order of civilized States. Often described as “minimum procedural standards,”<sup>20</sup> “principles of judicial procedure,”<sup>21</sup> and “fundamental procedural norms,”<sup>22</sup> these precepts may be defined by reference to two essential and commonly shared objectives: the impartiality of the adjudicative tribunal; and its corollary, the juridical equality between the parties in their capacity as litigants.<sup>23</sup> The universality of this definition, one that is now more correctly termed procedural due process, is reflected in the formulation of the two primary rules of the fair trial guarantee expressed in Article 6 of the European Convention on Human Rights (“ECHR”)—that is, a tribunal must be independent and impartial,<sup>24</sup> and the parties be given adequate notice and an opportunity to be heard.<sup>25</sup>

The sources of procedural justice principles are varied. In the absence of any fully developed theory of international procedural law, there is no accepted doctrine of international procedural principles

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19. For thorough discussions regarding the substantive and procedural issues surrounding international litigation, see KENNETH S. CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* (1946); BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1987); MANI, *supra* note 16.

20. See CARLSTON, *supra* note 19, at 36.

21. See CHENG, *supra* note 19, at 258.

22. See MANI, *supra* note 16, at 19-21.

23. See CHENG, *supra* note 19, at 290 (characterizing the two objectives as fundamentally important characteristics of a judicial process); see also MANI, *supra* note 16, at 20-21 (presenting the two chief considerations used by international tribunals in the application of the “fundamental procedural norms”). Mani suggests that the principles of the equality of parties and *audi alteram partem* complement each other and that both principles are fused to the concept of impartiality. See MANI, *supra* note 16, at 13.

24. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 1950, art. 6, sec. 1, 213 U.N.T.S. 221, 228 [hereinafter Human Rights Convention].

25. See *id.* sec. 3.



that defines its sources.<sup>26</sup> An inquiry into whether these are principles of international or municipal law serves no purpose because by their very nature, they are common to both systems.<sup>27</sup> In practice, however, the distinction between municipal and international legal systems may assume some significance for WTO dispute settlement. Accordingly, it is useful to refer to the approach of another international adjudicative body, the Court of Justice of the European Communities ("EC"). Although the EC Court of Justice has previously elaborated a catalogue of fundamental procedural rights based on a vertical reach into the legal systems of the Member States, it has recently preferred to distill general principles of EC law by reaching horizontally into other international legal instruments, such as the ECHR, rather than conduct the more difficult exercise of performing a sufficiently extensive comparative study of the national legal systems of the Member States.<sup>28</sup> By comparison, with over 130 Members, it would seem extremely difficult, if not impossible, to detect general procedural principles common to all legal systems of the WTO. It may be preferable, therefore, to look to international procedural law as a suitable source of general principles of procedural justice for the WTO dispute settlement.

## B. PROCEDURAL JUSTICE IN INTERNATIONAL TRIBUNALS

In the absence of any generally accepted international treaties containing procedural rules on how to govern international adjudication in public international law, the procedural jurisprudence of other international courts and tribunals should provide the most fruitful

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26. See H.W.A. Thirlway, *Procedure of International Courts and Tribunals*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1128, 1128 (Rudolph Bernhardt ed., 1997) [hereinafter Thirlway, *International Courts and Tribunals*] (noting that despite the absence of a common governing text of international procedural law, international tribunals and international arbitral bodies are considerably homogeneous in their procedures); H.W.A. Thirlway, *Procedural Law and the International Court of Justice*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOR OF ROBERT JENNINGS 389, 389 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996) [hereinafter Thirlway, *Procedural Law in the ICJ*].

27. See CHENG, *supra* note 19, at 390.

28. See Deirdre Curtin, *Constitutionalism in the European Community: The Right to Fair Procedures in Administrative Law*, in HUMAN RIGHTS AND CONSTITUTIONAL LAW: ESSAYS IN HONOR OF BRIAN WALSH 293, 294 (James O'Reilly ed., 1992).

sources for the development of the WTO system. One scholar has described such jurisprudence as "the most important means for the determination of the rules and principals of international law."<sup>29</sup> The statutes of the Permanent Court of International Justice ("PCIJ"), and that of its successor, the International Court of Justice ("ICJ"), have served as remarkably solid foundations for both the statutes of the many other standing tribunals, as well as for the procedural law of the other bodies.<sup>30</sup> This common source of law has resulted in a notable degree of "homogeneity"—especially in the absence of a fully developed theory of international procedural law—among the procedures of various international adjudicative bodies.<sup>31</sup> Hence, both the decisions of the PCIJ and the ICJ may prove to be of great importance for the WTO system.

Other factors favoring the use of procedural justice principles of other international tribunals include: the lack of a common procedural background shared by panelists and members of the Appellate Body, as well as counsel, in WTO proceedings and the absence at the international level of the precautions in municipal law brought on by historical and social influences.<sup>32</sup> Further, such an approach may also seek to avoid the WTO panel's adoption of the lowest common denominator of a procedural rule, a potential result of a comparative study of diverse municipal legal systems.<sup>33</sup> Before the question of what normative basis of procedural justice applies in the WTO dis-

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29. CHENG, *supra* note 19, at 1.

30. See Thirlway, *International Courts and Tribunals*, *supra* note 26, at 1128 (noting that the procedures of the PCIJ and the ICJ serve as a benchmark for the procedures of other tribunals).

31. See *id.* (attributing the "homogeneity" to the manner in which tribunals and other international bodies have developed in this century, and also to the nature of the field of procedure).

32. See H.W.A. Thirlway, *Evidence Before the International Courts and Tribunals*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 302, 302 (Rudolph Bernhardt ed., 1995).

33. See Case 17/74, *Transocean Marine Paint Ass'n v. Comm'n*, 1974 E.C.R. 1063, 1089 [1974 pt. 87] 14 C.M.L.R. 459, 471 (1974) (opinion of Mr. Advocate-General Warner) (rejecting the Commission's contention that it need not provide Applicants with an opportunity to be heard on a particular matter before it takes action on it—based on a comparative survey of some Member States which indicated that such a procedural rule existed in some form in a majority of those States).

pute settlement is addressed, however, it is important to first consider why it should apply at all. The answer to this question relates to two critical areas, namely, the need for legitimacy of both the WTO dispute settlement and the WTO system as a whole, and the sovereign nature of the litigants in the dispute settlement system.

## II. THE NEED FOR PROCEDURAL JUSTICE

The judicialization of the dispute settlement system following the Uruguay Round is a well known and celebrated feature.<sup>34</sup> Admittedly, it is somewhat anomalous that the system is characterized by, on the one hand, an Appellate Body that is judicial, being akin to an appellate court in a municipal system, and, on the other hand, panels that function more on the arbitral model.<sup>35</sup> Both bodies, however, may be said to fall within the province of judicial settlement.<sup>36</sup> Their inherent responsibility is, therefore, to render an impartial decision according to a judicial procedure on the basis of law and legal standards that guarantee at a minimum the procedural equality of the parties.<sup>37</sup> Procedural equality of the parties is "an inevitable and indispensable concomitant of any judicial institution exercising judicial functions."<sup>38</sup> If the WTO dispute system is to achieve and maintain

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34. See, e.g., Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organisation and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 COMMON MKT. L. REV. 1157, 1211-15 (1996) (discussing the further legalization of panel procedures).

35. Debra P. Steger & Peter Van den Bossche, *WTO Dispute Settlement: Emerging Practice and Procedure*, in PROCEEDING OF THE NINETY-SECOND ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 79, 79 (1998).

36. See generally Petersmann, *supra* note 34, at 1215 (asserting that provisions of the Dispute Settlement Understanding on various forms of arbitration proceedings represent a further move towards judicial methods of dispute settlement and that methods used for adopting Appellate Body Reports fell under the label of "quasi-judicialization" of WTO dispute settlement process).

37. See MANI, *supra* note 16, at 20-21 (listing the considerations that international tribunals should take into account when they apply the "fundamental procedural norms" in their proceedings); see generally Helmut Steinberger, *Judicial Settlement of International Disputes*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 42, 42 (Rudolph Bernhardt ed., 1997) (describing the basis of the authority of international courts to render binding decisions).

38. MANI, *supra* note 16, at 13 (contending that procedural equality is in fact a firm reality that is innate in the judicial process).

legitimacy under international law, then litigants' claims must be adjudicated under established legal principles, namely, independence, impartiality, and objectivity of the adjudication process.<sup>39</sup>

#### A. ESTABLISHING NEED FOR LEGITIMACY OF THE WTO SYSTEM

The resolution of disputes in a principled manner plays an important role in legitimating the WTO dispute settlement system by fulfilling the Members expectations of improved and strengthened dispute settlement procedures.<sup>40</sup> If one considers the WTO to be "an embodiment of a democratic and contractarian theory of government,"<sup>41</sup> these principles of procedural justice preserve, and are preserved by, the notion of separation of powers in that they prevent the WTO from acting as both lawmaker and judge.<sup>42</sup> It is evident that the principles of procedural justice can contribute in no small way to the actual and perceived legitimacy of the WTO system in general and, in particular, its dispute settlement system. This enables the latter to bring about solutions that will meet with widespread acceptance, and should thus procure compliance with the recommendations and rulings of the Dispute Settlement Body ("DSB").

#### B. SOVEREIGN EQUALITY OF LITIGANTS IN THE WTO

The two factors important for an appreciation of the fundamental principles of international procedural law are: international courts

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39. See generally THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995) (suggesting that the ICJ legitimizes the international legal system through its principled process of dispute resolution); Lady Hazel M. Fox, QC, *Reparations and State Responsibility: Claims Against Iraq Arising Out of the Invasion and Occupation of Kuwait, in THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW* 261, 285 (Peter Rowe ed., 1993) (concluding that a United Nations process for settlement of compensation claims must be subject to established principles of law, including independence, impartiality, and objectivity).

40. See generally 2 *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* (1986-1992) (Terence P. Stewart ed., 1993) (listing the Members' expectations of improving and strengthening the dispute settlement rules and procedures).

41. Palmeter, *supra* note 3, at 52 (emphasizing the requirement of consensus in the WTO to make any changes of significance).

42. As yet, none of the WTO organs act as a prosecutor or guardian of the WTO Agreements in the way the Commission does in the EC system.

have no jurisdiction in the absence of parties' consent; and sovereign equality is an unseverable component of the principle of sovereignty in international law.<sup>43</sup> The first of these two factors does not, of course, assume the same importance for WTO dispute settlement as it does for the ICJ, for example, because WTO panel proceedings are not based on the notion of consensual jurisdiction that underlies the latter. Failure to observe procedural justice, however, will adversely affect the perception of the legitimacy and fairness of WTO dispute settlement, which could eventually undermine the commitment of its Members. The second factor is, of course, of no less importance for the WTO dispute settlement system than it is for the ICJ, or any other international adjudicatory or arbitral body, as it proceeds, with the exception of the EC, on an essentially inter-State basis.

Procedural justice translates the sovereignty of the parties into procedural equality by way of three general principles: recognizing the litigants' sovereign sensibilities, securing active involvement by the litigants in the communicative process, and assuring that neither party derives any special procedural advantage over the other.<sup>44</sup> While the last of these three functions is largely self-explanatory, with respect to the first two, a leading scholar has recognized that:

An international tribunal cannot afford to deal with [sovereign States] in the same way in which a municipal tribunal does with private litigants. For, cooperation of the litigant States is an essential prerequisite for successful adjudication of disputes. To secure their cooperation, their sovereign sensibilities have to be respected by specially guaranteeing to them observance of certain fundamental procedural rights.

... [The fundamental procedural principles] envisage the establishment of procedural rules concerning presentation of proofs and reasoned arguments by the parties. They cater to the ultimate objective of each litigant

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43. See MANI, *supra* note 16, at 20. See generally U.N. CHARTER art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members."); Doc. 944, 1/1/34, 6 U.N.C.I.O. Doc. 457 (1945) (noting that the definition of "sovereign equality" includes that States are "juridically equal"); *Draft Declaration on Rights and Duties of States* art. 5, reprinted in [1949] Y.B. Int'l L. Comm'n 286, 288, U.N. Doc. A/CN.4/SER.A/1949 ("Every State has the right to equality in law with every other State.").

44. See MANI, *supra* note 16, at 15 (highlighting the major objectives of the "procedural norms").

(sic) party—which is to maximize its goal values projected through its claims before the adjudicative machinery. This naturally involves a demand by the party for maximum advantage of the procedure in expounding and systematically establishing its claims. The fundamental procedural [principles], consequently, guarantee reasonable opportunity for each party to demonstrate its claims before the tribunal.<sup>45</sup>

Another reason why procedural justice should apply to WTO dispute settlement is the important function it performs in assisting an adjudicatory body reach a decision or resolution of the dispute.<sup>46</sup> Procedural justice facilitates the effective conduct of the adjudication, provides sufficient fact-gathering opportunities concerning a dispute, and thereby enables a tribunal to provide a well-reasoned and just adjudication of the controverted claims.<sup>47</sup> This consideration raises the interesting question of whether all that matters in the end is the correctness of the substantive decision. The answer will be provided in future panel and Appellate Body decisions, and will determine the extent of respect for procedural justice in the WTO system.<sup>48</sup>

### III. THE NORMATIVE BASIS OF PROCEDURAL JUSTICE IN THE WTO DISPUTE SETTLEMENT SYSTEM

The “judicialization” of the dispute settlement system manifests the undoubted movement from the “power oriented” GATT approach to a “rule oriented” WTO system.<sup>49</sup> The inevitable consequence of this move will most likely be the increasing recourse by WTO panels

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45. *Id.* at 14-15.

46. See MANI, *supra* note 16, at 14 (discussing the objectives of applying procedural norms).

47. See *id.*

48. See Stephen P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 212 (1996) (implying that voluntary compliance is necessary to make the WTO system work); see also discussion *infra* pt. IV (analyzing the fundamental issue concerning the effects of failing to adhere to the norms of procedural justice and its intrinsic limits).

49. See *Singapore Ministerial Declaration* para. 1, WTO Doc. WT/MIN(96)/DEC/W (Dec. 13, 1996), 36 I.L.M. 218 (1997) (noting the establishment of the WTO as a forum for continuing liberalization of trade in a “rule-based” system).

and the Appellate Body to the principles inherent in these rules, as has occurred in nearly all other systems of law. This should be true of procedural, as well as substantive, principles. A general, but brief, analysis of the sources of law applicable to the WTO dispute settlement will determine whether the law of the WTO will reflect, in particular, principles of procedural process.<sup>50</sup>

Judge Pescatore has documented the remarkable reversal of the law applicable to dispute settlement from GATT to WTO.<sup>51</sup> Under the GATT regime, the substantive rules applicable to dispute settlement rested on the primary legal provisions of Articles XXII and XXIII of the GATT.<sup>52</sup> The bulk of these rules governing dispute settlement consisted mainly of secondary law in the form of various resolutions of the contracting parties.<sup>53</sup> The WTO Agreement<sup>54</sup> fundamentally reversed this state of affairs insofar as the provisions regulating dispute settlement were upgraded to the level of primary WTO law.<sup>55</sup> So far, the WTO has used the remaining openings from the creation of secondary law very sparingly. At the same time, the WTO Agreement brought to the forefront a source of law which had

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50. See generally Pierre Pescatore, *Drafting and Analyzing Decisions on Dispute Settlement*, in 1 HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT, Pt. 2, at 27-39 (Pierre Pescatore et al. eds., 1998) (discussing dispute settlement after completion of the Uruguay Round); EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION sec. 1.121 (1995) (describing the WTO agreements as the principal sources of law applicable to the conduct of trade relations between WTO Members); David Palmeter & Petros C. Mavroidis, *The WTO System: Sources of Law*, 92 AM. J. INT'L L. 398, 398-413 (1998).

51. See Pescatore, *supra* note 50, at 27-29 (noting the legal basis of dispute settlement procedures under GATT and the new WTO agreement).

52. See GATT 1947, *supra* note 16, arts. 22-23; see also Pescatore, *supra* note 50, at 28 (noting the essential basis of dispute settlement under GATT).

53. See Pescatore, *supra* note 50, at 29 (reporting Articles XXII and XXIII of GATT as the pre-WTO dispute settlement provisions).

54. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE RESULTS OF THE URUGUAY ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 21 (1994), 33 I.L.M. 1125, 1144 [hereinafter WTO Agreement].

55. See Pescatore, *supra* note 50, at 27-28 (noting that the Agreement establishing the WTO is a central structural instrument with a direct relevance to the problem of dispute settlement).

been essentially ignored in the "secluded world" of the GATT, that of general international law.<sup>56</sup>

#### A. PRIMARY AND SECONDARY WTO LAW

Dispute settlement is first mentioned in Article III.3 of the WTO Agreement.<sup>57</sup> Pursuant to Article III.2 of the WTO Agreement, the Dispute Settlement Understanding<sup>58</sup> ("DSU") is made an integral part of the constitutive instrument of the WTO<sup>59</sup> and is considered to be at the highest rank in the system of sources of world trade law.<sup>60</sup> The DSU is composed of twenty-seven articles bearing broadly on the structure of the system, procedure, and implementation of the dispute settlement, and is complemented by four appendices.<sup>61</sup> Specifically, Appendix 1 defines the scope of the understanding by reference to the "Covered Agreements;"<sup>62</sup> Appendix 2 lists a number of special rules and procedures for dispute settlement;<sup>63</sup> Appendix 3 mandates some complementary working procedures;<sup>64</sup> and Appendix 4 adds some rules on the functioning of the expert review groups.<sup>65</sup> There

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56. See *id.* at 29 (expressing hope for an accelerated growth of international law).

57. See WTO Agreement, *supra* note 54, art. III.3 (stating that the WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes found in Annex 2 of the WTO Agreement).

58. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 3(2), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 404 (1994), 33 I.L.M. 1125, 1226 [hereinafter DSU].

59. See *id.*; see also Pescatore, *supra* note 50, at 27-28 (describing the integration of the DSU into the legal structure of the WTO).

60. See Pescatore, *supra* note 50, at 11.

61. See Pescatore, *supra* note 50, at 28 (describing the DSU and its various appendices).

62. See DSU, *supra* note 58, Appendix 1. The Covered Agreements include the following: the WTO Agreement; Agreements on Trade in Goods, Annex 1A ("GATT 1994"); General Agreement on Trade in Services, Annex 1B ("GATS"); Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C ("TRIPS"); and the DSU itself.

63. See *id.* Appendix 2.

64. See *id.* Appendix 3.

65. See *id.* Appendix 4; see also DSU, *supra* note 58, art. 8(2) (listing the per-



are also a number of dispute settlement provisions contained in the so-called "Covered Agreements," which retains dispute settlement provisions from a number of sources, including the GATT.<sup>66</sup> Additionally, the primary rules have allowed for some creation of secondary rules in the field of dispute settlement.<sup>67</sup>

From the beginning, the rules of the GATT were based on principles of general international law.<sup>68</sup> At that time, while the legal factors sustaining the whole structure consisted mainly of good faith and the reciprocity of the interests involved, there was still a reluctance to refer to international law.<sup>69</sup> One can attribute this to the "somewhat spurious character of the original GATT, as a consequence of its creation by a provisional protocol anticipating a treaty which was never entered into force."<sup>70</sup> Unlike the creation of the GATT, the WTO was created by a formal treaty-making process.<sup>71</sup> By following the requirements of international practice and national constitutional law, the signatories of the WTO Agreement have created a strong foundation "for the effect of the WTO rules in both the international and the municipal legal spheres."<sup>72</sup>

The Appellate Body confirmed in a recent decision that WTO law is now part of the body of public international law.<sup>73</sup> Article 3(2) of

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missible sources for panels seeking information).

66. See Pescatore, *supra* note 50, at 28 (noting the retention of Articles XXII and XXIII of GATT 1947 in GATT 1994; the roughly equivalent Articles XXII and XXIII in GATS, and Article 64 of the TRIPS Agreement). All of these provisions maintain the basic legal concepts of dispute settlement. *See id.*

67. *See* WTO Agreement, *supra* note 54, art. III.3 (providing that "[t]he General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding" and that "[t]he Dispute Settlement Body may have its Chairman and shall establish rules of procedure as it deems necessary for the fulfillment of those responsibilities").

68. *See* Pescatore, *supra* note 50, at 11.

69. *See id.*

70. *Id.*

71. *See id.*

72. *Id.*

73. *See* WTO Appellate Body Report on United States-Standards For Reformulated and Conventional Gasoline, at 16, WTO Doc. WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *U.S. Gasoline Case*] (confirming the body of general interna-

the DSU explicitly recognizes this new legitimacy for the purpose of dispute settlement and as such, the Covered Agreements will need clarification under the customary rules of interpretation established by general international law.<sup>74</sup> The Appellate Body found this reference to general international law to relate to the rules of interpretation set out in the Vienna Convention on the Law of Treaties.<sup>75</sup>

It is evident, therefore, that in seeking a normative basis for procedural justice in WTO dispute settlement it is necessary to first look to the provisions of the DSU or the specific dispute settlement rules and procedures indicated in Appendix 2. One must also look to the provisions of secondary law to identify the principles endorsed therein that ensure the impartiality of panelists and members of the Appellate Body or establish the procedural equality of the parties. Appellate Body decisions reflect a belief that the demands of due process are implicit in the DSU<sup>76</sup> and that decisions should be "grounded on among other things due process considerations."<sup>77</sup>

#### B. GENERAL INTERNATIONAL LAW AS A SOURCE OF PROCEDURAL RIGHTS AND PRINCIPLES

The role of general international law as a tertiary or residual source of principles of procedural justice in the WTO may, however, be problematic. Article 3(2) of the DSU limits the function of the

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tional law includes WTO law).

74. See Pecatore, *supra* note 50, at 31 (stating that the Covered Agreements will require clarification "in accordance with customary rules of interpretation of general international law").

75. See *U.S. Gasoline Case*, *supra* note 73, at 16 (remarking that the general rule of treaty interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties has attained the status of a rule of customary or general international law); see generally Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, 1155 U.N.T.S. 340, 8 I.L.M. 679 [hereinafter Vienna Convention].

76. See WTO Appellate Body Report on India-Patent Protection for Pharmaceutical and Agricultural Chemical Products para. 94, WTO Doc. WT/DS56/AB/R (Dec. 19, 1997) [hereinafter *India Patent Protection Case*] (noting that the demands of due process are inherent in the DSU).

77. WTO Appellate Body Report on United States-Restrictions on Imports of Cotton and Man-made Fibre Underwear, sect. VI, WTO Doc. WT/DS24/AB/R (Feb. 10, 1997) (finding that the requirement of consultation has its basis in due process rights).

rules of general international law to assisting in the interpretation and clarification of the WTO Agreement.<sup>78</sup> Moreover, decisions of the Appellate Body to date seem to confine such rules to those enumerated in the Vienna Convention and recognize that the words of a treaty form the foundation for the interpretative process and should be given their ordinary meaning in their context and in light of the treaty's object and purpose.<sup>79</sup> It seems unlikely though, for a number of reasons, that Article 3(2) of the DSU precludes WTO panels and the Appellate Body from applying general principles of international law found outside the WTO system, which do not find expression in primary or secondary WTO law. The law of the WTO, as previously noted, is part of the body of public international law.<sup>80</sup> There is, therefore, a presumption that the WTO Members did not intend to depart from existing general principles which are part of public international law when they negotiated the WTO Agreement. Hence, those general principles found outside the WTO system may also influence the interpretation of WTO rules. As Judge Pescatore has argued, "[t]he opening of the WTO to international law methods will, no doubt, bring about further developments in the direction of larger recourse to general principles of law, as they are relied upon in international adjudication."<sup>81</sup> Further, general principles, including those of procedural justice, "apply *directly* to the facts of the case whenever there is no formulated rule governing the matter."<sup>82</sup>

Although from an operative point of view treaties and custom have a superior value to general principles of law, this hierarchical order is reversed from the juridical viewpoint.<sup>83</sup> General principles of law perform two additional, important functions in the WTO dispute settlement context in that they constitute the source of various rules of

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78. See DSU, *supra* note 58, art. 3(2).

79. See WTO Appellate Body Report on Japan-Taxes on Alcoholic Beverages, at 5-6, WTO Doc. WT/DS8/AB/R (Nov. 1 1996) (citing Article 31.1 of the Vienna Convention for the proposition that the language of a treaty forms the basis for the interpretive process); see generally Vienna Convention, *supra* note 75, art. 31(1).

80. See *supra* note 73 and accompanying text (noting that the WTO Appellate Body includes WTO law in the body of general international law).

81. Pescatore, *supra* note 50, at 21.

82. CHENG, *supra* note 19, at 393.

83. See *id.* at 393.

law that are merely the expression of those principles, and form the guiding principles of the juridical order according to which the interpretation and application of the rules of law are oriented.<sup>84</sup> The Appellate Body fulfilled the first of these two functions by noting that due process constituted the basis for the procedural requirement of consultation.<sup>85</sup> Thus, it appears that the Appellate Body is willing, to some extent, to look to the principles of procedural justice for “programmatic guidance” in interpreting their duties under the DSU.<sup>86</sup>

Direct application of general principles of procedural justice by panels and the Appellate Body, in the absence of formulated rules in WTO law, may prove to be problematic and the boundary line between direct application and programmatic justice may not always be clear. This criticism raises more general questions of whether the WTO dispute settlement system should be a sort of constitutional court for the whole WTO system,<sup>87</sup> and which of the two competing models of judicial activism and judicial restraint is appropriate to the WTO dispute settlement system.<sup>88</sup> While the answers to these questions must await future decisions, a number of observations may be made concerning the direct application of procedural justice.

As between the two dispute settlement bodies, the Appellate Body is more likely to resemble a traditional constitutional court. In con-

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84. *See id.* at 390.

85. *See India Patent Protection Case*, *supra* note 76, para. 94 (noting that procedural requirements of consultations were grounded on due process considerations).

86. *See* WTO Appellate Body Report on European Communities-Measures Concerning Meat and Meat Products (Hormones), sect. VI, WTO Doc. WT/DS26/AB/R (Feb. 13, 1998) (noting the need to seek guidance from outside principles of procedural justice in the decision-making process); *see also* Thomas Cottier, *Constitutional Trade Regulation in National and International Law: Structure-Substance Pairings in the EFTA Experience*, in 8 NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 409, 411 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993) (discussing constitutional norms, procedural principles, due process, decision-making, checks and balances, and how principles provide “programmatic guidance”).

87. *See* John H. Jackson, *Comments*, in THE EMERGING WTO SYSTEM AND PERSPECTIVES FROM EAST ASIA 72, 73 (Joint U.S.-Korea Academic Studies, 1997) (discussing constitutional issues in the context of WTO dispute settlement).

88. *See id.* at 72-73 (discussing the competing models of judicial activism and restraint).

trast to the panels, which are closer in their composition and functions to the arbitral body and hence are concerned with findings on a case-by-case basis, the Appellate Body is more engaged with the legal issues. As such, it is more likely to foster a greater concern towards the integrity of the dispute settlement system. It may, therefore, evolve into a body that seeks to ensure decisions are taken with the appropriate procedures that foster the democratic and contractual nature of the WTO system<sup>89</sup> and engage in judicial activism to the extent necessary to achieve this end.<sup>90</sup> This can be contrasted with Article 3(2) of the DSU, which explicitly specifies that the panel shall not add to or diminish the rights and obligations of Members as provided in the WTO Agreement.<sup>91</sup> Some have interpreted this specification as a caution to the panels to operate with a measure of restraint, rather than activism.<sup>92</sup>

As a result, panels find themselves in a strangely anomalous position. In contrast to the detailed, complex, and specific working procedures governing Appellate Body proceedings, panels rely on the very general provisions set out in Appendix 3 of the DSU.<sup>93</sup> As noted already, in the absence of precisely formulated principles of procedural justice the direct application of general procedural principles assumes a greater significance thus necessitating some degree of judicial activism.<sup>94</sup> Since panels are permitted under the DSU to develop their own working procedures after consulting with the par-

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89. See Cottier, *supra* note 86, at 410-12 (discussing the importance of constitutional norms in any international trading system). In Member States of the European Free Trade Association, the search for both substantive and procedural norms is ongoing. See *id.* These States are: Austria, Finland, Iceland, Norway, Sweden, and Switzerland. See *id.*

90. See *id.* at 412 (implying that trade issues are justiciable despite difficulties in doing so).

91. See DSU, *supra* note 58, art. 3(2).

92. See Croley & Jackson, *supra* note 48, at 212 (discussing the degree of activism in the decision-making process of the WTO panels).

93. See DSU, *supra* note 58, Appendix 3 (describing the working procedures of the DSU panels and noting that, in contrast to Appellate Body provisions that resemble court procedural rules, WTO panel guidelines are largely general); see also Steger & Van den Bossche, *supra* note 35, at 79-80 (dealing with WTO emerging practice and procedure).

94. See Cottier, *supra* note 86, at 412 (discussing due process and per se justiciable constitutional rights).

ties,<sup>95</sup> both the wording of Article 3(2) of the DSU and dictates of prudence act as constraints on judicial activism. Yet, legal scholars warn panels to be cautious about adopting “activist” postures in the GATT/WTO system.<sup>96</sup> Inappropriate panel activism could well alienate members, thus threatening the stability of the GATT/WTO dispute settlement procedure itself.<sup>97</sup> Moreover, the requirement of consultation with the parties presents its own difficulties, because opposing parties may not share the same perceptions of fairness and due process.<sup>98</sup>

### C. CREATING DETAILED PANEL WORKING PROCEDURES

It is not a little ironic that the body best suited to engage in some form of judicial activism, namely the Appellate Body, has the least need to do so because of its comprehensive procedural rules. It comes as little surprise that an increasing number of recent decisions in WTO proceedings feature calls for detailed, standard working procedures for panels “to help ensure due process and fairness in panel proceedings.”<sup>99</sup> The introduction of standard working procedures, therefore, would also confer a broader systemic benefit to WTO dispute settlement.

The procedural jurisprudence of the ICJ contains little discussion on the level of general principles. One explanation “may be that so much of the Court’s procedure is codified, in the Statute and Rules of

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95. See DSU, *supra* note 58, Appendix 3 (presenting the mandatory and discretionary procedures of WTO panels).

96. See Croley & Jackson, *supra* note 48, at 212 (noting that international dispute settlement, unlike national systems, depends heavily on voluntary compliance by participating members).

97. See *id.*

98. See Steger & Van Den Bossche, *supra* note 35, at 79-80 (noting that consultation and accommodation processes may not complement each other).

99. WTO Appellate Body Report on Argentina-Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, at 31, WTO Doc. WT/DS56/AB/R (Mar. 27 1998) [hereinafter *Argentinean Footwear Case*] (calling for more specific working procedures for panels to ensure fidelity to due process considerations); see also WTO Appellate Body Report on European Communities-Regime for the Importation, Sale and Distribution of Bananas para. 144, WTO Doc. WT/DS27/AB/R (Sept. 25, 1997) [hereinafter *EC Bananas Case*] (citing the need for more detailed working procedures panels); *India Patent Protection Case*, *supra* note 76, para. 95 (noting the importance of more specific working procedures for WTO panels).

Court; and as a result many procedural problems, perhaps the majority, resolve themselves into questions of interpretation of the Statute, and are thus governed by the law of interpretation of international treaties."<sup>100</sup> It may be assumed that the adoption of detailed, standard working procedures will result in a similar situation in the WTO system, and hence general international law would be confined to assisting in the interpretation of such rules, as probably intended by the negotiators of the Uruguay Round.

There could be, however, at least one disadvantage to introducing more detailed working procedures for panels. The objective of ensuring observance of the principles of procedural justice by the enactment of such rules can arguably be defeated if it simply results in legal wrangling, which in turn leads to protracted delays, excessive proceduralism, and inconclusive results.<sup>101</sup> In the United Kingdom House of Lords, Judge Sachs observed that rules, which may appear impeccable on paper, may unduly hamper, lengthen, and even frustrate the legal preparation or activities.<sup>102</sup> It would also appear that the courts in the United States are equally insistent that due process does not require the creation of and adherence to complicated sets of rules and procedures.<sup>103</sup> A similar approach is reflected in international judicial practice with its requirement that adjudicative tribunals balance achievement of the objectives of procedural justice against the need for an expeditious determination or early settlement of all disputes, so as to avoid unwarranted delay.<sup>104</sup> Drafters of any additional

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100. Thirlway, *Procedural Law in the ICJ*, *supra* note 26, at 389.

101. See Julian Mathie Joshua, *Attitudes to Anti-Trust Enforcement in the EU and US: Dodging the Traffic Warden, or Respecting the Law?* at \*16 (visited Oct. 31, 1998) <<http://www.europa.eu.int/comm/dg04/speech/five/en/sp95044.htm>> (discussing the annulment by the EC Court of Justice and the Court of First Instance of EC Commission decisions on purely procedural grounds).

102. See *id.*

103. See *id.*; see also *Mathews v Eldridge*, 424 U.S. 319, 349 (1976) (holding that an evidentiary hearing is not required prior to the termination of disability benefits).

104. See, e.g., *Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain)* 1968 I.C.J. 13, 15 (May 24, 1968) (noting that procedural delays may be unwarranted); *South West Africa (Eth. v. S. Afr.)* 1966 I.C.J. 6 (July 18, 1966) (equating a denial of justice with unreasonable or unjustified delays).

WTO panel working procedures must achieve a suitable balance appropriate to the WTO system.

#### IV. THE APPLICATION OF PROCEDURAL JUSTICE TO THE WTO

The concept of procedural justice, while not capable of precise definition, is generally characterized by two important features: the impartiality of the tribunal and the juridical equality of the parties in their capacity as litigants.<sup>105</sup> The first of these two features finds expression in the legal principles that no one should be a judge in their own cause (*nemo iudex in propis sua causa*),<sup>106</sup> and a tribunal should be free from corruption.<sup>107</sup> The juridical equality of the parties is manifested through a number of fundamental procedural rights: (1) the right to standing before a tribunal,<sup>108</sup> (2) the right to composition of a tribunal,<sup>109</sup> (3) the right to be heard,<sup>110</sup> (4) the right to due deliberation by a duly constituted tribunal,<sup>111</sup> and (5) the right to a reasoned judgement.<sup>112</sup> It is submitted that the rights of third parties are subsumed, to a large extent, in the preceding list. The following section will analyze some of these rights and principles of procedural justice as applied in WTO dispute settlement against the background of their content, expression, and observance in the practice of international courts and tribunals. In the context of WTO dispute settlement, the analysis focuses heavily on the principle of *nemo iudex in propria sua causa* and the related right to a tribunal free from corruption, as well as the issue of standing of both disputants and third parties. The choice of these general principles is largely subjective, but

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105. See CHENG, *supra* note 19, at 279-89 (discussing the importance of impartial judges, thus prohibiting self-judgment).

106. See *id.* at 279, 283-84.

107. See CARLSTON, *supra* note 19, at 53.

108. See FRANCK, *supra* note 39, at 340 (discussing the standing of States who are not parties to the dispute to participate in judicial proceedings).

109. See MANI, *supra* note 16, at 25-30 (describing the rights of parties as to choice and composition of a tribunal).

110. See CHENG, *supra* note 19, at 290-98 (discussing opportunities of parties to assert themselves and their cases).

111. See *id.* at 292-96.

112. See *id.* at 307-10.



is influenced to some extent by their absence from analyses undertaken elsewhere.

#### A. THE PRINCIPLE OF *NEMO JUDEX IN PROPIA SUA CAUSA*

There is little doubt that *nemo judex in propia sua causa* is a universal doctrine that all systems of law adopted.<sup>113</sup> As early as 1903, in an arbitration proceeding between a United States citizen and the Venezuelan government, the Commissioner acknowledged that the jurisprudence of civilized States and the principles of natural law forbid one party to a contract to pass judgement upon the other, and that both parties are equally entitled to the hearing and decision of a disinterested and impartial tribunal.<sup>114</sup> This principle guarantees an essential impartiality in the administration of justice by disqualifying both parties from acting as judges of the dispute between them.<sup>115</sup>

One practical consequence *nemo judex in propia sua causa* is that the position of national arbitrators or judges taking part in international judicial proceedings is not one of a representatives of their respective countries that are parties to the dispute. The consistent practice of international tribunals attests to this statement. For example, one American Commissioner in deciding against the United States, observed that people in his position should consider themselves not as the attorneys for either the one or the other country, but as the judges appointed to decide the questions submitted to them impartially and according to law and justice.<sup>116</sup> "It is therefore, perhaps not without reason that justice is always represented as being blindfolded."<sup>117</sup>

The question then becomes, how have adjudicators translated this fundamental principle into the practice and procedure of international

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113. See *id.* at 279 (citing Ile Conference International de la Paix: 1 Actes et Documents, at 367 (1907))

114. See JACKSON H. RALSTON & W.T. SHERMAN DOYLE, VENEZUELAN ARBITRATION OF 1903 (Rudolf v. Venez.) 194, 197 (1904) (opinion of Commissioner Bainbridge).

115. See CHENG, *supra* note 19, at 284 (noting that the principle disqualifies both parties from acting as judges because by definition they are partial rather than impartial).

116. See *id.* at 281-82 (recounting past judicial practice).

117. *Id.* at 282.

adjudicative tribunals? Elihu Root, a noted American international lawyer and statesman, has remarked that "judges are but men [. . . and] are subject to the influence of their environment. They cannot escape the influences of popular feeling and prejudice in their communities [. . . and] their own tenure of office may be at stake upon their action. . . . They desire the approbation of their fellow citizens, and, in cases of public interest, it may be harder to decide against than for their own country."<sup>118</sup> Bias may, therefore, be said to arise from two sources: internal and external.<sup>119</sup> The former very much depends on the personality of the individual judge; his background, temperament, and collegiality may all affect his or her personal choices concerning evidence and doctrine.<sup>120</sup> Such bias cannot be eradicated and is difficult to control, although some control may be afforded by the right of composition of the tribunal and the appointment of a judge or arbitrator to a strong, collegial bench. One can control external bias, however, by carefully structuring the process of judicial appointments and tenure.<sup>121</sup>

The Statute of the ICJ provides a suitable illustration of the practical ways in which these controlling influences may be brought to bear in the appointment of national judges.<sup>122</sup> Article 2 of the ICJ Statute provides that "the Court shall be composed of a body of *independent judges* elected *regardless of their nationality* from among persons of *high moral character* who possess the qualifications required in their respective countries for appointment to the highest judicial offices or are juriconsults of recognized competence in international law."<sup>123</sup> Once elected, the judges' independence is protected by a nine-year term,<sup>124</sup> during which time the judges may not exercise

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118. ELIHU ROOT, ADDRESSES ON INTERNATIONAL SUBJECTS 37 (1916) (finding that while judges desire the approbation of their fellow citizens in cases of public interest, it may be much harder to decide against, than for, their own country).

119. See FRANCK, *supra* note 39, at 320 (outlining the sources of bias that may affect the judges of the ICJ).

120. See *id.*

121. See *id.*

122. See Statute of the International Court of Justice, June 26, 1945, art. 2, 59 Stat. 1055 [hereinafter ICJ Statute] (outlining the qualifications of judges).

123. *Id.* (emphasis added).

124. See *id.* art. 13.1.

any political or administrative function or engage in any other occupation of a professional nature.<sup>125</sup> Furthermore, the collegiality of the judges, registrar, and staff, as well as the deliberate solemnity with which the Court's business is conducted, have counterbalanced any bias a judge might experience.<sup>126</sup> As one legal scholar noted, "once elected the Court is granted every facility to maintain the proper degree of judicial independence."<sup>127</sup>

The principle of *nemo iudex in causa sua* and the right to a tribunal are often considered as two sides of the same coin. Article 20 of the ICJ Statute requires every member of the Court, before taking up his duties, to make a solemn declaration in the open that he will exercise his powers "impartially and conscientiously."<sup>128</sup> This is because the parties whose case is being adjudicated have the right to a decision made by a tribunal free from corruption and willful partiality.<sup>129</sup> It may be said that corruption of a tribunal is the most serious and extreme form of partiality manifesting from clear external bias, in contrast to an arbitrator's inherent partiality resulting from internal bias. Observance of these two key principles helps to also underpin observance of another procedural principle, *audi alteram partem* ("hear the other side").<sup>130</sup>

### *1. Expression of Nemo Iudex in Propria Sua Causa in the Dispute Settlement System*

Article 8(2) of the DSU stipulates that panel members shall be selected with a view to ensuring their independence.<sup>131</sup> This objective is achieved in a number of ways. First, Article 8(3) of the DSU states:

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125. See *id.* art. 16.1.

126. See FRANCK, *supra* note 39, at 322 (pointing out the safeguards of judicial independence for the ICJ).

127. SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 165 (1985).

128. See ICJ Statute, *supra* note 122, art. 20 (emphasis added).

129. See CARLSTON, *supra* note 19, at 36 (finding that upon submission of their disputes to the ICJ, the States have certain fundamental rights which they may expect the Court to respect in full confidence).

130. See MANI, *supra* note 16, at 16 (stating that justice cannot be met without hearing both parties to a dispute).

131. See DSU, *supra* note 58, art. 8(2).

"Citizens of Members whose governments are parties to the dispute or third parties shall not serve on a panel concerned with that dispute unless the parties to the dispute agree otherwise."<sup>132</sup> Second, Article 8(6) authorizes the WTO Secretariat, rather than the parties, to propose nominations except under compelling reasons.<sup>133</sup> Further, pursuant to Article 8(9), "panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel."<sup>134</sup> Additionally, by way of derogation, Article 8(10) provides that: "when a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member."<sup>135</sup>

Article 17 of the DSU governs *inter alia* the composition of the Appellate Body.<sup>136</sup> According to Article 17(3): "Members of the Appellate Body shall comprise persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally."<sup>137</sup> Unlike panelists though, they must be unaffiliated with any government.<sup>138</sup> According to a Recommendation of the Preparatory Committee in February 1995, this qualification, however, would not exclude persons paid by governments provided they "serve[d] a function rigorously and demonstrably independent from that government."<sup>139</sup> Further, the DSU requires that members of the Appellate Body shall not participate in

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132. *Id.* art. 8(3).

133. *See id.* art. 8(6).

134. *Id.* art. 8(9).

135. *Id.* art. 8(10).

136. *See id.* art. 17.

137. DSU, *supra* note 58, art. 17(3). The author notes that this would appear to compose a narrower category of eligible persons for the Appellate Body, than for panels.

138. *See id.*

139. *Establishment of the Appellate Body: Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995*, para. 7, WTO Doc. WT/DSB/1 (June 19, 1995).

the consideration of disputes that would create a direct or indirect conflict of interests.<sup>140</sup>

The impartiality of the panels and members of the Appellate Body is further ensured by Article 18(1), which provides that there shall be no *ex parte* communications with the panel or the Appellate Body concerning matters under consideration by the panel or the Appellate Body.<sup>141</sup> These procedural safeguards are further supplemented by the Rules of Conduct adopted by the DSB that were expressed to secure the "Governing Principle" that panelists and members of the Appellate Body remain independent and impartial, avoid direct or indirect conflicts of interest, and respect the confidentiality of proceedings so as to maintain the integrity of the mechanism.<sup>142</sup> The Rules of Conduct also require disclosure of information likely to affect or give rise to justifiable doubts as to panelists' integrity, and protection of confidential information.<sup>143</sup> In addition, they provide a procedure for investigating alleged breaches, and if necessary, call for disqualification of those concerned with violating the obligation of independence.<sup>144</sup>

As illustrated, the rules of procedure and conduct seem to afford a fairly extensive endorsement of the principle of *nemo iudex in causa sua* and the right to a tribunal free from corruption in the WTO system. So far, there it does not appear that Members have made any suggestions that either members of the panels or the Appellate Body were tainted by partiality or corruption. One legal scholar, however, strongly criticized decision by the Appellate Body to exclude some private attorneys, who were appointed as delegates by a third party Member State from a panel meeting, as putting at risk all these efforts to ensure impartiality of panel procedure.<sup>145</sup> The affected Mem-

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140. See DSU, *supra* note 58, art. 17(3).

141. See *id.* art. 18(1).

142. See *id.* Rules of Conduct, art. II.

143. See *id.* Rules of Conduct, art. III.

144. See *id.* Rules of Conduct, art. VIII.2 (finding that "failure to disclose [a relevant interest, relationship or matter] shall not be a sufficient ground for disqualification unless there is also evidence of violation of the obligations of independence [and] impartiality").

145. See Martha, *supra* note 3, at 83 (arguing based on the *EC Bananas Case* that only wealthy countries are able to maintain a permanent cadre of legal repre-

ber State confined its own criticism of the decision, however, to the claim that it violated the rights of sovereign governments to nominate their representatives and entrenched the disadvantages of small countries in the WTO.<sup>146</sup>

Practicing trade lawyers have claimed, however, that a deficiency exists in the provisions governing the organization of the Appellate Body, specifically the lack of a rule analogous to Article 8(3) of the DSU.<sup>147</sup> It is argued that "[w]hereas it is not possible for a panel member to serve on a case in which his own government is either a party or a third party, the composition of the Appellate Body is only limited by the rule that Appellate Body members be 'unaffiliated' with any government."<sup>148</sup> Three observations may be made with respect to this criticism. First, these lawyers' description of Article 8(3) is not entirely accurate. As already noted, nationals of disputant Members may serve on a panel provided the parties agree to this.<sup>149</sup> Second, it does not necessarily follow that national members will tend to favor their own countries when they are appointed. The Statute of the ICJ—another standing body with appellate functions—permits the election of national judges,<sup>150</sup> even though, according to an empirical study, nationality of the parties is usually determinative of the outcomes of ICJ cases.<sup>151</sup> The results appear to reveal that judges whose country is a litigant vote more often than not in their

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sentatives at the WTO). See generally *EC Bananas Case*, *supra* note 99.

146. See Martha, *supra* note 3, at 91-93.

147. See Edwin Vermulst and Bart Driessen, *An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round Agreements-Nice on Paper But Too Much Stress for the System?* 29 J. WORLD TRADE, Apr. 1995, at 131, 145 (emphasizing that the lack of express language analogous to that found in the DSU is a deficiency of the Appellate Body).

148. *Id.*

149. See DSU, *supra* note 58, art. 8.3.

150. See ICJ Statute, *supra* note 122, art. 3 (stating that the Court shall consist of fifteen members, no two of whom may be nationals of the same State).

151. See Edith Brown Weiss, *Judicial Independence and Impartiality: A Preliminary Inquiry*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 123, 126 (Lori F. Damrosch ed., 1987) (describing a 1969 study conducted by Il Ro Suh for the American Journal of International Law on the election of judges).

countries' favor.<sup>152</sup> They do, however, also show *inter alia* that this does not hold true in every case and that judges do so less frequently than ad hoc national judges appointed by the other party.<sup>153</sup> Thus, one conclusion that may be drawn by analogy from this inquiry is that the propensity for partiality is greater for national panelists appointed ad hoc than for standing national members of the Appellate Body. Third, the members of the Appellate Body are obliged by the DSU, as discussed earlier, not to participate in any dispute that would create a direct or indirect conflict of interest.<sup>154</sup>

One legal scholar and WTO panelist for the past nine years remarked in a recent review of the Dispute Settlement system that:

In light of the regular links of panelists to national governments, it may be argued that panels do not exert a judicial function: they are not considered to be sufficiently independent. Indeed, frequent delays in appointing panelists by consensus of the parties to the dispute upon proposal of by the WTO Secretariat seems to indicate that that they are worried about the lack of independence of panelists, despite the fact that they are bound to serve in a personal capacity and must not take any instructions. While it is true that a panelist—as any judicial function—cannot dissociate from his or her background and context, it should be noted that interference is unlikely. In the proceedings over the last nine years, this author has never experienced any pressures. Nor did he find that fellow panellists defended interests apparently and closely related to their constituencies. There is a fine unwritten code, and elected panelists do in fact serve in a personal and sufficiently independent capacity, no more and no less than any lawyer serving on an ad hoc court of arbitration.<sup>155</sup>

Generally, the rules governing the composition of the Appellate Body compare favorably with those contained in the Statue of the ICJ.<sup>156</sup> If any reforms are to be made, they should be directed at es-

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152. See *id.* (finding that judges supported their own governments about 82% of the time).

153. See *id.* (revealing that 20% of the votes of regular national judges displayed a strong national bias as compared to 45% for ad hoc judges).

154. See DSU, *supra* note 58, art. 17(3); see also *supra* note 140 and accompanying text.

155. Thomas Cottier, *Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union*, 35 COMMON MKT. L. REV. 325, 348 (1998).

156. Cf. ICJ Statute, *supra* note 122, art. 16(1) (stating that no member of the

tablishing both the WTO panels and the Appellate Body permanently in Geneva. This could be achieved along the lines of the Court of Justice and the Court of First Instance of the European Communities, both of which are permanently based in Luxembourg. Such a remodeled institutional structure could also incorporate an extension of the type of chamber system utilized by the Appellate Body to the panels, in much the same way the two EC Courts operate. As a corollary, both panelists and Appellate Body members would have to be required to reside in Geneva and awarded a corresponding increase in financial compensation. Moreover, the presently understaffed WTO Secretariat would need to be strengthened. The increased solemnity and ceremony likely to accompany such a development would no doubt contribute to the *gravitas* of dispute settlement decisions and should serve to act as a counterweight to any pressure or bias that a member of a panel or Appellate Body might experience. Hence, it should also add to Members' perceptions of the dispute settlement system as being both impartial and legitimate.

## 2. Absence of Open Hearings in the WTO

The perception of impartiality leads us to a final related issue from which the WTO dispute settlement system has drawn a lot of criticism, the absence of open hearings in WTO proceedings.<sup>157</sup> In international adjudication, if not usually in international arbitration, there are generally open hearings.<sup>158</sup> As the Advisory Committee for the Establishment of the PCIJ counseled in its report, "[j]ustice . . . must

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Court may exercise any political or administrative function or engage in any other occupation of a professional nature). In a similar manner to Article 16 of the ICJ Statute, members of the Appellate Body must not accept employment nor pursue professional activities inconsistent with their duties and responsibilities. See DSU, *supra* note 58, art. 17(3) (stating that Appellate Body Members "shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest").

157. See President's Remarks, *supra* note 1 (proposing panel hearings that are open to the public); see also Palmetier, *supra* note 3, at 53-54, 57 (calling for open panel hearings as well as freedom to hire counsel of choice).

158. See ICJ Statute, *supra* note 122, art. 46 (stating that hearings shall be public unless otherwise decided by the Court or the parties). The absence of open hearings in international arbitration may be attributed to the fact that it normally involves the settlement of a dispute between private parties, a consideration that does not apply to the WTO dispute settlement system.



not only be just, but must appear so.”<sup>159</sup> While open hearings perform an important function in most civilized legal systems, one should ask whether this logic should be applied to the conduct of WTO proceedings. One American lawyer certainly thinks so, arguing forcefully for open hearings on the basis of analogies drawn from both the municipal and international legal spheres.<sup>160</sup> This lawyer points to the United States constitutional guarantees of due process under the Fifth Amendment and public trials in criminal proceedings under the Sixth Amendment.<sup>161</sup> Further, he acknowledges that while WTO dispute settlement “is not a criminal proceeding in the Sixth Amendment context, there is a strong connection between the notion of due process and an open hearing.”<sup>162</sup>

The inherent weakness of municipal law analogies to the WTO system undermines their usefulness, and thus it is more meaningful to look at the relevant practice in international law. In this respect, one can look to the Appellate Body’s decision to clarify that “WTO law is part of the body of public international law [and that] [t]he WTO procedures should reflect this status by being open and transparent.”<sup>163</sup> If one considers that the Statute of the ICJ provides in principle that oral proceedings before the Court are to be held in public,<sup>164</sup> there seems no reason why the same should not apply to hearings before the Appellate Body, which are confined to law. The arbitral nature of panels may help explain why panels conducted *in camera* comport with international practice.<sup>165</sup> There seems to be lit-

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159. See, e.g., President’s Remarks, *supra* note 1; Palmeter, *supra* note 3, at 54.

160. See Palmeter, *supra* note 3, at 54 (urging for open panel hearings for WTO proceedings).

161. See *id.* (pointing out that public access to legal proceedings is inherent in any modern notion of due process).

162. *Id.* It is inadvisable to stretch the analogy between the WTO dispute settlement system too far as the origins of the system lie largely in the consensual and diplomatic system of the 1947 GATT.

163. Palmeter, *supra* note 3, at 54; see also *U.S. Gasoline Case*, *supra* note 73, at 17 (finding that the WTO Agreement should “not be read in clinical isolation from public international law”).

164. See ICJ Statute, *supra* note 122, art. 46 (stating that hearings must be public unless the Court decides otherwise or parties demand that the public not be admitted).

165. See Thirlway, *International Courts and Tribunals*, *supra* note 26, at 185

the reason, however, as to why panel proceedings should not also be open to the public if the parties so consent.<sup>166</sup>

Because State parties may not wish for certain information contained in the pleadings or in submitted evidence to be subject to public scrutiny, it may require that some confidentiality be maintained. A compromise could be achieved by amending the rules of the DSU to provide in principle for open hearings unless, at least as regards panel proceedings, the panel or Appellate Body should decide otherwise following consultations with all the parties.<sup>167</sup> Any future reforms of the dispute settlement system should therefore introduce an absolute or conditional requirement of open hearings in the course of panel and appellate proceedings because they will only serve to enhance the public perception of impartiality and hence strengthen the legitimacy of the entire WTO system.<sup>168</sup>

#### B. THE PRINCIPLE OF *LOCUS STANDI*

The right of standing, more commonly known as *locus standi*, may be characterized as both a “sword” and a “shield” of procedural justice.<sup>169</sup> Issues of procedural justice usually arise when States not parties to a dispute claim a right to participate in the proceedings, under the right of intervention. Equally, they arise where a State party argues for discontinuance of proceedings on the basis that the claimant State is not entitled to bring a claim for want of a legal interest in the subject matter of the dispute or that in the absence of other States the tribunal or court cannot properly proceed.<sup>170</sup>

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(arguing that Article 54(3) of the ICJ Statute, which requires private deliberations, represents a practice of such widespread use as to be a general principle of law).

166. *See id.*

167. *Cf.* ICJ Statute, *supra* note 122, art. 46 (providing that unless the parties demand that the public be not admitted the hearings shall be public).

168. *See Cottier, supra* note 155, at 350 (calling for meetings with parties to be public).

169. *See FRANCK, supra* note 39, at 340.

170. *See* Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 422 (Nov. 26) [hereinafter *Nicaragua Case*] (setting forth the United States’ argument that since Costa Rica, El Salvador, and Honduras were indispensable parties to the dispute, the Court could not properly proceed in their absence).

With respect to the use of *locus standi* as a sword, the practice and procedure of the ICJ and other international arbitral tribunals do not provide very much guidance on the question of a State's entitlement to bring a dispute before a competent court or tribunal. This may be largely attributed to the fact that their jurisdiction is based almost wholly on the consent of the litigant States.<sup>171</sup> Specifically, Article 36(1) of the ICJ Statute provides that "the jurisdiction of the Court comprises all cases which the parties refer to it," implying from the use of the word "parties" plural that all disputants must agree that the case should be referred to the Court.<sup>172</sup> Hence, it is more likely that in the case of a dispute concerning the *locus standi* of a plaintiff State, the Court will usually lack the jurisdiction to determine a preliminary matter such as this. The Court of Justice of the EC, which like the WTO dispute settlement system enjoys compulsory jurisdiction, provides a more meaningful precedent.<sup>173</sup> Article 170 of the EC Treaty provides the means by which any Member State can initiate an action against another Member State which it considers to be in breach of the Treaty,<sup>174</sup> but its use is rare because of the degree of political ill-will such legal action generates between States.<sup>175</sup>

The practice and procedure of the ICJ provides some important guidance with respect to the use of *locus standi* as a shield against the institution of proceedings and the claim that in the absence of other States the court or tribunal cannot properly proceed. The ICJ has been willing to discontinue proceedings or to decline jurisdiction, provided that the absent party is found to be "truly indispensable to the pursuance of the proceedings."<sup>176</sup> This situation arises where the

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171. See ICJ Statute, *supra* note 122, art. 36(1).

172. *Id.*

173. See generally Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 182, 298 U.N.T.S. 11 [hereinafter EC TREATY].

174. See *id.* art. 170 (explaining that "[a] Member State which considers that another Member State has failed to fulfill an obligation under the Treaty may bring the matter before the Court of Justice").

175. See PAUL CRAIG & GRAINNE DE BURCA, EC LAW: TEXT, CASES AND MATERIALS 394 (1995) (finding that Article 170's infrequent use is attributed to its potential for causing ill-will between Member States).

176. FRANCK, *supra* note 39, at 342 (citing the *Nicaragua* case for the proposition that the judges did not believe the rights of non-parties were so intertwined with the issues of the case as to render nugatory any decision limited to the parties

interests of a State party not party to the proceedings would be both affected by the decision and provide the basis for the subject matter of that decision.<sup>177</sup>

An example of the use of the indispensable party shield is provided by the *Case Concerning Certain Phosphate Lands in Nauru*.<sup>178</sup> In that case, Australia argued that because Britain and New Zealand also made up the Administering Trusteeship Agreement, the subject of the litigation, it was only fair that a claim be brought either against all three States jointly or not at all.<sup>179</sup> The Court, however, rejected Australia's plea on the basis that the State's duties under the Agreement were severable from those of the other States, such that the Court did not need to have Britain and New Zealand before it to make a determination as to whether Australia had breached its trusteeship obligation.<sup>180</sup> The Court explained further that neither Britain's nor New Zealand's interests constituted the "subject-matter of the judgement to be rendered on the merits of Nauru's [case]."<sup>181</sup> The Court did, however, add that "'a finding by the Court regarding the existence or the content of the responsibilities attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned' thus opening the door for those states to seek to intervene on their own motion."<sup>182</sup>

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before them).

177. See *id.* (citing *Monetary Gold Removed from Rome in 1943*, (Italy v. Fr., U.K., and U.S.) 1954 I.C.J. 19, 32).

178. *Case Concerning Certain Phosphate Lands in Nauru* (Nauru v. Austl.), 1992 I.C.J. 240 [hereinafter *Nauru*]; see also FRANCK, *supra* note 39, at 342-43 (analyzing the use of the indispensable party shield in the *Nauru* case).

179. See FRANCK, *supra* note 39, at 342 (explaining that "Australia had been singled out by Nauru because its form of acceptance of ICJ compulsory jurisdiction under Article 36(2) contained none of the potentially insuperable exceptions found in the declarations of the other two Administering Powers").

180. See *id.*

181. *Nauru*, *supra* note 178, at 261, para. 55.

182. FRANCK, *supra* note 39, at 343 (quoting *Nauru*, *supra* note 178, at 261, para. 55) (observing that "there is much to be said for the proposition that [a State's] suit [. . .] should not fail solely because it has taken on only one of its adversaries at a time. On the other hand, to the extent that the outcome of [a case] affects the law applicable in parallel cases, states similarly situated could in fairness expect a right to intervene in the proceedings").

The question then becomes, when and upon what principle of fairness has the ICJ approved such interventions? Article 62 of the ICJ Statute authorizes any State which considers "that it has an interest of a legal nature which may be affected by the decision in the case [to] submit a request to the Court to be permitted to intervene."<sup>183</sup> Pursuant to Article 62(2) the Court's disposition of the request is discretionary and the Statute gives the judges no guidance as to the applicable principles.<sup>184</sup> In response to the few requests for intervention, the ICJ has generally adopted a "parsimonious" approach and has set a high standard for those seeking to intervene.<sup>185</sup> For instance, the Court found Malta's claim to an interest in shelf demarcation dispute between Tunisia and Libya insufficient because Malta only had an interest in the legal principles and rules for determining the boundaries of its continental shelf.<sup>186</sup> If such an interest was held to be sufficient, it would permit intervention to the extent of transforming two-party litigation into a "judicially sponsored global legislative enterprise."<sup>187</sup> The Court's approach, therefore, has the advantage of contributing to the observance of separation of powers within the international legal system. Yet, the judges' preference for resolving disputes one at a time and in a "binary adversarial mode," as opposed to sorting multiple parties' claims in a single action, may raise fairness concerns in litigation which bars interested parties.<sup>188</sup> The decision to accede to a request is influenced by issues of principle and policy, creating problematic choices for the Court.

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183. ICJ Statute, *supra* note 122, art. 62(1). Additionally, Article 63 provides that third parties are entitled to intervene provided they are parties to the multilateral convention in dispute. *See id.* art. 63.

184. *See id.* art. 62(2).

185. *See* FRANCK, *supra* note 39, at 345 (explaining that to intervene under Article 62, a party must demonstrate a high standard of directness to the interest).

186. *See* Case Concerning the Continental Shelf Tunisia/Libyan Arab Jamahiriya (Tunis. v. Libyan Arab Jamahiriya), 1981 I.C.J. 3, para. 13 [hereinafter *Case Concerning the Continental Shelf*].

187. FRANCK, *supra* note 39, at 345.

188. *Id.* at 344.

### 1. *Locus Standi in WTO Proceedings*

Both the panel and appellate levels have considered the right of a WTO Member to bring a dispute settlement claim under the GATT.<sup>189</sup> In one case, the WTO Appellate Body found that international law leaves this issue to the terms of the treaty that establishes the relevant dispute settlement mechanism.<sup>190</sup> It also noted that there is no explicit provision in the DSU requiring that a Member have a "legal interest" in order to request a panel, nor was any such a requirement implied in the understanding or any other provision of the WTO Agreement.<sup>191</sup> Further, the Appellate Body, the GATT, and the DSU, clearly indicate that "a Member has broad discretion in deciding whether to bring a case against another Member under the DSU" although it is expected to be largely self-regulating in deciding whether it would be prudent to bring such action.<sup>192</sup> In arriving at this conclusion, the Appellate Body noted the increasing interdependence of the global economy as a result of which this broad discretion is widening.<sup>193</sup> The Appellate Body also observed that WTO rules are concerned with competitive opportunities rather than actual trade and that generally "it would be difficult to conclude that a Member had no possibility of competing in respect of a product or service."<sup>194</sup> Moreover, the panel acknowledged that all Members have an interest in ensuring that other Members comply with their obligations.<sup>195</sup>

When looking comparatively at international procedural jurisprudence, the Appellate Body of the WTO has, correctly, not read decisions of the ICJ and PCIJ as establishing a general principle or rule

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189. See *EC Bananas Case*, *supra* note 99, at 8 (affirming the panel's finding that the European Union's regulatory scheme governing the importation of bananas violated the GATS and the GATT).

190. See *id.*

191. *Id.*; cf. ICJ Statute, *supra* note 122, arts. 34(1), 35(1) (illustrating that the same appears to be true for the ICJ whose Statute does not explicitly require that a member have a legal interest to request a panel).

192. See *EC Bananas Case*, *supra* note 99, para. 135.

193. See *id.*

194. European Communities-Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador, Report of the Panel para. 7.50, WTO Doc. WT/DS27/R/ECU (May 22, 1997).

195. See *id.* para. 7.51.

that in all international litigation a complaining party must have a legal interest in order to bring a case. This result is supported by the ICJ's extreme concern with keeping the issues and the facts of a case within manageable proportions and the ICJ's desire to avoid engaging in a legislative exercise where the interest demonstrated by the State seeking to intervene is essentially theoretical and indistinguishable from that of other States.<sup>196</sup> Further, Article 170 of the EC Treaty, which resembles Article 3(7) of the DSU, leaves it to the discretion of the Member State as to whether to bring a case against another Member State, for failure to fulfill its treaty obligations, before the appropriate dispute settlement mechanism.<sup>197</sup> In the event that the complainant or a domestic constituency has a lot to gain from a favorable decision, the institution of proceedings may very well be rewarding. In this instance, one may justifiably argue that the complainant has a "legal interest" in bringing such a case. On the other hand, the initiation of proceedings by a complainant that does not have any such trade interest—e.g., the position of the United States in the *EC Bananas* case—may be said to be useful if it confers a "systemic" benefit of ensuring the enforcement of the negotiated rules.<sup>198</sup> An argument based on the possibility of a Member competing for a product or service, however, would not be convincing. This type of an interest is simply a fiction that ignores the political considerations that motivate a Member to bring such a case.<sup>199</sup> It should

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196. See FRANCK, *supra* note 39, at 345 (justifying the ICJ's refusal to accede to Malta's request to intervene in the *Case Concerning the Continental Shelf* because of concerns with keeping the case within manageable proportions).

197. Compare EC TREATY, *supra* note 173, art. 170, with DSU, *supra* note 58, art. 3(7). These provisions do differ, however, as to the discretion afforded to the complainant. Article 3(7) of the DSU is the broader of the two provisions, although discretion is limited to the extent that the initiation of proceedings would be "fruitful." DSU, *supra* note 58, art. 3(7) (stating that before bringing a case, "a Member shall exercise its judgment as to whether action under these procedures would be fruitful"). It is submitted that the term "fruitful" should be read to mean "rewarding" or "useful."

198. See William J. Davey, *Issues of Dispute Settlement in the WTO System*, in THE EMERGING WTO SYSTEM AND PERSPECTIVES FROM EAST ASIA, *supra* note 87, at 54, 57. The same policy, if not the same principle, would seem to underpin EC Article 170 in permitting a Member State to initiate proceedings where it considers whether another Member State has failed to fulfil an obligation under the EC Treaty. See EC TREATY, *supra* note 173, art. 170.

199. Cf. *EC Bananas Case*, *supra* note 99, para. 135.

therefore be ignored by future panels as an unacceptable justification for the approach to *locus standi* evolved to date in WTO dispute settlement.

From the DSU requirement that an action be “fruitful,”<sup>200</sup> one can imply that a panel could justifiably decline jurisdiction or order the discontinuance of proceedings where it considered the use of the dispute settlement procedures to be pointless or vexatious. The panels and Appellate Body, however, are more likely to afford Members an appreciable margin of latitude in exercising their discretion and will be inclined to hear proceedings. Still, these bodies are constrained by the right of the respondent State to proceedings free from fraud, which in the international procedural arena amounts “to what is known in municipal legal terminology as ‘the abuse of the process of the Court.’”<sup>201</sup> In most situations, this type of fraud involves one party’s abuse of the diverse procedural rights to the material disadvantage of the other party, thereby nullifying all judicial proceedings.<sup>202</sup> These rights of process are not only an expression of a tenet of procedural justice, namely the juridical equality of the parties, but are also based on a fundamental principle of treaty interpretation, good faith.<sup>203</sup> In the context of the DSU, this principle appears to require a Member not to bring an action under its procedures if to do so would be vexatious or an abuse of process. A panel should thus feel obliged to decline to hear all proceedings that are tainted in this way.

## 2. Third Party Intervention in WTO Proceedings

Article 10 of the DSU governs the rights of third parties in respect to WTO panel proceedings.<sup>204</sup> It provides that the position of third parties must be fully taken into account during the panel process.<sup>205</sup> A

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200. DSU, *supra* note 58, art. 3(7).

201. MANI, *supra* note 16, at 36.

202. *See id.*

203. *See id.* *See generally* Vienna Convention, *supra* note 75, art. 31(1) (stating that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in the light of its object and purpose”).

204. *See* DSU, *supra* note 58, art. 10.

205. *See* DSU, *supra* note 58, art. 10 (stating that “[t]he interests of the parties to a dispute and those of other members of a covered agreement at issue in the dis-



Member that has a "substantial interest" in a matter before a panel and has notified the DSB, "*shall* have an opportunity [to] be heard by the panel and to make written submissions to the panel."<sup>206</sup> Though third parties themselves have no direct right of appeal, if a panel report is appealed the third parties do have full rights to participate *inter alia*, including the right to be heard by and make submissions to the Appellate Body.<sup>207</sup> Dispute settlement in the WTO, therefore, does not allow for full intervention by third parties, rather they are limited to the right to be heard.<sup>208</sup>

It is evident, however, that the right of intervention afforded to third parties in the WTO system is as generous, if not more, than those accorded, for example, under the practice and procedure of the ICJ.<sup>209</sup> The language used in Article 10 of the DSU is mandatory in contrast to that of Article 62 of the ICJ Statute, which affords the Court wide discretion in determining whether to grant a right of intervention.<sup>210</sup> Further, although the substantial interest standard appears to pitch a high level of directness of interest similar to that required by the ICJ, a reading of this term in the context of Article 4 of the DSU indicates otherwise.<sup>211</sup> The latter provision requires that in order to join a consultation, a third party must demonstrate a "substantial *trade* interest."<sup>212</sup> In practice, panels have interpreted the distinction between the substantial interest and the substantial trade interest standards to permit Members to become third parties if they

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pute shall be fully taken into account during the panel process").

206. *Id.* (emphasis added).

207. *See Cottier, supra* note 155, at 342 (looking at the rights of third-parties in the dispute settlement in the WTO and finding that full intervention is not afforded to them).

208. *See id.*

209. *See id.* at 343 n.52 (providing that "[t]he interpretation of Art. 62 of the [ICJ] Statute comes close to the functions of *amicus curiae*, It (sic.) does not go beyond the functions of Art. 10 DSU").

210. *Compare* ICJ Statute, *supra* note 122, art. 63 (entitling States to be heard where they are party to the multilateral convention), *with* DSU, *supra* note 58, art. 10.

211. *See* DSU, *supra* note 58, art. 4.

212. *Id.* (emphasis added) (stating that "[w]henever a member other than the consulting Members considers that it has a substantial trade interest in consultations . . . such Member may notify the consulting members of the DSB").

too have a systemic interest, meaning a systemic concern for the enforcement of the negotiated rules, in the issue before the panel.<sup>213</sup> Additionally, as discussed earlier, the judicial policy underpinning third party intervention stems from the preference for resolving one complex dispute at a time, rather than sorting out the conflicting claims of multiple parties in a single action.<sup>214</sup> This contrasts markedly with the policy underlying the rules and procedures for "Multiple Complaints" contained in Article 9 of the DSU, which demonstrates a clear preference for the resolution of multiple complaints concerning the same matter by a single panel and if this is not possible that "to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized."<sup>215</sup>

It appears that the dictates of procedural justice, in so far as the *locus standi* requirements for third-parties are concerned, are met by the procedural rules of the DSU.<sup>216</sup> With respect to the limits on third party rights of intervention, one legal scholar opined that "[f]ull intervention [before the ICJ] is likely to tip the balance and discourage States from agreeing to adjudication in the first place."<sup>217</sup> The WTO dismissed intervention of third-parties in the negotiations for these reasons and on the basis of the ICJ's experience.<sup>218</sup> Thus, the DSB, or the panels, should be entitled to refuse intervention where the interest demonstrated is essentially theoretical as it may risk transforming panel proceedings into a legislative exercise, a function clearly outside the remit of the DSB and at odds with the separation of powers inherent in the WTO system. As with the ICJ, "the case by case approach which enhances adjudication tends to be diluted if litigation is

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213. See Davey, *supra* note 198, at 57.

214. See FRANCK, *supra* note 39, at 344; see also discussion *supra* pt. IV.B.1.

215. DSU, *supra* note 58, art. 9. The multitude of third party applicants, such as occurred in the *EC Bananas* case, undoubtedly created administrative headaches for the WTO secretariat.

216. The extent of the rights of third parties once they gain standing to panel proceedings are an entirely different matter and outside the scope of this paper. For a more thorough discussion of these rights, see Davey, *supra* note 198, at 57-58.

217. Cottier, *supra* note 155, at 343.

218. See *id.*

so broadened to include states which have a purely hypothetical, remote or political interest in its outcome."<sup>219</sup>

### 3. *The Indispensable Party Shield in WTO Proceedings*

The question of whether a party to WTO proceedings is entitled to raise the indispensable party shield is both an intriguing and topical one. A respondent Member could, for example, claim as a defense that the allegedly offending measures resulted from its obligations under documents like a bilateral treaty with another Member not joined as a party to the dispute.<sup>220</sup> Similarly, a Member State of the EC might argue that the measures in dispute resulted from its obligations under Community law and hence the EC should be joined to the dispute. In either situation, the third party Member may be said to be an indispensable party in the sense envisioned by the ICJ, that its interests would not only be affected by the decision of the panel but would form its very subject matter.

For a number of reasons, however, the DSB should be generally disinclined to entertain arguments that favor the discontinuance of proceedings. First, to do so would seem at odds with the broad discretion of Members to initiate proceedings under Article 3(7) of the DSU, and thus would create an unwarranted interference with their sovereign choice to take on one Member at a time. Second, the relative ease with which a third party may intervene demonstrates that the door is open for those Members who seek intervention in exercise of their fundamental procedural rights and on their own motion. Hence, the risk of impairing the perceived fairness and legitimacy of the dispute settlement system far outweighs the risk of breaching the procedural rights of a third party.

## V. BREACHES OF PROCEDURAL JUSTICE IN THE WTO

After centuries of discussion, the problems surrounding the nullity of judicial decisions and arbitral awards in international law still re-

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219. FRANCK, *supra* note 39, at 340-41.

220. See WTO FOCUS, NO. 29, Apr. 1998, at 3 (reporting that Turkey claimed in its defense to a request for a panel by India that the measures at issue were necessitated by its obligations to the EC under an Association Agreement).

main unsettled.<sup>221</sup> It may be said that material abrogation of the fundamental procedural rights may engender an aggrieved party's claim to nullity of the tribunal's decision and "every such claim may, if established, lead to vacating the decision."<sup>222</sup> The Second Preliminary Draft on Arbitral Procedure submitted to the International Law Commission in 1952, for example, impliedly recognized that the procedural equality of the parties is the underlying principle of any arbitral jurisdiction.<sup>223</sup> Furthermore, the Draft revealed that a party injured by a violation of the equality principle may invoke this failure to the principle as a reason for voiding an award.<sup>224</sup>

Not all procedural irregularities, however, can serve as the basis for a party's claim of nullity. Rather, many breaches of the procedural rules, such as those concerning time limits, are treated as irregularities that can be cured.<sup>225</sup> The grounds for nullity will vary according to the procedural rights or duties at issue,<sup>226</sup> whereby making it difficult to prescribe a rule of thumb as to what sort of breaches shall lead to vacating a tribunal's decision. There does appear though to be a consensus in international arbitral practice that essential errors in law that are material to the decision may constitute a ground for reversing a judgement.<sup>227</sup> Arguably, one may broaden this test to include manifest breaches that have resulted in the material impairment of the exercise of any of the fundamental procedural rights.<sup>228</sup>

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221. See K. Oellers-Frahm, *Judicial and Arbitral Decisions: Validity and Nullity*, in 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 38 (Rudolph Bernhardt ed., 1992).

222. MANI, *supra* note 16, at 49.

223. See *Summary Records of the 148th Meeting*, [1952] 1 Y.B. Int'l L. Comm'n 60, U.N. Doc. A/CN.4/46/1952 (stating that "the principle of equality of the parties before the rules of procedure should be broadly observed").

224. See *id.*

225. See MANI, *supra* note 16, at 52-53.

226. See generally CHENG, *supra* note 19, at 357-71 (describing the various grounds for nullity).

227. See *id.* at 361 (explaining that error through fraud of the parties enables an otherwise valid decision to be put aside and that the same rule applies to manifest and essential error and error through lack of essential evidence).

228. See MANI, *supra* note 16, at 53 (asserting that such manifest breaches should directly cause "mis-decision").

## A. STANDARDS OF REVIEW EMPLOYED BY APPELLATE BODIES

The standard of review by which a higher international court or tribunal should examine the decision of a lower court or tribunal is conditioned by a number of factors. First, it is necessary to establish whether the review is by way of appeal or *recours en nullite*. The distinction between the two turns on the fact that with the latter form of review, the reviewing tribunal does not have to inquire into whether or not the lower tribunal could have exercised its discretion in a number of different ways and then consider which was the preferable way.<sup>229</sup> Rather, the reviewing tribunal must consider whether the lower tribunal acted in manifest breach of the fundamental principles of procedural justice.<sup>230</sup> Second, the tribunal's inquiry must be set in its proper context: that international procedural law is distinguished from its municipal counterpart by its flexibility and absence of technicalities or form.<sup>231</sup>

The ICJ has, for instance, permitted itself a good deal of latitude regarding its standard of review, preferring a liberal interpretation and application of its procedural rules.<sup>232</sup> This approach may be explained by the sovereign nature of the litigants' and the Court's desire to enable them to present their cases both completely and effectively.<sup>233</sup> Another important explanation, as expounded by one prominent legal scholar, is that when assessing the method of review

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229. See *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.)*, 1991 I.C.J. 53, para. 47 (Nov. 12) (referring to the standard of competence conferred on the Tribunal by the Arbitration Agreement in question).

230. See *id.*

231. See *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (ser. A) No. 2, at 34 (Aug. 30) (providing that procedural issues are not as important to a court with international jurisdiction, as opposed to a court only applying municipal law).

232. See Thirlway, *Procedural Law in the ICJ*, *supra* note 26, at 405 (explaining the manner in which procedural issues are addressed). See, e.g., *Case Concerning the Northern Cameroons (Cameroon v. U.K.)* 1963 I.C.J. 15, 27-28 (Dec. 2) (indicating that while the ICJ has international jurisdiction it is not as procedurally restricted as a court with only municipal jurisdiction).

233. Cf. Sir Muhammad Zafrulla Khan, *The Contribution of the Principle Judicial Organ of the United Nations to the Achievement of the Objectives of the Organization*, 7 U.N. MONTHLY CHRON., July 1970, at 144 (stating that digressions from a compulsory jurisdiction requirement are justified when the overall practical value of international judicial settlements are at issue).

of other judicial or quasi-judicial bodies, the reviewing tribunal must take into account the way in which the lower decision has come before it, concentrating primarily on the outcome, as opposed to procedure, of the case.<sup>234</sup> In support of this contention, the scholar looked to caselaw in which a reviewing body overlooked a procedural error, so long as the correct result was reached.<sup>235</sup> If the end justifies the means in international adjudicative and arbitral law in general, then the test for invalidity or nullity of a decision should be amended by adding a requirement that the material breach caused an incorrect decision or prevented a just decision from being made.<sup>236</sup>

It is not clear whether the ICJ's approach has met with widespread acceptance in international practice. The EC, for example, appears to have adopted a different approach, in the review of administrative procedures for the enforcement of EC competition law and both the Court of Justice and the Court of First Instance have generally applied a rigorous review of the legality of the Commission's procedures.<sup>237</sup> Some believe, however, that the Courts have acted too rigorously and may have lost sight of the goal of protecting against an administration's arbitrary behavior by attaching too much importance to the observance of procedural rules.<sup>238</sup> There seems little reason to doubt the subordinate character of procedural justice vis-à-vis essential justice, because a correct decision on the merits of the case is the proper end of any judicial process.<sup>239</sup> The extent to which pro-

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234. See Thirlway, *Procedural Law in the ICJ*, *supra* note 26, at 405 (finding that the importance of substance to a reviewing tribunal has resulted in an eclipsing of procedural issues).

235. See *id.* (citing Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.) 1972 I.C.J. 46 (Aug. 18)) (stating that even if the Council reached the right conclusion in the wrong way, the decision is still considered valid).

236. See MANI, *supra* note 16, at 53 (finding that although there is no rule-of-thumb to determine what types of breaches constitute essential errors this may be the most appropriate test).

237. See Joshua, *supra* note 101, at \*2 (indicating that in several recent judgments the European Court of Justice and the Court of First Instance have invalidated various Commission cases solely on the grounds of procedure).

238. See *id.* at \*12-18 (arguing that procedure is not merely an end in itself, but is intended to ensure that justice is accomplished).

239. See Thirlway, *Procedural Law in the ICJ*, *supra* note 26, at 400 (implicating that although the correctness of a particular decision is of primary importance, this reasoning undermines the sensitive balance between procedural justice and es-

cedural justice should be subordinated remains an open question concerning whether a distinction should be drawn between venial and mortal sins, the latter of which may be unforgivable notwithstanding the justice achieved.<sup>240</sup>

## B. STANDARDS OF REVIEW IN THE WTO SYSTEM

The WTO has addressed these difficult and unresolved issues in a number of ways. Under Article 17 of the DSU, the Appellate Body has the responsibility of reviewing panel decisions.<sup>241</sup> Under the governing provisions, the appeal process is limited to those issues covered in the panel report and legal interpretations developed by the panel and the Appellate Body is given the right to uphold, modify or reverse the legal findings and conclusions of the panel.<sup>242</sup> The text of Article 17 is significant because it raises a number of important points, requiring a more careful examination of its specific paragraphs and issues related to their interpretation.

Paragraph 6 of Article 17 establishes that an appeal must be based on purely legal grounds, a form of *recours en nullite*, restricted to issues covered in the panel report and raised by the parties.<sup>243</sup> Moreover, paragraph 13 sets forth the power of the Appellate Body to determine the invalidity or nullity of a decision.<sup>244</sup> While neither paragraphs of Article 17 expressly mention procedural error as a grounds for review, as noted earlier, the Appellate Body has recognized that the requirements of due process are implicit in the rules of the DSU.<sup>245</sup> One recent WTO decision illustrates the Appellate Body's satisfaction that the question of whether or not the panel made an objective assessment of the facts as required by Article 11 of the DSU was a legal one, falling within the scope of appellate re-

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sential justice); 4 GEORG SCHWARZENBERGER, INTERNATIONAL LAW 666-68 (1986) (stating that decisions made by international tribunals should be based on respect for law) (citations omitted).

240. *See id.*

241. *See* DSU, *supra* note 58, art. 17.

242. *See id.* arts. 17(6), 17(13).

243. *See id.* art. 17(6).

244. *See id.* art. 17(13).

245. *See* discussion *supra* pt. IV (analyzing procedural due process in WTO proceedings).

view.<sup>246</sup> In that case, the Appellate Body responded to the EC's allegation on appeal, that the panel had committed a "disregard," "distortion," and "misrepresentation" in denying their submission of certain evidence, by recognizing that such a claim went to fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.<sup>247</sup> The Appellate Body concluded that the panel's deliberate disregard of or refusal to consider evidence, an "egregious" as opposed to a mere judgment of error in the appreciation of evidence, as well as willful distortion or misrepresentation of the evidence presented to the panel, interfered with its ability to objectively assess the facts of the case.<sup>248</sup>

In the same case, the Appellate Body stipulated a further requirement necessary in order to justify the reversal of a panel decision that bears significantly on its standard of review: "[T]he DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by the legal ruling."<sup>249</sup> It is not clear, however, whether the requirement of prejudice, as described above, arises only with regard to the panel's exercise of its discretion in dealing with matters that are unregulated and without standard working procedures. It is evident that the commission of what is known in the United States as harmless error will be insufficient to warrant reversal of a panel decision.

The standard of review that has evolved for the Appellate Body is clearly a difficult one to satisfy. So far, not surprisingly, it has not reversed any decision for breach of procedural justice, preferring in-

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246. See generally WTO Appellate Body Report on European Communities-Measures Concerning Meat and Meat Products (Hormones), WTO Doc. WT/DS26/AB/R (Jan. 16, 1998) [hereinafter *EC Hormones*].

247. *Id.* paras. 132-33.

248. See *id.* (stressing that this interference with panel abilities did not include a mere error of judgement in the appreciation of evidence but rather an "egregious error" or gross negligence amounting to bad faith).

249. *Id.* para. 152 n.138 (explaining that Appendix 3 of the DSU is another example of the wide latitude afforded to the panels).



stead to show a broad deference to panels in the exercise of their discretion, particularly in dealing with unregulated procedural issues.<sup>250</sup> In the *Argentinean Footwear Case*, for example, the panel allowed claimant United States, in absence of a rule in the DSU to the contrary, to submit additional documentary evidence after the first hearing on the understanding that Argentina would be afforded a period of two weeks to provide further comments on these additional documents.<sup>251</sup> On appeal, the Appellate Body stated that "while another panel could well have exercised its discretion differently, we do not believe that the Panel here committed an abuse of discretion."<sup>252</sup> The additional time afforded to Argentina made sufficient amends for the decision favoring the United States, which one could regard as a procedural irregularity meaning that the advantage conferred on the United States by incorrect procedural means was conferred equally to the other side.<sup>253</sup>

The standard of review the Appellate Body has evolved to date is cause for concern. Its requirement of an egregious error or breach of procedural justice evidently requires a lesser standard of compliance with the dictates of procedure than that generally required by other international tribunals. With respect to the latter, the standard of review is met when a manifest breach of procedural justice, meaning a clear or apparent breach, can be shown.<sup>254</sup> In contrast, the Appellate Body's choice of an egregious standard connotes the necessity of a shocking or flagrant error, or breach of procedural justice.<sup>255</sup> It would thereby appear that the gravity of the procedural error or omission required to result in nullity is set at a very high threshold, and hence

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250. See generally *Argentinean Footwear Case*, *supra* note 99 (providing an example of Appellate Body deference to panel decisions).

251. See *id.* paras. 79-81 (referring to the decision of the panel indicating that the submission of untimely additional evidence after the hearing is not prohibited since the goal of the panel is to ensure due process by allowing all parties to present their case to the fullest potential).

252. *Id.* para. 81.

253. See Thirlway, *Procedural Law in the ICJ*, *supra* note 26, at 402 (remarking that this type of balancing act is sometimes difficult to implement but helps to ensure procedural justice despite certain procedural irregularities).

254. See *supra* notes 227-237 and accompanying text (arguing that a manifest breach as opposed to a material error should provide grounds for appellate review).

255. See, e.g., *EC Hormones*, *supra* note 248, paras. 133, 144.

will be almost impossible to prove save in cases of breaches that amount to fraudulent conduct. If this standard continues to govern, serious consequences may result regarding the perceptions of fairness and legitimacy of the WTO's dispute settlement system. Principles of procedural justice will be of only secondary importance if breach or non-observance of procedure will only be sanctioned where such conduct is regarded as glaring or extreme.

## CONCLUSION

Neither the Appellate Body nor the panels appear to have directly addressed the position of procedural justice with respect to essential justice. One may speculate, however, that in light of treaty interpretation, of both Article 31(1) of the Vienna Convention and Article 3(4) of the DSU, the Appellate Body regards the objectives of procedural justice as subordinate to the achievement of essential justice, or the just decision on the merits, as the proper end of panel proceedings. This may help to explain why the Appellate Body has chosen to apply the current standard of review. Yet, in an attempt to ensure that above all substantive justice is done, the Appellate Body should not forget that disregard of the fundamental procedural principles in order to render a decision is not the type of conduct expected of a judicialized dispute settlement system.

The absence of standard, detailed working procedures for the panels may help to explain this unusually difficult standard of review. Clearly, the Appellate Body is willing to indulge the panels in the exercise of their discretion in formulating the missing rules of procedure, and so one can assume that the introduction of such rules would reduce the deference presently afforded to the panels down to a more acceptable level that is in line with international practice. In the meantime, however, the principles of procedural justice should not be held to hostage by the WTO.