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## What is Fairness in WTO Law?

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## **What is Fairness in WTO Law?**

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**Abstract:** The idea of fairness is a recurrent one in international economic law and relations. By and large however, commentators have failed to provide a structured understanding of this vital concept or explain its reflection in legal rules. This submission proposes a theory of fairness as part of a broader set of reflections on the nature of fairness in WTO law.

## What is Fairness in WTO Law?

By Chios Carmody<sup>1</sup>

1. Introduction
2. The Nature of Fairness
3. Fairness in Domestic Law: the Anglo-Canadian example
4. Fairness in WTO Law
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### 1. Introduction

Fairness is a famously ill-defined subject. People and countries argue endlessly about what is fair. To get some sense of what it means in any given instance, we need to identify the role it plays and its core features. What are these?

This article attempts to answer this question, mining the law of the World Trade Organization for illustrative examples. It aims to identify the recurrent elements of fairness as a means of ascertaining what might be fair in any given situation.

The article posits that fairness has a biologic and evolutionary basis. What is fair is a function of what is “appropriate” in specific circumstances and is warranted for the purpose of promoting buy-in, or communal cohesion. When a claimant is heard, when they are entitled to reasons, or when they are permitted to retaliate in the form of authorized countermeasures, they are likely to believe in the essential justice of arrangements. In this respect, fairness is to be contrasted with what is ‘equal’. Fairness is a supplementary and assistive value. It helps to *promote* what is equal.

I examine the experience of both Anglo-Canadian and WTO law with fairness to illustrate these points. In the process, I suggest that both procedural and substantive fairness have at least four characteristics. First, fairness is a secondary value. It is subjective and might be tied to John Broome’s observation that fairness claims “should be satisfied in proportion to their strength.”<sup>2</sup> It is what is “appropriate”. Second, fairness is a property of specific relationships as opposed to general ones. It is circumstantial. What is fair in one proceeding will not necessarily be fair in another. Third, while fairness is often conceived of as a “duty” (in the sense of a “duty of fairness”), fairness is more easily and naturally understood as a right. Individuals and countries assert these rights when they make claims to fairness and all rights are subject to limitation. No right is absolute. Fairness must therefore be reconciled with the rights of others. This observation leads to the issue of limits to fairness. International tribunals like WTO dispute settlement cannot be endlessly fair, endlessly “appropriate”, otherwise they risk undermining the predictability that is the hallmark of the law. Fourth then, the issue of fairness involves justice, but not all of justice is fair. In many cases - perhaps the majority - a more generic metric is called for. This is equality. WTO law, with its myriad standards of equality in the form of non-discrimination, market access, equivalence and harmonization, is richly illustrative of this last point.

This article should be regarded as an attempt to discern what the essential character of fairness is. The reason for doing so is simple. Until we develop a theory of fairness and are able to derive from it a “stable conception” about fairness, it will be difficult to say much that is meaningful about the concept either procedurally or substantively. Part Two of this article therefore develops a theory - or “system of ideas” - about fairness. Part Three goes on to explore how these ideas are replicated in the duty of fairness that is an acknowledged part of Anglo-Canadian administrative law. Part Four examines the experience with procedural and substantive fairness in WTO law. That experience suggests that the idea of justice as composed only of

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<sup>2</sup> John Broome, “Fairness” 91 *Proc. Aristotelian Society N.S.* 95 at 96 (1990-91).

fairness is inaccurate because law is about more than simply the sum of particular instances of fairness. Part Five offers some analysis in this vein. Part Six furnishes some concluding observations.

## 2. The Nature of Fairness

The idea of fairness is elusive. As Americo Beviglia Zampetti observed in 2006:

Fairness is a complex idea with a long history. As Woods put it, ‘very few ideas are very new’, and fairness is certainly not one of them. There is no accepted, uniform, and commonly shared definition of fairness. The notion is strongly associated with such ideas as equality, proportionality, reciprocity, equity, and justice, only to mention other terms that have found currency in the trade policy discourse. These concepts are entangled and their usage across disciplines and policy areas is far from univocal. But fairness, like justice, addresses issues that are fundamental to the social life of individuals as well as to nations.<sup>3</sup>

A similar lack of clarity about the definition of fairness is observed in international economic relations.<sup>4</sup> Commentators often fail to provide a definition for the term or simply assume its importance without explaining why it might be so fundamental. Given these qualifications, it is useful to examine the nature of fairness.

In common English usage what is “fair” is considered to be fitting or appropriate in the circumstances.<sup>5</sup> We say, for example, that a particular transaction is “fair”, meaning that it is suitable for all concerned. This is not the same as saying it is optimal. A fair transaction will simply be unobjectionable.

This set of preliminary observations provides some initial insight about the content of fairness. First, fairness is a rough measure of what is communally acceptable. It may not satisfy every interest fully, but it is enough to preserve the relationships involved. Second, usages of fairness suggest that it is something which applies in particular situations as opposed to general ones. Fairness is something that humans and states are chiefly concerned with as an attribute of their continuing relationships. Instinct tells us that it would make a poor rule for behaviour as a whole. Third, fairness is *not* equality (i.e. fairness  $\neq$  equality). The plain difference in terminology emphasizes the fact that there is a clear distinction between the two.<sup>6</sup> Instead, fairness can be thought of as *inequality*, although it is inequality of a special type. That inequality is designed to promote ‘buy-

<sup>3</sup> Americo Beviglia Zampetti, *Fairness in the World Economy* 26 (2006). Similarly, Steven Suranovic has written, “The concept itself overlaps with many other normative principles such as justice, equity, law and even morality. As such, one cannot simply pick up a book or article and quickly discover what fairness means or how to distinguish between the various normative principles. And yet, at the same time, everyone seems to have an inherent sense of what fairness is.” Steven Suranovic, “A Positive Analysis of Fairness with Applications to International Trade” 23(3) *The World Economy* 283 (2000).

<sup>4</sup> For instance, in 2006 Amrita Narlikar, writing about the fairness of international trade relations conducted under the auspices of the WTO, interpreted fairness to mean legitimacy of process and equity of outcomes and noted that there have been shifts in the attitudes of developing countries towards the institutional balance struck between these two concepts in the organization. See Amrita Narlikar, “Fairness in International Trade Negotiations” 29 *The World Economy* 1005 (2006). Like Franck however, Narlikar did not explain why fairness is important as a substantive matter nor why it might be of concern to developing countries in the WTO. And in a contribution on the same subject by Andrew Brown and Robert Stern published in 2007, the authors concluded with the cautionary observation that “[a]ny attempt to define fairness in global trade relations should teach humility” and that “there is still no conclusive and incontrovertible way of assessing fairness.” see Andrew Brown & Robert Stern, “Concepts of Fairness in the Global Trading System” 12:3 *Pacific Econ. Rev.* 293, 316 (2007). See also Nicholas Rescher, *Fairness: theory and practice of distributive justice* (2002).

<sup>5</sup> “Fair ... [f]ree from bias, fraud or injustice; equitable, legitimate.” J.A. Simpson & E.S.C. Weiner, *The Oxford English Dictionary – Vol. V* (2<sup>nd</sup> ed.) 671 (1989). Legal dictionaries offer a slightly different definitions. “Fair means ... 1. impartial; just; equitable; disinterested; 2. Free from bias or prejudice ...”. *Blacks Law Dictionary* (9<sup>th</sup> ed.) 674 (Brian Garner, ed.); “Fair means ... reasonable”, Daphne Dukelow, *The Dictionary of Canadian Law* (4<sup>th</sup> ed.) 474 (2011).

<sup>6</sup> Confirmation of this point comes from common definitions, which do not always equate fairness with equality. Instead, they tend to suggest that fairness plays a supplementary role in *attaining* equality. For example, Ioana Tudor observes, “the common understanding given to fair treatment is that of right and reasonable treatment that sometimes *may achieve equality* between the parties, although this is not always the case.” Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* 126 (2008) (emphasis added). Joseph Henrich refers to behavioural fairness as “whatever combination of motivations and expectations yields *more equal divisions*”. Joseph Henrich et al., “Markets, Religion, Community Size, and the Evolution of Fairness and Punishment”, 327 *Science* 1483 (19 March 2010) (emphasis added). “Fairness relates to (but does not identify with) the propriety of distribution between burdens and benefits. Just outcomes are generally those that flow from fair processes. A ‘fair trade’ (as a ‘fair fight’) is one conducted under *roughly equal conditions*.” Americo Beviglia-Zampetti, *Fairness in the World Economy* 27 (2003).

in' and therefore reinforce community.

These observations invite controversy and need to be tested against a range of usages and practice in order to be confirmed. Science can help. Since 2000 there has been considerable scientific research into the origins and nature of fairness.<sup>7</sup> Both biologists and evolutionary psychologists have sought to determine the origins and contribution of fairness to human relations.

Some of this research reveals that fairness is an intensely human trait. Generally speaking, it is not something observed in our closest genetic relative, the chimpanzee.<sup>8</sup> Looking at the way species have evolved differently, biologists and evolutionary psychologists have hypothesized that fairness is vital to human interaction, and in particular, to the formation of groups. These are not just small-scale groups, such as families, kinship assemblies and associations, where individuals are likely to know each other intimately and where, in particular, they are likely to discount or revalue their transactions in the expectation of a continuing relationship, but also include larger, more complex forms of human affiliation where personal connections are effectively lost and where, as Joseph Henrich has pointed out, substitutive social mechanisms such as religion, education and esteem for altruistic behaviour, all contribute to reinforce the wider communal sense of fairness.<sup>9</sup>

If these findings are accepted, then it becomes apparent that fairness is important both at an individual and a communal level because it is part of a successful evolutionary strategy. In essence, fairness has allowed complex human communities to arise. The guarantee of fairness in many situations affirms relationships by affording individuals the security of knowing that at least some of their interests will be taken into account "appropriately". The security so afforded encourages participation in communal arrangements.

But if fairness is so important and if it has played such a critical role in our evolution as a species, why are communities – including the international community - not *entirely* fairness-based. Why is the central question we are so often confronted with in international law not the one that Thomas Franck posed – "is international law *fair*?"<sup>10</sup> – but a different one, "is international law *just*?" A number of commentators have observed that fairness cannot serve as a basis for *all* law, otherwise the law risks becoming purely political.<sup>11</sup> Another reason is that the doing of fairness is variable and therefore tends to erode stability and predictability. Furthermore, no community will have the luxury of meeting all claims to fairness. This is because individuals are endlessly

<sup>7</sup> Ernst Fehr & Simon Gächter, "Fairness and Retaliation: The Economics of Reciprocity" 14:3 *Journal of Economic Perspectives* 159 (Summer 2000); Joseph Henrich et al., "Markets, Religion, Community Size, and the Evolution of Fairness and Punishment", 327 *Science* 1480 (19 March 2010) [hereinafter Henrich]. See supporting references in T.C. Burnham et al., 27 *Anal. Kritik* 113 (2005); M.A. Nowak et al, 289 *Science* 1773 (2000). See also Karla Hoff, "Fairness in Modern Society" 327 *Science* 1467-68 (19 Mar. 2010); George Akerlof & Robert Schiller, *Animal Spirits* pp. 19-26 (2010); and see generally Samuel Bowles & Herbert Gintis, *A Cooperative Species* (2011); Peter Corning, *The Fair Society* (2011).

<sup>8</sup> "Evolution: Patience, Fairness and the Human Condition" 950 *The Economist* 67 (6 Oct. 2007). But see indications that some other species do exhibit a rudimentary sense of fairness: Sarah Brosnan & Frans de Waal, "Monkeys Reject Unequal Pay" 425 *Nature* 297 (18 Sept. 2003); Sarah Brosnan et al., "Partner's Behaviour, Not Reward Distribution, Determines Success in an Unequal Cooperative Task in Capuchin Monkeys", 68 *Am. J. Primatology* 713 (2006). Researchers in this study concluded that "Monkeys refused to participate if they witnessed a conspecific obtain a more attractive reward for equal effort ... These reactions support an early evolutionary origin of inequity aversion." The competing evidence suggests that while fairness is not a uniquely human trait, it is most distinctively developed in humans.

<sup>9</sup> See Henrich, *supra* note 7.

<sup>10</sup> Thomas Franck, *Fairness in International Law and Institutions* 7 (1995).

<sup>11</sup> "The distinctive features of justice and their special connection with law begin to emerge if it is observed that most of the criticisms made in terms of just and unjust could almost equally well be conveyed by the words 'fair' and 'unfair'. Fairness is plainly not coextensive with morality in general; references to it are mainly relevant in two situations in social life. One is when we are concerned not with a single individual's conduct but with the way in which classes of individuals are treated, when some burden or benefit falls to be distributed among them. Hence what is typically fair or unfair is a 'share'. The second situation is when some injury has been done and compensation or redress is claimed." H.L.A. Hart, *The Concept of Law* (2<sup>nd</sup> ed.) 158 (1997). "Conflicts among ideals are common in politics. Even if we rejected integrity and based our political activity only on fairness, justice, and procedural due process, we would find the first two virtues sometimes pulling in the opposite direction. Some philosophers deny the possibility of any fundamental conflict between justice and fairness because they believe that one of these virtues in the end derives from the other. Some say that justice has no meaning apart from fairness, that in politics, as in roulette, whatever happens through fair procedures is just. That is the extreme of the idea called justice as fairness. Others think that the only test of fairness in politics is the test of result, that no procedure is fair unless it is likely to produce political decisions that meet some independent test of justice. That is the opposite extreme, of fairness as justice. Most political philosophers – and I think most people – take the intermediate view that fairness and justice are to some degree independent of one another, so that fair institutions sometimes produce unjust decisions and unfair institutions just ones." Ronald Dworkin, *Law's Empire* 177 (1986).

different, and consequently, not all claims to “appropriateness” in the form of human needs, wants or desires can be satisfied. Decision-makers must therefore weigh the expense of being fair in a particular situation against its wider value in reinforcing the sense of communal affiliation.<sup>12</sup>

The limits of fairness suggest that in a complex community – a community where the majority of transactions are impersonal, that is, conducted with strangers with whom we have no regular relationship – another value becomes important. This is the value of equality.

Equality has long been the abstract ideal of a political community, at least in the West, but in modern life it assumes enhanced importance because individuals engage in episodic transactions with strangers to meet most of their daily needs. Impersonality, in turn, feeds a preoccupation in legal rules with equality.<sup>13</sup> However, that preoccupation can only be partly fulfilled since each instance of doing equality involves the impossible task of assessing identity and constitutes, in essence, an instance of what is appropriate, or fair.<sup>14</sup>

These conclusions can be distilled into a set of relationships that can be expressed as follows:

$$\text{Justice} = \text{Equality} + \text{Fairness}$$

This equation has the advantage of replicating the definition of justice given by a number of legal theorists.<sup>15</sup> The biological and evolutionary theory set out above, however, also infers that this basic relationship is accompanied by an important proviso:

$$\text{Equality} > \text{Fairness}$$

The proviso stems from the fact that in any complex community the value of equality must exert a degree of conceptual priority, or ‘pull’, reflecting the fact that the foundation of a community lies in the application of equal rules to all. Only exceptionally are variable rules, that is, rules tailored to specific circumstances in the form of ‘fairness’, called for.

A critical eye might object to what I have just put forward by pointing out that sophisticated political entities in the form of empires have flourished without much idea of equality, at least in a political sense. This is true and I recognize this objection, but I also maintain that the theory must be understood in light of *contemporary* conceptions of equality and fairness which give an ever greater force to the egalitarian impulse (i.e. equality >

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<sup>12</sup> Herbert Hart referred to this idea of a limit to the “cost” of enforcement in the following terms: “In civil cases, a similar conflict between justice and the general good is resolved in favour of the latter, when the law provides no remedy for some moral wrong because to enforce compensation in such cases might involve great difficulties of proof or overburden the courts, or unduly hamper enterprise. There is a limit to the amount of law enforcement which any society can afford, even when a moral wrong has been done.” H.L.A. Hart, *The Concept of Law* (2<sup>nd</sup> ed.), p. 166 (1997). There are, of course, some troubling conclusions to the theory of justice and fairness put forward here. A community’s resources will be devoted to satisfying certain claims at the expense of others, something which inevitably gives rise to the conclusion that any community will be, in some way, residually unjust. In this respect, two further observations can be made. First, as mentioned, fairness is just, but not all justice is fair. The explanation for this paradox lies in the fact that in a sustainable community justice will be composed of equality and fairness, but there will be some instances where what is just is *not* fair. This ‘residual’ unfairness may be a stimulus to communal reform, re-organization or, in certain circumstances, to a radical reformation of the community in the form of revolution, secession or dismemberment. A second conclusion is that communal arrangements reflective of justice will be oriented in a certain way: *towards* equality and *away from* fairness. This means that equality will have a certain idealistic and attractive character, something that involves its identification with the future and what *will be*.

<sup>13</sup> In several domains of law, such as contract and tort, the aim of the law is said to be to put the plaintiff in as good a situation as if the breach had never occurred. See *Restatement of Contracts* (2<sup>nd</sup>), s. 344. This holding infers an equality metric. You get what you expected or what you’ve lost. For a classic statement of this view see Lon Fuller & William Purdue, “The Reliance Interest in Contract Damages” 46:3 *Yale L.J.* 373 (1937).

<sup>14</sup> We might choose to comprehend the difference in the distinction observed between the image in a single frame and that image seen many times over in a film strip. The Victorian photographer Eadweard Muybridge (1830-1904) was the first to demonstrate how a single frame, when shown at accelerated speeds featuring incremental changes, could depict motion, capturing what the human eye could not distinguish as separate movements. In the same way, we might decide to understand the distinction between individual instances of fairness and the general norm of equality, one transitioning at greater velocities into the other.

<sup>15</sup> Sanne Taekema observes that “[t]he combination of fairness and equality at the core of the concept of justice is also propagated by Neil MacCormick (1978, 73). Fairness as the core of justice is proposed e.g., by David Miller (1976). Justice as equal treatment can also be found in – apart from Radbruch (1932, 278) Hart (1994, 159), Harris (1996, 171), and Aristotle (1934 *Nicomachean Ethics*).” Sanne Taekema, *The Concept of Ideals in Legal Theory*, 192, n. 31 (2003).

fairness). Much of the last three hundred years in human history has been devoted to the sweeping away of political structures like monarchies that, in their earliest phases, must have been based on fairness. The default value becomes one of equality. It is a manifestation of the ever more abstract and complex communities we live in, including the international community.

To summarize, I take a particular view of the concept and role of fairness. Many commentators have had difficulty in defining and identifying what fairness involves and what role it plays, a difficulty I would attribute to its inherent variability. Much has been written about fairness and discussion of it often seems to go around and around like a Merry-Go-Round. Fairness is subjective. That subjectivity frequently obscures its definition so that it is challenging to develop a stable conception of the idea.

I see fairness as playing a certain role in human and international relations and as part of the idea of justice. It is a necessary attribute of continuing relationships and involves a degree of discounting or revaluation in recognition of their maintenance. It might be termed “the justice of particular circumstances”. Because fairness is relational, it usually implies a departure from equality. It is *inequality* for the purpose of affirming relationships, and therefore in a wider sense, of reinforcing community. In law this can be understood in terms of adjusting procedures to specific circumstances so as to tailor them to individual needs, wants or interests. In so doing, the commitment to fairness promotes buy-in, and by extension, the sense that what is taking place is beneficial, or just.

But fairness cannot constitute the basis for *all* legal rules due to its cost and the need for predictability. The law must be *normative*, not purely political. Thus, while a general statement of justice might be that justice involves a combination of equality and fairness, in any reasonably complex legal system, the law will prioritize equality such that fairness becomes a secondary and supplementary value. A legal system giving expression to justice is likely to display its own combination of equality and fairness.<sup>16</sup>

### 3. Fairness in Domestic Law: the Anglo-Canadian example

Lawyers and legal scholars tend instinctively to understand international law through the prism of the domestic legal systems in which they have been educated. This tendency is legitimized by ICJ Statute Art. 38(1)(c), which identifies “general principles of law recognized by civilized nations” as a recognized source of international law. If fairness is a general principle of law in a domestic legal system, it should serve as a basis for international law.

In Canadian law fairness is often referred to in connection with a “duty of fairness” now imposed upon all non-legislative acts. This includes judicial, quasi-judicial and administrative acts as well as many executive acts. The duty of fairness is closely associated with the broad principle of natural justice developed in, and imported from, English law, which itself was of uncertain extent and evolved only gradually and inconsistently.<sup>17</sup>

Traditionally, natural justice and the duty of fairness under English law were said to be comprised of two main rules: 1. that a person must know the case against him or her and be given an opportunity to answer it, and 2. that a decision-maker be free from bias. Due to the fact that the traditional remedy for a breach of fairness was *certiorari*, which was only available for judicial acts, the application of both rules came to be clouded by questions pertaining to the identity of the decision-maker and the need for a decision-maker to act “judicially” before a duty of fairness could be identified.<sup>18</sup> Nevertheless, what is noteworthy even in early English case law is awareness of the duty of fairness in situations involving the rights of *individuals*.

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<sup>16</sup> My ideas about equality and fairness, and therefore justice, bear resemblance to those of Michael Walzer. However, Walzer argues that the criteria of justice should be discerned from analysis of how social goods are *actually* distributed as opposed to their distribution by some process of abstract reasoning. See Michael Walzer, *Spheres of Justice* (1983). I go beyond Walzer to suggest that more recent research and abstract reasoning can help to identify a standard typology of justice that involves a combination of equality and fairness.

<sup>17</sup> For an overview of this development see David Jones & Anne de Villars, *Principles of Administrative Law* (5<sup>th</sup> ed.) 207-251 (2009).

<sup>18</sup> *Certiorari* is a writ seeking judicial review. It is issued by a superior court, directing an inferior court, tribunal, or other public authority to send the record of a proceeding for review.

Following the English House of Lords decision in *Ridge v. Baldwin*<sup>19</sup>, the nature of natural justice and the associated duty of fairness was released from much of its previous rigidity in both England and Canada and came to be understood as it is today. In English law this freedom has meant that the duty to be fair has been liberated from its historic tie to judicial acts and has now been extended to official decisions of a broad range of types. In addition, the modern emphasis on a “duty to be fair” is much more robust and extensive than classic ideas of natural justice. Whereas traditionally natural justice was only in issue in quasi-judicial or other administrative functions, English jurisprudence now holds that there is a duty to be fair even if *no* quasi-judicial function is involved.<sup>20</sup> Likewise in Canadian law, *Ridge v. Baldwin* promoted a substantial rethinking and expansion of the duty. Canadian jurisprudence had traditionally recognised two requirements for a quasi-judicial function, first, that rights are affected, and second, that there is a duty to act judicially.<sup>21</sup> With the evolution promoted by *Ridge v. Baldwin* however, a change occurred. Something less than a formal right - such as an interest - can now trigger the duty.<sup>22</sup> In addition, a duty of procedural fairness lies “on every public authority making an administrative decision which is not of a legislated nature and which affects the rights, privileges or interests of an individual.”<sup>23</sup>

As a result of this evolution, Canadian administrative law now recognises that courts must concentrate on whether the procedures used in a case were fair in all the circumstances. The Supreme Court of Canada has identified five factors to assist in the determination of a duty of fairness:

- (i) the nature of the decision and the process followed in making it;
- (ii) the nature of the statutory scheme;
- (iii) the importance of the decision to the individual affected;
- (iv) the legitimate expectations of the person challenging the decision; and
- (v) the choices of procedure made by the tribunal itself.<sup>24</sup>

The analysis of these factors is by no means straightforward. As one prominent authority on Canadian administrative law points out, “[t]he precise content of the duty to be fair in a given circumstance may be very difficult to determine without litigation.”<sup>25</sup> That is because fairness is an inherently subjective value. Different decision-makers may come to different determinations on each of the above factors.

At the same time, while the duty of fairness is said to extend to virtually all official decision-making, a significant exception remains for legislative functions. The principles of natural justice have never been applied in Anglo-Canadian law to the exercise of legislative power and this prohibition has not been affected in any way by the development of a duty to be fair. One authority notes, “the courts will generally not inquire into the procedure followed by Parliament in enacting laws, no matter how directly anyone’s rights are affected.”<sup>26</sup> The specific reason for this limitation is little understood, but it is sometimes said that “the wisdom and value of legislative decisions are subject only to review by the electorate.”<sup>27</sup> Another reason could be the inherent individualism of fairness. As the theory above suggests, fairness is not in issue where general or collective interests are engaged.

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<sup>19</sup> (1963), [1964] A.C. 40 (U.K.H.L.). The case involved the Brighton police authority, which dismissed its chief without offering him any opportunity to defend his actions. The chief appealed, arguing that the Brighton Watch Committee to which he reported, had acted unlawfully in terminating his appointment in 1958 following criminal proceedings against him. The House of Lords held that the Brighton Watch Committee had violated the doctrine of natural justice by failing to provide Ridge with procedural fairness in relation to his dismissal.

<sup>20</sup> See for instance *R. v. Gaming Board for Great Britain*, [1967] 2 Q.B. 617 (Eng. Q.B.). For an overview of the law see William Wade & Christopher Forsyth, *Administrative Law* (9<sup>th</sup> ed.) 494 (2004). See also David Mullan, “Fairness: The New Natural Justice” 25 *U.T.L.J.* 281 (1975).

<sup>21</sup> For an example of the traditional Canadian position see *Calgary Power v. Copithorne* (1958), [1959] S.C.R. 24 (S.C.C.).

<sup>22</sup> See *Harvie v. Calgary (City) Regional Planning Commission* (1978), 8 Alta L.R. (2d) 166 (Alta C.A.); *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.).

<sup>23</sup> *Cardinal v. Kent Institution* (1985), 16 Admin L.R. 233 (S.C.C.) [emphasis added].

<sup>24</sup> *Baker v. Canada (Minister of Citizenship & Immigration)*, 14 Admin. L.R. (3d) 173 at 192ff; see also *Knight v. Indian Head School Division No. 19* (1990), 43 Admin. L.R. 157 (S.C.C.).

<sup>25</sup> Jones & de Villars, 208.

<sup>26</sup> Jones & de Villars, 240.

<sup>27</sup> Jones & de Villars, *ibid.*, quoting from *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 at para. 59 (S.C.C.).



#### 4. Fairness in WTO Law

The excursion into domestic law helps to translate the abstractions of theory into practical legal rules. What fairness amounts to in procedural and substantive terms can, at a minimum, be thought about according to the two legal rules mentioned above, namely, first, that an actor or interested party appearing before a tribunal must know the case against him or her and be given an opportunity to answer it, and second, that a decision-maker be free from bias. What theory does more distantly is to point out how the doing of fairness in this form is an occasion for the affirmation of relationships.

WTO law in general is not a body of law that places emphasis upon fairness. Rather, the overwhelming concern in the WTO Agreement is on equality. The immediate concern of WTO law in most instances is said to be the “equality of competitive conditions”<sup>28</sup> and other references to equality and equality-type concepts dot the treaty. Nevertheless, there are some references to fairness in both the treaty and WTO dispute settlement. In the WTO Agreement on Agriculture, for example, preambular reference is made to the need to develop a “to establish a *fair* and market-oriented agricultural trading system”. The same reference is effectively repeated in AA Art. 20(c). Similarly, in the preamble of the WTO Customs Valuation Agreement, reference is made to “the need for a *fair*, uniform and neutral system for the valuation of goods for customs purposes”. Article 1(3) of the same agreement speaks of “The rules for import licensing procedures shall be neutral in application and administered in a *fair* and equitable manner.” It is also noteworthy that there are several references to fairness in the TRIPS Agreement. TRIPS Art. 42 speaks, for instance, of “*Fair* and Equitable Procedures” in national IP enforcement as allowing “[d]efendants ... the right to written notice which is timely and contains sufficient detail”, “[p]arties shall be allowed to be represented by independent legal counsel” and “[a]ll parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence.” Elsewhere, there are a number of WTO provisions where considerations of fairness are evident, even though they may not be clothed in the precise language of fairness. Thus, GATT Art. X:3(b) refers to the need of WTO members to maintain “judicial, arbitral or administrative tribunals or procedures” which shall be “independent”, or in other words, free from bias.

Fairness itself is obviously at issue in certain types of WTO proceedings. They can involve, for example, panel and Appellate Body hearings where countries are required to give notice of their claims and arguments in a given case.<sup>29</sup> Second, procedural fairness is also relevant in the context of national proceedings or actions to which WTO commitments apply. These involve procedural obligations of member states pertaining to legislative enactments, transparency obligations, and administrative proceedings of different kinds, as mentioned in the case of TRIPS. At both levels, the development of a body of jurisprudence about procedural fairness is evident which echoes the duty of fairness considerations seen in the case of Anglo-Canadian administrative law. Still, because of the generality of WTO law, and the obvious subjectivity of any fairness standard, the law in this field continues to develop. It likely will do so for some time to come.

A few references have been made in WTO dispute settlement to the concept of “fundamental fairness”. Thus, for instance, in *Mexico – HFCS (21.5)* the Appellate Body referred to a panel’s duty under DSU Art. 12.7 to provide a “basic rationale” for its decision as “[reflecting] or [conforming] with the principles of *fundamental fairness* and due process that underlie any inform the provisions of the DSU.”<sup>30</sup> Similarly, in *U.S. – Hot-Rolled Steel*, the word “‘objective’, which qualifies the word ‘examination’ [in AD Agreement Article 3.1] indicates that the ‘examination’ process [in national anti-dumping proceedings] must conform to the dictates the basic principles of good faith and *fundamental fairness*.”<sup>31</sup> These references to “fundamental fairness”, though few

<sup>28</sup> See, for instance, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, para. 7.316 (21 December 2001). “It is a well established principle under WTO jurisprudence that Article III of the GATT 1994 is to provide equality of competitive conditions for imported products in relation to domestic products. .... These competitive conditions are affected even in the absence of actual trade flows, wherever the conditions afforded to imported products are such as to affect their competitive opportunities on the market.”

<sup>29</sup> DSU Art. 6.2 requires that the request for the establishment of a panel contain “a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly.” The Appellate Body has held that this “legal basis” should contain a summary of the claims and arguments sufficient to give the defendant country – and other potentially interested countries – adequate notice of the matters in issue.

<sup>30</sup> WT/DS132/AB/RW, para. 107 (22 Oct. 2001).

<sup>31</sup> WT/DS184/AB/R, para. 193 (24 July 2001). On that occasion the Appellate Body observed that “[t]his provision is yet another expression of the general principle of good faith in the *Anti-Dumping Agreement*.” See *ibid.*, fn. 141.

to date, may signal the emergence of a more liberal, elastic concept of appropriate administrative behaviour than simply following due process or otherwise behaving in good faith. What may be emerging is a more muscular, independent concept that may be applied to remedy unjust behaviour where no explicit WTO procedural rule has been violated.

References to “procedural fairness” have been somewhat more numerous. In *U.S. – Shrimp*, for instance, the panel and Appellate Body had to examine whether or not a certification scheme for foreign shrimping operations met “certain minimum standards for transparency and *procedural fairness* in the administration of trade regulations”.<sup>32</sup> The Appellate Body observed that with respect to the certification scheme, there was no formal opportunity for a country to be heard, or to respond to any arguments that might be made against it, in the course of the certification process. Moreover, countries seeking certification received no indication of the outcome of their applications nor any opportunity to appeal. All of this was held to be contrary to GATT Art. X:3.<sup>33</sup> The Appellate Body concluded that there had been a denial of basic fairness and due process as well as arbitrary discrimination *vis-à-vis* countries to whom certification had been granted. In essence the certification scheme was ‘inappropriate’.

In *Canada – Continued Suspension* the Appellate Body concluded that the allocation of the burden of proof under DSU Art. 22.8 (termination of countermeasures) is a function of the nature of the cause of action, which party may be in a position to prove a particular issue, and “the requirements of *procedural fairness*” which make it appropriate that “the Member whose measure has brought about the suspension of concessions should make some showing that it has removed the measure found to be inconsistent ...”<sup>34</sup>. The usual rule as to the burden of proof in WTO law is stated in *U.S. – Shirts and Blouses* as follows:

... it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.<sup>35</sup>

In *Canada – Continued Suspension*, however, procedural fairness meant the usual rule was modified:

Much of the reluctance of the parties to secure a definitive determination in respect of Article 22.8 is the apprehension that, upon initiation, a party will attract the full burden of proof. ... In our view, the allocation of the burden of proof, in the context of Article 22.8, should not be determined simply on the basis of a mechanistic rule that the party who initiates the proceedings bears the burden of proof. As we have indicated, in case of a disagreement, *both parties are under an obligation to secure a definitive multilateral determination as to whether the suspension of concessions must be terminated*. The burden of proof does not attach to a party simply because such party discharges this obligation. To hold otherwise would create a disincentive to act in a manner which we consider to be obligatory and desirable.<sup>36</sup>

These comments appear to reinforce the idea that the rule on the burden of proof in such circumstances is governed by the sense of what is “appropriate” in the circumstances. Settlement in WTO dispute *settlement* is a joint obligation of *all* the parties to a WTO dispute, and perhaps more generally, of the WTO membership as a whole. This is reflected in the fact that there is considerable discussion in *Canada – Continued Suspension* of the obligation to “have recourse to” and “abide by” WTO dispute settlement procedures.<sup>37</sup> Where a disagreement arises as to whether a measure found to be in violation has been removed, the Appellate Body indicated that “this disagreement must be resolved through [DSU] Article 21.5 proceedings”.<sup>38</sup> Obviously, in

<sup>32</sup> WT/DS58/AB/R, paras. 177-186 (12 Oct. 1998).

<sup>33</sup> GATT Art. X:3(a) provides “Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings ...”

<sup>34</sup> WT/DS321/AB/R, para. 362 (16 Oct. 2008).

<sup>35</sup> WT/DS33/AB/R, p. 13 (25 April 1997).

<sup>36</sup> *Canada – Continued Suspension*, WT/DS321/AB/R, para. 359-60 (16 Oct. 2008) [emphasis added].

<sup>37</sup> DSU Art. 23 requires that WTO members have exclusive recourse to, and abide by, WTO dispute settlement results.

<sup>38</sup> *Canada – Continued Suspension*, WT/DS321/AB/R, para. 389 (16 Oct. 2008).

the normal course, the original violator bears the burden of proving that the violation has in fact been removed, although the Appellate Body concluded that “[t]his does not mean that [the original complainants] do not have an obligation to engage in the dispute settlement procedures in a cooperative manner.”<sup>39</sup>

Another reference to “procedural fairness” occurred in *Thailand – Cigarettes*. In that case, the Philippines had contested certain decisions of the Thai customs administration involving guarantees posted to secure the release of goods pending final duty assessment. The Philippines asserted that Thailand’s demand for guarantees were reviewable actions under GATT and the WTO Customs Valuation Agreement, an assertion Thailand denied. The Appellate Body upheld the panel’s finding that the guarantees were “administrative action relating to customs matters” since such action encompasses “a wide range of acts that have a rational relationship with customs matters”. As an interpretive aid, the Appellate Body noted that GATT Art. X:3 established “certain minimum standards for transparency and *procedural fairness* in member’s administration of their trade regulations.”<sup>40</sup> These were invoked to help WTO decision-makers come to the conclusion that Thailand had acted inconsistently with Art. X:3(b) by failing to maintain or institute independent tribunals or procedures for the prompt review of guarantee decisions.

Procedural fairness in terms of transparency has also been in issue in *U.S. – COOL*, a challenge by Canada and Mexico of certain U.S. country-of-origin labelling requirements for imported beef. The relevant restrictions went through several iterations. Their clarity was obscured by the issuance of an official letter (the “Vilsack Letter”) by the U.S. Department of Agriculture on the accession to office of a new U.S. administration. In that instance, a WTO panel found that “the Vilsack letter did not meet these minimum standards of *procedural fairness* in relation to the implementation of the 2009 Final Rule by both allowing the 2009 Final Rule (AMS) to enter into force and, at the same time, suggesting industry compliance with stricter labelling requirements than those contained in the 2009 Final Rule (AMS)”.<sup>41</sup> Due to such inconsistencies, the panel found that the Vilsack letter was “not ‘appropriate’” in terms of administrative guidance and did “not meet the requirement of reasonable administration of the COOL measure”.<sup>42</sup> On that basis, the panel concluded that Canada and Mexico had demonstrated that the United States “acted inconsistently with Article X:3(a) by failing to administer the COOL measure in a reasonable manner.”<sup>43</sup>

Another related set of flexibilities that raise fairness considerations in WTO law involve formal exceptions. Every legal system must have exceptions that allow for selective release from generalized rules. In the case of GATT, for instance, these are found most notably in GATT Art. XX, where countries have the right to depart from liberalization requirements in the pursuit of certain defined policy objectives. The applicable method of justification is two-fold. First, a country must prove that it has met the terms of the relevant exception. Second, it must subsequently prove that it has met the terms of GATT Art. XX’s preamble, which the Appellate Body has emphasized focuses attention on the *application* of the measure at issue. The analysis centers on whether there is adequate justification for the measure when compared with other, similar situations.

Not surprisingly, the invocation of exceptions has led to rigorous analysis of their extent in WTO jurisprudence. A number of cases and commentators have pointed out that exceptional behaviour in the form of rights must not be allowed to vitiate the rights of other WTO members. Consequently, there have been a number of references in case law to doctrines such as abuse of rights, proportionality and estoppel that suggest a preoccupation in these instances with definition, conditioning and limitation.<sup>44</sup> The preoccupation stems directly from the exceptions which, while required to respect state sovereignty and to tailor the law to

<sup>39</sup> *Ibid.*, para. 409 [emphasis added].

<sup>40</sup> WT/DS371/AB/R, para. 202 (17 June 2011).

<sup>41</sup> WT/DS384, DS386/R, para. 7.861 (18 Nov. 2011).

<sup>42</sup> *Ibid.*, para. 7.863.

<sup>43</sup> *Ibid.*, para. 7.864.

<sup>44</sup> For instance, in *U.S. – Shrimp* the Appellate Body observed in relation to the preamble, or chapeau, of Art. XX that “The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the *right* of a Member to invoke an exception under Article XX and the *rights of the other Members* under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.” *U.S. – Shrimp*, WT/DS58/AB/R, para. 159 (12 Oct. 1998) (emphasis added).

individual circumstances in the manner of “fairness”, are not unrestricted. For instance, in interpreting the word “necessary” in GATT Art. XX(b) the panel in *Brazil – Tyres* observed:

The necessity of a measure should be determined through ‘a process of weighing and balancing of factors’ which usually includes the assessment of the following three factors: the relative importance of interests or values furthered by the challenged measures, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce.<sup>45</sup>

It is particularly noteworthy that in relation to this last issue – the restrictive impact of a measure on international trade – panels and the Appellate Body have crafted a sequence of proof about what is “appropriate” given evidentiary limitations in the dispute settlement system and the need to respect national sovereignty.<sup>46</sup> The same sequence, anchored in appropriateness, is evident in decisions involving TBT Art. 2.2.<sup>47</sup>

A further consideration of substantive fairness arises in cases of WTO retaliation where member countries are entitled to retaliate against other countries’ breaches of the WTO Agreement. On the surface the law appears to mandate equality. Thus, Art. 22.4 of the WTO Dispute Settlement Understanding (DSU) provides that:

The level of the suspension of concessions or other obligations .... shall be *equivalent* to the level of the nullification or impairment.

Thus, for instance, in the *Bananas* dispute between the U.S. and EU, the U.S. was authorized to retaliate against the EU in the amount of \$201.6 million annually for EC tariff restrictions on foreign bananas. The U.S. implemented the retaliation in the form of additional duties on a range of EU agricultural products in the period 2000-09 until the dispute was finally settled. Such retaliation is temporary and to be invoked “as a last resort”.<sup>48</sup>

Several commentators have pointed out, however, the opacity of the retaliatory equivalence standard.<sup>49</sup> What exactly is “*equivalent* to the level of the nullification or impairment” and how is it to be implemented? It might seem reasonable to assume that nullification or impairment should be tied to the detrimental trade *effects* of a violation, but even this initial issue is unclear given that the MFN obligation infers that a single violation may have multi-directional effects within the trading system. WTO arbitrators in compliance proceedings are left to make ‘reasoned estimates’, an imperfect science. Each calculation is reduced to the specifics of the trading relationship, an exercise which is an expression of what is ‘appropriate’ to the circumstances of the relationship, but not necessarily equal. In *EC – Hormones*<sup>50</sup>, for example, the arbitrators who calculated the cost of a ban on beef imports admitted that what they had derived “can *only be a reasoned estimate*.”<sup>51</sup> Likewise in *U.S. – Copyright*<sup>52</sup>, arbitrators observed that “[i]n order to discharge the mandate given to us by the parties, and in the absence of some important data, *we have had to make ourselves a number of estimations ... we recognize that [they] may not be entirely accurate*.”<sup>53</sup>

Perhaps the greatest complaint of the equivalence standard is the fact of its limited intensity. Many

<sup>45</sup> *Brazil – Tyres*, WT/DS332/R, para. 7.104 (12 June 2007).

<sup>46</sup> *Brazil – Tyres*, WT/DS332/AB/R, para. 178 (3 Dec. 2007); *China – Raw Materials*, WT/DS394/R, para. 7.588 (5 July 2011).

<sup>47</sup> *U.S. – Tuna II (Mexico)*, WT/DS381/AB/R, paras. 321-323 (16 May 2012); *U.S. – COOL*, WT/DS384, 386/AB/R, para. 379 (29 June 2012); *EC – Seal Products*, WT/DS400, 401/R, para. 7.422-7.505 (25 Nov. 2013).

<sup>48</sup> See DSU Art. 3.7 (“The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements ...”).

<sup>49</sup> See for instance Thomas Sebastian, “World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness” 48:2 *Harvard Int’l L.J.* 337 (2007) [hereinafter ‘Sebastian’]; Bryan Mercurio, “Retaliatory Trade Measures in the WTO Dispute Settlement Understanding: Are there Really Alternatives?” in James C. Hartigan (ed.), *Frontiers of Economics and Globalization - Vol. 6*, 397 (2009) [hereinafter ‘Mercurio’].

<sup>50</sup> *EC – Hormones*, WT/DS26/ARB (12 May 1999).

<sup>51</sup> *Ibid.*, para. 41.

<sup>52</sup> *U.S. – Section 110(5) of the U.S. Copyright Act*, WT/DS160/ARB25/1 (9 Nov. 2001).

<sup>53</sup> *Ibid.*, para. 4.36.

commentators have observed that strict equivalence for retaliation provides no real incentive to comply. Thomas Sebastian concludes with palpable frustration that:

The search for an instrumental rationale to guide arbitrators leads us to conclude that many theories cannot be reconciled with the structure of the remedial provisions of the DSU, are not achievable in practice, or are simply incoherent. ... It follows that, unless one endorses the retribution rationale, one must conclude that the bulk of the WTO remedial regime relating to the permissible intensity of retaliation is simply bereft of any valid rationale.<sup>54</sup>

Nevertheless, it is useful to consider exactly why an equivalence standard might make sense on the theory put forward in this article and how the conclusions of Sebastian and others can be reformulated so as to be more logically and naturally understood in the context of “fairness” or appropriateness.

This conclusion would appear to be nonsensical if considered in light of the treaty’s plain directive that the amount of retaliation should be “*equivalent*”. But it is intelligible if seen against a broader background of the treaty - a background composed of all the transactions within series of trading relationships *taken together*. Shortfalls in the assessment of nullification or impairment routinely occur because WTO members expect their relationships to continue and are therefore content to contemplate such a result. Like private actors in any ‘community’, WTO members will be content to accept permission to retaliate for somewhat *less or more* than the damage they have sustained in recognition of an ongoing relationship requiring reciprocation in future.<sup>55</sup> The equality language contained in DSU Art. 22.4 is valuable, however, because it gives the system a touchstone to *aim* for. In this sense, the aspiration to equality is important for the promotion of community *even if* it is never fully nor satisfactorily realized.

Such considerations are perhaps even more apparent in the realm of WTO disciplines on subsidies. The WTO Subsidies Agreement (SCM) Art. 3 allows countries to complain against export subsidies, that is, subsidies which are conditioned on exports or on schemes of import substitution. In the event that a violation is found, SCM Art. 4.10 provides that the WTO “shall grant authorization to the complaining Member to take *appropriate* countermeasures ...” An accompanying footnote explains that the term “appropriate” “... is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.” The standard of “appropriateness” is evidently different from the equivalence standard found in DSU Art. 22.4. In three instances arbitrators assessing retaliation under DSU Art. 22.6 have considered this difference in determining what is “appropriate”. Thus, in *Brazil – Aircraft (Article 22.6)* the arbitrators observed that the difference did not require an equality-of-harm approach as is normally the case under DSU Art. 22.4 and instead decided that “a countermeasure is appropriate *inter alia* if it effectively induces compliance.”<sup>56</sup> In *U.S. – FSC (Article 22.6)* the issue was tax credits received by U.S. firms for certain overseas operations, something that was found to amount to an export subsidy. Because there was no easy way of calculating the exact benefit conferred on U.S. companies, the arbitrators determined that “appropriate” involved the “imposition on firms of the Member concerned of expenses *at least equivalent* to those initially incurred by the treasury of the Member concerned in granting benefits to its firms.”<sup>57</sup> Finally, in *Canada – Aircraft (Article 22.6)* the arbitrators noted that the complainant, Brazil, had failed to substantiate a causal link between the subsidy and the sales lost by a Brazilian manufacturer so that the typical equality-of-harm approach could not be usefully applied. In the alternative, the arbitrator decided to base “appropriate countermeasures” on the amount of the subsidy conferred, but also added a 20 percent top-up, or premium, to

<sup>54</sup> Sebastian, *ibid.*, pp. 378-379.

<sup>55</sup> The same could be said for instances of compensation worked out under DSU Art. 22.2. Thus, on the announcement of compensation payable by the U.S. to the Brazil Cotton Institute to settle action in *U.S. – Cotton*, WT/DS267, an adviser to Brazilian litigants “characterized the \$300 million payment as “*fair* compensation” to Brazilian producers for the damages identified by the WTO.” See “U.S., Brazil Settle WTO Cotton Dispute; Deal Includes \$300 Million Payment” 32:39 *Inside U.S. Trade* 1 at 20 (3 Oct. 2014) [emphasis added]. See also settlement in *U.S. – Clove Cigarettes*, WT/DS406, where it was announced that “Indonesia and the United States have agreed to sign [a memorandum of understanding (MOU)] to end this case *by way of settlement accommodating to the interests of both parties* involved,” according to Bachrul Chairi, director-general of international trade cooperation at Indonesia’s Ministry of Trade. See “U.S. Settles WTO Clove Cigarette Case with Indonesia; Keeps Ban in Place” 32:40 *Inside U.S. Trade* 1 at 22 (10 Oct. 2014).

<sup>56</sup> WT/DS46/ARB, para. 3.44 (Aug. 28, 2000).

<sup>57</sup> WT/DS108/ARB, para. 6.21 (Aug. 30, 2002).

this amount in recognition of the fact that Canada has made clear its refusal to withdraw the subsidy. It is noteworthy that in coming to their specific conclusion, the arbitrators took into account a number of factors that had the effect of further particularizing the relief.<sup>58</sup>

The individuality of fairness has also been in issue in several recent cases, notably concerning how particular, and hence fair, a national authority can be in choosing comparable evidence. Debate has raged in WTO law over the permissibility of “zeroing”, that is, the practice of omitting certain positive values in anti-dumping investigations and thereby potentially inflating the final anti-dumping margin. In *U.S. – Orange Juice*, for instance, the panel observed that “the meaning of the notion of “fairness” as it is articulated in (ADA) Article 2.4 will depend upon the particular context in which it is intended to operate.” The panel concluded:

... a comparison methodology (such as “simple zeroing”) that ignores transactions, which if properly taken into account, would result in a lower margin of dumping, must be considered “unfair” and therefore inconsistent with Article 2.4.<sup>59</sup>

Panels have also generally described the idea of fairness as “appropriateness”. In *Egypt – Rebar*, for instance, the panel concluded that:

In short, Article 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a *fair* comparison, through various adjustments as *appropriate*, of export price and normal value.<sup>60</sup>

Likewise in *China – Raw Materials*, the panel also appeared to equate fairness with appropriateness, as follows:

It is not “*fair*”, “*equitable*”, “*just*”, “*legitimate*” or “*appropriate* for the circumstances” that exporter applicants may well be subject to different interpretations of whether or not they have sufficient operation capacity to qualify for the zinc quota depending on where they are located.<sup>61</sup>

These illustrations of the tension between notions of equality as an abstract ideal and the determination of what is fair or “appropriate” in specific circumstances should also help to clarify the overarching purpose of WTO remedies and of WTO law. This purpose is manifestly different from that of international investment law, which aims to vindicate investor rights for the larger purpose of promoting investment flows.<sup>62</sup> If we understand the contrasting roles of equality and fairness as manifestations of justice, it becomes apparent that the WTO’s remedial system may have a mix of conventionally accepted purposes: compensation, coercion, compliance. Chief among these purposes, however, is the idea of *transformation*, something that leads to the modification of *legal* relationships and comports well with the idea that fairness is, ultimately, about the

<sup>58</sup> See *Canada – Aircraft (II)*, WT/DS222/ARB, para. 3.121 (Feb. 17, 2003).

<sup>59</sup> *U.S. – Orange Juice*, WT/DS382/R, para. 7.153 (25 March 2011) [emphasis added]. For a dissenting view see *ibid.*, para. 7.143. See also *U.S. – Shrimp from Vietnam*, WT/DS404/R, para. 7.95 (11 July 2011).

<sup>60</sup> *Egypt – Rebar*, WT/DS211/R, para. 7.335 (8 Aug. 2002) [emphasis added].

<sup>61</sup> *China – Raw Materials*, WT/DS394/R, para. 7.743 (5 July 2011) [emphasis added]. See also *United States – “Zeroing”*, WT/DS294/R, para. 9.45 (31 Oct. 2005) (“As to the “discernible standard of *appropriateness* or rightness within the four corners of the agreement which would provide a basis for reliably judging that there has been an unfair departure from the standard” of *fairness*, I am convinced that there at least four, either specifically related to the comparison exercise or more general in nature, permeating the entire *AD Agreement*, but also relevant in the context of price comparisons.”) [emphasis added]. For definitions of “appropriateness see *U.S. – FSC*, WT/DS108/ARB, para. 5.9 (30 Aug. 2002) (“The ordinary dictionary meaning of the term “appropriate” refers to something which is “especially suitable or fitting”). The panel report in *U.S. – Clove Cigarettes*, WT/DS406/R, n. 849 (2 Sept. 2011) noted that “[t]he word “appropriate” has been interpreted in a number of prior panel reports, including but not limited to the following: Panel Report, *Mexico – Telecoms*, paras. 7.265, 7.367-7.368; Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.240-7.241; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.191 and 7.365; Panel Report, *EC – Sardines*, para. 7.116; Panel Report, *U.S. – Steel Plate*, para. 7.72; Panel Report, *Australia – Salmon*, paras. 8.57 and 8.71.”

<sup>62</sup> Again, many commentators have expressed bewilderment at the shape of WTO remedies. Thus, Bryan Mercurio has noted: “... the system, as written and interpreted, does not have clear aims and objectives (beyond simply resolving the dispute). The question of whether the retaliatory phase of the process is designed to rebalance concessions, coerce compliance or punish recalcitrant respondents is simply not clearly addressed in the text of the DSU.” See Bryan Mercurio, “Retaliatory Trade Measures in the WTO Dispute Settlement Understanding: Are there Really Alternatives?” in James C. Hartigan (ed.), *Frontiers of Economics and Globalization - Vol. 6*, 397 at 431 (2009).

maintenance of a community.<sup>63</sup>

## 5. Analysis

It is difficult, and potentially hazardous, to discern one meaning from these mixed references to “procedural fairness”, “fundamental fairness”, or simply fairness in WTO law. Nevertheless, there are common threads that run through them which, together, can be woven together into a “stable concept” of the term. Perhaps the most consistent is the idea that fairness is variable. If recourse to metaphors is helpful, fairness can be thought about as involving a “basket” or “cluster” of associated meanings. Fairness might be considered to involve appropriateness in the circumstances.

In addition, use of the term “fair”, as the theory presented in Part Two implies, is an intensely subjective and specific assessment. Fairness will vary from case to case, and to some extent, from institution to institution, depending upon the nature of the particular ‘community’ and the importance that given to affirming the relationship between entities in a given situation. It may be that what is fair is understood “to connote impartiality, even-handedness or lack of bias”, as mentioned in *U.S. – Softwood Lumber*<sup>64</sup>, “appropriateness or rightness”, as mentioned in *U.S. – Zeroing*<sup>65</sup>, or simply as “appropriate”, as mentioned in the WTO Working Procedures for Appellate Review<sup>66</sup>, but such usages will not always be consistent, and indeed, WTO law has evidenced a wide range of proximate terms to denote what is being referred to here. We have a broad, general idea of what is being got at, but consistency in every instance will be elusive. A keen appreciation of the variability of fairness’ designations needs to be kept in mind when analysis of the role of fairness in WTO law.

A related observation is the fact that trying to fit all fairness references in WTO law neatly into the theory proposed in this article is probably impossible. Loose terminology, generalism and vagueness all play a role in blurring the boundaries of what is considered ‘fair’. For every hypothesis put forward above concerning the role of fairness and its function in reinforcing community, it is almost certain that some contrary usage might be found.<sup>67</sup> We have to proceed, therefore, on the assumption that the ideas put forward here may explain a large number - possibly even the majority - of such uses, but they will not explain *every* use. Again, this idea needs to be kept at the forefront of thinking about fairness.

Surveying the evidence from WTO law, there are four overarching points or themes that can be identified in relation to fairness. The first of these involves the role of fairness in reinforcing the equality of states, and to a lesser extent individuals, before international law. As mentioned, the chief ambition of WTO law is to introduce obligations of non-discrimination in interstate behavior. This has been necessary because while

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<sup>63</sup> In conventional thinking about WTO remedies this is often referred to as “rebalancing.” Thomas Sebastian describes rebalancing as follows:

In effect, under this approach arbitrators are being asked to rewrite the WTO Agreements between two WTO Member states. But they have no guidance about what the reformulated agreement should look like. To arrive at this reformulated agreement they would need to know, at the outset, the precise content of the underlying bilateral bargain between the concerned countries. However, this knowledge is simply not attainable. For a variety of reasons, an arbitrator has not practical way to determine the “price” paid by State R for State V’s commitment to abide by the obligation breached.

Thomas Sebastian, “World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness” 48:2 *Harvard Int’l L.J.* 337 at 371 (2007). Sebastian dismisses the rebalancing function as a plausible purpose of WTO remedies because he conceives of the relationship between two WTO members, and more broadly and diffusely between the entire membership, in starkly empiric terms of a “price” rather than as I do, metaphorically for an entire set of economic, political and social relations.

<sup>64</sup> WT/DS264/AB/RW, para. 138 (15 Aug. 2006). On that occasion the Appellate Body borrowed from dictionary definitions to state “The term “fair” is generally understood to connote impartiality, even-handedness, or lack of bias.” The Appellate Body went on to observe in a related footnote that, “The relevant dictionary meaning of “fair” is “just, unbiased, equitable, impartial; legitimate, in accordance with the rules or standards”, and “offering an equal chance of success”. *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol.1, p. 915.”

<sup>65</sup> WT/DS294/R, para. 7.260 (31 Oct. 2005).

<sup>66</sup> The Working Procedures Art. 16 provide “In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an *appropriate* procedure for the purposes of that appeal only ...” (emphasis added).

<sup>67</sup> David Schmitz also makes the point that “Any theory simple enough to be useful has counterexamples.” See David Schmitz, *Elements of Justice* 22 (2005).

states may be equal *before* international law, they are not necessarily equal *in* international law.<sup>68</sup> That is to say, a wide variety of behaviors is observed between and among countries depending upon the particular state of their relationships. GATT and WTO law were designed, in part, to overcome this. Therefore, insistence on fairness in WTO proceedings, as elsewhere in international law, can be understood as an attempt at ‘appropriateness’ in order to ensure states’ essential equality. Here, equality of treatment is *not* necessarily required. Rather, as in *U.S. – Continued Suspension*, what is mandated is whatever is appropriately applied in the circumstances.<sup>69</sup> The important point is that affording fair treatment allows for particular conditions to be taken into account, and therefore, for the natural disparities between individual circumstances and actors to be leavened.

This first point restates the observation made earlier that fairness is essentially a supplementary value. It works to complement and reinforce the basic idea of equality. At the same time, because WTO law has consequences both interstate and national level, the presence of fairness considerations in situations involving individual persons assists in some measure in recognizing their equality rights under international law as well.

A second point that is observed again and again in relation to procedural fairness claims is the fact that these claims are made in specific instances. We already seen how textual references to the concept center on individual situations, such as those involving anti-dumping or other procedural steps, where the law becomes ‘transactionalized’. It no longer speaks in broad general terms, the way it does about obligations of equal treatment or non-discrimination, but instead focuses its attention on a single occasion. In essence, it becomes limited to a particular operation or a single, very discrete set of circumstances. I have already pointed out how fairness in WTO law often seems to be a matter of describing the relation among elements that are less than the whole. In the struggle to give meaning to the idea of fairness, it may be useful to remember this limitation. Fairness may be a “*general principle*”, but that does not mean it is necessarily *generalized*. Instead, fairness seems to be a value that is recognized as “fundamental” or “elemental” yet also episodic. This reconciliation is part of its stable conception.

My third point - related to the second - involves jurisprudential consideration of fairness. What we have seen repeatedly in the experience of WTO law is the assertion of fairness claims clothed in the language of rights. A right in its barest form “enables the right-holder to invoke the law to obtain certain willing and acting from another [legal] person.”<sup>70</sup> Rights are therefore empowering. They “affirm[] the desiring and hence the willing of the right-holder.”<sup>71</sup> Fairness claims can be understood as a means of individual actors seeking to exert power within a legal system. There is ample evidence of this from the examples examined above. In essence, a claim of fairness usually relates to some attenuation or relaxation of obligations, yet no right is absolute. Claims to fairness must therefore be reconciled with the general sense of obligation in the legal system and with certain doctrines that are traditionally observed in relation to the exercise of rights. This means that procedural fairness claims are linked to notions of conditionality, proportionality, and mutuality. Conditionality relates to the conditions that must apply before fairness claim can be made out. Proportionality involves appropriate action based on a process of weighing and balancing of factors. Mutuality involves the idea that no right may be exercised “in an excessive and unreasonable manner which is contrary to the requirements of good faith.”<sup>72</sup> All of these tend to limit the extent of fairness claims.

<sup>68</sup> Thus, Robert Jennings and Arthur Watts note that “[s]ince international law the common consent of states as sovereign communities, the member states of the international community are equal to each other as subjects of international law.” They go on to note, however, that “[s]tates are by their nature certainly not equal as regards power, territory, and the like. But as members of the community of nations they are, in principle, equal, whatever differences between them may otherwise exist.” *Oppenheim’s International Law - Vol. 1* (9<sup>th</sup> ed.) 339 (1996).

<sup>69</sup> In *U.S. – Gambling* the U.S. raised a defence under GATS Art. XIV that Antigua had foreseen but was not formally notified of until an intermediate stage in proceedings. The Appellate Body later held that “Antigua admitted that it raised no objection to the timing of the United States’ defence before the Panel. Antigua also acknowledged that it did have an opportunity to respond adequately to the United States’ defence, albeit at a late stage of the proceeding. For these reasons, we consider that the Panel did not “deprive” Antigua of a “full and *fair* opportunity to respond to the defence.” See WT/DS285/AB/R, para. 276 (7 April 2005) [emphasis added].

<sup>70</sup> Philip Allott, *Eunomia*, p. 161 (1990).

<sup>71</sup> *Ibid.*, p. 159.

<sup>72</sup> Civil Code of Quebec, Art. 7. See Michael Byers, “Abuse of Rights: An Old Principle, A New Age” 47 *McGill L.J.* 389 at 430 (2002). The Appellate Body has observed “... a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members.” *U. S. –*



These considerations, in turn, emphasize the point that the right to fairness is not absolute. In an ideal proceeding in an ideal world fairness would not be in issue because all parties would be absolutely equal. There would be no need for fairness. However, the world is not ideal. Fairness therefore operates in a supplementary and assistive way to redress inequalities that are naturally encountered. But if tribunals are constantly doing fairness, they erode the predictability that their power of decision-making are largely premised upon. Consequently, fairness only goes so far. It cannot be the general rule. It is the exceptional one.

As a fourth and final point it is possible to query the role of fairness as part of justice. As the examples from WTO law have indicated, fairness involves justice, but not all of justice is fair. Fairness is a right. In so being, it is limited by others' right to fairness. It is also restricted by the need for "stability and predictability"<sup>73</sup> that are at the heart of any legal system.<sup>74</sup> This concluding observation highlights the way in which fairness, as a form of inequality, ultimately works to *promote* equality rather than constitute the *whole* of equality, as some commentators appear to infer.<sup>75</sup>

## 6. Conclusion

I have attempted in this article to put forward a definition of fairness derived from the experience of WTO law and to highlight a stable conception of this notoriously slippery subject. In short, I have suggested that fairness is synonymous with 'appropriateness'.

In international economic law the issue of fairness is most closely associated with appropriate treatment, which I have suggested is undertaken to preserve and strengthen relationships. This view coheres with humans' biologic and evolutionary nature, which depends upon relationships to accomplish the increasingly complex tasks that sustain human life.

The understanding of fairness as appropriateness offers a number of advantages. For one, we no longer have to resign ourselves to the fact that "talk about fairness is conceptually muddled."<sup>76</sup> Rather, we can be much clearer about what fairness involves and more aware of its ultimate function as a tool of relational affirmation and communal cohesion.

Fairness considerations are most evident in the law of rights because it is rights-oriented situations that most often express "the individuality of the law".<sup>77</sup> Individuality is manifested differently in different fields of international economic law and ultimately depends upon the overall 'orientation', or 'pitch', of a particular legal system.

*Shrimp*, WT/DS58/AB/R, para. 156 (Oct. 12, 1998).

<sup>73</sup> For cases where panels stated that the purpose of GATT is to protect expectations see Working Party Report, 'Brazilian Internal Taxes', adopted 30 June 1949, BISD II/181, at para. 16; Panel Report, *United States—Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136, at para. 5.1.9; Panel Report, *Canada—Administration of the Foreign Investment Review Act*, adopted 7 Feb. 1984, BISD 30S/140, at para. 6.6; For some WTO dispute settlement reports referring to the protection of expectations see *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (5 Sept. 1997), paras 45-62; *EC—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R (5 June 1998), paras 83-84; *Korea—Taxes on Alcoholic Beverages*, WT/DS75/AB/R (18 Jan. 1999), paras 125-127; *Korea—Measures Affecting Government Procurement*, WT/DS163/R (1 May 2000), paras 7.9ff, 7.75; *U.S. – Import Measures on Certain Products from the EC*, WT/DS165/R, para. 6.14 (17 July 2000).

<sup>74</sup> *U.S. – Stainless Steel*, WT/DS344/AB/R, n. 313 (30 April 2008) (citing several instances where stability and predictability identified as an important principle of international decision-making).

<sup>75</sup> This is particularly true of the work of John Rawls, whose well-known doctrine of "justice as fairness" inferred that justice consists of doing fairness in individual instances. Justice as fairness, with its principles of justice and the institutionalization of the values of public reason, could produce an overlapping consensus. Rawls argued that it establishes a basis of fair cooperation that is neutral among substantive conceptions of the good and thus is the conception of justice that satisfies the criteria of reasonable agreement and reflective equilibrium. For an overview of Rawls' work see Jack Knight, "Justice and Fairness", 1 *Annu. Rev. Polit. Sci.* 425 (1998). For an application of these ideas to the domain of WTO law see Frank Garcia, *Trade, Inequality and Justice* 120 (2003). Garcia observes that "The general conception of Justice as Fairness consists of a single central idea: "All social primary goods – liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured." *Ibid*. This suggests departures from equality, or fairness, are only to be countenanced for the purpose of improving the lot of the disadvantaged.

<sup>76</sup> Mathias Risse, "Fairness in Trade" 2 (Working Paper, Feb. 5, 2005).

<sup>77</sup> Philip Allott, *Eunomia* p. 159-160 (¶ 10.43) (1990).

In WTO law the law is obligation-oriented and generalized, being keyed in most instances to equality-based standards. Hence, the “individuality of the law” is more obscure. Nevertheless, attention to individualism is often manifested in particular WTO rules concerned with fair conduct and due process.

It is intriguing to note how this experience contrasts with experience involving the law of international investment, where the law which concentrates its attention on the protection of individual investors and their investments, and hence, on their rights. Not surprisingly, claims to ‘*fair* and equitable treatment’ are of increasing frequency in international investment law and may, in fact, be one reason why other commentators have often complained about the fragmentary nature of IEL and how it fails to display principled coherence.<sup>78</sup>

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<sup>78</sup> “[M]any critical voices have deplored the lack of predictability and balance of investment arbitration ...” August Reinisch, “The Future of Investment Arbitration” in Christina Binder et al. (eds), *International Investment Law for the 21<sup>st</sup> Century*, 894 at 916 (2009).