

2015

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Citation of this paper:

Chios Carmody, "Fairness as Appropriateness: Some Reflections on Procedural Fairness in WTO Law" in Armin Savarian & Filippo Fontanelli (eds.), *Procedural Fairness in International Courts and Tribunals* (British Institute for International and Comparative Law, 2015)

Fairness as Appropriateness: Some Reflections on Procedural Fairness in WTO Law

By Chios Carmody¹

1. Introduction

The subject of fairness is a perennial one in human and international affairs, and yet for all its pervasiveness, it is surprisingly hard to define.² A definition would be helpful, if only to assist in illuminating the oft-mentioned distinction between procedural and substantive fairness.³ Examining the law with respect to at least one of these types of fairness – here the procedural kind – may assist in arriving at a stable conception of fairness with broader, more universal applications.

In this contribution I examine aspects of procedural fairness in the law of the World Trade Organization (WTO). Generally speaking, WTO law is not a body of law that places direct emphasis on fairness. Instead, its most immediate concern is the “equality of competitive conditions”.⁴ That concern is tied to the law’s general orientation as an order of obligations. Member countries are obliged to treat all other member countries the same, a reflection of the general principle of equality in international law. Nevertheless, there have been a number of references to fairness and procedural fairness in WTO law and its dispute settlement system. Taken together, these can help to provide some idea of what a substantive conception of fairness involves.

I will suggest here that, at a minimum, fairness can be understood as ‘appropriateness’, or what is fitting or proper in specific circumstances. We should understand the preoccupation with fairness – and especially procedural fairness – as a matter of the claims of one specific individual or interest versus another. Fairness is something that humans 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. The rationale for this assertion is the plain fact that the law does not demand fairness in *every* instance. More often it demands equality – as WTO law amply demonstrates. I draw on examples from three different areas in WTO law: third party rights, the burden of proof, and the handling of evidence, to illustrate my point. In each WTO law appears to have developed its own conception of what is ‘appropriate’, or fair.

Still, the subjectivity of each of these examples, and the particularity of the WTO legal system more generally, makes the derivation of an overarching definition of fairness problematic. Procedural fairness in WTO law must be understood as an artefact of a specific legal system. It is a system that focuses on “dispute settlement” as opposed to litigation, thereby subordinating concerns about procedural fairness to the collective goals of the law, and whose chief aim is “settlement”, that is, outcomes which may or may not be arrived at entirely fairly or appropriately. Moreover, behind the façade of WTO law lies a residual realm of negotiation and agreement-making in which power politics remain a factor. Thus, conclusions reached about procedural fairness in WTO law here must be appreciated in light of the general character of the system from which they emanate.

This contribution is divided into four parts. Following this introduction, Part II is devoted to providing some

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

³ Steven Suranovic has written, “The concept [of fairness] 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). See also Americo Bevigilia Zampetti, *Fairness in the World Economy* 26 (2006).

⁴ Numerous WTO cases have emphasized the importance of the law’s maintenance of equality of competitive conditions. See for instance *Japan – Alcoholic Beverages*, WT/DS8/R, p. 16 (4 Oct. 1996); *Korea – Alcoholic Beverages*, WT/DS75/AB/R, para. 120 (18 Jan. 1999); *Chile – Alcoholic Beverages*, WT/DS87, 110/AB/R, para. 54 (13 Dec. 1999).

general observations about the nature of the WTO legal system and how specific concerns about procedural fairness arise within it. Part III is devoted to an examination of procedural fairness or appropriateness in relation to the third party rights, the burden of proof and the treatment of evidence in WTO law. Finally, Part IV offers some concluding reflections about a ‘stable conception’ of procedural fairness in WTO and other systems of international law.

II. Procedural Fairness in WTO Law

What does it mean to say that something is “fair”? In common English usage, for instance, what is “fair” is considered to be fitting or appropriate in the circumstances. We say, for example, that a particular transaction is “fair”, meaning that it is suitable for those concerned. This is not the same as saying that it is optimal. A fair transaction is simply 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, the use of fairness suggests that it is something which applies in particular situations as opposed to general ones.⁵ Fairness is something that we are chiefly concerned with as an attribute of continuing relationships.

These initial observations suggest that fairness is important as a procedural matter in WTO law chiefly in circumstances where the law is concerned with particular relationships as opposed to general ones. Specificity might be readily discernible in international criminal law, where the issue before a tribunal is the behaviour of a *single* defendant, or in international investment law, where the issue before an arbitrator is the behaviour of a state towards a *particular* investor, but it is more difficult to discern in WTO law where the implicit focus of the law is on maintaining the “equality of competitive conditions” among WTO members and where, consequently, specificity is more obscure.⁶

To fully understand the nature of claims to procedural fairness in WTO law, therefore, we must understand the broader envelope, or environment, in which such claims are made. WTO dispute settlement is popularly thought of as a “trade court”. However, a number of key provisions in the WTO Dispute Settlement Understanding (DSU), or WTO code of procedure, suggest that the system is designed to do something more than simply litigate individual members’ trade interests. WTO dispute settlement is styled “*dispute settlement*”, a term which suggests that while the system is tasked with the job of resolving individual “disputes”, its ultimate aim is “settlement”.⁷

Disputes themselves originate between countries in the WTO Dispute Settlement Body (DSB), a political organ of the WTO, and are heard by panels normally composed of representatives from three neutral countries.⁸ Panel functions are limited.⁹ The dispute settlement system is described as “a central element in providing *security and predictability* to the multilateral trading system” serving “to preserve” rights and obligation of the membership and “to clarify” WTO law. (DSU Art. 3.2) Once a panel has finished its work, its recommendations and rulings are forwarded to the DSB which, in the normal course, adopts them as its own.

⁵ “The content of the duty to act fairly always depends on the circumstances of the particular case ...”: T. R. S. Allan, *Law, Liberty, and Justice* 198 (1994); “the demands of fairness depend on the circumstances”. Andrew Mitchell, *Legal Principles in WTO Disputes* 145 (2008).

⁶ Andrew Mitchell observes that “Several human rights treaties impose due process obligations on states ... In addition, a number of bilateral trade or investment treaties contain standards regarding the treatment of aliens and these often include due process requirements.” Andrew Mitchell, *Legal Principles in WTO Disputes* 151 (2011). It is noteworthy that Mitchell selects examples focused on the vindication of *individual* interests (human rights, investment protection etc.) where due process or fairness considerations might be expected to be pronounced. In WTO law the individual interest is diminished and fairness considerations therefore more muted.

⁷ That interpretation is confirmed by several provisions in the DSU, especially Art. 3, which refers to the “the prompt *settlement* of situations” (DSU Art. 3.3), to “[r]ecommendations or rulings ... [being] aimed at achieving a *settlement*” (DSU Art. 3.4) and to “[t]he aim of the dispute settlement mechanism [being] to secure a *positive solution* to a dispute.” (DSU Art. 3.7).

⁸ Disputes begin within the general envelope of a “matter” raised in the DSB. A “matter” has been defined as “... the specific *measures* at issue and the legal basis of the complaint (that is, the *claims*)”. *EC – Bed Linen* (Art. 21.5), WT/DS141/AB/RW, para. 78 (8 Apr. 2003) [emphasis in original].

⁹ The role of panels and the Appellate Body is said to be to “assist” the DSB in discharging its responsibilities with respect to “the *settlement* of disputes” (DSU Art. 1.1).

However, recommendations and rulings “cannot add to or diminish the rights and obligations provided in the covered agreements.” A number of panels have taken their cue from this wording to stress that their function is restricted to “assisting” the DSB in discharging its responsibilities.¹⁰

The supplementary and assistive function of panels is reinforced by DSU provisions and interpretations that have the effect of muting antagonism between the parties. Procedural rules of dispute settlement have been described as being “designed to promote, not the development of litigation techniques, but the *fair*, prompt and effective resolution of trade disputes”.¹¹ In addition, counterclaims are prohibited, something which tends to dilute assertions that the matter in question involves only the litigants alone.¹² The system also lacks a mechanism for compulsory discovery, a feature which has obvious consequences for the fairness of rules related to handling of evidence.¹³

Antagonism is further diluted by a number of DSU provisions and practices that appear to make WTO dispute settlement a multipolar exercise in achieving a resolution that is acceptable to *all* parties involved, including in some degree the WTO membership as a whole. As will be discussed, WTO law lacks a definition of standing, or ‘interest’, for the purposes of dispute settlement, meaning that in practice virtually any WTO member can participate in dispute resolution proceedings.¹⁴ Third parties – that is, parties formally outside the litigation – are accorded liberal rights of intervention and often have done so by expressing their views, offering interpretations, or making suggestions.¹⁵ Several dozen WTO disputes have featured multiple parties and third parties.¹⁶

Procedural fairness considerations in WTO law arise in WTO review of national administrative proceedings, where foreign imports or importers can be the victim of national bias. This bias is often an issue in anti-dumping proceedings, for instance, where a comparison must be made between the exported price and the normal value in the producer’s home market. Thus, for instance, Art. 2.4 of the WTO Anti-Dumping Agreement (ADA) provides that in calculating margins of dumping “A *fair* comparison shall be made between the export price and the normal value.” The obligation is for national authorities to ensure that assessments of price are made that accurately reflect comparable conditions. In *EC – Bed Linen* a WTO panel had an opportunity to expand on comparability in light of the obligation of fairness as follows:

... Read in light of the obligation in the Article 2.4 to make a fair comparison, the specific requirements to make comparisons at the same level of trade and at as nearly as possible at the same time, and the obligation to make due allowance for differences affecting price comparability, the use of the word comparable in Article 2.4.2 indicates to us that investigating authorities may insure comparability either by making necessary adjustments under Article 2.4, or by making comparisons for models which are, themselves, comparable.¹⁷

The panel’s reference to a comparison “at the same level of trade and at as nearly as possible at the same time”

¹⁰ *Mexico – Anti-Dumping Duties*, WT/DS331/R, para. 7.2 (8 June 2007); *U.S. – Lamb*, WT/DS177/R, para. 7.280 (21 Dec. 2000); *U.S. – Stainless Steel*, WT/DS344/AB/R, para. 155 (30 April 2008).

¹¹ *U.S. – FSC*, WT/DS108/AB/R, para. 166 (24 Feb. 2000) [emphasis added].

¹² DSU Art. 3.10 provides “[i]t is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.” Notwithstanding this, tit-for-tat litigation has been observed in WTO dispute settlement and is not uncommon. See the *Brazil-Canada Aircraft* cases (WT/DS46, WT/DS70), the *EU-U.S. Large Aircraft* (“Airbus/Boeing”) cases (WT/DS316, WT/DS353), *EC – Commercial Vessels*, WT/DS301/R, para. 7.127 (22 Apr. 2005).

¹³ As noted in *Chile – Alcoholic Beverages*, WT/DS87, 110/R, para. 6.26 (15 June 1999).

¹⁴ “...we believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be ‘fruitful’.” *EC – Bananas*, WT/DS27/AB/R, para. 135 (9 Sept. 1997). See also *Turkey – Textiles*, WT/DS34/R, para. 9.11 (31 May 1999).

¹⁵ Third party participation is provided for in DSU Art. 10. Third parties cannot raise issues not raised by the parties themselves, but otherwise their participation has been “profound, vigorous and sustained.” Chi Carmody, “Of Substantial Interest: Third Parties under GATT” 18:4 *Mich. J. Int’l L.* 615 at 618 (Summer 1997).

¹⁶ Cases involving large numbers of parties include *EC – Bananas*, WT/DS27 (24 third parties). WTO cases involving large numbers of third parties include *Canada – Patent Protection*, WT/DS114 (11 third parties), *Australia – Plain Packaging*, WT/DS434 (36 third parties).

¹⁷ *EC – Bed Linen from India*, WT/DS141/R, para. 6.117 (30 Oct. 2000).

speaks to the circumstantial nature of a “fair” assessment. In essence, the treaty requires the comparison must be tailored to circumstances that are as close as reasonably possible to original conditions in the country of production. This could be accomplished either by one of the methods set out in ADA Art. 2.4 or some comparable method. Because the EC had not done so fully in that instance, it was found to have breached its obligation.

Occasionally, the procedural obligation of fairness in WTO law is also something projected into national legal systems as something that must be furnished in the course of domestic administrative determinations, such as those involving anti-dumping proceedings. Thus in *Brazil – Dessicated Coconut*, for instance, the Appellate Body observed that:

[b]ecause a countervailing duty is imposed only as a result of a sequence of acts, a line had to be drawn, and drawn sharply, to avoid uncertainty, unpredictability and *unfairness* concerning the rights of states and private parties under the domestic laws in force when the WTO Agreement came into effect.¹⁸

More often, however, issues of fairness are raised in a variety of circumstances arising *within WTO proceedings* themselves. Like the duty of fairness in English and continental systems of administrative law, these involve circumstances where specific rights are in play and where the decision in question has some particular importance to an individual WTO country as opposed to another.¹⁹

Within these proceedings the WTO Appellate Body has also referred to a requirement of due process. Due process, in turn, has been described as “fundamental to ensuring a *fair* and orderly conduct of dispute settlement proceedings.”²⁰ In *Canada – Continued Suspension* due process was described as guaranteeing “that the proceedings are conducted with *fairness* and impartiality, and that *one* party is not *unfairly* disadvantaged with respect to *other parties in a dispute*.”²¹ Similarly, in *Chile – Price Band System* the Appellate Body observed that “[a] panel will fail in the duty to respect due process if it makes a finding on a matter that is not before it, because it will thereby fail to accord to a party a *fair* right of response.”²² In *Canada – Continued Suspension* the Appellate Body also observed that the allocation of the burden of proof in compliance proceedings was, among other considerations, a matter of “procedural *fairness*.”²³ And again, in *Chile – Price Band System* an arbitrator assessing the reasonable period of time (RPT) for implementation by Chile noted that the RPT chosen “will *fairly* balance the legitimate needs of the implementing Member against those of the complaining Member.”²⁴ Once more, the recurrent issue in claims of procedural fairness appears to involve

¹⁸ *Brazil – Dessicated Coconut*, WT/DS22/AB/R, p. 19 (21 Feb. 1997).

¹⁹ It is useful to keep in mind that there is an analogous body of jurisprudence in English law and the law of other common law jurisdictions concerning the “duty of fairness” in administrative proceedings. This body can help to inform and supplement the idea of fairness as appropriateness put forward above given that what fundamentally is at issue as in many cases of fairness in international economic law is the relationship between government and the individual. In the domestic context courts have held that administrative tribunals and bodies owe a duty to be fair – usually conceived of as a duty to take into account the specific circumstances of the applicant – whenever the applicant’s rights are specially affected. The duty can be thought of as an individualization of the procedure to the applicant, or in other words, an obligation of “appropriateness”. The Supreme Court of Canada observed in *Baker v. Canada* that:

[t]he values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[1999] 2 S.C.R. 817, para. 28. The passage from *Baker* speaks of a desire to tailor procedures and outcomes to the specific rights in question, thereby affirming the relationship between the state and the claimant. It also speaks to the point that law, which is largely instrumental, is best equipped to achieving procedural as opposed to substantive fairness. The same point has been made by other commentators who have referred to similar fairness principles developed in the context of European and EU administrative law. See for instance Stephan W. Schill, “Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law”, ILLJ Working Paper 2006/6.

²⁰ *Thailand – H-Beams from Poland*, WT/DS122/AB/R, para. 88 (12 Mar. 2001) [emphasis added].

²¹ *Canada – Continued Suspension*, WT/DS321/AB/R, para. 433 (16 Oct. 2008) [emphasis added].

²² *Chile – Price Band System*, WT/DS207/AB/R, para. 176 (23 Sept. 2002) [emphasis added].

²³ *Canada – Continued Suspension*, WT/DS321/AB/R, para. 361 (16 Oct. 2008) [emphasis added].

²⁴ *Chile – Price Band System* (21.3), WT/DS207/13, para. 37 (17 Mar. 2003) [emphasis added].

relationships among members and between tribunals and litigating parties.²⁵

What is noteworthy in these instances is the particular *role* of fairness. In both *Canada – Continued Suspension* and *Chile – Price Band System* the concept of fairness appeared to play a gap-filling function, serving as a “basket of meaning” in circumstances where the WTO Agreement itself is silent. On these occasions the Appellate Body appeared to borrow the concept from general principles of law, noting for instance in *Canada – Continued Suspension* that “the protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU.”²⁶ The reference to “a rules-based system of adjudication” suggests that the exact source of due process obligation imposed by fairness lies simply in the impartial, adjudicative nature of WTO dispute settlement.

Elsewhere, however, fairness has been linked more directly to the distinctive multipolar character of the system. Thus, in *Mexico – Corn Syrup* the Appellate Body examined a claim by Mexico that the panel had failed to set out a “basic rationale” for its decision, contrary to DSU Art. 12.7. The Appellate Body dismissed the claim but nevertheless observed in passing that the obligation to provide a basic rationale “reflects and conforms with the principles of *fundamental fairness* and due process”.²⁷ It added that providing such an explanation “assists [a defending] Member to understand the nature of its [WTO] obligations” and promotes the aims of “security and predictability in the multilateral trading system and of clarifying the existing provisions of the covered agreements, because the requirement to provide “basic” reasons contributes to *other* WTO Members’ understanding of the nature and scope of [their WTO] rights and obligations.”²⁸ This example, like others, suggests WTO dispute settlement will employ several sources to elaborate on the idea of procedural fairness, sources that are ‘appropriate’ to the circumstances.

III. Procedural Fairness in Action: Third Parties, the Burden of Proof and the Handling of Evidence

With the above observations about the nature of WTO law, dispute settlement and procedural fairness in mind, I proceed to examine the exercise of third party rights, the burden of proof (and its reversal), and the handling of evidence, as specific examples of procedural fairness. In each area it is important to recall that when we are asking are the particular procedures fair, we are asking are the procedures appropriate? In other words, are they fitting or right in the circumstances?

A useful subject to begin an examination of procedural fairness in WTO law with is the status of third parties in WTO dispute settlement. The traditional rule in international law is that a treaty creates no rights or obligations for third parties, a rule now formalized in Art. 34 of the Vienna Convention on the Law of Treaties.²⁹ The rule has been interpreted to preclude participation by third parties in many international proceedings, notably those of the International Court of Justice, because “the concept of opposability reduces the issue [in dispute] to one of bilateral application as between the immediate parties.”³⁰

This logic is questionable in a treaty like the WTO Agreement whose “central” and “essential” feature is a Most Favoured Nation clause, a clause that multilateralizes all benefits to the WTO membership.³¹ Thus, in WTO law a more permissive approach is contemplated. DSU Art. 10.1 provides:

The interests of the parties to a dispute and *those of other Members* under a covered

²⁵ *Canada – Continued Suspension*, WT/DS321/AB/R, Annex IV, para. 6 (16 Oct. 2008)

²⁶ *Canada – Continued Suspension*, WT/DS321/AB/R, para. 433 (16 Oct. 2008).

²⁷ *Mexico – Corn Syrup* (21.5), WT/DS132/AB/RW, para. 107 (22 Oct. 2001) [emphasis added].

²⁸ *Ibid.* [emphasis added].

²⁹ Art. 34 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969) provides “A treaty does not create either obligations or rights for a third State without its consent.”

³⁰ See Christine Chinkin, *Third Parties in International Law* 2 (1994). For a discussion of third party intervention in the International Court of Justice see John Gaffney, “Due Process in the World Trade Organization” 14:4 *Am. U. Int’l L. Rev.* 1173 at 1298 (1999). More recently some commentators have detected a slight relaxation in the ICJ’s traditionally restrictive interpretation of requests to intervene under ICJ Statute Arts. 62-63. See Paolo Palchetti, “Opening the International Court of Justice to Third States”, 6 *Max Planck U.N.Y.B.* 139 (2002).

³¹ *US – Section 211 Appropriations Act*, WT/DS176/AB/R, para. 297 (2 Jan. 2002).

agreement at issue in the dispute shall be fully taken into account during the panel process.³²

DSU Art. 10.2 provides “Any Member having a substantial interest in a matter before a panel ... shall have an opportunity to be heard by the panel and to make written submissions to the panel.” Commenting on these rules the panel in *Australia – Apples* noted that “not only have third parties the *right* to make submissions in a dispute, but panels have the *legal obligation* to consider them.”³³

WTO members have activated their third party rights on many occasions, making submissions that are profound, vigorous and sustained. The ease of intervention speaks to the ‘multipolarity’ of many WTO disputes and the way that the definition of WTO law is part of shaping a broader common endeavour founded on interdependence. When something is conceived of as belonging to all, then all should have an interest in its definition. In this sense, liberal rights of participation appear appropriate in the circumstances, or ‘fair’.

At the same time, third party rights in WTO law are not limitless. The need occasionally arises to restrict participation in order to get deals done. Thus, DSU Art. 4.11 provides that where a WTO member that is not a principal party believes it has a substantial interest at the preliminary consultation stage, it “shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded.” Skirmishing has occasionally occurred when third countries have been excluded at this phase, or later, in the case of arbitration, specified under DSU Art. 25, where the principal parties have exclusionary rights due to the law’s reassertion of a more evidently ‘bilateral’ nature.³⁴ This too might appear to be procedurally “fair” in light of the acknowledged need to settle matters and restore communal peace. From another viewpoint, however, DSU Arts. 4.11 and 25 could be regarded as procedurally unfair in the sense that they restrict the generally liberal right of participation. The law’s vacillation is illustrative of the highly subjective nature of fairness, which is regarded differently by different actors in a legal system.³⁵

A second area where fairness concerns are evident in WTO law is with respect to the burden of proof in WTO proceedings, and in selected instances, its reversal. The ordinary rule on the burden of proof was outlined by the Appellate Body in *U.S. – Shirts and Blouses*, where it held that “a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, [is] that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence”.³⁶ At the same time, in *U.S. – Clove Cigarettes* the Appellate Body observed that “the burden of proof in respect of a particular provision in the [WTO Agreement] *cannot* be understood in isolation from the overarching logic of that provision, and the function it is designed to serve.”³⁷ Thus, in a number of WTO proceedings panels and the Appellate Body have modified the ordinary rule to take account of the difficulty of either providing evidence or proving a negative.

As mentioned, WTO dispute settlement has limited means of fact-finding. Parties are frequently exhorted to cooperate in the production of evidence - not always successfully. Adverse inferences can be drawn against a

³² Emphasis added.

³³ *Australia – Apples*, WT/DS367/R, para. 7.76 (9 Aug. 2010) [emphasis added]. See also *U.S. – Shrimp*, WT/DS58/AB/R, para. 101 (12 Oct. 1998). For instances where panels have actively considered third party submissions, in some cases even preferring them to submissions by the parties see *EC – Bed Linen*, WT/DS141/AB/R para. 142-144 (1 Mar. 2001), *U.S. – Cotton*, WT/DS267/R, para. 7.443 (8 Sept. 2004), *U.S. – Softwood Lumber*, WT/DS264/AB/RW, paras. 98, 112 (15 Aug. 2006); *U.S. – Aircraft*, WT/DS353/R, para. 7.767 (31 Mar. 2011).

³⁴ DSU Art. 25.3 states, “Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration.” In retaliation proceedings pursuant to *U.S. – Clove Cigarettes*, WT/DS406/R (4 Apr. 2012), for instance, the EU challenged a deal reached as a result of arbitration between the U.S. and Indonesia in that case. See “Clove Cigarettes: EU Challenges Indonesia at WTO over Compliance, Arbitration Proceedings” 18:22 *BRIDGES* (19 June 2014). Third party status has also been denied in a number of other arbitrations under DSU Art. 22.6: see *EC – Bananas (Art. 22.6)*, WT/DS27/ARB, para. 2.8 (9 April 1999) (third party rights not granted to Ecuador); *Brazil – Aircraft (22.6)*, WT/DS46/ARB, paras 2.4-2.6 (28 Aug. 2000) (third party rights not granted to Australia); *US – Gambling Services (Art. 22.6)*, WT/DS285/ARB, paras 2.30-2.31 (21 Dec. 2007) (third party rights not granted to the EC).

³⁵ “... opposing parties may not share the same perceptions of fairness and due process.” John Gaffney, “Due Process in the World Trade Organization” 14:4 *Am. U. Int’l L. Rev.* 1173 at 1193 (1999).

³⁶ *U.S. – Shirts and Blouses*, WT/DS33/AB/R, p. 14 (25 April 1997).

³⁷ *U.S. – Clove Cigarettes*, WT/DS406/AB/R, para. 286 (4 April 2012) [emphasis in original].

non-cooperative party.³⁸ Similarly, in certain situations involving the invocation of an exception or the reasonable availability of alternative measures, WTO decision-makers have effectively *reversed* the burden of proof. These modifications may be understood as “appropriate”, hence fair, in a system where the body of law is composed largely of *negative* obligations, that is, obligations about what member countries must *not* do.³⁹ Situations can arise where the law’s attention focuses on what members should have done to fulfil their WTO commitments. Without a reasonable alternative, it would be impossible to say. At the same time, WTO panels and the Appellate Body cannot be tasked with the job of constructing a viable hypothetical. Member countries must also enjoy some latitude in the legislation they enact.

As a result, in several instances the burden of proof has been reversed to require claimants to demonstrate how an alternative proposed by the claimant is more appropriate, or fair. In *U.S. – Tuna II (Mexico)*, for instance, the measure at issue involved the WTO consistency of certain U.S. labelling requirements for tuna caught by Mexican fleets. The Appellate Body noted that the burden of proof required Mexico, as complainant, to make a *prima facie* case under Art. 2.1 of the WTO Technical Barriers to Trade Agreement (TBT) that the challenged measure created an “unnecessary obstacle” to international trade. The Appellate Body also held, however, that as part of making its *prima facie* case “a complainant may also seek to identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available.” This latter set of factors would apply to satisfy the requirements of TBT Art. 2.2, namely that “technical regulations shall not be more trade-restrictive than necessary.” Mexico proposed use of an alternative labelling standard in the U.S. market to satisfy this, an alternative that allowed for fishing by setting on dolphins, something the usual “dolphin safe” label prohibited. The Appellate Body ultimately decided that that the alternative proposed by Mexico would contribute to U.S. objectives “to a lesser degree than the measure at issue, because, overall, it would allow more tuna harvested in conditions that adversely affect dolphins to be labelled “dolphin-safe”.”⁴⁰

The burden of proof is also shifted in compliance proceedings under DSU Art. 22.8, where emphasis is placed on the twin subjects of compliance and the need for settlement. As a last resort, WTO dispute settlement contemplates countermeasures by claimant countries. Countermeasures allow for temporary suspension of concessions and commitments under the WTO Agreement. The question has arisen as to who bears the burden of proof to prove that a member country has brought itself into compliance. In *Canada – Continued Suspension*, for instance, the Appellate Body noted that the burden “is a function of the following considerations ... (1) what is the nature of the cause of action that is framed under DSU Article 22.8”, “(2) the practical question as to which party may be expected to be in a position to prove a particular issue” and “(3) consideration must be given to requirements of procedural fairness.”⁴¹ The Appellate Body said that it is “*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 by the DSB in the original proceedings, so that normality can be lawfully restored.”⁴² At the same time, it also went on to modify the usual rule on the burden of proof as follows:

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*

³⁸ “[A] panel is entitled to draw adverse inferences from a party’s refusal to provide information.” *Argentina – Import Measures*, WT/DS438/AB/R, para. 5.159 (15 Jan. 2015) citing *U.S. – Wheat Gluten*, WT/DS166/AB/R, para. 172-173 (22 Dec. 2000).

³⁹ Peter Gerhart has noted, for instance, that “All other WTO treaty obligations [apart from TRIPS] require states to refrain from taking action (“do not impose quotas”) or to refrain from taking action without meeting specified conditions (“do not ban foods without scientific evidence that they are unhealthy”).” Peter Gerhart, “Reflections: Beyond Compliance Theory – TRIPS as a Substantive Issue” 32 *Case W. Res. J. Int’l L.* 357 at 358 (2000). On the vagueness of many WTO norms see also Mary Footer, *An Institutional and Normative Analysis of the World Trade Organization* 187-189, 192-193 (2006) (referring to WTO norms as either prescriptive, prohibitive, permissive, exceptive or programmatic).

⁴⁰ *U.S. – Tuna II (Mexico)*, WT/DS381/AB/R, para. 330 (16 May 2012).

⁴¹ *Canada – Continued Suspension*, WT/DS321/AB/R, para. 361 (16 Oct. 2008).

⁴² *Ibid.*, para. 362.

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.⁴³

These comments appear to reinforce the idea that settlement is a *joint* obligation of *all* parties to a WTO dispute, and in some sense, of the WTO membership as a whole. Again, the fairness, or “appropriateness”, of such rulings is evident.

A third domain of procedural fairness concerns arises in the handling of evidence. As mentioned, WTO law only possesses rudimentary fact-finding ability. WTO dispute settlement possesses no mechanism for compulsory discovery and there is as yet no power to issue subpoenas or compel testimony. Indeed, because of the lack of a discovery process, a rule of collaboration exists that often requires an adversary to provide the tribunal with documents that are in its sole possession.⁴⁴ The very limited nature of fact-finding reflects the fact that members themselves retain significant power in the system. As noted, the system is essentially cooperative and is designed to settle disputes in a manner that does not “add to or diminish the rights and obligations provided in the covered agreements.”

Still, the acknowledged power of member states sits in delicate tension with the need to discharge the burden of proof through the production of evidence. In *U.S. – Zeroing*, for instance, the Appellate Body emphasized that “the nature and scope of the evidence that might be reasonably expected by an adjudicator in order to establish a fact or claim in a particular case will depend on a range of factors, including the type of evidence that is made available by a Member’s regulating authority”.⁴⁵ It added that “a panel may have a sufficient basis to reach an affirmative finding regarding a particular fact or claim on the basis of inferences that can be reasonably drawn from circumstantial rather than direct evidence.”⁴⁶ The decision-maker’s power is backed up by the implicit threat of drawing an adverse inference against a non-producing party. Thus, in *Canada – Aircraft* the Appellate Body observed that WTO members are “under a duty and an obligation to ‘respond promptly and fully’ to requests made by panels for information” under DSU Article 13.1 and drew an adverse inference against Canada for its failure to provide information about certain transactions.⁴⁷ The fairness or appropriateness of such an outcome is once again evident given the limits of the dispute settlement system.

IV. Conclusion

This brief contribution has aimed to give some idea of the nature and role of procedural fairness in WTO law. It is difficult - and potentially hazardous - to discern one meaning from many mixed, and often singular, references to “procedural fairness” in general. Nevertheless, there are common threads that run through them, the most consistent being that procedural fairness is variable. It depends on the circumstances and demands appropriateness.

‘Appropriateness’ is itself a vague standard. What insight can it provide about the nature of procedural fairness? As we have seen, procedural fairness is an intensely subjective concept. It 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. It may be that procedural fairness or what is fair is understood “to connote impartiality, even-handedness or lack of bias”, as mentioned in *U.S. – Softwood Lumber*⁴⁸, but such usages will not always be consistent, and indeed, WTO law

⁴³ Ibid., para. 359-60 [emphasis added].

⁴⁴ *Argentina – Textiles*, WT/DS56/R, para. 6.40 (25 Nov. 1997).

⁴⁵ WT/DS350/AB/R, para. 357 (4 Feb. 2009).

⁴⁶ Ibid.

⁴⁷ WT/DS70/AB/R, para. 186-190 (14 April 1999). DSU Art. 13.1 provides that “A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.” More recently see also *Argentina – Import Measures*, WT/DS438/AB/R, para. 5.159 (15 Jan. 2015).

⁴⁸ WT/DS264/AB/RW, para. 138 (15 Aug. 2006). On that occasion the Appellate Body borrowed from dictionary definitions. 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”” The reference was drawn from *Shorter Oxford English Dictionary*, (5th ed.), W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol.1, p. 915.”

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 agreement on the details in every instance may be elusive. A keen appreciation of the variability of fairness' designations needs to be kept in mind when analysis of procedural fairness is undertaken.

A related observation is the fact that trying to shoehorn all procedural fairness references in WTO law into the idea of fairness as appropriateness previewed in this contribution 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 procedural fairness and its function in reinforcing community, some contrary usage can probably be found. We have to proceed, therefore, on the assumption that the idea of fairness as appropriateness may explain a large number - possibly even the majority - of procedural fairness references, but it will not explain *every* use. That qualification needs to be kept in mind in the search for a definition of substantive fairness going forward.