# Process Failure: What Does the Lack of Appellate Review Mean for Due Process of Law in WTO Disputes?

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**Abstract**

Due process is a central principle in most domestic legal systems and international dispute settlement, although its contours are nebulous, and its application is highly contextual. The purpose of this article is to examine the role of due process as a principle in the World Trade Organization (WTO) dispute settlement, addressing the specific question of whether the absence of an Appellate Body (AB) and the resulting "appeals into the void" constitutes a violation of due process norms. We first discuss "due process" conceptually, focusing on the functions that due process serves and the importance of context in determining its components in each circumstance. To do so, we focus on the settings in which it has been given the most explicit content: common law countries in general and the United States (US) in particular. From this foundation, we identify the elements of due process embedded in WTO dispute settlement as compared to the Dispute Settlement Understanding (DSU) and related documents. In addition, we examine how panels and the Appellate Body have interpreted these elements. Based on this analysis, we consider what the lack of appellate review means for due process in WTO disputes and offer some conclusions and recommendations for the future.

**Keywords:** Due Process, Appellate Body, WTO Dispute Settlement

## A. Introduction

In November 2020, Prof. Dr. *Hong Zhao* marked the conclusion of her tenure as an Appellate Body (AB) member of the WTO with a farewell address delivered at the Graduate Institute in Geneva, Switzerland. For the vast majority of her predecessors, this valedictory was a moment to bask in the successes of the departing judge's tenure and to toast the continued preservation of the WTO's "crown jewel", its dispute settlement system. Unfortunately for *Zhao*, her impending departure carried heavy implications that effectively stifled an atmosphere of revelry. Indeed, as a result of a years-long effort by the United States (US) to block the appointment of new AB members, *Zhao* was the only judge to remain on the bench. When her term officially expired, so too did the hopes of many that there would continue to be appellate review in the WTO.

Despite the surrounding circumstances, *Zhao*, like those who had recently left the bench – *Van den Bossche*, *Graham*, and *Bhatia* among them – attempted to locate silver linings in the dark clouds. She noted:

> "The AB (…) established and maintained a standard and consistent practice of implementing its working procedures, in particular in areas of due process, procedural fairness, and keeping a good reputation for its adjudication."[1]

Her remarks about fidelity to due process, which were conspicuously delivered in the past tense, are unquestionably rooted in truth. However, it leaves an ominous, unuttered question about the *current state* of things at the WTO. Specifically, what does an absent Appellate Body mean for adherence to due process norms in the WTO? This article will aim to address that question.

The Structure of the article is as follows. Part B will discuss the concept(s) of "due process", focusing on the functions that due process serves and the importance of context in determining its constituent parts in a given circumstance. With this as a foundation, Part C will identify the due process elements embedded in WTO dispute settlement vis-à-vis the Dispute Settlement Understanding (DSU) and associated documents. Additionally, it will explore how panels and the AB have interpreted those elements. Part D will turn to the specific question of whether the absence of the AB and the subsequent "appeals into the void" constitute a violation of due process norms. Part E concludes.

## B. Due Process of Law in International Dispute Settlement

To effectively determine whether the AB's absence and/or the appeals into the void constitute breaches of due process norms, we must first frame what is meant by "due process." This is no easy task. The concept is, at once, nebulous in its contours and highly contextual in its application. Further complicating matters, it has a duality of functions – facilitating a rights-based system and legitimating structures – that are likewise rooted in ill-defined concepts.

With these complications in mind, this section will proceed in the following manner. First, we shall discuss the concept of due process in the settings where it has received the most explicit content: common law countries, generally, and the US, in particular. This discussion will reveal two larger truths about due process that are applicable to our analysis of the WTO. First, the "rights" associated with due process are highly contextual, even within common law jurisdictions. Second, the functional utility of due process norms/rights largely relates to the legitimizing role that it plays both for the dispute settlement system to which it adheres and, by extension, to the larger governance structure to which that dispute settlement system is a part.

Having recognized the contextual nature of due process, we shall briefly explore the extent to which these themes have been recognized in civil jurisdictions and within international law more widely, to determine the extent to which certain elements of due process have been universalized. This will provide a baseline for

1 Farewell speech of Appellate Body member Prof. Dr. Hong Zhao, 30 November 2020, available at: https://www.wto.org/english/tratop_e/dispu_e/farwellspeechhzhao_e.htm (28/10/2024).

the sorts of due process elements we are apt to encounter within the WTO system, which will be discussed in Part C.

## I. Understanding Due Process

### 1. Common Law Antecedents

While there is not a voluminous literature on due process in the WTO, those who have written on the subject typically begin with an examination of its incarnations in common law countries. This is a seemingly logical starting point, as these are the jurisdictions in which the phrase has been explicitly invoked with the greatest frequency and fervor.

The earliest expression of due process concepts in the common law tradition is found in the text of the Magna Carta itself. Therein, the sovereign pledged that "no freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed (…) except by the legal judgement of his peers or by the law of the land".[2]

The core of the US due process provisions, as found in the Fifth Amendment, echoes the Magna Carta, stating that "[n]o person shall be (...) deprived of life, liberty or property, without due process of law (...)".[3]

Note that the Magna Carta provides process rights only in criminal cases. This linkage between due process and criminal law persisted for centuries in common law jurisdictions. Even in the US, where there is arguably the most explicit discussion of "due process" rights, there was a long-held presumption that process requirements were only relevant to criminal cases.

Eventually, however, the US Supreme Court interpreted "due process" requirements established in the Fifth and Fourteenth Amendments to the US Constitution more broadly – determining that the amendments aim to constrain the arbitrary exercise of governmental powers in both criminal and civil proceedings.[4]

2 The Magna Carta was not seen as a statute at the time of its making – but rather a treaty between King John and a disgruntled aristocracy. Given its importance, however, there was a habit of re-issuing the Magna Carta in the name of successive Monarchs. *Mott* asserts that the first use of the phrase "due process" itself probably came in the form of the 1354 confirmation, which provides that "no man of what estate or condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought to Answer by due Process of the Law." Statute of 28 Edward III (Sometimes called "the Statute of Westminster of the Liberties of London").

3 While the Fifth Amendment protects citizens against actions by the Federal government, the Fourteenth Amendment extends these protections to citizens from infringements by one or more of the Several states.

4 For completeness, we should also mention that the court found there to be "substantive due process rights" embedded in these amendments. The substantive due process case law has been difficult to synthesize in a cogent way for legal scholars and lawyers alike. In fact, the use of the due process clauses as a source of substantive rights has been called "a little puzzling" by the Constitution Center (https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/701 (28/10/2024)). The initial substantive due process case was *Lochner v. New York*, in which the Supreme Court determined that a New York rule establishing a maximum work week for bakers violated the "freedom to

The Legal Information Institute (LII) provides a nice summary of the concept of procedural due process requirements in the US, noting:

> "Procedural due process refers to the constitutional requirement that when the government acts in such a manner that denies a citizen of life, liberty, or property interest, the person must be given notice, the opportunity to be heard, and a decision by a neutral decision-maker. The government must also demonstrate that there is an articulated standard of conduct for their actions with sufficient justification. The requirements, called 'fundamental fairness', protect citizens from unjust or undue deprivation of interest."

As will be discussed in greater detail below, this general due process requirement does not produce a one-size-fits-all set of prescriptive obligations for each and every type of proceeding. With that said, we can begin to imagine some of the elements that might be deemed "fundamental" to the American conception of procedural due process. In an influential article published over a half-century ago, Judge *Henry Friendly* conducted such a thought experiment and provided a list of due process elements for a fair hearing. Judge *Friendly*'s list called for:

a) A neutral and unbiased tribunal.
b) A notice of the government's intended action and the asserted grounds for it.
c) The opportunity for the individual to present the reasons why the government should not move forward with the intended action.
d) The right for the individual to present evidence, including the right to call a witness.
e) The right for the individual to see the opposing side's evidence.
f) The right to cross-examination of the opposition's witnesses.
g) A decision based exclusively on the evidence presented.
h) The opportunity to be represented by counsel.
i) The requirement that the tribunal prepare a record of the evidence presented.
j) Requirement that the tribunal prepare written findings of fact and reasons for its decision.[5]

Ultimately, in most US cases, one examines the "fundamental fairness" of the government's actions to determine whether the government has met the requirements for due process. Certainly, this provides something of a benchmark for considering other schemes. However, one must be circumspect about simply mapping US-style due process requirements to other dispute settlement systems. The concepts of "due

contract". Subsequently, the Supreme Court has stated that fundamental rights protected by substantive due process are those deeply rooted in U.S. history and tradition, viewed in light of evolving social norms. These rights are generally not enumerated (i.e., they are not explicitly listed in the Bill of Rights), but rather are within "the penumbra" of certain Amendments that refer to or assume the existence of such rights. This has led the Supreme Court to find that personal and relational rights, such as privacy, are fundamental and protected. For purposes of this article, we have limited the scope of our inquiry to procedural due process requirements.

5 *Friendly*, University of Pennsylvania Law Review 1975/6, pp. 1267–1317.

process" and "fairness" are highly connected to notions about what "legitimizes" the power structure that is in place. It is on this latter topic that we now turn.

## 2. Legitimacy

While one can focus on the prescriptive elements that due process provides in a functional, almost administrative, fashion, it is important to recognize the larger role that the concept of due process plays in a given system. Specifically, it serves as a gauge of systemic quality, not unlike the concept of "rule of law". That is, the extent to which one can demonstrate adherence with the underlying tenets of the concept (or, more accurately, with the beliefs about the underlying concept by those within the particular governance system), the greater legitimacy that system has.

There is a rich, and developing, literature on the legitimacy of governance structures in the political science and international affairs literature(s) that buttresses this supposition. Generally speaking, academic discussions of governmental legitimacy have focused on domestic governance and have been rooted in sociological and normative notions of authority and, more particularly, justification(s) of (for) that authority.[6] One of the principal ways in which these distinctive foci are captured in the literature is in the development of "legitimacy" sub-concepts. Notable, in this respect, is the concept of "input legitimacy."[7] With regard to input legitimacy, *Mügge* states:

> "In essence, there are three ways of generating input legitimacy: direct participation ('government by the people'), representation on the basis of general elections ('government of the people'), and representation on the basis of social, cultural, religious or economic groupings ('government with the people'; see Schmidt, 2004). These three modes have to ensure that '[p]olitical choices (…) can be derived from the authentic preferences of the members of a community' – the core of input legitimacy according to Scharpf."[8]

This aspect of legitimacy is very much rooted in the strength of the "voice" that participants (feel they) possess. This strength/weakness of voice is inextricably linked with the processes that make up the governance structure. While the focus in the literature on legitimacy is clearly on *political* mechanisms, it seems reasonable to extend the analysis to the judicial function as well. If the judiciary appears to consistently mute the voices of the governed or if its decisions seem unpredictable – and thus run counter to one of the fundamental elements of the "due process" concept – then input legitimacy for the larger system would clearly suffer.

6 *Bodansky*, AJIL, 1999/3, pp. 596–624.

7 *Scharpf*. *Fritz W. Scharpf* also introduced the concept of "output legitimacy" which has been conceived in a more functional or consequentialist frame. *Scharpf* states, "'Government for the people' derives legitimacy from its capacity to solve problems requiring collective solutions because they could not be solved through individual action, through market exchanges, or through voluntary cooperation."

8 *Mügge*, RIPE 2011/1, pp. 52–74.

Interestingly, this recognition of the function played by the "legitimacy" concept is one that is readily identified, not just by political scientists, who are arguably more apt to frame legal concepts in a more instrumentalist way, but by lawyers as well.[9] Moreover, the concepts of legitimacy have begun to be applied to International Organizations (IOs).[10] As such, it is a dimension that ought to be considered when determining due process norms in a given milieu. It is to this more specific notion of context that we next turn our attention.

## 3. Context Matters

Certainly, one could (as some have) simply map the "due process" concept, as it is understood and practiced in countries like the US, to some international dispute settlement system (e.g., the WTO) as a kind of interesting thought experiment. However, this is an unsatisfying tack, for a number of reasons. Most importantly, the shape and content "due process" takes is highly dependent upon the context in which the studied system sits. Indeed, even within systems, we see variance in expectations about the specific elements that are required by due process norms. Consider, for example, the list of good practices provided by Judge *Friendly*. Would we expect that each and every element he discusses be available in every sort of proceeding within the US? Absolutely not. In the American system, where there is an overarching right to due process before life, liberty, or property can be taken by the state, the nature of the process required (including what types of hearing, or the kind of notice, etc.) will fluctuate depending upon, inter alia, nature of the liberty or property interests at stake. In criminal proceedings, for example, the US Constitution explicitly provides for certain procedural requirements (e.g., without the presence of certain exceptions, the police cannot search/seize the property of a suspected criminal without a warrant). However, far fewer procedural guarantees need to be made to fire a state employee or expel a student from a state university.[11] Putting a finer point on the importance of context in the US, the Supreme Court noted that due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstance."[12]

9 See, for example, the terrific chapter on "Legitimacy and Fairness" in *Franck*.

10 See, for example, *Howse/Nicolaidis*, Governance 2003/1, pp. 73–94, the authors make "legitimacy" a feature of their 2003 piece. However, the concept of legitimacy developed by the authors concludes that WTO legitimacy would be maximized by taking on a role of "subsidiarity" as a means of recapturing the "embedded liberalism" that inspired the creation of the GATT in the post-war period. While the efforts of political scientists tend to incorporate aspects of input and output legitimacy, it is important to note that there is a level of variety that exists. For example, a 2019 effort by *Tallberg* and *Zürn* "conceptualize legitimacy as beliefs of audiences that an IO's authority is appropriately exercised, and legitimation as a process of justification and contestation intended to shape such beliefs" (emphasis added), *Tallberg/Zürn*, Review of International Organizations 2019/4, pp. 581–606.

11 *Tribe*, secs. 10-7–10-19.

12 See *Mathews v. Eldrige*. As if to emphasize the contextual nature of due process requirements, the court set out a test in the case for identifying such necessary procedures. The

The acknowledgment of the importance of context reaches not just to the concept of due process, but to the larger notions of fairness that underpin it in a given milieu. Indeed, while speaking to the more general notion of "fairness" within WTO dispute settlement, *Carmody* avers that "the context of fairness is highly circumstantial."[13] *Hovell*, and others come to the same conclusion.[14] All of this suggests that we ought to be deliberate about accurately perceiving due process in the WTO context. Given that the WTO is an IO, we will briefly look at the concept of due process in international legal settings, before coming to the WTO setting itself.

## II. Due Process in International Law

While explicit references to "due process" were initially more prevalent in common law jurisdictions, fundamental features of due process are recognizable the world over.

Indeed, even when we examine legal texts from the Magna Carta's era, we find that the very same due process concepts that are present in that document existed in other traditions as well (particularly, in areas that would later be known as 'civil law' countries). Consider, for example, the feudal decrees of *Conrad II* – Emperor of the Holy Roman Empire between 1024 and 1039. As summarized by *Mott*, "it is there stated that no man shall be deprived of his fief, whether held of the Emperor or of a demi-lord, but by the laws of the Empire and the judgment of his peers."[15] When we fast forward to the present day, we continue to find a commitment to due process themes. Consider, for example, Article 29 (concerning General Procedural Guarantees) of the Swiss Constitution, which guarantees every person the right to fair and equal treatment in judicial and administrative proceedings and declares that any government authority that is unable to manage a case equally and fairly commits a denial of justice. These explicit appeals to process requirements, as well as those that are infused in (and exude from) civil law concepts such as *abus de droit* and the more substantively formed (relative to common law jurisdictions) notion of "good faith", help to establish expectations about the types of process guarantees one would expect to find at the international level.

Mathews test requires US courts to weigh (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards against; and (3) the Governments' interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. In the US context, this would seem to invite a periodic review of presumptions about what does and does not constitute a due process issue.

13 *Carmody*, pp. 256–325.

14 *Hovell*, AJIL 2016/1, pp. 9–48. *Hovell* explains this dynamic well and hints at the types of ways in which the underlying ethos might infuse the concept of "due process".

15 *Mott*.

And, in fact, legal scholars, have noted such "minimum procedural standards" in the international arena.[16] For example, *Mani* noted two principal considerations employed by international tribunals in the application of "fundamental procedural norms."[17] In particular, he pointed to the impartiality of the tribunal adjudicating the matter and the equality of the parties litigating the case. This view is echoed, to an extent, in *Bin Cheng*'s opus "General Principles of Law as Applied by International Courts and Tribunals."[18]

The first general precept mentioned by *Mani* is often referred to by its Latin phrase, *Nemo iudex in causa sua* ("no one can be a judge in his own case"), or what we will term as the "rule against bias." Taken literally, this is a rather narrow premise. However, the underlying concept has been read to require the impartiality of the tribunal. This call for an unbiased court is a precursor for a number of supporting elements that will assist in avoiding bias. As *Gaffney* notes:

> "The juridical equality of the parties is manifested through a number of fundamental procedural rights: (1) the right to standing before a tribunal, (2) the right to composition of a tribunal, (3) the right to be heard, (4) the right to due deliberation by a duly constituted tribunal, and (5) the right to a reasoned judgement."[19]

Another significant due process requirement that is identified by *Mani* and others as being present in international adjudication is known by the Latin *audi alteram partem* (hear the other side). *Mitchell*, who refers to this as the "hearing rule." states that

> "this rule encompasses requirements such as: providing reasonable notice of the decision; informing affected persons of the case to be met; disclosing adverse material so that it may be challenged; and permitting representation at hearings".[20]

If, in fact, these concepts are infused in international law – as the aforementioned authors suggest/contend – we would expect that WTO dispute settlement would manifest a dedication to the principles underlying them. However, recognizing the importance of context, it is imperative to use rules and case law to determine the core procedure elements guaranteed by the WTO.

### C. Due Process of Law in the WTO Dispute Settlement Mechanism

While an appeal to the international context gives us some sense of the due process requirements that we are apt to find in the WTO, it is obviously important to delve into the system itself to arrive at a more accurate picture. This section will conduct such an examination. In particular, it will set out the historical elements that led to the creation of the WTO and its dispute settlement system. It will also assess the

16 *Carlston*.
17 *Mani*.
18 *Cheng*.
19 *Gaffney*, American University of International Law Review 1999/4, pp. 1173–1222.
20 *Mitchell*, in: Yerxa/Wilson (eds.), p. 147.

elements of due process that are established in the DSU (i.e., the document that provides for dispute settlement proceedings) and which are explicitly discussed in the case law.

A few important themes are apparent from the discussion that follows. First, while the phrase "due process" is not explicitly used in the DSU, its thematic presence is notable throughout the document. It is so suffused, in fact, that one can confidently conclude that the WTO dispute settlement system attempts to guarantee much more than a minimum international standard. Second, and as the case law makes clear, due process rights are seen as fundamental to the dispute settlement system in the WTO, a point evidenced by frequent evocations of the concept. Finally, and in contradistinction to the foregoing, there are elements of the system (or perhaps, more notably, gaps in the system) that draw into question the WTO's capacity to support due process rights in the way that might be expected.

## I. Due Process in the WTO – Establishing Context

We have previously noted the importance of context in establishing the notions of fairness that will undergird procedural "due process" claims in a given environment. We will, therefore, now begin to explore how these concepts manifest themselves in the WTO.

Recall that the General Agreement on Tariffs and Trade (GATT) system of rules, which held sway from 1947 until the mid-1990s, allowed for dispute settlement long before the advent of the WTO. However, that ad hoc "system" was largely governed by political considerations, as countries were allowed to effectively "opt out" of the dispute settlement process by simply rejecting the establishment of a panel (or by rejecting the report issued by the panel/working party).[21] Certainly, even in the GATT era, one could point to certain procedural rules and hold them out as being in concert with due process norms. However, conformity with those principles was secondary to the supposition that a sovereign had a right to refuse to submit to the system.

While this approach satisfied GATT Contracting Parties for a time, a mélange of factors made a more robust dispute settlement system attractive for a number of them. For example, a series of exceedingly successful trade rounds led to a significant reduction in overall tariff rates. The benefits to consumers were tangible, and a desire to maintain those advantages grew. At the same time, the regime began to be stressed by the appearance of more surreptitious non-tariff barriers (such as technical barriers and increased use of subsidies) within various countries. Negotiations relating to such issues led to inconsistently applied rules among the contracting parties, (e.g., only some were adhering to the Subsidies Code that was created during the Tokyo Round).

21 As has been well documented, in the GATT era, a panel report was not adopted if any party, including the party that "lost" in litigation, objected to the report.

The preponderance of these elements led to calls for a greater "legalization" of the trade system. Those ambitions were fulfilled by the Uruguay Round's prolific output of agreements, which included an updated GATT (i.e., GATT 1994), an agreement dealing with trade in services (GATS), as well as agreements covering technical barriers to trade,[22] sanitary and phytosanitary measures,[23] intellectual property,[24] and many other areas. More notable, however, were the Marrakech Agreement, which established the WTO and the DSU.

The DSU, in particular, represents the doctrinal manifestation of the desire to "legalize" the rules. Most notably, the DSU did away with the GATT-era practice of blocking the establishment of a panel by an uncooperative respondent and formed a two-tiered system of judicial review made up of a panel stage and an appellate stage, with the latter overseen by a standing body (i.e., the Appellate Body) of jurists.[25] The commitment to establishing a more robust legal framework is captured by Article 3.2 of the DSU, which provides:

> "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

Moreover, the DSU contains elements that would seem to comport with the rule against bias, the "hearing rule," and, interestingly, a number of additional due process elements that appear in Judge *Friendly*'s list. We will now highlight some of those elements. As appellate review is a focus of this piece, it warrants specific attention and will, therefore, be taken up in the next section (i.e., Part D).

### 1. Impartiality (Rule against bias)

We begin with one of the most widely recognized aspects of due process: the impartiality of the adjudicator/adjudication (i.e., the rule against bias). There are a number of ways in which the dispute settlement system of the WTO attempts to ensure neutrality in adjudication.

22 Agreement on Technical Barriers to Trade (TBT Agreement).
23 Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).
24 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).
25 There was a significant faction that wished to continue to emphasize negotiation in the settling of disputes rather than engaging in what some feared would be an 'over-legalization' of the system. Indeed, certain 'backstops', were put in place to limit this trend. Perhaps most notable, in this respect was the open stance against stare decisis (let the decision stand) in panel and AB reports. Rather, ultimate interpretive power was vested in the Members themselves by virtue of Article IX:2 of the Agreement Establishing the World Trade Organization (WTO Agreement). Despite these guardrails, the fact is that a de facto stare decisis did take root.

One interesting incarnation of the rule against bias in the WTO context is the attempt to mitigate (the appearance of) prejudice(s) that might be rooted in national identity. Taken objectively, there is no reason to automatically suggest that one would be biased toward her home country. Nevertheless, concerns about such prejudices are something of a preoccupation in the WTO context.

For example, Article 8 has a number of provisions that aim to assuage concerns about biased adjudicators at the panel stage. Notably, Article 8.2 states that "Panel members should be selected with a view to ensuring the independence of the members", and Article 8.3 explicitly precludes seating a panelist hailing from the same country as one of the litigants. Additionally, Article 8.6 affords the litigants an opportunity to reject panelists proposed by the other party.

At the Appellate Body level, the concerns about national bias are muted somewhat. Specifically, no explicit prohibition is placed on an AB member serving as an adjudicator to a case brought by his/her home state. However, Rule 6 of the Working Procedures ostensibly attempts to insulate the AB from charges of national bias by instituting random selection into the determination of the AB members who serve in a particular case. More particularly, Rule 6 of the Working Procedures calls for three members to hear an individual case (and refers to the three as a "division"). The three members constituting a division are arrived at on the basis of rotation, taking into account the principles of random selection and regardless of national origin. While it is possible for an AB member to hear an appeal concerning his/her home country, it is notable that AB Members (by virtue of Article 17.3) must not be "affiliated with any government."[26] This is not an encumbrance shared by panelists in the WTO system, who are often diplomats.

In addition to the adjudicators themselves, the DSU, recognizing the important role that is to be played by the WTO Secretariat in administering the dispute settlement process, requires impartiality from WTO staff in connection with their assistance to tribunals. While the specific context in which the term "impartiality" is employed (Article 27.2) refers to the provision of technical assistance to developing country Members, the requirement relates to the "*continued* impartiality of the Secretariat,"[27] implying that this is the standard to be observed at all times.

## 2. Right to a Fair Hearing

As with the rule against bias, the WTO is highly reflective of the prescriptions of the so-called "hearing rule", which calls for dispute systems to, inter alia, afford litigants sufficient notice and an ability to be heard in connection with a proceeding.

The DSU attempts to address the provision of notice in a number of ways. The rather unique WTO requirement that there be consultations in advance of any formal legal proceeding, offers a valuable contribution in this regard. This vestige

26 The same Article provides that AB Members: "They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest."

27 Emphasis added.

of the GATT era was meant to promote a negotiated settlement between or among parties, rather than allowing them to immediately resort to litigation. In practice, the consultation phase, established by Article 4 of the DSU, has become a formality, with little evidence of negotiated settlements being arrived at through this exercise. With that said, the requirement of consultations does effectively put a respondent on notice of an impending dispute. Specifically, Article 4.4. of the DSU requires that all requests for consultations be notified, in writing, to the Dispute Settlement Body (DSB) (and all relevant Counsels and Committees). Moreover, the communiqué must "give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint." This essentially provides notice, not just to the party alleged to be in nonconformity with an obligation, but to all Members.[28] As such, it lays the groundwork for interested third parties to participate.

Similar to the consultation phase, notice is given – in the form of a written request, made pursuant to Article 6.2 – in connection with the formation of a panel. The Article notes that the panel request must "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." In the context of an appeal, the appellant must likewise provide notice, according to Rule 20 of the Working Procedures for Appellate Review. Similarly, the appellant must provide a written submission that supports its legal claims. Failing to do so can lead to claims being set aside.

Recall that the concept of *audi alteram partem* is relatively broad and, as such, envisions that "interested parties" (not just the litigants themselves) have an opportunity to be heard. This broad framing of the "hearing rule" is well-represented in the DSU. For example, the default working procedures set out in Appendix 3 to the DSU call for a panel to hold two substantive meetings with the parties, in addition to the written submissions that parties provide. Parties to the dispute are even allowed to provide their comments to an Interim Report provided by the Panel before the final version is produced. Similarly, the appellate process calls for written submissions and an oral hearing, pursuant to rules 21, 22, and 27 of the Working Procedures.

Article 10.2 also makes explicit that so-called "third parties" – i.e., a Member that has a "substantial interest in a matter before a panel" and has notified the Panel – "shall have an opportunity to be heard by the panel and to make written submissions to the panel."

### 3. Concerning the "Right to Timely Resolution"

One of the principal aims of the WTO dispute settlement system is the *prompt* settlement of disputes between WTO Members. The priority given to this feature of the dispute settlement process offered by the WTO is explicitly set forth in Article

28 This is due to the fact that all the Members of the WTO sit on the Dispute Settlement Body.

3.3, which states, "the prompt settlement of situations (…) is (…) essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

To facilitate this ambition, the DSU frequently establishes specific timelines for the completion of tasks associated with adjudication. For example, Article 12 (Panel Procedures) states that in order to make the procedures more efficient, a panel should aim to conduct its examination and issue its report within six months from the date that the composition and terms of reference of the Panel have been agreed upon. Meanwhile, Article 17.5 states that: "In no case shall the proceedings exceed 90 days."[29] Notably, the AB has explicitly extended the responsibility for prompt resolution to the parties themselves. In *US-Gambling,* it was held that the principle of due process "obliges a responding party to articulate its defense promptly and clearly."

## 4. Concerning "Transparency"

In connection with its larger effort to abide by due process norms, the WTO has put elements in place to facilitate the *transparent* publication of documents developed during the legal proceedings. Perhaps most notably, the Panel and AB reports that, in essence, provide the findings/rulings of the adjudicators, are circulated to the DSB (i.e., the entire WTO Membership) as a prerequisite to adoption. Additionally, the Working Procedures (Rule 10) provide:

> "In the interest of full transparency, the presentations, rebuttals and statements (…) shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties."

Importantly, the transparency that is touted in the DSU is that between the parties. While this is certainly an important element of the due process concept, there are many who believe that to be truly compliant with due process norms, procedural transparency should extend to the larger public as well. For example, in the early days of the WTO, *Palmeter* opined, "Public access to legal proceedings is inherent in any modern notion of due process."[30] This stands in contrast to a WTO dispute settlement system that allows parties to choose whether or not to have their submissions made public and/or to open oral arguments to a larger audience.

While admitting that he was basing his conclusion on a distinctly American sense of due process (and one rooted in criminal proceedings rather than civil courts, as well), *Palmeter* found this lack of transparency anathema to due process, particularly in the context of an appeal. He stated, "there is no good reason why

29 Notably, these timeframes were breached with regularity, despite the seemingly firm edict.

30 *Palmeter*, JWT 1997/1, p. 5.

panel procedures and hearings of the Appellate Body cannot be public – particularly appellate hearings which are, after all, merely arguments on questions of law."[31]

## 5. Concerning the "Legal Basis for Decisions"

As noted by *Gaffney*,[32] the profile or pedigree of the judge is not the only source of concern that the rule against bias is meant to address. Indeed, the decision-making of panels and the AB must guard against prejudice and caprice. In the context of the WTO, all decisions and recommendations must be based on the relevant WTO agreements and obligations, ensuring that outcomes are consistent with the established legal framework.

The DSU provides assistance to panels in their attempts to frame the scope of inquiry in a given case. For example, Article 7 provides guidance for determining the "terms of reference" of panels in a given case. Although the parties have latitude to determine the terms of reference, the default position presented by Article 7.1 of the DSU, states that it is the Panel's responsibility to

> "examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document (...) and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

Moreover, Article 7.2. limits a panel's scope to the provisions cited by the parties to the dispute. Thus, the Panel is not empowered to invoke rules that were not raised by the parties themselves in the panel request. For its part, the AB in *Brazil – Desiccated Coconuts* stated that terms of reference also "fulfil an important due process objective – they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case."[33]

At a more granular level of interpretation, Article 11 of the DSU provides that

> "[a] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".[34]

31 *Ibid*.
32 *Gaffney*, American University of International Law Review 1999/4, p. 1179.
33 WTO Appellate Body, *Brazil – Measures Affecting Desiccated Coconut*, Report of 21 Febriaru 1997, WT/DS22/AB/R, p. 22.
34 Article 11 also adds further due process elements that service the provision of a "hearing", stating that "Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."

Additionally, Article 3.2 makes clear that

> "[t]he Members recognize that it serves to preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

Article 3.2 of the DSU has effectively given a permission structure to panels and the AB to appeal to Articles 32 and 33 of the Vienna Convention on the Law of Treaties (VCLT) in interpreting the judiciable "covered" treaties. This is invaluable as the VCLT provides a consistent methodology for interpreting disputed treaty terms, phrases, and concepts.

## II. Due Process in WTO Case Law

Despite a dearth of explicit mentions in the DSU of "due process", the concept has been overtly noted by panelists and the AB as being an essential element of WTO dispute resolution. This recognition is significant as it validates any suspicions that the DSU is (not) so oriented. The context(s) of specific evocations of due process are also important as they indicate the circumstances in which panels and the AB feel it within their purview to raise (and address) the issue. A few themes in the case law are noteworthy. First, the AB has identified instances in which claims should be precluded on due process grounds. Second, the case law shows panels and the AB weighing due process considerations in determining the appropriate scope of judicial interpretation. Finally, panels and the AB have attempted to distinguish between due process and potentially overlapping concepts, like "good faith."

### 1. Precluding claims on "due process grounds"

If a judicial system is committed to defending due process standards, it will need a way to address deviations from said norms. Arguably, the most frequent remedy employed in the WTO context relates to precluding claims that were untimely. This general proposition was clearly annunciated by the AB in *US – Stainless Steel (Mexico)*, where they held that "[c]ompliance with established time periods by all participants regarding the filing of submissions is an important element of due process of law."[35]

The AB and panels have applied this general mandate. For example, in *EC – Fasteners (China)*, the AB found that the Panel erred in ruling on a claim under

35 WTO Appellate Body, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, Report of 20 May 2008, WT/DS344/AB/R, para. 164. This decision is also celebrated (or decried, depending on one's position) for bringing a de facto stare decisis to WTO panel and AB rulings. The AB noted that absent "cogent reasons", panels were to abide by precedent.

Article 6.5 of the Anti-Dumping Agreement, despite the fact that said claim was identified in the panel request. The Appellate Body explained that:[36]

> "Rule 4 of the Panel's Working Procedures requires that, '[b]efore the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.' [T]he Panel record shows that China asserted its claim (…) only in response to questions from the Panel, and articulated this claim only after the parties had provided the Panel with written submissions and had attended a substantive meeting. *We do not find that assertions made so late in the proceedings, and only in response to questioning by the Panel, can comply with* either Rule 4 of the Panel's Working Procedures, or *the requirements of due process of law*. The late assertion of a claim (…), and the absence of proper argumentation and of the provision of relevant evidence in support of this assertion, demonstrates that the European Union was not called upon to respond to China's claim under Article 6.5."[37]

In *Thailand – Cigarettes (Philippines)*,[38] the Philippines introduced a claim under Article 4 of the Customs Valuation Agreement (CVA) in its written responses to a set of questions from the Panel, submitted to the parties' second substantive meeting. Prior to that point, while Article 4 was explicitly listed in the panel request, the Philippines had consistently maintained the position that Article 4 was not relevant to its claim relating to valuation methodologies under Articles 5 and 7. The Philippines had, therefore, neither specifically referenced a violation of Article 4, nor provided evidence or specific arguments to demonstrate a violation of that provision.[39] Ultimately, the Panel agreed with Thailand that "the due process rights of Thailand would not be respected" if the Panel were to decide to rule on this claim at such a later stage, noting that "since the parties have not been able to put forward substantive arguments and/or evidence regarding this (…)."[40]

While timing seems to be a preoccupation of the due process case law, it is important to recognize that the true crux of the issue is whether the respondent has received notice sufficient enough to allow it(them) to litigate the issue. Consider, in this regard, another example from the case law, *Morocco – Hot Rolled Steel (Turkey)*. In that case, Turkey asserted its claim under Article VI:6(a) GATT only in response to the Panel's written questions and articulated its claim only after the parties had provided written submissions, attended a substantive meeting, and orally responded to the same questions. According to the Panel, "[a] statement

36 WTO Appellate Body, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, Second Recourse to Article 21.5 of 12 July 2019, WT/DS371/RW2, para. 7.63.

37 WTO Appellate Body, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, Report of 28 July 2011, WT/DS397/AB/R, para. 574.

38 WTO Panel, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, Report of 15 July 2011, WT/DS371/R, paras. 7.271 – 7.278.

39 WTO Appellate Body, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, Second Recourse to Article 21.5 of 12 July 2019, WT/DS371/RW2, para. 7.63.

40 WTO Panel, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, Report of 15 July 2011, WT/DS371/R, para. 6.95.

of claim made so late in the proceedings does not comply with the due process requirement of paragraph 6 of our Working Procedures."[41]

### 2. Due Process Considerations in the Context of Judicial Interpretation

In addition to addressing how the timeliness of submitting claims might impact a Member's due process expectations, WTO adjudicators have also considered how due process concerns should impact the scope of inquiry in each case. This has primarily related to interpretations of Article 11 of the DSU, which was set forth in full in the previous section.[42]

In *Chile – Price Band System*, the AB determined that the Panel had made a finding on a claim that had actually been advanced by Argentina. Chile had claimed that, by making a finding on that claim, the Panel had deprived Chile of a fair right to response. The AB concurred with Chile and concluded that the Panel had acted inconsistently with Article 11 of the DSU by denying Chile the due process of a fair right of response. In connection with this finding, the AB stated that,

> "in making 'an objective assessment of the matter before it', a panel is (…) duty bound to ensure that due process is respected. Due process is an obligation inherent in the WTO dispute settlement system. 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."[43]

In a previous case, *EC – Hormones (US)*, the AB opined on the ways in which a panel may fail in its duties to "make an objective assessment of the facts before it", as required by Article 11 of the DSU. Notably, the AB concluded that the deliberate disregard of the evidence could constitute such a failure.[44] It held that "not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts," adding that a claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the Panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, due process of law

41 WTO Panel, *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*, Report of 8 January 2020, WT/DS513/R, para. 7.64. Notably, the Panel held that the panel request not only establishes and delimits the Panel's jurisdiction, but also "fulfils a due process objective" to the benefit of the respondent and third parties.

42 The AB in *EU – Poultry* held that an allegation that a panel has failed to conduct the "objective assessment of the matter before it" is a serious allegation. "Such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself." WTO Appellate Body, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, Report of 23 July 1998, WT/DS69/AB/R, para. 133.

43 WTO Appellate Body, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, Report of 23 October 2002, WT/DS207/AB/R, para. 176.

44 WTO Appellate Body, *European Communities – EC Measures Concerning Meat and Meat Products (Hormones)*, Report of 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 133.

or natural justice.[45] Furthermore, according to the AB, the DSU, and in particular its Appendix 3 (the Working Procedures), leaves panels a margin of discretion to deal with specific situations that may arise in a case and that are not explicitly regulated, "particularly if the Panel considers it necessary for ensuring to all parties due process of law."[46]

In *Indonesia – Chicken (Article 21.5)*, Indonesia requested a review of the interim report, including the rephrasing of a sentence, as well as adding a sentence and a footnote. Brazil opposed both requests. According to the Panel, Indonesia's proposed language implied an assertion that Indonesia had not made in the proceeding before, and that to introduce it now meant raising it in an untimely manner. Even assuming they were to consider the assertion as admissible, despite it being untimely, the Panel held that their duty under Article 11 of the DSU and due process would require reopening the procedure to accurately assess Indonesia's assertion. As this is not the purpose of the interim review stage, nor would it be fair to the complainant, who has a right to see this proceeding ended, the Panel rejected Indonesia's request.[47]

### 3. Disentangling overlapping concepts (the case of "good faith")

Perhaps unsurprisingly, one of the ways in which due process has arisen in case law is in connection with closely related concepts, such as "good faith." More specifically, the AB and panels have aimed at disentangling such concepts so as to make the jurisprudence more coherent.

For example, in *US – FSC*, the US contested the Panel's conclusion that any failure by the European Communities to meet the requirements of Article 4.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) was excused by the fact that the US did not object to the European Communities' request when it was made. According to the US, this apparent exercise of "equitable powers" was contrary to Article 3.2 of the DSU, and the obligation to include a statement of available evidence serves to ensure that defending Members receive due process – particularly in view of the short time periods applicable to subsidy claims. The European Communities did not accept the premise that the US's due process rights had been violated, arguing inter alia, that the US was well aware of the features of the measure and, in spite of the fact that the US had ample opportunity to request further information, it failed to do so during three rounds of consultations.

45 *Ibid.*

46 WTO Appellate Body, *European Communities – EC Measures Concerning Meat and Meat Products (Hormones)*, Report of 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, paras. 152 fn. 138 and para. 154.

47 WTO Panel, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*, Recourse to Article 21.5 DSU Report of 10 November 2020, WT/DS484/RW, paras. 6.48 – 6.50.

The AB ruled on this alleged violation of due process by applying the principle of good faith. According to the AB, Article 3.10 of the DSU requires WTO Members, when a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute." Referring to the facts of the case before it, the AB stated in *US – FSC* that

> "[t]his is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law. This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules."

On this basis, the AB held that the principle of good faith "requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes."

Ultimately, the good faith obligations mentioned in the context of litigation (e.g., those explicitly mentioned in the DSU), relate to an obligation owed by parties to each other and to the process. Due process rights, by contrast, deal with an obligation that the governance system owes to participants in that system.[48]

## III. Is WTO Really a Paragon of Respect for Due Process?

While the foregoing presents evidence to show that the WTO is dedicated to assuring adequate process in dispute settlement, it is worth taking a moment to note arguments that may offset, at least to some extent, that supposition. For example, we might consider whether WTO panels and the AB are always able to offer remedial action in the event that the system is unable to guarantee due process. This is no small matter, as most would consider such an attribute fundamental to a legal system.[49] Thus, the phrase *Ubi jus, ibi remedium* (Where there is a right, there must be a remedy). Certainly, where the appropriate remedy is to set aside a claim, a panel or AB has this power. However, the WTO system has a rather limited menu with additional remedial options at its disposal. For example, the DSU does not contemplate the organization compensating a Member for harm caused by the failure to provide due process.

48 Still, there are times when the two concepts are seemingly lumped together. Consider, for example, a statement made by the AB in *US – Gambling*, Report of 7 April 2005, WT/DS285/AB/R, para. 272, that "It follows that the principles of good faith and due process oblige a responding party to articulate its defense promptly and clearly." For a solid overview of the connectivity of the concepts, see *Panizzon*, Good Faith, Fairness and Due Process in WTO Dispute Settlement Practice (8 January 2008), available at: https://papers.ssrn.com/abstract=1549565 (28/10/2024).

49 See, for example, *Blackstone*. In particular, see Book Three, Chapter 8 ("Of Wrongs and Their Remedies"), thereof.

Another area where one might caveat the WTO's fidelity to due process is with regard to the consistency of judgments. Take, for example, the interpretation of the covered agreements. We have already noted that the DSU and the VCLT help to guide and frame interpretation conducted by panels and the AB. However, it should be highlighted that it is the Membership itself that retains the power to officially interpret the agreements (by virtue of Article IX of the WTO Agreement) rather than panels or even the AB. Indeed, the panels and the AB were never given explicit authority to create binding precedents through their decisions. Thus, there is an extent to which the system accedes to the possibility that politics, rather than law, will have hold sway in decision making.

This leads to a final, more theoretical, point. While one can and should acknowledge the importance of context in determining the concepts of "fairness" and "due process" that pervade a certain system, it is worth wondering how closely either concept actually corresponds to an international organizational setting. In the domestic setting, the concept of due process is strongly aimed at protecting individual freedoms from infringements by the state. It is, perhaps, a bit presumptuous to map these sensibilities to the protection of 165 sovereigns, particularly when each of them has the power to decouple itself from the system if it so chooses. If nothing else, the sense of what constitutes fundamental fairness is altered, given the relative autonomy of those 'subject' to the law.

## D. Is the lack of an Appeal Mechanism in WTO disputes a lack of due process?

The lack of a functioning Appellate Body in WTO disputes is widely regarded as a significant challenge to the WTO's dispute settlement system, and it clearly raises concerns about the adequacy of due process. This section will examine this dynamic in the following way. First, it will relate the basic elements of appellate review offered by the DSU. Second, it will recount the scenario which led to the dissolution of the Appellate Body. Third, it will explore the extent to which due process is impeded in the WTO by the lack of a functioning appellate body. Fourth, and finally, it will discuss whether the MPIA offsets due process-related concerns or whether it potentially adds to them.

### I. Appellate Review in the WTO

Appellate review is afforded to litigants by virtue of the substance of Articles 17–20 of the DSU. This review centers around the AB, which is meant to be a standing body consisting of seven Members at any given time,[50] with three Members, select-

50 The DSU provides limited guidance as to the national make-up of the Appellate Body. Article 17.3 of the DSU requires that: "[t]he Appellate Body membership shall be broadly representative of membership in the WTO. Therefore, factors such as different geographical areas, levels of development and legal systems are taken into account." Notably, it is

ed on the basis of rotation,[51] assigned to each particular case. Each Appellate Body member can serve up to two, four-year, terms.[52] At both the initial nominating stage and when up for a second term, an Appellate Body member must be approved unanimously by all 165 voting Member countries.[53]

Procedurally, an appeal is commenced by notification in writing to the DSB – which is composed of the entire WTO Membership – in accordance with paragraph 4 of Article 16 of the DSU. The AB's scope of review is constrained by Article 17.6 of the DSU, which limits appealable disputes to "issues of law covered in the panel report and legal interpretations developed by the panel." Three AB Members serve on any given case. As noted above, the AB was/is expected to conclude cases in a rather truncated timeframe; however, the workload of the AB frequently posed challenges to the designated targets.

The AB drew up the more granular procedures for appellate review (working procedures), pursuant to their authority granted by Article 17.9. In a nod to transparency, those procedures were made available, not only to WTO Members, but to the general public as well.[54] These rules govern, inter alia, the duties and responsibilities of the members of the AB, expectations relating to the submissions of the Appellant and the Appellee, guidelines for establishing a working schedule, frameworks for oral hearings, etc.

Notably, the Appellate Body's services remained in high demand right up until they were no longer able to preside over cases. Worldtradelaw.net calculates that there were 150 Appellate Body reports issued over the span of the AB's operation, and a whopping 70 percent of all panel reports have been appealed.[55]

## II. The Fall of the AB

In an ironic twist, the fall of the AB is the result of one legitimacy mechanism being pitted against another with disastrous consequences. Within the WTO, there are a number of elements in the governance structure aimed at promoting the agency, freedom, and sovereignty of each and every Member. Perhaps nowhere is this more fully on display than in the consensus requirement that often prevails in the WTO. This carryover from the GATT era helps maintain equality in decision-making and

generally a presumption that a judge from Europe and the United States will sit on the Appellate Body at any given time.

51 Rule 6(2) of the Working Procedures for Appellate Review sets forth that the rotation take into account the principles of random selection and unpredictability and opportunity for all Members to serve, regardless of their national origin.

52 See Article 17.2 of the DSU.

53 See Article 2.4 of the DSU.

54 https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm#23 (15/10/2024). In addition, although they were not formally part of the Working Procedures, the Appellate Body has adopted two sets of guidelines relevant to appellate proceedings: Post-Employment Guidelines (WT/AB/22) and Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings (WT/AB/23).

55 See Worldtradelaw.net (searched 10/9/2024)

implicitly puts the imprimatur of all of the WTO Members on decisions that are taken.

When applying the standard of "input legitimacy" described earlier, it is clear that decisions arrived at through such a gauntlet ought to be perceived as "legitimate." Regardless of how "legitimate" the outcome may be perceived, the costs of proceeding in this way are high. First, the requirement of consensus puts a near stranglehold on the ability to advance a progressive "legislative" (i.e., treaty-created) agenda. The most likely outcome for treaties formed in this way is that they will be bland, as anything "spicy" will have to be removed. Second, and more germane to this paper, it creates an opportunity for each and every Member to hold the entire institution hostage to its own demands. They simply need to be willing to play that card.

And this leads us to the AB's downfall. Indeed, in the context of the AB, there is no mystery whatsoever about "whodunit?" The US, ostensibly angered over a great many things – not the least of which were the subsidies cases related to "zeroing" – pressed for "reforms" to the dispute settlement system. This tactic yielded little fruit, and so the Obama Administration decided that it would halt the reappointment of one of the AB members, who the administration viewed as being particularly activist.[56] In the years that followed, the Trump administration, which included old guard "realist" *Robert Lighthizer* as US Trade Representative and trade advisors such as *Peter Navarro*,[57] made this an official policy. One by one, the terms of the sitting AB members expired, leaving no one to hear appellate cases. To the surprise of some, this tack of halting AB nominations has continued under the *Biden* Administration. Notably, there is every indication that it will be a part of the next administration as well.[58]

In the succeeding years, two important things happened. First, countries have begun to "appeal into the void." That is, they have appealed to a body that does not exist. Second, some countries have agreed to abide by an appellate process, mirroring the one provided for by the DSU, in the event those countries are in litigation with each other. We will discuss these in connection with the due process considerations that make up the remainder of this section.

56 In a blog post in 2016, *Steve Charnovitz* noted that "The Obama Administration has not yet apologized for its unilateral action in May 2016 to unseat Appellate Body Member Seung Wha Chang, a distinguished jurist from South Korea.", see International Economic Law and Policy Blog, available at: https://worldtradelaw.typepad.com/ielpblog/2016/09/the-obama-administrations-attack-on-appellate-body-independence-shows-the-need-for-reforms-.html (28/10/2024).

57 Notably, *Navarro* went to prison for contempt of congress after Trump's term, in connection with a failure to testify before the January 6th Commission.

58 One of the side effects of populism in the United States has been to functionally remove apologists for freer trade from the American political landscape. Discussions related to trade during this 2024 cycle (not to mention elections in 2020 or 2016) never mention the issue of the Appellate Body, nor the role the US has played in its downfall.

## III. The AB and Due Process

Having examined the AB, its functions, and the history related to its arrestation, we can now start to consider the extent to which the absence of the AB creates a nonconformity with due process concepts.

We might begin by making a relatively obvious point. That is, if we are appealing to due process theory alone, it is difficult to claim that there is an underlying right to appellate review embedded in the concept of procedural due process.[59] Even if one looks to the US, where a broader array of procedural due process rights are apt to be found, no right to appeal is guaranteed. The US Supreme Court has noted, on several occasions, that it does not view appellate review as being a sacrosanct part of due process in the US. For example, in the 1903 case, *Reetz v. Michigan*, the majority noted that "Neither is the right of appeal essential to due process of law. In nearly every state are statutes giving, in criminal cases of a minor nature, a single trial, without any right of review. (…) In civil cases a common rule is that the amount in controversy limits the entire litigation to one court, yet there was never any serious question that in these cases due process of law was granted." More recently, in *M.L.B. v. S.L.J.*,[60] the court affirmed its "oft-affirmed view that due process does not oblige States to provide for any appeal, even from a criminal conviction".[61]

### 1. A Violation of Due Process? International Law? Both?

As we know, when it comes to due process, context matters. In contrast to the just-mentioned situations dealt with by the US Supreme Court – that is, those dismissing the notion of the necessity of appellate review in all cases – the WTO rules explicitly afford an opportunity for appellate review. What would due process norms have to say about the situation?

We might first note that the absence of the AB potentially frazzles compliance with not just due process norms but also international law itself. Consider, in this regard, the first sentences of each of the first two paragraphs of Article 17 of the DSU. Article 17.1 states: "A standing Appellate Body *shall be established by the DSB*." Article 17.2 begins: "The DSB *shall appoint* persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once." This would seem to suggest that the organization is not in compliance with its treaty-based obligations under international law.

59 Certainly, there are those that have presented such an argument. One scholar has pointed out: "The underlying sentiment that there is (or must be) a higher authority which may be consulted to correct injustice has been ingrained in formal, governmental dispute-resolution systems throughout recorded history."

60 See *M.L.B. v. S.L.J.*, 519 U.S. 102, 131 (1996) (*Thomas, J.*, dissenting)

61 Notably, some have argued that that the "writ of error," which facilitated the correction of legal error by a higher court, was allowed "as a matter of right" under English common law.

Returning to the subject du jour, we must note that the dynamic situation created by the lack of the AB potentially creates a variety of situations in which due process concerns might be raised. In our view, a great many of these problems stem from the ability of a party to "appeal into the void." Consider the following: The DSU grants parties to a WTO proceeding the opportunity to appeal, so long as their arguments relate to an alleged mistake of law. The DSU further provides that if a panel ruling is appealed, it (i.e., the panel report) cannot be adopted until the appeal is completed. If it is appealed, but that stage cannot be completed, then the case remains in limbo. Effectively, this means that, in cases where a party appeals into the void, even the panel decisions are rendered moot.

It is hard to produce a good argument as to why this would be in compliance with due process standards. Take, for example, the rule against bias (i.e., that no one can act as a judge in his own case). Are those who would cynically take advantage of this possibility to defer – perhaps indefinitely – their own failed litigation, not effectively acting as judges in their own case? In this vein, one could potentially make a particularly indignant case against US appeals into the void (which happened, for example, in DS533, *US – Countervailing Measures on Softwood Lumber*) as the US was availing of this possibility after systematically dismantling the Appellate Body.[62]

Though a more consequentialist argument, it is worth highlighting the rather obvious fact that the absence of appellate review effectively removes the most likely agent for enforcing due process elements. Why is this the case? It must be remembered that WTO panels are not full-time adjudicators, nor are they even necessarily lawyers. While they are assisted by very competent staff in the legal services office of the WTO, there remains some risk of uneven performance(s) from Panel to Panel. By contrast, the AB is (supposed to be) a standing body, required by Article 17.3 to be composed of "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally." As a result, one would expect that they (i.e., the AB) would be better suited to identify both (i) the due process rights that exist in the WTO dispute settlement system and (ii) violations of the same. The fact that the AB's review naturally occurs subsequently to panel review means that the AB is able to clean up any incidental messes left by a panel's lack of familiarity with the full gamut of due process requirements. Their absence negates that possibility.

### 2. What is the impact of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA)

In order to maintain the efficacy of the rules-based trading system and to provide Members with access to an independent appeal process for dispute settlement, 16

62 Even if one were to take an unreasonably sunny view of the prevailing situation and surmised that the AB may eventually return to hear the case, one could still plausibly contend that there has been an unreasonable delay in the process.

WTO members set up a separate appeal system for trade disputes in March 2020. As described by *Ahmed et al.*, the MPIA

> "represents a significant departure from the traditional WTO dispute resolution process. Under this arrangement, participating countries agree to follow a two-stage process: first, they engage in arbitration to resolve their dispute at the appellate level, and second, they agree to abide by the arbitration panel's decision. Importantly, this mechanism is meant to be temporary and will remain in operation until a lasting solution to the Appellate Body crisis is found."[63]

The advent of the MPIA presents some fascinating questions where due process is concerned. As a general matter, we might concede that the breath of life that has been thrust into the 25th Article of the DSU likely inures to some greater modicum of legitimacy for the arbitration function that is allowed by that Article. If one is attempting to frame the MPIA as an alternative to the AB, however, it is difficult to say how due process expectations are markedly improved. The MPIA is, by no means, universal at this point. Only a handful of countries have agreed to be bound by its processes. For those that have, it no doubt provides a psychic benefit. However, for those who are not a part of it, it does little to nothing in terms of guaranteeing the process rights that are explicitly owed by virtue of the DSU.

At the same time, it is difficult to say how it would actively worsen "due process" norms in the WTO, either. The die seems to already be cast in that respect. Clearly, the Members see appellate review as being a step in the judicial process that fairness requires. To live without it is to necessitate an acceptance of an unfair situation.

## 3. A Return to the Topic of Legitimacy

When discussing a concept like due process, with its somewhat nebulous shape and contextually malleable content, it can be difficult to identify causative connections between the presence/absence of a particular system-level framework and the commitment to a particular aspect/element of due process. This is evidenced above, where there is some ambivalence about the connection.

Where we can be more certain is with regard to the larger question of how the absence of the AB redounds to the reputation of the WTO dispute settlement system. Recall that the concept of due process is, at its roots, about legitimizing the authority of the dispute settlement apparatus (i.e., giving greater legitimacy to the decisions rendered by it), and, by extension, the overall governance system to which it is a part. As *Hovell* notes:

> "[T]he concept of legitimacy envisages a connection between decision-making authority and community values sufficient to ground acceptance of that authority in the relevant community. Due process provides legal standards that serve to establish a dialogue

63 *Ahmed/Zhang/Alsaeed/Ajmal*, IJSRM 2024/5, pp. 473–496.

> between decision makers and the community affected by decisions, thereby ensuring that decision making takes place in accordance with relevant community values."[64]

When we look at the absence of the AB through this larger frame, it is difficult not to find an erosion of legitimacy. Avenues of adjudication that were promised (and therefore were expected) to (by) the WTO Members, do not exist, and may not return. This has introduced a looming question over every consequential decision made by a panel: what would the AB have done? Without the traditional path for validation of these "lower court" decisions, they carry a scent of the illegitimate. Worse still, the fact that parties are now willing to appeal into the void simply tables the scrutiny. Ultimately, the dispute settlement system is significantly weaker today than it was a decade ago. Whether the WTO itself has been imperiled by these events is a continuously unfolding story.

## E. Conclusion

It has now been eight years since the US began to block the appointment of AB judges. As the full scope of the damage of that stance reveals itself slowly, it is worth conducting periodic diagnostic tests to assess the health of the organization and its dispute settlement system. This article represents one such effort. Specifically, it examines due process concepts and juxtaposes these theories to the realities that exist in the WTO. Certainly, there are strong corollaries between the due process ideal as expressed by scholars and courts and the words and interpretation of the DSU. However, the disabling of the AB leaves the dispute settlement system unable to adequately identify and redress breaches of due process.

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