Fairness, Promptness and Effectiveness: Creating a Good Faith Standard for WTO Dispute Settlement Procedures

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WTO dispute settlement, public international law, good faith principle, equity, fairness, standard of review, litigation techniques, consultations, fruitful disputes

ABSTRACT
Fairness as an equity of outcomes has been introduced into the WTO relatively late with the proclaimed goal of the Doha Development Agenda to achieve equitable trading conditions for developing countries. Fairness as process legitimacy stands for increasing the participation of smaller size economies in WTO decision-making and predates Doha. It ensures that every Member’s voice is heard in rule-making but also relates to dispute settlement, where participation of developing countries has been low. Procedural justice has been used by the WTO judiciary since the beginnings of GATT/WTO jurisprudence. However, this third prong of fairness in the WTO, has so far received little attention. Standards of procedural fairness unite distributive justice considerations and process legitimacy. Due process ensures equality of opportunity in the dispute settlement process, while good faith protection and prohibition of abus de droit stand for equitable outcomes. By resorting to the principles of good faith, fairness and due process, the WTO Panels and the Appellate Body have rebalanced inequities in the procedural law of the WTO Dispute Settlement Understanding (DSU). The public international law principles of fairness and good faith have introduced nothing less than a constitutional component to the WTO legal system, which relegates to the past power-oriented, diplomacy-based structures of WTO dispute settlement. This paper will show how the principle of procedural justice rolls back the use of the DSU as a litigation technique in trade remedy cases and has prevented the abuse of policy space in Articles 3.10, 4.3 and 3.7 of the DSU. Procedural fairness considerations, it will be argued, define the strictness of the Appellate Body’s standard of review for facts, introduce into Article 11 DSU the right of the Panel to draw adverse inferences if a WTO Member party to a dispute has failed to provide it with information, introduce a duty of prior consultation before the establishment of a Panel and impose limitations on the conditional withdrawal of notices of appeal.

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1. Introduction

The WTO Members have been criticized for adopting, during the Uruguay Round, treaty provisions that failed to realize a measure of fairness vis-à-vis developing countries. In the now suspended Doha Round of multilateral trade negotiations, the WTO Members were expected to remedy such imbalances in the WTO agreements by adopting equitable, sustainable and fair trading provisions in light of distributive justice. The aspect of procedural fairness in trade litigation, however, has gone almost unnoticed. Nonetheless, the Appellate Body has developed a body of jurisprudence to test procedural fairness in multilateral trade relations, which has not only solidified the WTO Dispute Settlement Understanding (DSU) but has also contributed to a fairer and more predictable WTO trading system. This article explains how the Panels and the Appellate Body of the WTO, by analysing the DSU provisions in the light of international legal principles, such as good faith and due process, have used the method of effective treaty interpretation to prevent, the WTO Members from abusing the positive treaty law of the DSU.

Recent political economy scholarship on economic justice and fairness in trade stipulates that global distributive justice may be best realized in international economic organizations, including the WTO, because such trade organizations enhance welfare through growth.1 Regularly the aim of such studies on the “principles of economic justice” is how to “maximize” and “equalize” the participatory opportunities of countries in the decision-making procedures and governance structures of international economic organizations.2 Most authors, including Ethan Kapstein, Amrita Narlikar, Mathias Risse, discuss whether participating in such organizations and negotiating global free trade rules have a distributive justice-enhancing effect on dedeveloping countries or not.3 However, only few authors

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question the fairness in the Rawlsian sense of today’s WTO multilateral trading rules and call for the content and structure of such rules to be remedied.4 An important tool to rebalance the rules of the WTO Agreements is to prevent their abuse by powerful states.5 This is the task of the WTO judiciary embodied in the Panels and the Appellate Body. This study will analyse the fairness of the WTO dispute settlement procedure, as one aspect of formulating just trade rules. The contribution of the WTO dispute settlement procedures and their interpretation by the Panels and the Appellate Body to “justice as fairness” is the missing piece in the analysis of global economic justice at the WTO.6

Three analytical tools may be used to characterize the World Trade Organization (WTO) dispute settlement system. According to Stefan Kadelbach, the WTO dispute settlement procedures—owing to their solidifying effect on the implementation and enforcement of the rules of the WTO covered agreements—promote the constitutionalization of the WTO legal system.7 Secondly, the receptiveness of general public international law, including that of the WTO, regarding legitimate expectations, moral content, ethical principles and social policies, is also reflected in the evolving body of WTO dispute settlement rules. Thus, when the Panels and the Appellate Body (AB) find that principles of good faith, prohibition of abus de droit, fairness and effectiveness are inherently part of WTO procedural rules, the legal system’s openness to sources of general public international law8 does

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8 See Pauwelyn, Joost, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law, Cambridge: Cambridge University Press, 2003, pp. 201-236, for whom openness expresses the Panels’ and the Appellate Body’s interpretative references to non-WTO norms, but also the openness of the WTO legal system as the right of governments to freely chose the policy instruments by which to achieve non-trade values; in political economy, the WTO
not so much flow from the judiciary being convinced of the normatively correct and sound value these principles express, but rather reflects the fact that drawing from such pre-legal principles and policies is how international law searches for its rules and creates its norms.9

Thirdly, the WTO dispute settlement system, according to Thomas Franck, has succeeded in realizing a measure of ‘process legitimacy’.10 This means that unlike many other international organizations, the WTO has a mechanism whereby multilateral rules and remedies substitute for the ‘aggressive unilateralism’ of economically powerful states.11 It is true that of the three institutional pillars of the WTO, encompassing decision-making at the General Council and Ministerial Conferences, the Trade Policy Review Mechanism and the adjudicatory dispute settlement before the Panels and the AB, none has more authority than the quasi-judicial dispute settlement mechanism to enforce multilaterally agreed trade laws. Compared to decision-making, where the unequal economic status of the WTO member countries creates unbalanced rules, before the adjudicating Panel and/or the AB, all WTO Members are equal. No principles other than those of good faith, due process and procedural fairness underlying Articles 3.10, 3.7 and 4.3 of the Dispute Settlement Understanding (DSU) embody such power-blind justice more effectively. While ‘fairness as equality of opportunity’12 is impossible to achieve in WTO negotiations and decision-making, the imbalance may be corrected by the application of the principles of good faith and fairness in WTO dispute settlement. Thus, the principles of good faith, due process and procedural fairness implied in the DSU express the WTO judiciary’s commitment to ‘fairness as the equality of outcome’,13 which counterbalances the unequal distribution of power among the WTO Members and ‘raise[s] a number of questions with fundamental and far-reaching implications for the entire WTO dispute settlement’.14

It is not only that it is equipped with dispute resolution procedures, however, that distinguishes the WTO from other international organizations. In addition to being an effective and prompt mechanism, the WTOs dispute

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11 Id.
12 Narlikar, 2006; see also Risse, 2005.
14 Canada–Aircraft, Appellate Body Report, para. 182.
resolution system is a fair process, and perhaps the only one able to prevent the economically powerful states from abusing the dispute settlement procedures. The AB is to be given credit for developing the necessary safeguards to prevent such system abuse. The AB jurisprudence has established a WTO-specific principle of procedural fairness and the standard of due process. It is this WTO judicial body’s creation of norms by reference to the general principle of good faith and its corollary of prohibition of *abus de droit* which this article will address.

2. Good Faith Foundations of WTO Procedural Fairness

Since the end of the nineties, which coincided with the end of the first five years of WTO case law, a rise in the abuses of the WTO dispute settlement procedures could be observed. Such litigation techniques were employed particularly by the US as a respondent in trade remedy cases to draw out a case in order to gain time. The AB halted these ‘unfortunate litigation techniques’,15 through what Lester and Leitner describe as a ‘trend’ by the WTO judiciary of reminding WTO Members of their responsibility to litigate trade disputes fairly and in good faith. Thus, the WTO procedural fairness was born out of necessity, rather than created by design.

The AB halted the proliferation of litigation techniques, which ‘frustrate the objectives of the DSU’,16 destabilize the WTO trading system and increase the case-load for the WTO judiciary,17 by interpreting DSU provisions with the general principle of good faith. By reading into the provisions of the dispute settlement system this general principle of law which the Panels and the AB considered an underlying principle of WTO procedural law, the WTO judiciary created a standard of due process for WTO disputes and established the principle of procedural fairness for WTO law. In the AB’s view, Article 3.10 DSU would, thus, ‘give teeth’ to the rules and procedures for the settlement of disputes by offering a legal ground for holding WTO Members accountable for manipulating those WTO rules and procedures that are reserved for a fair and prompt settlement of disputes.18 The same set of provisions, which some WTO Members were abusing also provide the grounds for preventing such abuses.

The language in Articles 3.10, 4.3 and 3.7 DSU on the one hand offers too much wiggle room, or policy space, for domestic agencies and regulators to justify litigation techniques. On the other hand, the terms of those same articles do not provide enough material to prosecute the parties to a dispute who are abusing them. In order to resolve this dilemma in favour of the sta-

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bility, predictability and procedural justice of the dispute settlement system, the Panels and the AB interpreted Articles 3.10, 4.3 and 3.7 DSU consistently with the general principle of good faith. This so-called technique of effective treaty interpretation requires the introduction of another level of norms. The AB had for the first time in WTO law used such a technique in the US – Shrimp case to find an abus de droit prohibition in the chapeau of Art. XX GATT. Therefore, for WTO procedural law, it could refer to a precedent when judging that abusing Articles 3.10, 4.3 and 3.7 DSU would violate the principle of good faith and its corollary of abus de droit.

By analysing the meaning of Articles 3.10 and 4.3 DSU consistent with the general principle of good faith and its corollary of prohibition of abus de droit, the AB introduces the obligations to conduct consultations and to settle disputes in good faith. Such a prohibition on manipulation of dispute settlement procedures and a requirement to comply with the legal standards of fair, prompt and effective dispute resolution express the WTO’s current standards of procedural fairness and due process. By rooting the obligations and duties of dispute settlement procedures in the general principles of law of good faith and prohibition of abus de droit, the AB has strengthened the legality and constitutionality of the WTO dispute settlement system. It has thus laid the groundwork for a body of high-quality international jurisprudence that will not only be respected by trade lawyers, but will also influence general public international judgments. Kenneth Keith observed that the AB is a ‘successful international tribunal’ because it has, accomplished ‘the ability to successfully ground itself not only in its specialized area of law, but also in the general area of public international law’.

There are six leading cases which introduce WTO procedural fairness via Articles 3.10 and 4.3 DSU. In four cases, a developing and a developed country are parties to the dispute: these are Canada–Aircraft (1999), Thailand–Steel (2001), Mexico–HFCS (Article 21.5) (2001), and EC–Sardines (2002). In two cases, US–FSC (2000) and US–Lamb Safeguards (2001) an industrialized country is on both sides of the case. Two additional cases worth noting are EC–Bananas (1997) and US–Offset Act (‘Byrd Amendment’) (2002), which introduce considerations of WTO due process.

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3. Procedural Fairness Obligations

At least three provisions in the DSU show how the WTO dispute settlement system is being guided by the objectives of procedural fairness.\textsuperscript{21} Firstly, Article 3.10 DSU prohibits WTO Members from considering using, or to intending to use the dispute settlement procedures as 'contentious acts'.\textsuperscript{22} Article 3.10 implies a due process obligation by calling upon Members to respect the duty to engage in dispute settlement procedures 'in good faith in an effort to resolve the dispute'.\textsuperscript{23} Secondly, under the interpretation, the AB gives to Article 3.7 DSU in Mexico–HFCS (Article 21.5) Report, WTO Members are prohibited to 'frivolously set in motion the procedures contemplated in the DSU'.\textsuperscript{24}

The Panels and the AB of the WTO make use of both the obligation in Article 4.3 to conduct consultations, and, in Article 3.10 DSU, to settle international trade disputes before the WTO in good faith in order to establish a WTO rule of procedural fairness.\textsuperscript{25} In the chronology of a dispute, the principle of procedural fairness assists in gauging whether a Member is consulting with another Member in good faith or simply to gain time before initiating a dispute. In this consultation phase, a safeguard against abuses is expressed in the good faith obligation of Article 4.3 DSU.

1.1. Good Faith in Consultations: Articles 4.3 DSU

Consultations are a 'prerequisite to panel proceedings'.\textsuperscript{26} Even if holding consultations is not an obligatory precondition to the establishment of a Panel,\textsuperscript{27} the fact that GATT 1947 Contracting Parties already 'regularly held consultations is testimony to their important role in the dispute settlement process'.\textsuperscript{28}

\textsuperscript{21} The WTO legal system also subscribes to the principles of fairness and due process relating to substantive rules as opposed to the procedural norms of dispute settlement mentioned above. In their substantive legal function, fairness and due process guard against 'unfair trade practices', including the prohibition on abuse of the right to exercise trade remedies, such as imposing anti-dumping duties, countervailing measures or safeguards. As such 'substantive' fairness and due process ensure that the right to commercial defence is exercised fairly.


\textsuperscript{23} Article 3.10 DSU.

\textsuperscript{24} Mexico–HFCS (Article 21.5), Appellate Body Report, para. 50.

\textsuperscript{25} The GATT 1947 Contracting Parties, who negotiated the Uruguay Round did not have to create the wording for such a duty because it already existed, with wording identical to Article 3.10 DSU, under Paragraph 9 of the Tokyo Round DSU Code of 1979, but had never been used.

\textsuperscript{26} Mexico–HFCS (Article 21.5), Appellate Body Report, para. 58.

\textsuperscript{27} See Article 4.1 DSU stating that WTO Members’ affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members’.

\textsuperscript{28} Mexico–HFCS (Article 21.5), Appellate Body Report, para. 55.
The AB finds that holding consultations prior to the establishment of a panel benefits the outcome of the dispute. The AB says that ‘parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties, as well as to third parties and to the dispute settlement system as a whole’. In summary one can say that in a dispute settlement as judicialized as that of the WTO DSU, consultations remain an important opportunity for parties to the dispute to clarify the situation among themselves.

In Mexico–HFCS (Article 21.5), the AB defined the procedural fairness in consultations in terms of the relationship of ‘the responding party’s conduct towards consultations to the complaining party’s right to request the establishment of a panel’.

For the Panel to be validly established there is no obligation to hold prior consultations. In addition, such consultations can be held over a shorter time than the thirty-day period specified in Article 4.3 DSU, as long as both parties agree.

Even if both parties to a dispute remain silent on the issue of whether or not consultations were held, the Panel is neither required to examine on its own motion the issue nor does this ‘defect deprive a panel of its authority to deal with and dispose of the matter’ in dispute.

Pursuant to this jurisprudence, therefore, the fact that the responding party fails to explicitly and timely object to the failure of the complaining party to request or engage in consultations is taken as having consented to the lack of consultations and the responding party is therefore treated as having relinquished its right to consult. Thus, if the responding party complains in such a situation of having been deprived of its right to consult, such a claim is considered an abuse of the right to engage in consultations in good faith.

While the AB in Mexico–HFCS (Article 21.5), did not interpret Article 4.3 DSU as requiring WTO Members to hold consultations, it nevertheless indicated that there may be legal consequences of a failure to conduct consultations under the good faith obligation of Article 3.7 DSU, which requires that WTO Members only bring cases before dispute settlement that are ‘fruitful’.

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29 Mexico–HFCS (Art. 21.5), Appellate Body Report, para. 54
30 See Mexico–HFCS (Art. 21.5), Appellate Body Report, para. 59
31 Mexico–HFCS (Art. 21.5), Appellate Body Report, paras. 64 and 65.
33 See Mexico–HFCS (Art. 21.5), Appellate Body Report, para. 66.
In this case, Mexico argued that the US had violated Article 6.2 DSU, because it had failed to include in its communication requesting the establishment of a Panel to examine the recourse to Article 21.5 DSU, an indication of whether or not consultations had been held.\textsuperscript{35} The AB firstly found that since there is no obligation under Article 4 DSU to hold consultations prior to the establishment of a Panel, a \textit{maiore minus}, the requirement for informing the Panel whether or not consultations were held under Article 6.2 DSU is even less mandatory.\textsuperscript{36} Thus, in the view of the AB, Mexico’s failure to object to the lack of consultations weighed more heavily than the failure of the US to communicate whether or not consultations had been held. Mexico then argued that failing to hold consultations should be considered as evidence that the complainant had not acted in good faith in submitting the conflict for dispute settlement. To Mexico the US’s requiring the establishment of a Panel without holding prior consultations with the respondent showed that the dispute is not fruitful in the sense of Article 3.7 DSU.\textsuperscript{37} On this issue, the AB found that given the self-regulatory nature of the right to exercise judgment as to whether or not a dispute is fruitful established in \textit{EC–Bananas}, the Panel had correctly refused to ‘look behind’ the US’s decision or to ‘question its exercise of judgment’.\textsuperscript{38} The AB concluded by stating that since Mexico did not object to the failure of the US to request or hold consultations, it could not accuse the Panel of having failed to examine whether, under Article 6.2 DSU, the US should be held accountable for failing to communicate to the Panel whether or not consultations had been held, and for failing to examine whether the US had acted in bad faith because it had brought a dispute that was not fruitful.\textsuperscript{39}

In our view, however, the AB could have examined more closely the relationship between the requirements of the consultations process under Article 4 DSU and the duty to bring only fruitful cases pursuant to Article 3.7 DSU to dispute settlement. Both provisions relate to a WTO Member’s good faith when using the dispute settlement procedures and the AB could have given more guidance on the interesting question of when a lack of consultations constitutes evidence that a case was brought before the DSU for the wrong reasons, i.e. in bad faith. Perhaps the AB could have interpreted Article 4.3 in combination with Article 3.7 to establish that where consultations were not held nor requested, a case is presumed not fruitful. In summary, the duty to hold consultations in good faith has not yet been clarified through jurisprudence. Up to now, except for the abovementioned \textit{Mexico–HFCS} (Article 21.5) case, no other WTO AB decision has yet set a precedent for this good faith duty.

\textsuperscript{36} See \textit{Mexico–HFCS} (Art. 21.5), Appellate Body Report, para. 70.
\textsuperscript{38} See \textit{Mexico–HFCS} (Art. 21.5), Appellate Body Report, paras. 74-75.
\textsuperscript{39} See \textit{Mexico–HFCS} (Art. 21.5), Appellate Body Report, para. 75.
1.2. Good Faith in the Use of Dispute Settlement Procedures: Article 3.10 DSU

In the international law of the sea, Article 294 UNCLOS, contains a similar prohibition against the abuse of procedural rights, as Article 3.10 DSU. An evolutionary approach to Article 294 United Nations Convention on the Law of the Sea (UNCLOS) reveals, that this provision was included in order to find an equilibrium between the interests of coastal states and landlocked states. By analogy, Article 3.10 DSU may be said to strike a balance between economically powerful states experienced in trade litigation and developing countries or other small and vulnerable economies less adept at trade litigation, by prohibiting the abuse of due process rights in WTO dispute settlement.

The Canada–Aircraft AB Report of 1999 was the first to mention the good faith obligation relating to the use of the dispute settlement procedures of Article 3.10 DSU in combination with procedural fairness. Canada–Aircraft (1999), introduces—under the good faith obligation of Article 3.10 DSU, the right of the Panel to seek information under Article 13 DSU—the now-famous procedural duty of the Panel to draw adverse inferences if a party refuses to supply it with information. Brazil had claimed under Article 3.10 DSU that Canada had violated the duty of collaboration that exists in public international law between parties to a dispute and a tribunal. While omitting any reference to a public international legal source relating to the duty of collaboration, the AB nevertheless ‘took inspiration from the Brazilian’ broad analysis of Article 3.10 DSU and created the duty to supply the Panel with the information that it sought. As such, the AB may have been influenced by investor-to-state arbitration, where Article 23 International Centre for Settlement of Investment Disputes (ICSID) Convention codifies—under the precept of good faith—the duty to cooperate with the Commission in ‘furnish[ing] all relevant documents, information and explanations, […]’.

Canada justified its failure to provide the information on the Export Development Corporation, Canada (EDC)’s financing of the Atlantic Southeast Airlines (ASA) transaction, by claiming firstly that Brazil had not established a prima facie case as to why Canada’s export subsidy on the airlines transaction was prohibited under Part II of the Agreement on Subsidies and

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41 The use of Article 3.10 DSU in WTO jurisprudence has coincided with the surge in trade remedy cases.

42 Canada–Aircraft, Appellate Body Report, paras. 48-53.

43 See Rule 23 ICSID Rules of Procedure for Conciliation Proceedings, (Conciliation Rules), of January 1985, available at http://www.worldbank.org/icsid/basicdoc/basicdoc.htm, ‘Cooperation of the Parties’ (i) The parties shall cooperate in good faith with the Commission and, in particular, at its request furnish all relevant documents, information and explanations as well as use the means at their disposal to enable the Commission to hear witnesses and experts whom it desires to call. The parties shall also facilitate visits to and inquiries at any place connected with the dispute that the Commission desires to undertake.’
Countervailing Duties. Secondly, Canada maintained that the obligation to provide the Panel with information under Article 13(1) DSU vests only after the opposing party has established that the claim is valid. However, the AB replied that it is incumbent upon the Panel to request information and to decide when it needs which piece of information. The Panel may request information even before the opposing party has established a prima facie case. Moreover, and this argument of the AB is especially important for developing countries, which have fewer resources for investigating the facts of a case and establishing the evidence of a prima facie claim, if a Member were to make its duty to provide the Panel with information dependent on the opposing party’s formulation of a claim, the decision as to whether or not a prima facie case is established would erroneously become the responsibility of the Member and not the Panel. As Steger notes, Canada had refused 16 times to provide the information. Such repetitive infringement was likely to trigger the Panel’s right to draw ‘adverse inference’.\textsuperscript{44}

'We believe also that the duty of a Member party to a dispute to comply with a request from the panel to provide information under Article 13.1 of the DSU is but one specific manifestation of the broader duties of Members under Article 3.10 of the DSU not to consider the "use of the dispute settlement procedures...as contentious acts", and, when a dispute does arise, to "engage in these procedures in good faith in an effort to resolve the dispute."\textsuperscript{45}

The findings in Canada–Aircraft relating to procedural fairness can be summarized as the introduction by the AB under Article 3.10 DSU of a Member State’s duty to provide the Panel with the information that the Panel is seeking under that Article. Short of establishing a fully-fledged duty of collaboration between the parties to the disputes and the Panel, the AB nevertheless reinforces, by establishing this duty to provide information, the Panel’s right to seek information.

In EC–Sardines (2002), Peru submitted that the EC’s withdrawal of its original notice of appeal upon the condition of filing a new notice of appeal was ‘impermissible’. Peru claimed that the consequence should be that the new Notice of Appeal was ‘inadmissible because there is no right to appeal twice’.\textsuperscript{46} The EC defended its decision not to appeal twice by stating that its reason for withdrawing the original notice of appeal was simply to respond to Peru’s request for additional information. In response, the EC claimed, that its new notice of appeal was based on the same legal grounds as the original notice, so that in the EC’s view, Peru did not suffer any prejudice.

It is a fact that Rule 30(1) of the Working Procedures for Appellate Review (Working Procedures), accords the appellant a right to withdraw an appeal at any time. While this right appears to be ‘unfettered on its face’ insofar a there is no prohibition on attaching conditions to a withdrawal, the


\textsuperscript{45} Canada–Aircraft, Appellate Body Report, para. 190.

\textsuperscript{46} EC–Sardines, Appellate Body Report, para. 135.
AB in EC–Sardines set a limit of procedural good faith on the right of withdrawing an appeal.\textsuperscript{47}

According to the AB, good faith in Article 3.10 DSU read in conjunction with Rule 30(1) of the Working Procedures ensured that no conditional withdrawal in a particular case would neither diminish the right of the appellee or of any other participant in any way, nor would the conditional withdrawal otherwise obstruct the ‘fair, prompt and effective settlement of disputes’.\textsuperscript{48}

‘[T]here may be situations where the withdrawal of an appeal on condition of re-filing a new notice, and the filing thereafter of a new notice, could be abusive and disruptive. However, in such cases, we would have the right to reject the condition, and also to reject any filing of a new notice of appeal, on the grounds either that the Member seeking to file such a new notice would not be engaging in dispute settlement proceedings in good faith, or that Rule 30(1) of the Working Procedures must not be used to undermine the fair, prompt, and effective resolution of trade disputes’.\textsuperscript{49}

In EC–Sardines, the AB even expounded on the development-specific dimension of the duty in Article 3.10 DSU to settle disputes in good faith: “[T]he rules must be interpreted so as to ensure that appellate review proceedings do not become an arena for unfortunate litigation techniques that frustrate the objectives of the DSU, and that developing countries do not have the resources to deal with.”\textsuperscript{50}

Mengozzi confirms what the AB implies to be a distributive justice function of the duty to settle disputes in good faith, by stating that for developing countries ‘still more than for developed countries, time is money’; and that ‘for them an expeditious settlement can in many instances be vital’.\textsuperscript{51}

However, the AB in EC–Sardines argued in favour of the EC and against Peru. The EC, according to the AB, had filed the replacement notice of appeal in a timely manner and early on in the process. In addition, the replacement notice contained no new or modified grounds of appeal. Also, Peru has not demonstrated that it suffered prejudice as a result.

Moreover, Peru had been given an adequate opportunity to address its concerns about the EC’s actions during the course of the appeal.\textsuperscript{52} Therefore, the AB found, that the EC had not violated the duty to engage in dispute settlement in good faith, which also applied, according to the AB, to the withdrawal and filing of notices of appeal under rule 30(1) of the Working

\textsuperscript{47} EC–Sardines, Appellate Body Report, para. 138.
\textsuperscript{48} EC–Sardines, Appellate Body Report, para. 141.
\textsuperscript{49} EC–Sardines, Appellate Body Report, para. 146.
\textsuperscript{50} EC–Sardines, Appellate Body Report, para 146.
\textsuperscript{52} EC–Sardines, AB Report, para 150.
Procedures. Nonetheless, the AB also shared a note of concern with Peru, that the filing of new notices of appeal could be 'abusive and disruptive' and thus cause 'immense potential for abuse and disorder in appellate review proceedings'.

The AB’s final argument in support of the EC was reminiscent of that of the International Court of Justice in the Barcelona Traction case. In its findings, the AB in EC–Sardines even cited from the Barcelona Traction case, the argument that in the absence of a prejudice to the defendant, a conditional withdrawal of the notice of appeal was justified.

As O’Cunningham and Cribb say, there is a call for WTO Members to ‘auto limiting’ the use of due process rights in the profession, because '[t]o the extent that the United States is busy defending charges of procedural unfairness, efforts to defend more substantive decisions will suffer'.

As EC–Sardines shows, good faith under Article 3.10 DSU functions to ensure that ‘procedural justice’ is observed. It protects procedural rights against abuse through ‘unfortunate litigation techniques’. Art. 3.10 DSU thus implies a measure of respect for the goal of fair dispute settlement in the DSU by translating into practice the objectives of legal security and predictability of the WTO trading system. Article 3.10’s exemplification of procedural justice also contains a development-specific element, that of providing developing countries an equal chance of winning a case before the AB.

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53 See EC–Sardines, AB Report, para 142.
54 EC–Sardines, AB Report, para. 146 with reference to Peru’s appellate submission, para. 45.
55 In the case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain), Judgment of 24 July 1964 (Preliminary Objections) Spain in a Note to the Belgian Embassy in Madrid had invoked estoppel and good faith in the Barcelona Traction case against Belgium who had given notice of discontinuance, in order to replace dispute procedures with direct negotiations: '[O]blige de déclarer formellement qu’est contraire au principe de la bonne foi... toute tentative de réintroduire l’affaire devant la Cour internationale de Justice, puisque cette affaire-en tant que prétendu litige international-est définitivement et irrévocablement close;’ see Zoller, Elisabeth, *La Bonne Foi en Droit International Public*, Paris: Editions A. Pedone, 1977, p 145, citing Spanish Note of 5 March 1962 addressed to the Belgium Foreign Ministry at the Belgian Embassy in Madrid. The Court however, found that since notices of discontinuance are a procedural and ‘neutral’ act, the Parties’ ignorance must be established in ‘attendant circumstances’. In this case, there was no real renunciation nor was the discontinuance made in circumstances that ‘must preclude further proceedings’. Moreover, the Court did not find that Belgium’s action had in any way injured Spain and that Belgium had not created any legitimate expectations *vis-à-vis* Spain, so that in consequence, the claim of good faith and estoppel related closely to an abuse of procedure by Belgium, was unfounded and Belgium was free to submit all the preliminary objections it had invoked before the original (and now retracted) request; *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain), Judgment of 24 July 1964 (Preliminary Objections)*, Summary, cited in: *International Law Reports, Volume 46, E. Lauterpracht, (ed) London, 1973*, p 4; see also Kolb, R., 2000, p 641, for a discussion of the case.
1.3. Fruitful Disputes: Article 3.7 DSU

Article 7 DSU imposes the duty upon WTO Members desiring to bring a conflict before a WTO Panel to first assess whether resolving the conflict through the WTO dispute settlement process would be useful. The standard by which WTO Members shall measure the fruitfulness of the dispute is said by the AB jurisprudence in Mexico–HFCS (Article 21.5) to be good faith, even though the wording of Article 3.7 DSU does not mention such a good faith standard.\(^57\)

Article 3.7 DSU is, together with the above-mentioned Articles 3.10 and 4.3 DSU, a provision within WTO procedural law designed to prevent it being the availability of funds which determines a WTO Member’s access to and use of the DSU. Thus, the good faith standard implied in the test of fruitfulness imposes the duty upon WTO Members to exercise political judgment and restraint in bringing cases and to seek the negotiation of a mutually acceptable solution to the conflict before lodging a complaint. The EC–Bananas AB report of 1997, the first decision to expound on how broadly to interpret what effectively functions as one of the thresholds (in addition to Articles 3.10 and 4.3) for engaging in WTO litigation, maintains that even a WTO Member with no legal interest can bring a case; it suffices for the WTO Member to be an importer of the goods at issue and, thus, affected by the rise or fall of the world market price for the product in question. The AB in this case interpreted the notion of fruitfulness broadly to mean that a Member is largely ‘self-regulating’ in deciding whether or not it determines a dispute to be fruitful or not. Under this analysis of the wording of Article 3.7 DSU, the WTO Member’s broad extent of discretion in deciding in favour of bringing a conflict before the WTO DSU is limited only by the principle of good faith Article 3.7 expresses through the term of ‘fruitfulness’. In EC–Bananas this meant for the US that they were entitled to bring a dispute because they were a producer of bananas and even if only their ‘potential’ export interests were threatened by the EU’s measures.\(^58\) Thus, under the requirement for fruitfulness, any WTO Member can bring a dispute as long as it can show that another WTO Member’s measures are influencing world prices or world supplies in a way that affects the internal economy of the first Member.\(^59\)

In the later Mexico–HFCS (Article 21.5) AB decision, the AB even presumes the WTO Member to have exercised good faith when deciding that bringing a case would be fruitful. Thus, in this later Mexico–HFCS (Article 21.5) AB decision, the AB substantiated that the self-regulatory nature of a Member’s decision meant that neither the AB nor the Panel was authorized to examine the fruitfulness of a claim in the absence of a party’s judgment as to whether or not to bring a case.\(^60\) In fact, Article 3.7 DSU expresses the presumption that when a WTO Member does bring a case before the DSB, it is

\(^{57}\) See Mexico–HFCS (Art. 21.5), Appellate Body Report, para. 73.

\(^{58}\) EC–Bananas, Appellate Body Report, para 136.

\(^{59}\) See EC–Bananas, Appellate Body Report, para 136.

doing so in good faith. In this case, the only option open to the AB is to find that the Panel had erred in presuming that a Member’s evaluation was made in good faith and that a dispute would be fruitful for that Member.

4. Standard of Fair, Prompt and Effective Dispute Settlement

The goal of the WTO dispute settlement system is to provide security and ensure predictability of the multilateral trading system.61 The system is ‘not designed to promote the development of litigation techniques’.62 While Article 3.7 DSU prescribes that a dispute should be settled ‘satisfactorily, in accordance with the rights and obligations under the Dispute Settlement Understanding and under the covered agreements’,63 not only the result, but also the process leading to a satisfactory result should also be fair.64 The importance of a fair procedure for the dispute resolution system is especially important for those WTO Members, including developing countries, which lack the political power or the resources to shape the outcome of a conflict to their advantage.

In scholarship, Bacchus, a former Chairman and Member of the AB, finds that the ‘Members of the WTO [shall] establish a useful, workable, practical, enduring institution that will contribute to the continuing success of the […] WTO dispute settlement system’.65 At first glance, Bacchus’s statement does not seem to give much consideration to the issue of fairness in dispute settlement, but more to considerations of practicality and effectiveness, which, until the US–FSC case in 2000, in fact had influenced the design of the dispute settlement procedures more than considerations of fairness, due process and procedural justice. Nonetheless, Bacchus underscores that the WTO dispute settlement system should ‘serve all the people of the world’.66 Ehlermann, another former Chairman and Member of the AB, says that the goal of the DSU, ‘from the very start was the establishment of an independent, quasi-judicial institution that would serve all the Members of the WTO equally and effectively’.67 Thus, Ehlermann, more clearly than Bacchus, emphasizes the mission of the WTO dispute settlement process for ensuring the equality of WTO law and application, and, in this sense, the equal access to justice for all WTO Members as one means to ensure the de-

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63 Art. 3.7 DSU.
66 Id.
mocratic legitimacy of the WTO of which the fairness of its dispute settlement system is one significant prong.

Although the DSU itself does not expressly codify an obligation to conduct dispute settlement procedures under the rule of law and following due process, WTO jurisprudence since 2000 and with the US–FSC case, has recognized the importance of setting a precedent of due process for WTO laws on dispute settlement. In US–FSC, the AB thus created the standards of good faith and due process, with which parties to subsequent WTO disputes are now automatically expected to comply. Independent of the substantive fairness of the decision’s findings, the standard of due process and procedural good faith holds not only WTO Members,\(^49\) but also the WTO judiciary to adhere to the precepts of procedural justice and is encapsulated in a formula first introduced by the US–FSC AB Report: ‘The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.’\(^50\)

The formula splits up into the three elements, each of which stands for a different element of due process. The EC–Sardines AB Report, for instance, defined the concept of ‘fundamental fairness’, as the capacity to defend and complain, applicable to both developing and developed countries. The issue of fairness in dispute settlement arose when the EC filed a new notice of appeal subsequent to and conditioned upon the withdrawal of its original notice. The AB had to decide whether the EC’s action was fair to Peru. It found that the EC had compromised the standard of fair, prompt and effective dispute settlement on two grounds: firstly, the circumstances under which the EC filed its new notice of appeal amounted to a violation of the obligation to engage in dispute settlement proceedings in good faith under Article 3.10 DSU. Secondly, the AB found that the EC had abused Rule 30(1) of the Panel Working Procedures of Appendix 3 to the DSU and had thereby undermined the goal of a fair, prompt and effective dispute resolution. The meaning of the requirement to abide by the principle of fairness, was elucidated by the AB in EC–Sardines with the words that ‘the rules must be interpreted so as to ensure that the appellate review proceedings do not become an arena for unfortunate litigation techniques that frustrate the objectives of the DSU, and that developing countries do not have the resources to deal with.’\(^50\)

In EC–Sardines the AB emphasized the particular importance of the due process guarantees for developing countries. It implied that a specific concern in interpreting the DSU must be to guarantee fairness to developing countries by ensuring that access to dispute settlement already limited by lack of funds is not being prejudiced by industrialized countries’ better knowledge of how to abuse procedural rights to their own advantage. Such an abuse is exemplified by what the EC did in EC–Sardines when it retracted

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\(^{49}\) See Panizzon, 2006, pp. 279, 310.

\(^{50}\) US–FSC, Appellate Body Report, para. 166.

\(^{50}\) EC–Sardines, Appellate Body Report, para 146.
the original notice of appeal only to reapply later on, in order to gain time. Fairness, thus, relates not only to the relationship between the complaining and responding party, but also refers to a Member’s good faith obligations vis-à-vis a Panel, the AB and the DSB. Fairness guarantees that the procedural rights in the DSU are not abused, and thus fairness assumes a corrective function in the exercise by the Members and the WTO judiciary, of the procedural rights in WTO dispute settlement.\(^{71}\)

At least two AB Reports have elaborated on the issue of promptness. Firstly, in *Mexico–HFCS (Article 21.5)* the Panel concluded that Mexico’s objections were not raised in a timely manner, because in the words of the AB Report ‘when a Member wishes to raise an objection in dispute settlement proceedings, it is always incumbent on that Member to do so *promptly*’ (emphasis added).\(^{72}\) In the appeal against the *Mexico–HFCS (Article 21.5)* Panel report, the AB defined the obligation to respect promptness in settling disputes as follows: a ‘Member that fails to raise its objections in a *timely* manner, notwithstanding one or more opportunities to do so, may be deemed to have waived its right to have a Panel consider such objections’ (emphasis added).\(^{73}\)

In *US–Offset Act (‘Byrd Amendment’)*, the AB found the US to violate the good faith standard of a fair, prompt and effective settlement of disputes, specifically the duty of timeliness. To the AB, the US had acted inconsistently with the duty of timeliness implied in the duty of good faith in dispute settlement under Article 3.10 DSU by letting several months pass after the composition of the Panel and two months after the issuance of the descriptive part of the Panel report, before filing an appellant’s submission.\(^{74}\) The AB based its finding of a violation against the US on the good faith standards of fairness, promptness and effectiveness, which it had derived from Article 3.10 DSU and had developed in the *US–FSC Appellate Report*. The *US–Offset Act (‘Byrd Amendment’)* AB Report, thus, also shows, that that the AB clearly gives precedential value to its decisions, which is another important step towards assuring a functional, secure and predictable legal system, committed to fairness through continuity of case law.

The third prong of the good faith standard in dispute settlement is what the AB refers to as “effectiveness”, meaning respect for considerations of legal order, encompassing the stability, predictability and foreseeability of treaty relations. Effectiveness being the good faith function embodying respect for the legal order, calls on the responsibilities of both the parties to the dispute and the judiciary. While the party to a dispute has to the duty to bring a dispute in good faith and timely, the Panel and the AB are called upon to settle the dispute through fair and prompt procedures.\(^{75}\) Even if Article 12.2 DSU relates to Panel proceedings it applies, by analogy, to the conduct of WTO dispute settlement proceedings overall. It impliedly con-

\(^{71}\) Panizzon, 2006, p. 278.

\(^{72}\) *Mexico–HFCS (Art. 21.5)*, Appellate Body Report, para. 50.

\(^{73}\) *Mexico–HFCS (Art. 21.5)*, Appellate Body Report, para. 50.

\(^{74}\) See *US–Offset Act (‘Byrd Amendment’)*, Appellate Body Report, paras. 313 and 314.

\(^{75}\) Panizzon, 2006, p 278.
tains the duty of effectiveness as it relates to the responsibility of the Panels and the AB. Article 12.2 DSU thus requires “procedures [to] provide sufficient flexibility so as to ensure high quality [Panel] reports, while not unduly delaying the [Panel] process”.

In the author’s opinion, this formulation encapsulates the very concept of effectiveness with respect to the judiciary’s task of balancing the promptness and the flexibility of the process against the high quality of the reports. However, recent case law has shown that the standard of effectiveness in dispute settlement procedures requires also some duties of the parties to a dispute. These should a) submit sufficiently precise Panel requests; b) make claims explicitly and not implicitly; c) file replacement notices of appeal timely; d) do not improperly withhold arguments from competent authorities with a view to raising those arguments later before a Panel; e) disclose evidence to interested parties during investigations; f) to accept that the Panel may inquire into facts undisclosed or indiscernible to parties during final determination; g) comply with the requirements for consultations; h) and realize that there is no (unqualified) right of WTO Members to request a separate Panel Report at any time during the proceedings and without any reason.

5. Conclusions

As O’Cunningham and Cribb say, it is important for WTO Members to ‘auto limit’ the use of due process rights. However, it is equally necessary, that the WTO judiciary continue to prosecute parties which are ‘busy defending charges of procedural unfairness’, but may be using this as a tactic to distract attention from the substantive issues. Unless the WTO judiciary distinguishes procedural fairness from the abuse of procedural rights ‘the efforts to defend more substantive decisions will suffer’.

The mainstay of WTO reform as propagated by the now suspended Doha Development Agenda must come from within the legal system and be applied by the judiciary of the WTO. Only if the WTO dispute settlement system is committed to protecting procedural fairness will the WTO trading system operate more fairly and equitably. As Stiglitz says: “Redressing the

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76 Art. 12.2 DSU
77 See Panizzon, 2006, p 283.
83 Thailand–Steel, Appellate Body Report, paras 117-120.
85 US–Offset Act (Byrd Amendment), Appellate Body Report, para. 311.
86 O’Cunningham, Cribb, 2003, p 170.
current imbalances does not require that the world wait until the end of a new round of trade negotiations”.

By deriving procedural good faith obligations from Articles 3.10 and 3.3 DSU, the AB has added an important corrective to the exercise, by WTO Members, of procedural rights in dispute settlement. By introducing this standard of due process, which it finds ‘inherent in the WTO dispute settlement system’, the AB has increased the level of detail of its jurisprudence and has thus ‘improved the quality of legal decision making’.

This paper has elucidated how WTO jurisprudence has contributed to the fairer settlement of trade disputes. It has analysed how far the WTO judiciary has interpreted the existing law of the DSU in the light of the general principle of good faith in order to ensure a fair, prompt and effective settlement of disputes brought to the WTO. In so-doing, the WTO judiciary has established a normative relationship with general principles of law to create a standard of WTO procedural justice. By developing a body of jurisprudence based upon the principles of good faith and fairness, the WTO Panels and the AB have solidified the institutional development of WTO dispute settlement rules, and made a normative choice favouring independence, impartiality and equity over the original diplomacy and power-oriented settlement proceedings. What is more, by introducing the unifying principles of good faith, fairness and procedural justice, the WTO adjudicators have added a constitutional level of analysis to dispute settlement rules. Interpreting dispute settlement provisions consistently with principles of international law, the WTO adjudicators will counteract the tendencies towards fragmentation which may arise when too many international norms are allowed to collide.

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