POLICY GUIDANCE FOR THE PROTECTION OF DUE PROCESS IN INTERNATIONAL DISPUTE SETTLEMENT:

A COMPARATIVE ANALYSIS OF ICSID, UNICTRAL AND WTO PROCEDURES

James Headen Pfitzer, PhD Candidate

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ABBREVIATIONS

ABA	American Bar Association
AFR	ICSID Additional Facility Rules
ATC	Agreement on Textiles and Clothing
BIT	Bilateral Investment Treaty
CIEL	Center for International Environmental Law
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
ECHR	European Convention on Human Rights
EU	European Union
FAA	Federal Arbitration Act
GATT	General Agreement on Tariffs and Trade
GC	General Court
IBA	International Bar Association
ICC	International Criminal Court
ICJ	International Court of Justice
ICISD	International Centre for Settlement of Investment Disputes
ICCPR	International Covenant on Civil and Political Rights
IISD	International Institute for Sustainable Development
ILA	International Law Association
IMF	International Monetary Fund
IP	Intellectual Property
ITLoS	International Tribunal for the Law of the Sea
LDC	Least-developed Country
LMICs	Low and Middle Income Countries
MDGs	Millennium Development Goals
NAFTA	North American Free Trade Agreement
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade Agreement
UNCITRAL	United Nations Commission on International Trade Law
US	United States
UN	United Nations
UNDP	United Nations Development Program
WTO	World Trade Organization

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INTRODUCTION

A certain degree of judicial discretion with respect to procedural matters is fundamental to all dispute settlement. However, due process must be respected and protected at all times to maintain the legitimacy of the system. In the international context, while national norms may be considered, there is generally very limited guidance on what steps a tribunal should take to ensure that flexible procedure effectively protects due process and what the principles of due process actually require. The development of policy guidance around procedural mechanisms to protect due process for the international community to consider when reforming existing and establishing new international dispute settlement systems will provide needed support and practical options for the requirements of due process in the broader international context. This work seeks to derive such policy options based upon a comparative analysis of three specifically selected international dispute settlement mechanisms, the World Trade Organization, the International Centre for the Settlement of Investment Disputes and the UNCITRAL Rules. These three mechanisms were selected based upon their international legitimacy but also based upon the differing subject matter they address to demonstrate that due process protection is fundamental, rises above specific subject matter and cuts across all types of international dispute settlement.

This work focuses on issues surrounding the balancing of judicial discretion as well as procedural flexibility with the need to protect due process in the context of international dispute settlement. This is done initially through an analysis of the history of judicial discretion, procedural flexibility and due process – where do they come from, how were they developed and why are they so important? Particular attention is paid to the international context, recognizing the attractiveness of flexibility in international dispute settlement to parties but also the challenges related to due process protection internationally and why this differs from the application of due process protections on the national levels. A set of requirements for the protection of due process in the international context is developed and then applied to three said international dispute

settlement mechanisms – the World Trade Organization (WTO), the dispute settlement mechanism under the United Nations Commission on International Trade Law (UNCITRAL) and the International Centre for Settlement of Investment Disputes (ICSID).

With respect to each system's approach to the protection of due process, the analysis seeks to identify strengths and also weaknesses within each system and then compares and contrasts the identified weaknesses across all three of the systems reviewed. This exercise is intended to identify areas for improvement within each of the three systems but also to consider whether specific weaknesses identified are unique to a particular system or alternatively are commonly found in the world of international dispute settlement. From this analysis and the weaknesses identified, policy options to protect due process are developed and then applied back to the three dispute settlement systems to determine whether weaknesses previously identified are addressed.

Regarding the analysis of judicial discretion, this work defines judicial discretion and translates the concept to procedural flexibility in the context of international dispute settlement. Fundamental to this analysis is the concept that a degree of procedural flexibility and judicial discretion is beneficial in the context of international dispute settlement. This is in fact considered attractive to potential parties as it enables procedures to be tailored to their specific needs. However, unbridled discretion – discretion and procedural flexibility without clear guidance and limits from the rules of the dispute settlement mechanism upon which the decision maker can base decisions related to the exercise of their discretion, leaves eventual opinions and decisions vulnerable and without sufficient support.

The work then traces the historical developments of the concepts of due process, why it is fundamentally important and also presents and highlights complexities surrounding the fact that there is no universal definition of due process. Given that national jurisdictions find themselves grappling with the concept of due process, complexities are heightened in the international context because there is no supra-

national legislative body. For this reason international due process requirements were derived based upon an overview of relevant international jurisprudence in order to establish a framework within which the remainder of this work could be completed. The international due process requirements include: 1) a tribunal must be independent and impartial, 2) the parties must be given adequate notice of the proceedings, and 3) the parties must be given adequate opportunity to be heard and present their case. The analysis of the three international dispute settlement mechanisms is conducted against these three components.

Regarding the development of policy guidance and proposed options for the international community to consider when strengthening existing or creating new dispute settlement systems to ensure the protection of due process in the international context, the goal is to provide the international community with practical and effective guidance and options to consider. Based upon the analysis of how the three considered dispute settlement mechanisms address the protection of due process, the development of common rules relating to discovery in an effort to ensure that all evidence is made available to the decision maker is identified as the primary existing gap to be addressed. Additional policy options developed highlight the benefits of a clearly defined substantive appeals mechanism and also the practice of looking to past precedent in order to ground future decisions.

A robust evidence base is necessary for solid decision making and moving towards the development of common rules related to discovery in international dispute settlement will be an effective means to ensure that all relevant evidence is available to the decision maker, ensuring further that the parties enjoy protection of their full right to be heard and present their case. While the UNCITRAL and ICSID have appeal processes limited only to procedural issues, a formalized appeals mechanism that considers substantive issues, similar to that of the WTO, does not exist and would provide a needed relief option to parties suffering from an egregious substantive arbitral error and demonstrates more broadly the value of policy ensuring substantive appeals in all contexts. Finally, policies encouraging consistency and predictability in the decision

making within a dispute settlement mechanism, firmly grounded on principles of precedent, also protect a party's right to be heard by enabling them to prepare and anticipate how to best frame and present their case, argumentation and supporting evidence.

Considering that over the last fifty years there has been a steady increase in the number of developing countries and parties from developing countries participating in the international community and in international dispute settlement, these weaker and more inexperienced parties will be at a disadvantage as a result of the inherent complexities and uncertainties around due process protections linked to tensions between maintaining a degree of procedural flexibility and the need for parties to effectively be heard and present their case. This further heightens the need to ensure the protection of due process in international dispute settlement and policy options for such protections of due process provide a good place from which to start.

Without effective protection of due process in international dispute settlement, the international community runs the risk of international dispute settlement becoming an option only for the rich, powerful and experienced. The formalization of how exactly due process protection should be protected is new territory and parties from developing and least-developed countries should watch with particular attention as the policies and practices relating to due process protection in the international context are further developed and refined. This will by no means be fast or simple; however, it is essential for this issue to be put on the agenda and discussed by all. Perhaps the consideration of the due process protecting policies and their application can spark such a dialogue, thus making a valuable contribution to this process and to the overall legitimacy of international dispute settlement in general.

PART I

JUDICIAL DISCRETION AND DUE PROCESS

Chapter 1 Judicial Discretion

A. What is judicial discretion?

The exercise of judicial discretion forms the core of the institutional and social functions known as judgment. Discretion can be simply defined as allowing the decision maker or official to choose from a number of legally permissible options provided by norms within the rule of law. It allows the decision maker to select among different approaches to the interpretation of legal theory as they feel most appropriate and provides leeway to the decision maker when applying well-established law to disputed circumstances or fact. More broadly, from an appellate perspective, judicial discretion considers the degree of latitude or deference afforded to lower courts during situations of judicial review.[1] For the purposes of this work, procedural discretion will be focused on.

Discretion must be considered from an interdisciplinary perspective and given the growing body of national and international regulation, jurisprudence and academic writing available, the degree of discretion managed by the decision maker has increased significantly because there is simply more information that must be considered and interpreted throughout the adjudication process. Over time, legal principles have emerged fine-tuning due process and in certain circumstances reducing procedural discretion, as an example WTO panels are bound by strict rules. However other aspects of discretion, including standards of proof and burden of proof decisions, nevertheless remain.

Facts can be interpreted differently by officials and different legitimate outcomes can result from the same situation which indicates the presence of discretion. Different

[1] Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Court's Resolving Issues in the First Instance,* 87 Notre Dame L. Rev. 1521 (2013) at 1522.

outcomes can arise because different weights are attached by individuals to the relevant factors or because different facts are emphasized, again pointing to the existence and importance of discretion – all rules require interpretation and all interpretative work involves the exercise of discretion.[2] However, legal theory is more than the analysis and application of a tight framework of rules. A legislature and a court system are complex institutions and are more than a rule or a collection of rules; nor are these and other basic legal phenomena reducible to a simple union of primary and secondary rules.[3] As important as a tight framework of rules may be, they cannot be considered the only "atomic" particles out of which legal theory is built.[4] In order to be functional, the law requires the incorporation and integration of non-formal resources in its interpretation and application.

There is a link between the exercise of discretion and regulatory theory in the context of public administration discretion which has been described by Kenneth Culp Davis, the American legal academic, as a public official within an administrative agency having "discretion whenever the effective limits of his power leave him free to make a choice among possible courses of action or inaction."[5] Davis was particularly concerned with the arbitrary use of discretion.

The exercise of discretion has the potential to lead to the development of new law, new precedents and new rules where before there were different ones in place or none at all. In the context of international arbitration, the more the evidentiary procedural aspects of a particular mechanism are left to the discretion of the arbitral tribunal, without clear guidance presented in the dispute settlement rules, the more the system becomes vulnerable to unguided tribunal discretion which can quickly lead to violations of due process and in turn erode legitimacy. While international dispute settlement mechanisms

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[2] Robert Baldwin, "Why Rules Don't Work" (1990) 53(3) *Modern Law Review* 321, 321-37.

[3] Robert S. Summers, *Essays in Legal Theory* (New York: Kluwer, 2000) at 95-98.

[4] Id.

[5] Kenneth Culp Davis, *Discretionary Justice: A Primary Inquiry* (Springfield: University of Illinois Press, 1976) at 56-60.

differ in nature, it is essential for each to respect and protect due process. Moreover, for any guidance on the use of judicial discretion to have meaning, the protection of due process must be a fundamental consideration.

While leading international dispute settlement conventions and national law in most developed states permit parties to agree upon the arbitral procedures, subject only to mandatory due process requirements, how does one know when those due process requirements are met? Arbitration agreements will ordinarily provide simply for arbitration pursuant to a set of institutional rules, which supply only a broad procedural framework. Filling in the considerable gaps in this framework is left to the subsequent agreement of the parties or, if they cannot agree as is often the case, the discretion of arbitral tribunal. The arbitrators' discretion to determine the procedure must be subject to the requirements of due process, particularly those related to the ability of the parties to be adequately heard and present their case. However, in the context of international dispute settlement, while there is a fundamental understanding of what due process is, how can it be applied in a way to guide the exercise of a tribunal's discretion while maintaining flexibility?

Judicial discretion is not a new concept. The legal history of the United States, particularly regarding American constitutional theory, has consistently maintained a close relationship between a legal system's exercise of judicial discretion and basic concepts of legitimacy that form the foundation of that system.[6] This dynamic is by no means unique to American jurisprudence and has influenced many of the most highly developed legal systems throughout the world.[7] Further, this connection between legitimacy and the exercise of guided judicial discretion must also apply to international dispute settlement mechanisms.

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[6] As implemented in State and Territory statutes, reprinted in Marcus S. Jacobs, *Commercial Arbitration Law & Practice* (Australia: Thomson Rueters Australia, 2008) at 532.

[7] Hans Smit & Vratislav Pechota et al, "The American Review of International Arbitration" (1994) 2 Wld. Arb. Rep. 701.

Tension between judges' creative approach and the legitimacy of doctrinal written law is common in any domestic legal system in which for their legitimacy norms rely on institutions or processes that lie beyond the reach of its highest court.[8] In order to balance these tensions, it is necessary to develop boundaries that confine the use of discretion to prevent overreaching which would erode the essential legitimacy of the law. A significant amount of constitutional legal theory in the United States is devoted to the debate over whether norm-articulation is a judicial function that is legitimate. Central to such discussions are issues related to constitutionalism. That is, in a system devoted to democratic self-governance, how is it possible that unelected judges have the authority to strike down legislation created by the duly-elected legislature – the official voice of the majority population?[9]

International jurisprudence does not face this concern as its jurists do not exercise judicial discretion so as to invalidate some foundational legitimizing text as such document does not exist. While countries have national constitutions that are supreme domestically, there is not a single agreed upon international constitution containing written international law developed by a single set of elected international legislators. In an international setting, a broad variety of customary law is heavily relied upon as are internationally negotiated treaties. When set against the backdrop of the various legal traditions that exist throughout the world, the interpretation of international law and its' intent rapidly becomes complex.

B. Equity as justification for the exercise of judicial discretion

Discretion left to the tribunal is not inherently negative but helps to bring about equitable results as it enables a consideration of the facts rather than the simple application of a fixed rule; however, unbridled discretion – discretion without clear guidance and limits from the rules of the dispute settlement mechanism upon which the tribunal can base

[8] Extra sources may include statutes enacted by an elected legislature, written constitutions, the proclamations of an absolute monarch. In all cases, there is some tension when the judge, who is not a legislature, attempts to fill gaps in the law through the exercise of his own reasoning.

[9] Smit, *supra* note 2 at 701. See also 59 Stat. 1055, 3 Bevans 1179-82.

decisions related to their discretion - leaves the eventual opinion without necessary support. Equity underlying the exercise of judicial discretion goes a long way in providing justification; however, as there is no clear and fixed definition to what is equitable for every situation ambiguity remains. Equity is however an essential component to the acceptability of any legal system and without the ability to rely upon equity, justice systems have the potential to abuse their authority and legitimacy may be undermined.

Over time accepted equitable principles, or the common law maxims of equity, emerged as an addition to both Roman law and to the English common law based on the need to refine or correct the body of civil law through practice. In Roman law equity was administered through the magistrates, advised by the judges, in issuing edicts supplementing or correcting the body of civil law.[10] As an example, equity supplemented civil law by supporting the practice of granting remedies to persons who did not have rights of action ordinarily at civil law. A widow of a man who dies intestate leaving no blood relatives was allowed through the application of the maxims of equity to claim her late husband's property although she was not his heir.[11]

Equity is not easy to define with specific particularity. The Tribunal in the United States-Norway Arbitration in 1922 defined equity to include general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State.[12] Equity can further be considered as an aspect of fairness that is fundamental when seeking to do justice when considering the facts of a particular case. Equity inherently implies fairness, equality, and impartiality where the law's function is to ensure order and security in a certain context while taking into consideration several elements, including justice. Equity essentially serves as an access port for religions, ethical moral and philosophical considerations when interpreting, completing and overruling the rigidity of the existing law. Further, actions in an attempt to secure equity

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[10] R P Meagher, J D Heydon & M J Leeming (eds) *Meagher, Gummow and Lehane Equity Doctrines and remedies* (Butterworths, 4th ed, 2002) at 978-80.
[11] Id.
[12] This was the definition of the phrase "law and equity" used by the Tribunal in the United States-Norway Arbitration, 1922 (1923) 17 AJIL 362 at 384.

may be viewed as measures intended to reduce the gap between law and justice in a specific case.[13] Equity is therefore a fundamental principle in any form of dispute settlement when seeking to deal with human conduct and the specific facts of a particular situation. Equity and the exercise of judicial discretion are closely intertwined in that equity requires an active judicial role which is based upon the use of discretion in either completing or even altering existing law in the pursuit of justice and fairness.[14]

With respect to providing a degree of justification for the exercise of judicial discretion, equity can be distinguished into three different types: 1) equity infra legem, 2) equity praeter legem, and 3) equity contra legem.[15] Equity infra legem is the form of equity which constitutes a method of interpretation of the law in force or the equity used to adapt the law to the facts of an individual case.[16] In contrast is equity praeter legem which is the form of equity used to justify the filling of gaps in the law, or more precisely used "not … with a view to filling a social gap in law, but … in order to remedy the insufficiencies of international law …"[17] Equity contra legem is equity used in derogation from the law in an effort to remedy social inadequacies of the law.[18] All three types of equity contribute to the justification of the exercise of judicial discretion and are part of the legal process, informing the law's interpretation by taking recourse to objective factors and criteria, yet remaining short of formalization and dogmatism, in deciding individual cases. Given its dependence on particular circumstances, equity continues to mean different things in different contexts. Each circumstance must be assessed on its own merits. However, the risk of subjectivism and legal uncertainty in the recourse to equity is apparent and amounts to a main argument in favour of per se rules and concerns

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[13] Ruth Lapidoth, *Equity in International Law,* American Society of International Law, Vol. 81 (April 8-11, 1987), pp. 138-147.

[14] Thomas Cottier, Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law, Cambridge University Press 2015.

[15] Vaughan Lowe, *The Role of Equity in International Law,* 4 AUYrBkIntLaw (1989) at 56.

[16] Lapidoth at 142.

[17] Taken from the separate judgment of Judge Ammoun in the *Barcelona Traction case (Second Phase)*, ICJ Rep 1970, p 3.

[18] Taken from the separate judgment of Judge Ammouon in the *North Sea Continental Shelf* cases, ICJ Rep 1969, p 3 at 139-142.

around the potential for the unbridled use of discretion. To what extend does the recourse to equity undermine predictability?

Article 38 of the Statute of the International Court of Justice which mandates the sources of law to be applied by the Court was derived from Article 35 of the Statute of the Permanent Court of International Justice and was incorporated as follows:

1. The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

    a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

    b. International custom, as evidence of a general practice accepted as law;

    c. The general principles of law recognized by civilized nations;

    d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The understanding of the drafters of Article 38 seems to have been that equity itself was not an independent source of law because it was too vague a concept for universal acceptance as to its interpretation but that particular equitable principles, common law maxims of equity, as recognized within legal systems throughout the world might play a role as general principles of international law.[19] While 'maxims of equity' would have been acceptable, Lord Phillimore opposed the inclusion of equity generally as a source of law on the basis that it would give the judge too much liberty, unless the technical meaning of equity as understood in English law was adopted.[20] The framers did not offer clarification as to the meaning of 'general principles' and whether common law maxims of equity should be considered as a general principle of international law. What emerged

[19] P van Dijk, 'Equity: a Recognized Manifestation of International Law?' in M Bos and W Heere (eds) *International law and its Sources* (Kluwer Law and Taxation, 1989) 1, 11.
[20] Id.

in the final text of Article 38 left a degree of vagueness but accommodated the common lawyers' concern that the judge should not have a law creating role and the civil lawyers' concern that there might occur a denial of justice because of a declaration of there being a lack of law to apply.[21] Despite evidence that the maxims of equity are applied broadly, the characterization of equity as a 'general principle' of law remains unclear and therefore places constraints on its actual application and operation.

C. Rise of international dispute settlement

Increased globalization of business and expansion of international trade have led to a paradigmatic shift in the way international disputes are resolved. Over the last fifty years, hundreds of bilateral and multi-lateral trade agreements have been drafted and various international conferences convened to address the variety of issues raised by world commerce and disputes arising from cross border trade. As an example, cross-border commercial disputes between private companies were most often resolved in the national courts of one party's home country. This approach tended to disfavor the other party where the partiality of judge's toward the domestic party was often clear, or where the foreign party lacked a neutral forum. Further, the resolution of cross-border disputes within one party's national courts sometimes resulted in the inability to enforce these court's awards abroad. This inherently problematic nature of resolving international business disputes domestically led to a search for a better approach. In the subsequent decades, multi-national businesses began to realize that the global transformation of trade and economics needed a parallel transformation in the world's dispute resolution systems.

Often the procedural conduct of international dispute settlement proceedings is the main factor that leads parties to agree to submit their disputes to a particular international dispute settlement mechanism. Generally, parties agree to submit their international disputes to a mechanism with the objective of obtaining fair and neutral procedures which are flexible, efficient, and capable of being tailored to the specific needs of their

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[21] Clarence Wilfred Jenks, *The prospects of international adjudication, law of international institutions* (Michigan: Stevens, 1964) at 423-25.

individual dispute. Of particular interest to potential parties tends to be the fact that the dispute settlement proceeds without reference to the formalities and technicalities of procedural rules of national courts.[22]

While leading international dispute settlement conventions and sometimes even national arbitration legislation address the content of the procedures that are used in international dispute settlement, they adopt the basic principle of national judicial non-interference in the conduct of the international dispute settlement proceedings.[23] This principle is essential in that it ensures that the case can proceed, pursuant to the agreement of the parties or under the direction of the tribunal, without the delays, second-guessing, and other issues associated with national interlocutory judicial review of procedural decisions.[24]

D. Tribunal discretion to determine arbitral procedures

Leading international arbitration conventions confirm the tribunal's power, in the absence of agreement by the parties, to determine the arbitral procedures. Article IV(4)(d) of the European Convention on International Commercial Arbitration of 1961 which considers

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[22] Gary B. Born, *International Commercial Arbitration – Second Edition, Three Volume Set* (London: Wolters Kluwer, 2014) at 64-94. (discussing parties' objectives upon entering international arbitration agreements). Not all international arbitrations are necessarily designed to achieve every one of these objectives. For example, arbitrations may be conducted in one party's home jurisdiction, pursuant to the domestic procedural rules of that jurisdiction. Nonetheless, in most instances, parties enter into international commercial arbitration agreements with the objective of achieving all or most of these ends.

[23] *Ibid* at 414 (noting that parties get to select their procedural law by agreement); Emmanuel Gaillard & Philippe Pinsolle, "Advocacy in International Commercial Arbitration: France" in R. Doak Bishop, *The Art of Advocacy in International Arbitration* (Juris, March 2004) at 133 ("International arbitration ... gives the parties and their counsels the widest possible range of options."); Georgios Petrochilos, *Procedural Law in International Arbitration* (Oxford: Oxford University Press, 2004) ("Modern law affords arbitrating parties and arbitral tribunals wide freedom to fashion the procedural rules of the proceedings."); Robert Pietrowski, "Evidence in International Arbitration" (2006) 22 Arb. Int'l 373, 374 ("The procedure of most international tribunals is characterized by an absence of restrictive rules governing the form, submission and admissibility of evidence.").

[24] Born *supra* note 5 at 64-90 (discussing parties' objectives upon entering international arbitration agreements).

the freedoms of the parties to organize the arbitration, provides that, where the parties have not agreed upon arbitral procedures, the tribunal may "establish directly or by reference to the rules and statutes of a permanent arbitral institution the rules of procedure to be followed by the arbitrator(s) ... ."[25]

The Inter-American Convention also expressly recognizes the arbitral tribunal's procedural authority, although indirectly, providing in Article 3 that, "in the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission."[26] Further, Article 15 of the Inter-American Commercial Arbitration Commission ("IACAC") Rules grants the arbitrators broad procedural authority, subject only to requirements of due process.[27]

The New York Convention refers less directly to the arbitral tribunal's power to determine the arbitral procedures. The Convention makes no direct reference to the tribunal's authority to conduct the proceedings, it only indirectly acknowledges such powers in Articles V(1)(b) and (d).[28] At the same time, Article II(3) of the Convention requires giving effect to the parties' agreement to arbitrate, an express or implied authorization to the arbitrators to conduct the arbitral proceedings as they deem best (absent contrary agreement by the parties on specific matters).[29]

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[25] European Convention on International Commercial Arbitration of 1961, art. IV(4)(d).

[26] Inter-American Convention, art. 3.

[27] Inter-Am. Commercial Arbitration Comm'n R., art. 12(a) (2002), available at http://www.adr.org/sp.asp?id=22093 ("Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.").

[28] New York Convention, arts. V(1)(b), V(1)(d) (stating that both Article V(1)(b) and V(1)(d) of the New York Convention provide grounds for non-recognition of an award that presuppose the tribunal's power to determine arbitral procedures in the absence of agreement by the parties). See also Born *supra* note 5 at 2737-77.

[29] Born *supra* note 5 at 1776-77.

Even where a tribunal's procedural authority is not expressly recognized in applicable international conventions, the internationally-recognized status of such authority over procedure is clear. An inherent characteristic of the international dispute settlement process is the tribunal's adjudicative role and responsibility for establishing and implementing the procedures necessary to resolve the parties' dispute. Submitting to a tribunal's procedural authority is an implicit part of the parties' agreement to arbitrate[30] and is an indispensable precondition for an effective arbitral process. Accordingly, just as Article II of the New York Convention, and equivalent provisions of other international arbitration conventions, guarantee the parties' procedural autonomy,[31] these conventions also guarantee the tribunal's authority over the arbitral procedures (absent contrary agreement).

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[30] Most institutional arbitration rules expressly provide the arbitral tribunal discretion to establish the arbitral procedures (absent agreement between the parties). See also Petrochilos *supra* note 6, at 450 (analyzing the arbitral tribunal's procedural discretion under international arbitration conventions). This authority forms part of the parties' arbitration agreement and is entitled to recognition under Article II of the Convention

[31] See *supra* note 6 and accompanying text.

Consistent with the New York Convention, most developed national legal systems provide the dispute settlement tribunal with substantial discretion to establish the procedures in the absence of agreement between the parties, subject only to general due process requirements. Article 19(2) of the UNCITRAL Model Law, for example, provides that, where agreement has not been reached by the parties on dispute settlement procedures, "the arbitral tribunal may ... conduct the arbitration in such a manner as it considers appropriate."[32] French, Swiss, and other civil law arbitration statutes are similar,[33] as is contemporary arbitration legislation in much of Asia[34] and Latin America.[35]

In the United States, the Federal Arbitration Act (FAA) does not provide any basic principles of arbitral procedure or procedural framework that the decision-makers might consider or that the parties may deviate from; as such, the Act effectively leaves all issues of procedure entirely to the parties and arbitrators.[36] Although the FAA does not

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[32] UNCITRAL, Model Law, art. 19(2). As discussed below, Article 19(2) limits the tribunal's powers by reference to the "provisions of this Law," which includes Article 18's requirements that the parties be treated "with equality" and be given a "full opportunity of presenting [their] cases." See also *supra* note 6.

[33] See, e.g., Federal Statute on Private International Law Dec. 18, 1987, RS 291, art. 182(2) (Switz.) ("If the parties have not determined the procedure, the Arbitral Tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration."); Decree No. 81-500 of May 12, 1981, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], p. 1398, reprinted in N.C.P.C. arts. 1494, 1460 (Fr.)

[34] See, e.g., Arbitration Law, art. 26(2) (Japan) ("Failing such agreement [between the parties], the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitral proceedings in such manner as it considers appropriate."); Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1994, effective Sept. 1, 1995), art. 39 (P.R.C.), translated at Arbitration Law of the People's Republic of China, http://www.lawinfochina.com/law/display.asp?id=710 (last visited Apr. 9, 2013) ("An arbitration tribunal shall hold oral hearings to hear a case. Whereas the parties concerned agree not to hold oral hearings, the arbitration tribunal may give the award based on the arbitration application, claims and counter-claims and other documents"); International Arbitration Act, § 3(1) (Sing.); Hong Kong Arbitration Ordinance, No. 341, art. 34C(1) (1990), available at http://www.hklii.org/hk/legis/ord/341.

[35] See, e.g., Codigo de Comercio [Cod. Com] [Mexican Commercial Code], art. 1435(2) (Mex.); International Commercial Arbitration Law, R. No. 19.971, art. 19(2) (2004) (Chile).

[36] The Revised Uniform Arbitration Act Unif. Arbitration Act § 15(a), 7 U.L.A. 2 (2000).

expressly address the subject, U.S. courts have uniformly held that arbitrators possess broad powers to determine arbitral procedures (absent agreement on such matters by the parties).[37] As one U.S. court held:

> Unless a mode of conducting the proceedings has been prescribed by the arbitration agreement or submission, or regulated by statute, arbitrators have a general discretion as to the mode of conducting the proceedings and are not bound by formal rules of procedure and evidence, and the standard of review of arbitration procedures is merely whether a party to an arbitration has been denied a fundamentally fair hearing [the protection of due process].[38]

Particularly after the 1996 Arbitration Act, English law[39], and other common law jurisdictions,[40] follow similarly.

The above demonstrates that international dispute settlement tribunals are empowered to and should use their discretion to fill in the gaps with respect to procedures, subject only to the requirement that a party's due process be protected. However, there is little guidance linking international concepts of due process to what specific procedural aspects should be included in the adjudication of an international case to protect a party's due process. If judicial discretion is important to international dispute

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[37] *Berhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 (1956); D.E.I., Inc. v. Ohio and Vicinity Reg'l Council of Carpenters, 155 Fed. App'x 164, 170 (6th Cir. 2005)* ("Arbitrators are not bound by formal rules of procedure and evidence, and the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing.")

[38] *In re Turnkey Arbitration, 577 So. 2d 1131, 1135 (1991).*

[39] Arbitration Act, 1996, c. 23, § 34(1) (Eng.) ("It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter."); ABB Attorney General v. Hochtief Airport GmbH, [2006] EWHC 388, P 67 (Comm.) (Eng.) ("It is not a ground for intervention that the court considers that it might have done things differently."); Petroships Pte Ltd of Singapore v. Petec Trading & Inv. Corp. of Vietnam (The Petro Ranger) [2001] 2 EWHC 418, 419 (Q.B.) (Eng.) (award may be annulled under § 68(2)(a) only "where it can be said that what has happened is so far removed from what can reasonably be expected of the arbitral process, that the Court will take action").

[40] Commercial Arbitration Act, R.S.C., c. 17, § 19(2) (1985) (Can.) ("Failing such agreement, the arbitral tribunal may, subject to the provisions of this Code, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.")

settlement, grounded only by due process concerns, in the international context what are the components that make up due process? What specific procedures are necessary to ensure that due process is protected?

E. American Originalist and Responsivist opposing views on exercising judicial discretion

American constitutional scholars have attempted to address the use of judicial discretion and Christopher Tiedeman, writing over a century ago, developed the concept that judges should not have the ability to interpret the positions they hold to be drafters of constitutional law in a way that keeps the foundational law consistent with the "prevailing sense of right" of the nation.[41] Considering "the present will of the people as the living source of law," Tiedeman wrote that judges are "obliged, in construing the law, to follow, and give effect to, the present intentions and meaning of the people" be it with respect to the exercise of judicial discretion in interpreting the substance of the law or relating to the use of judicial discretion in the interpretation of procedural rules of law.[42] In this significant statement, Tiedeman pushes himself into the counter-majoritarian difficulty. The counter-majoritian difficulty becomes an issue when judicial discretion and review empowers a Court to nullify the popular, yet unconstitutional, decisions of the legislature. In presenting the concept that judges can strike down laws for unconstitutionality, Tiedeman attains justification in the claim that judges can discern the difference between the people's "whim" and there genuine "will," therefore striking down the former but affirming those of the latter.[43]

In line with Tiedman's approach, former US Supreme Court Justice William Brennan agreed that constitutions should be "living documents" that are able to change

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[41] Christopher G. Tiedeman, *The Unwritten Constitution of the United States* (1890) at 49. See also Jed Rubenfeld, "Reading the Constitution as Spoken" (March 1995) 104 Yale L.J. 55.

[42] Tiedman *supra* note 24 at 154.

[43] *Ibid* at 164 ("The popular will shall prevail . . . but [not] . . . their whims and ill-considered wishes …").

with the times "to cope with current problems and current needs."[44] This line of reasoning is based on the responsive school of US Constitutional thought.[45] Justice Brennan continued to root the legitimacy of judicial review in the justices' responsibility to shape the national ethos of the future, to "point toward a different path … [and] embody a community, although perhaps not yet arrived, striving for human dignity for all."[46] Responsivists view judicial discretion as the method to appropriately embrace the changing will of the people. This flexible view, however, is but one side to this debate and grapples with the issue of constitutional self-government: even should the future be somehow predictable, how can judges justify ignoring the present?[47]

In contrast, the late US Supreme Court Justice Antonin Scalia agreed with the originalist view, which sees judicial review of the present popular will as grounded in an appeal to some automatic consent of the "people" in the past, namely at the time when the original constitution was founded. Originalists argue that any interpretation that moves away from the original meaning of the constitution at the time of its original ratification, no matter how slight, is nothing less than tyranny and is the imposition of judges' personal views upon the independent rights of the people.[48] According to originalists, the people enshrined their supreme will in the constitutional text and until this document is officially amended, it must constrain the policy-activism of judges in the same way it requires ordinary legislative acts not to cross the boundaries it sets up.[49] Originalists argue that the proper function of a constitutional court is to ensure that the sovereign will of the people is enforced as expressed in the ratified constitution, while

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[44] William J. Brennan, "The Constitution of the United States: Contemporary Ratification" (1985) 27 S. Tex. L. Rev. 433, 438.

[45] Robert Post, "Theories of Constitutional Interpretation" (1991) 30 Representations 13, 19.

[46] Brennan, *supra* note 27 at 444.

[47] *Ibid*.

[48] Robert H. Bork, *The Tempting of America* (New York: Touchstone, 1990) 144-46, 252.

[49] Christopher A. Ford, "Judicial Discretion in International Jurisprudence: Article 38(1)(C) and General Principles of Law" (Fall 1994) 5 Duke J. Comp. & Int'l. L. 35 at 41.

leaving anything else not expressly included therein to self-rule by the modern majority.[50] The modern and changing opinion of the people does not matter to originalists until the people of today feel motivated to take it upon themselves to formally amend their constitution or founding document. However, it is not easy for originalists to escape the counter-majoritarian difficulty in that their emphasis upon the importance of majority self-government, which they feel is a result from judges' imposition of value judgments, focuses inquiry on how the "plain meaning" of the constitution can be enforced against the will of today's majority. Amending the constitution is the singular way, according to originalists; however, constitutional amendment is difficult to attain.[51] In the opinion of the originalists, judicial discretion should be extremely limited and not venture beyond the intent of the founding fathers until the Constitution is amended to reflect any necessary changes.

The ongoing American debates between originalists and responsivists demonstrate continuing challenges with the theoretical legitimacy of judicial review and the exercise of judicial discretion particularly in norm-articulation, within the scope of written constitutionalism.[52] Moreover, disagreements with respect to the role of judicial discretion are not limited only to American constitutional law. While the common law tradition does accept the judicial role in the elaboration of sub-constitutional legal norms,[53] countries that follow a civil law approach such as France, are often challenged with a judge's creative role in the legal system.[54] Given the subjective nature around the exercise of judicial discretion, in common law or civil law jurisdictions, these challenges remain when issues relating to the interpretation of due process and procedure are encountered.

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[50] *Marbury v. Madison*, 5 U.S. 137, 175-76 (1803), finding constitutional authority in authorship by the People; *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 308 (1795).

[51] Akhil Amar, "Philadelphia Revisited: Amending the Constitution Outside Article V" (1988) 55 U. Chi. L. Rev. 1043, 1080-85.

[52] See cases in note 20.

[53] Debates between "legal realists" and "positivists" illustrate the struggle in common law countries over the propriety of a self-assertive judicial role in law-creation.

[54] Michael Wells, "French and American Judicial Opinions" (1994) 19 Yale J. Int'l L. 81, 92-108.

F. A closer look at how judicial discretion works: The Barakian Model

The work of Israeli Supreme Court Justice Aharon Barak[55] on the use of judicial discretion is interesting to consider at this point because it highlights inherent difficulties in applying judicial discretion and provides a framework against which to consider the actual thought process conducted when judges are confronted with situations where they must appropriately use their discretion. The basic assumption of Barak's 1989 consideration of the application of judicial discretion is that from time to time judges and courts encounter what Barak considers to be a "hard case." In such situations "the judge is faced with a number of [outcome] possibilities, all of which are lawful within the context of the system"[56] and he must use his discretion to determine the most appropriate solution. In what Barak calls "easy" and even "intermediate" cases, there is a possibility for rules of law with long acceptance to be applied in a way that, "every lawyer who belongs to a legal community… will come to [a particular] conclusion – that only one lawful solution exists – such that if a judge were to decide otherwise, the community's reaction would be that he was mistaken."[57]

According to Barak, judicial discretion only exists because of the presence of "hard" cases[58] and he defines discretion as "the power given to a person with authority to choose between two or more alternatives, when each of the alternatives is lawful."[59] Two or more equally legitimate holdings are presented by hard cases to the decision maker and no single option can be clearly held out as the correct answer under the law as understood

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[55] Christopher A. Ford, "Judicial Discretion in International Jurisprudence: Article 38(1)(C) and General Principles of Law," (Fall 1994) 5 Duke J. Comp. & Int'l. L. 35 at 40.

[56] Aharon Barak, "Judicial Discretion Yadin Kaufmann trans, 1989" (2002) 116 Harv. L. Rev. 19. See also B.N. Cardozo, *The Nature of the Judicial Process* (1931) Yale Law School, 165-67.

[57] *Ibid* at 39.

[58] Barak borrows the term "hard cases" from Ronald Dworkin, see Ronald Dworkin, "Taking Rights Seriously" (1977) 52 N.Y.U.L.Rev. 1265 at 1268. See Barak, *supra* note 39 at 28-33.

[59] Barak, *supra* note 39 at 7.

up to that point in time. These cases, while rare, do require and make possible the use of judicial discretion.[60] According to Barak, judicial discretion therefore is:

> A legal condition in which the judge has the freedom to choose among a number of options. Where judicial discretion exists, it is a though the law were saying, "I have determined the contents of the legal norm up to this point. From here on, it is for you, the judge, to determine the contents of the legal norm, for I, the legal system, am now unable to tell you which solution to choose." It is as though the path of the law came to a junction, and the judge must decide – with no clear path and precise standard to guide him – which road to take.[61]

In order to find an answer to the question: "How is a judge properly to exercise judicial discretion?" Barak has developed a test to consider "objectivity." Any judge must reasonably apply and interpret the use of discretion so as to reach the result most in line with the legal system's values as a whole while balancing the conflicting values presented and formulating a new judicial policy by articulating a new norm.[62] While the judge must obviously make this decision in isolation, this decision must be made on a basis that is separate and distinct from the judge's own values. According to Barak, a judge must transition himself away from his personal position as "the judge" to embrace the perspective of "the court," a process which should enable him to determine the reasonable application of the standards of the legal community from a whole of society approach.

For the judge to be able to determine values which accurately represent society, he must look to the members of the society to give him clues to identify values that are shared and truly representational, even if they are not in line with his own opinions. He must not impose upon the society his subjective values, to the extent that they are inconsistent with the articles of faith of the society in which he lives. When it comes time for the judge to weigh various values according to their instant utility, he should

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[60] *Ibid* at 41-42.

[61] *Ibid* at 8.

[62] *Ibid*.

seek to do so according to what seems to him to be society's fundamental approach.[63] While Barak's approach to the consideration of the proper use of judicial discretion is innovative and useful, there remain four significant challenges that must be overcome before this approach can be successfully applied to any situation:

1. The problem of stepping outside one's self

First, there is the difficulty of actually achieving the personal perspective required to properly perform judicial discretion. While a judge's objectivity and freedom from external influence is highly prized and protected by legal systems, the judge's ability to step "outside himself" is particularly limited and challenging in that he cannot, in actuality, become another person.[64] Admitting that complete success is impossible, Barak still finds value in the attempt:

> If the judge is not aware that judicial discretion exists, he will not make any conscious effort to distinguish between his own out-of-the-ordinary subjective feelings and the need to make an objective decision … Awareness of the exercise of discretion puts the judge on guard and makes it possible for him to cut himself off from those subjective factors that he should not take into account.[65]

Should the judge be unable to attain the full nature of exercising discretionary judgment, the judge would be invited to impose his own substantive values upon the legal system … even unknowingly.

2. The problem of identifying cases requiring discretion

A challenge is posed when the task of determining which cases are genuinely hard is undertaken. Mistaking an intermediate or easy case for a hard one would result in a significant error as a judge would undertake, unnecessarily, all the pitfalls of Barak's objectivity analysis, and could likely reach an incorrect result. Mistaking a hard case for

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[63] *Ibid* at 125-126.

[64] The US Constitution in Article III provides for great independence of judges from political pressure by giving them life tenure and salary protection. See US Const., art. III, 1.

[65] Barak, *supra* note 39 at 139.

an easier one would be to decide a genuinely discretionary issue in simple ignorance and such a result might not do justice in the instant case. The doctrine of equity may provide guidance here. If the judge blindly and fully applies the law the result may be unjust. All legal systems encounter the problem that rules and principles which were shaped in the past may no longer be suitable for achieving justice under changing conditions and moral and ethical attitudes and perceptions change as society evolves. In the interest of ensuring an equitable outcome, the judge may wish to use discretion and in this manner use the flexibility which the law contains so as to lead to a just conclusion.

In contrast, according to Barak, individuals, no matter how astute, "do not possess an instrument that lets us distinguish in a precise manner between a lawful possibility and an unlawful possibility" and Barak argues that there still exists, in these categories, "a solid nucleus of certainty… [around which] rotates the entire structure, with all its broad spectrum."[66] Barak's formulation provides however a practical structure around which judges can frame their approach to an issue involving discretion.[67] While a judge following the Barak model might easily continue on to make a mistake, nothing is perfect, a judge who is willfully unaware that hard cases requiring discretion even exist would fall short every time.

3. The problem of finding the "fundamental" conception

A substantial challenge is that of identifying the "fundamental conception" of the legal community. This is consistent with the reasoning of Tiedeman that judges have the ability to determine and distinguish the genuine popular "will," which a judge must obey, and transitory popular "whim," which may be disregarded.[68] On this point, Barak writes:

> The objective tests force the judge to give expression to the fundamental values of the society and not to its subjective values, to the extent the two are different. The objective element does not require the judge to give expression to the

[66] *Ibid* at 43.

[67] *Ibid* at 136-137.

[68] Tiedeman, *supra* note 24 at 164.

> temporary and the fleeting. He must give expression to the central and the basic. Thus, when a given society is not faithful to itself, the objective test does not mean the judge must give expression to the mood of the hour. He must stand firm against this mood, while expressing the basic values of the society in which he lives.[69]

But how can this be achieved? For a decision maker to "step outside" himself requires significantly less than what would be required for that decision maker to "step outside" the immediate currents and scope of his legal system in order to identify a greater scheme representing values perhaps contradicting those presently held and articulated through the voice of a community. This is the case in part because of the need to make the distinction between values that are transient in nature from those values that are basic and considered "fundamental" to a society. Any decision maker attempting to apply the guidelines of Barak cannot simply "conduct a public opinion survey to ascertain the views of the legal community. Each judge must make this decision for himself … [in order to] give expression to what appears to him to be the basic conception of the society (the community) in which he lives and acts."[70] This undertaking is extremely complex and challenging, particularly when considering a society in which the fundamental legal values change and develop over time.

This particular issue creates the basis for the criticism presented by Justice Scalia and others about enabling courts to "speak before all others for [the people's] constitutional ideals."[71] According to Scalia, "community" norm-articulation results in nothing more than judges imposing their personal values[72] upon an unwilling and even unknowing society.[73]

4. The problem of value sub-communities

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[69] Barak, *supra* note 39 at 130.

[70] *Ibid* at 12.

[71] *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2816 (1992).

[72] Wells, *supra* note 37 at 251-252.

[73] *Casey,* 112 S. Ct. at 2882 (Scalia, J., dissenting in part).

Even in the event that the contours of the relevant legal community were able to be clearly articulated, in societies where values do develop and shift as time passes, a judge faces the possibility not simply that the values of the moment might traduce more fundamental values, but also that his community may lie somewhere along a continuum between one fundamental vision and the next. This, Barak explains, demands particular care from the judge:

> The judge must not feed into his system values that have not yet matured nor values that are the subject of bitter controversy. In this way one can ensure that the values of the legal system faithfully reflect the values of the society, and that only a mature change of the values of the society produces a change in the legal values. Thereby the coherence of the legal system will be guaranteed, for new values that are channeled into the legal system have a way of being formulated slowly, through reciprocal relations and strong connections with the values that already exist in the system.[74]

According to Barak a judge must be aware of the fundamental problems that lie at the basis of the exercise of judicial discretion. Barak has identified three different types of awareness of the legal decision maker: 1) awareness of the existence of judicial discretion; 2) awareness of what it means to use judicial discretion; and 3) awareness of the need to formulate the purpose behind a legal norm created through judicial discretion.[75]

Justice Barak's objectivity test requires that a judge "give expression to what appears to him to be the basic conception of the society (the community) in which he lives and acts."[76] This can cause great difficulty, however, when the legal community in question is not easily separated on a particular issue or where no clear values can be easily presented.

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[74] Barak, *supra* note 39 at 151.

[75] *Ibid* at 136.

[76] *Ibid* at 12.

Each judge must seek to identify the boundaries of the community within which they are mandated to act as well as the characteristics of their community. In the American legal system, these boundaries might be a particular state, a particular Federal Circuit, or the United States as a whole. Though the boundaries of a particular community might be clear, greater difficulties are encountered as the defined community grows larger. The greater and more diverse the population falling inside the community, the greater the likelihood diverging values on a particular issue. It therefore becomes increasingly difficult for the judge to identify a basic conception capable of guiding his articulation of a new legal norm.

These problems become most acute in the setting of international dispute settlement. The ICJ, for example, has a jurisdictional constituency encompassing virtually all of humanity and the value-diversity within its legal community can be extreme.[77]

G. Enforcement of judicial discretion internationally

A fundamental difference between domestic and international settings is the degree of influence the system provides to jurists to give force to their decisions. Domestic courts are particularly advantaged in this respect because they have the luxury to rely on the state to utilize its police powers to enforce the law as proclaimed by the courts in their opinions.[78] No such enforcement mechanism exists in the international context.

With respect to judicial discretion, the concept that judges play a role in developing jurisprudence is widely accepted and were gaps should be found in settled law, it is for the court to fill those gaps.[79] In Swiss law, for example, the judge is expected to provide law to cover such an eventuality as if he were the legislature[80], while

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[77] Christopher A. Ford, "Judicial Discretion in International Jurisprudence: Article 38(1)(C) and General Principles of Law," (Fall 1994) 5 Duke J. Comp. & Int'l. L. 35 at 81.

[78] *Ibid* at 54.

[79] International law attempts to deal with this problem by authorizing the ICJ to invoke general principles under Article 38(1)(c) of the Statute of the Court.

[80] Schweizerisches Zivilgesetzbuch art. 1, 2 (Switz.), Code civil Suisse art. 1, 2 (Switz.)

Austrian law authorizes recourse to the "national principles of justice,[81]" and Italian and Mexican law suggest turning to the general principles of the legal order of the state.[82] Further, these formal gap filling provisions are not uncommon in other jurisdictions and in common law jurisdictions, the law-creating role of the courts is well understood.

These above-mentioned broad powers of the state to enforce the decisions of the domestic court are not available to international dispute settlement tribunals. There are no government enforcers of international law and the international legal system has no monopoly or coercive power of the sort held by domestic governments. In fact, actors in the international arena often find that they are forced to apply coercive powers themselves in a form of "self-help," rather than through any type of central authority on their behalf.[83] In this environment, the international judge can only rely on persuasive power for the enforcement of his judgments and this places constraints upon his exercise of judicial discretion, and even upon the adjudication of intermediate and easy cases.

An international tribunal, unable to rely upon a compelling institutional means of enforcing the law developed by it, faces significant challenges. The law, in this international setting, will be followed only to the degree that the international judge can present his case so that it is logically and morally compelling. Further, the judge must strive to make perceived disadvantages of non-compliance significantly substantial so that governments will not simply disregard the international dispute settlement decision.[84] While most nations do obey most international decisions most of the time, this limited enforceability makes the exercise of judicial discretion particularly delicate.

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[81] Allgemeines Buergerliches Gesetzbuch art. 7 (Aus.).

[82] Codice civile art. 12 (Italy); Codigo Civil para el Distrito Federal 19 (Mex.). Section 370ª of the Mexican Code also refers to such "general principles."

[83] Hedley Bull, *The Anarchical Society: A Study of Order in the World Politics* (Cambridge: Cambridge University Press, 1977).

[84] Thomas Franck, "The Power of Legitimacy and The Legitimacy of Power" (2006) 100 Am.J.Int'l. L. 88, 90. See also Thomas Franck, *Judging the World Court* (1986) 14.

Without a formalized legislature in the international context, international "statutory" law is very limited,[85] and consists only of the body of written treaty and convention texts which nations of the world have been able to agree upon. Customary international law, a normative source also explicitly endorsed by the Statute of the International Court of Justice,[86] may provide useful guidance. However, customary international law's ability to create generally applicable norms is constrained by the need not only to demonstrate a clear customary practice not reduced by non-observance, but by the possibility that "persistent objector" status could limit obligations upon any particular state. Further, if customary law is to be taken as "evidence of a general practice accepted as law," international actors will decide to follow the rule because they believe it a legitimate and binding rule, and for no other reason.[87]

Complicating the matter, Article 38 of the Statute of the ICJ limits potential reliance upon judicial precedents that are international in scope. In following this view, "judicial decisions" are relegated to the status of mere "subsidiary means for the determination of rules of law" and have no more importance than the mere opinions of legal scholars.[88] In any event, Article 38 does still permit prior ICJ case law to constitute a formal "source of law." More difficult to handle is Article 59 of the Statute of the Court, which explicitly provides that a decision of the ICJ "has no binding force except between the parties and in respect of that particular case."[89] The clear terms of Article 59 appear to "preclude the Court from adopting any doctrine similar to the Anglo-American doctrine of stare decisis."[90] In applying general rules of law to particular cases, it is

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[85] Statute of the International Court of Justice, June 26, 1945, art. 38(1)(d), 59 Stat. 1055, 1060, 3 B, 1179, 1187.

[86] *Ibid* at art. 38, 1(b) (authorizing recourse to international custom, as evidence of a general practice accepted as law).

[87] Louis Henkin, et al., *International Law: Cases and Materials: American Casebook* , 2d ed. (London: Waterstones, 1978) 37-40.

[88] Statute of the International Court of Justice, June 26, 1945, art. 38(1)(d), 59 Stat. 1055,1060, 3 Bevans 1179, 1187.

[89] *Ibid* at art. 59

[90] Manley Ottmer Hudson, *The Permanent Court of International Justice* (New York: Macmillan, 1943) 536.

inevitable that that the Court should perform a law-developing function. Over the course of time, and because of the jurisdictional continuity of the ICJ, a sizable body of case-law has accumulated which is "a tangible contribution to the development and clarification of the rules and principles of international law."[91]

I. Deriving customary and international law

What are the general principles of international law? When there is no provision in an international treaty or statute or any recognized customary principle of international law available for application in an international dispute, the general principles of law can be used to fill the gaps.

Commonly, reference to the language of applicable multilateral or bilateral treaties or statutes is a way of resolving disputes under the rule of law. Another method is by reference to custom, the practice of nations in a particular area forms customary international law and principles of law can be derived as such.

In the municipal law systems of countries with a common law tradition, judges often look to the decisions from outside sources to fill the gaps of the law to be applied in the resolution of a particular case. As an example, the state courts in the United States often cite the decisions of other state courts in the course of on opinion in a case, where the needed legal rule of the deciding state is absent or unclear. Similarly, the United States Supreme Court has recently adopted the practice of using the decisions of courts of other countries and international courts for their persuasive value in clarifying unclear rules to be applied in a case.

In civil law countries, as Professor Mark Janis of the University of Connecticut Law School notes in his *An Introduction to International Law:*

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[91] Dharma Pratap, *The Advisory Jurisdiction of the International Court,* (Oxford: Oxford University Press, 1972) 260.

> [L]awyers and judges in the civil law tradition are familiar with the problem of *lacunae,* gaps in the law, a concept based on the premise that only formal legislative institutions are empowered to make legal rules.

Therefore, judges in civil law jurisdictions need statutory authority to fill in the gaps of the legislatively created legal rules and this relates back to the concept of equity as a general principle of law as discussed above. Fortunately for the international judge or the domestic judge faced with applying international law in a particular case, Article 38(1) of the Statute of the International Court of Justice provides some guidance on how an international decision-maker should go about determining what international law to rely on by clarifying that a court should consider:

1. International conventions establishing rules expressly recognized by the contesting states;
2. International custom, evidenced of a general practice accepted as law;
3. The general principles of law recognized by civilized nations,
4. Subject to some limitations, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[92]

This provision specifically authorizes, the sources of law to be applied by the court, treaties, customs and the general principles of law recognized by civilized nations.

The existence of a body of legal principles and rules that are common to all, or almost all legal systems, is supported by some observations made by C. Wilfred Jenks, in his book *The Common Law of Mankind,* published in 1958.[93] Jenks observes that virtually all of the legal systems in the world, including those in Latin America, Islamic countries, African countries, countries within the former Soviet Block, India, China, and

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[92] The Statute of the International Court of Justice, Article 38, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II

[93] Jencks, C. Wilfred, *The Common Law of Mankind* (London: S.N., 1958) (New York: Frederick A. Praeger, 1958).

Japan have been profoundly influenced in the course of their development by either the civil law or the common law. The result is that many principles of law are common to these legal systems. For example a quick review of respective tort or contract law yields much similarity. Thus, the common law and civil law, which by themselves share common principles of law, provide the basic framework from which many general principles of law can be derived and used to fill the gap when there is no general principle of international law available for application in the resolution of a particular case.

The International Law Association Committee on the Formation of Customary International Law offers a working definition that is useful. A rule of customary international law, they wrote:

> is one which is created and sustained by the consent and uniform practice of States and other subjects of international law in or impinging upon their international legal relations in circumstances which give rise to a legitimate expectation of similar conduct in the future.[94]

The process of forming, maintaining, refining, and reforming custom is a continuous, dynamic process of deed and word, act and argument.[95] Thus, the formation and application of customary norms cannot be sharply distinguished; likewise, no sharp distinction can be drawn between the validity and the effectiveness of customary norms.[96] This, however, creates a challenge for a theory of custom. It must reconcile a robust notion of action in violation of customary norms with the recognition that each deviation contains "seeds of a new rule."[97]

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[94] Jonathan I. Charney, "Third Party Dispute Settlement and International Law" (1998) 36 Colum. J. Transnat'l. L 65.

[95] Franck, *supra* note 67 at 420-33.

[96] Charney, *supra* note 70 at 70.

[97] *Ibid.*

Chapter 2 Due Process

A. Origins of due process

Due process has been described as the greatest contribution of law to modern civilization developed by the legal profession.[98] With the advance of civilized societies and formalization of traditional customs, equity, fundamental fairness, human rights and the principles of notice and an opportunity to defend have taken their place as part of the "jus gentium," to become later the law of nature. Moving back in history, these concepts creating the foundation of what is known today as due process were familiar in traditional Jewish law. Additionally, in ancient in Roman law, these concepts can be found underlying the conception of "justice" as "the steadfast and continued disposition to render to everyman his rights".[99]

While the origins of actual due process are far reaching, in practice, due process is largely an American concept.[100] The right to due process is expressly provided by the Fifth Amendment to the United States Constitution, which states that: "no person shall be [...] deprived of life, liberty or property, without due process of law...."[101]

The answer to the question of what process is due under the laws of the United States is very complex, as is evidenced by the large number of judicial rulings and legal literature generated on this subject.[102] Moreover, with respect to the level of due process protection required, there are many possible degrees that may be considered appropriate

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[98] P.S. Atiyah, *Law and Modern Society* (New Jersey: Wiley, 1985) 42.

[99] *Ibid.*

[100] John Harrison, "Substantive Due Process and the Constitutional Text" (1997) 83 Va. L. Rev. 493, 507, Quoted in John P. Gaffney Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System. Pg 2

[101] *Ibid.*

[102] *Ibid.*

depending on the context of a given situation.[103] In the Swiss constitution, for example, according to Article 29 of the Constitution considering General Procedural Guarantees, every person has the right in legal and administrative proceedings to be treated equally and have their case conducted fairly. Any government authority that is unable to handle a case equally and fairly commits a "denial of justice."[104]

B. There is no universal definition of due process

Complicating the application of due process is the fact that there is not one fixed definition of due process. It is essential to understand that due process can take different forms as there are different rules safeguarding procedural and substantive due process,[105] as well as what is referred to as "structural due process."[106] The United States Supreme Court has held that due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."[107] The Supreme Court has thus acknowledged the inherent flexibility of the concept and the necessity to take into consideration contextual specificities.[108]

In the international context, this ambiguity complicates the effort to identify the components of due process and develop guidelines to assist a decision-maker in exercising his discretion, although we know that the respect of due process in international dispute settlement is fundamental. Given the difficulties inherent in determining what process is due, not considering difficulties in defining what respecting

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[103] Laurence H. Tribe, *American Constitutional Law* (New York: University Press, 2000) secs. 10-7 – 10-19.

[104] Thomas Fleiner, Alexander Misic, et al., *Swiss Constitutional Law,* (The Hague: Kluwer Law International, 2005).

[105] *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992).*

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

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

[108] *Ibid* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

basic due process entails, it is understandable that the concept of due process is unfamiliar and particularly complex for non-American lawyers.[109]

The abovementioned difficulties associated with the application and definition of what the protection of due process requires are not unique to the American legal system and also apply to similar concepts in other national legal systems. The principle of "natural justice" in the English common law system and the droit de la defence in the droit civil or droit administrative system are also not capable of conveying a generally acceptable, fixed meaning with respect to the effective protection of due process.

Therefore, there is not a one size fits all concept of due process and the content of due process varies from legal system to legal system according to the political and cultural influences that condition each particular system, whether it national or international.[110]

C. Procedure and due process in international dispute settlement

An important issue for modern international dispute settlement is the need to balance the tension between the necessity to ensure due process protection and the private nature of arbitration. This is equally important for private commercial arbitration and international interstate arbitration under public international law; although with respect to international interstate arbitration the situation might be more complex given the existence of international treaties agreed to in advance by states. While international dispute

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[109] Christopher Schreuer, International Civil Litigation-Preliminary Relief, Taking Evidence and Enforcing Judgments, Remarks at the Proceedings of the American Society of International Law/Nederlandse Vereniging voor Internationaal Recht ("ASIL/NVIR") Joint Conference held in The Hague, The Netherlands (July 4-6, 1991), in Contemporary International Law Issues: Sharing Pan-European and American Perspectives 99, 100 (Dean C. Alexander ed., 1992) [hereinafter Joint ASIL/NVIR Conference] (acknowledging that non-American lawyers have great difficulty comprehending the concept of due process and opining that non-American courts will not use the "uniquely American concept" in the way that the American courts do). See also Catherine Kessedjian, Joint ASIL/NVIR Conference at 97, 98 (finding that the approach of some civil law countries to due process is not "dramatically different" from the American approach).

[110] J.C. Thomas, “The Need for Due Process in WTO Proceedings” (1997) Journal or World Trade 31 issue 1 at 45.

settlement must be agreed to by both parties, as explained above it is still subject to due process protection in order to maintain its legitimacy.[111] Further, as procedural flexibility is important and much discretion is left to the tribunal, the protection of due process becomes all the more crucial as a foundation to ensure that discretion is not abused.

To maintain legitimacy, international dispute settlement must ensure that disputes will not be resolved in accordance with the procedures of one party's home jurisdiction in a way that may favor one party over the other.[112] This procedural neutrality is a fundamental requirement to international dispute settlement and must be protected to ensure basic equality of the parties.[113]

No less important is procedural fairness and equity. In consenting to legitimate international dispute settlement, parties have a right to obtain fair and objective procedures guaranteeing both parties an equal opportunity to be heard. Arbitrators are required to decide on the parties' dispute impartially and objectively, based upon the law and the evidence presented by the parties.[114] This objective is presented in the terms of both international dispute settlement conventions and national arbitration legislation, both of which guarantee the parties' procedural rights.[115]

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[111] Richard Garnett et al., *A Practical Guide to International Commercial Arbitration* (Dobbs Ferry: Oceana Publications, 2000) 12 at 36.

[112] *Dell Computer Corp. v. Union des Consommateurs*, [2007] 2 S.C.R. 801, *2007 SCC 34, P 51* (Can.) ("The neutrality of arbitration ... is one of the fundamental characteristics of this alternative dispute resolution mechanism... . Arbitration is an institution without a forum and without a geographic basis.").

[113] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(b), June 10, 1958, *21 U.S.T. 2518,* 330 U.N.T.S. 38 [hereinafter New York Convention] (permitting the refusal to recognize and enforce an arbitral award where the parties are not on equal footing because the party against whom the award is invoked was not given proper notice of the proceedings or was for some reason not able to mount a case); Model Law on Int'l Commercial Arbitration art. 18 (1985) [hereinafter UNCITRAL, Model Law] ("The parties shall be treated with equality ... .").

[114] Born, *supra* note 5, at 1742-44 ("One of the fundamental objectives of most international commercial arbitrations is procedural neutrality.")

[115] *Ibid,* see also New York Convention, art. V(1)(b) (allowing the non-enforcement of an award where one party was unable to present a case); UNCITRAL, Model Law art. 18 (stating that "each party shall be given a full opportunity of presenting his case").

International dispute settlement tribunals have the inherent responsibility to render a decision that is impartial and which stems from the application of judicial procedure in line with the protection of due process grounded in law and legal standards.[116] The protection of due process through the protection of procedural neutrality and procedural fairness for the parties is "an inevitable and indispensable commitment of any judicial institution exercising judicial functions."[117] Due process requires the administration and application of laws equally and in accordance with established rules that do not violate fundamental principles, by a competent tribunal having jurisdiction over the proceeding and upon sufficient notice and hearing.[118]

On a practical level, the domestic court, when determining whether to recognize a foreign dispute settlement decision, must first determine whether the parties were fairly afforded the arbitral process they had contracted for. This necessitates the consideration of a series of queries: "was there an arbitration agreement? Were the arbitrators unbiased and honest? Did the loosing party have the opportunity to adequately develop and present its case? Does the outcome move against fundamental public policy?"[119] In short, the considerations revolve around whether due process was effectively protected and recognized.

The parties' freedom to agree upon the arbitral procedures, and the tribunal's discretion to adopt such procedures (absent contrary agreement), are subject to mandatory requirements of applicable national and international law. In most cases applicable mandatory law imposes only very general requirements of protection of due process, notably the parties' ability to be adequately heard and to present their case. Additionally,

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[116] Helmut Steinberger, "Judicial Settlement of International Disputes" (2000) 3 Encyclopedia of Public International Law 42 (describing the basis of the authority of international courts to render binding decisions).

[117] *Ibid.*

[118] Lucius Polik McGehee, *Due Process of law under the Federal Constitution* (Northport: Edward Thompson Company, 1906) 305.

[119] William W. Park & Alexander A. Yanos, "Treaty Obligations and National Law: Emerging Conflicts in International Arbitration" (2006) 58 Hastings Law Review, 251 at 273-74.

there is little guidance available as to how applicable mandatory law envisages the implementation of the requirements of due process.

Article 182(1) of the Swiss Law on Private International Law provides that "the parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice."[120] Other arbitration legislation in developed jurisdictions is similar, including in England, [121] France,[122] Germany,[123] Belgium,[124] Austria,[125] Japan,[126] Singapore,[127] and

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[120] Loi Federale sur le Droit International Prive [RS] [Federal Statute on Private International Law] Dec. 18, 1987, RS 291, art. 182(1) (Switz.), reprinted in Swiss Chambers' Court of Arbitration and Mediation (Marc Blessing et al. trans.), https://www.sccam.org/sa/download/IPRG english.pdf. For commentary on Article 182, see Michael E. Schneider, Article 182, in International Arbitration in Switzerland: An Introduction to and a Commentary on Articles 176-194 of the Swiss Private international Law Statute 395 (Stephen V. Berti ed., 2000).

[121] Arbitration Act, 1996, c. 23, § 1(b) (Eng.) ("The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."), § 33 (outlining the general duties of the tribunal in arbitral proceedings), § 34 (describing the treatment of procedural and evidentiary matters before an arbitral tribunal).

[122] Decree No. 81-500 of May 12, 1981, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], May 14, 1981, p. 1398, reprinted in Nouveau Code de Procedure Civile [N.C.P.C.] art. 1494, available at http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070716&dateTexte=20090412) ("The arbitration agreement may, directly or by way of reference to a resolution by arbitration, lay down the procedure to be followed in the course of the arbitration proceeding; it may also bring the latter under the law applicable to procedural matters that it determines.").

[123] Zivilprozessordnung [ZPO] [Civil Procedure Statute] January 1, 1998, Bundesgesetzblatt, Teil I [BGBl. I], § 1042(3) (F.R.G.) ("Furthermore, subject to the mandatory provisions of this book the parties may choose the procedure themselves or by reference to institutional arbitral rules."); see also Peter Schlosser, in 9 Kommentar zur Zivilprozessordnung [Commentary on Civil Procedure Law] § 1042, P 3 (Fortgefuhrt Von Friedrich Stein & Martin Jonas eds., 2002).

[124] Judicial Code, art. 1693(1) (Belg.) ("Without prejudice to the provisions of Article 1694, the parties may decide on the rules of the arbitral procedure ... .").

[125] Zivilprozessordnung [ZPO] [Civil Procedure Statute] § 594(1) (Austria), translated in Christopher Liebscher, *The Austrian Arbitration Act 2006: Text and Notes* (London: Kluwer Law Int'l ed., 2006) ("Subject to the mandatory provisions of this Section, the parties are free to determine on the rules of procedure. The parties may thereby refer other rules of procedure.

[126] Arbitration Law, Law No. 138 of 2003, art. 26, no. 1 (Japan), translated in Arbitration Law Follow-Up Research Group Arbitration Law, http://www.kantei.go.jp/foreign/policy/sihou/arbitrationlaw.pdf (last visited Apr. 9, 2012) ("The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the

others.[128] In the United States, the statutory text of the Federal Arbitration Act ("FAA") is silent in this respect; however, judicial decisions uniformly confirm the parties' freedom to agree upon the arbitral procedures (subject to very limited requirements of due process).[129]

In the Paris Cour d'appel, the parties' autonomy with regard to procedural matters has been affirmed as follows:

> It has been established that the arbitration in question ... is an international arbitration governed by the intentions of the parties. In this case, the rules of domestic law have a purely subsidiary role and apply only in the absence of a specific agreement by the

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arbitral proceedings. Provided, it shall not violate the provisions of this Law relating to public policy.").

[127] International Arbitration Act, 2002, Ch. 143A, § 15A(6) (Sing.), reprinted in ITA Reporter (Michael Huang ed.) ("The parties may make the arrangements ... by agreeing to the application or adoption of rules of arbitration or by providing any other means by which a matter may be decided.").

[128] Voluntary Arbitration Act, art. 15(1), L. no. 31/863 (2003) (Port.) (noting that parties may agree on the rules of procedure); obcansky soudni rad c. 99/1963 Sb., art. 19 (Czech Rep.) (stating that under Article 19 parties are free to agree on the procedure); The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India) (stating that under Article 19(2) parties are free to agree on the procedure used by the arbitral tribunal); Nomos (1999:2735) [International Commercial Arbitration Law], 2004, (Greece). See also European Convention Providing a Uniform Law on Arbitration Annex art. 15(1), Jan. 20, 1966, Euro. T.S. No. 56 ("Without prejudice to the provisions of Article 16, the parties may decide on the rules of the arbitral procedure and on the place of arbitration. If the parties do not indicate their intention before the first arbitrator has accepted his office, the decision shall be a matter for the arbitrators.").

[129] *UHC Mgmt. Co. v. Computer Scis. Corp.,* 148 F.3d 992, 995 (8th Cir. 1998) (noting that private agreements to arbitrate are usually enforced according to their terms); *Glass Molders, Pottery, Plastics & Allied Workers Int'l Union v. Excelsior Foundry Co.,* 56 F.3d 844, 848 (7th Cir. 1995) (noting that if there is a conflict between federal arbitration rules and state law, the federal law applies); *Security Ins. Co. of Hartford v. TIG Ins. Co.,* 360 F.3d 322, 325 (2d Cir. 2004) ("The FAA requires arbitration proceed in the manner provided for in [the parties'] agreement.") (internal citations omitted) (emphasis in original); *Baravati v. Josephthal, Lyon & Ross, Inc.,* 28 F.3d 704, 709 (7th Cir. 1994) ("Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes ... ."). See also *Volt Info. Scis., Inc. v. Bd. of Trustees,* 489 U.S. 468, 479 (1989) (noting the FAA was designed to ensure that arbitration agreements that parties entered into were enforced); Unif. Arbitration Act, Prefatory Note, 7 U.L.A. 2 (2000) ("Arbitration is a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration, so long as their agreements conform to notions of fundamental fairness. This approach provides parties with the opportunity in most instances to shape the arbitration process to their own particular needs.").

> parties ... the rules of the [ICC] Court of Arbitration, which constitute the law of the parties, must be applied to the exclusion of all other laws.[130]

In the United States, a court observed similarly that "parties may choose to be governed by whatever rules they wish regarding how an arbitration itself will be conducted."[131] Another court opinion explained, more colorfully, that between competent parties, even procedures such as "flipping a coin, or, for that matter, arm wrestling" are enforceable.[132] For their part, English authorities have upheld sui generis procedural mechanisms, such as selecting arbitrators by drawing names from a pool.[133]

In contrast, it is virtually impossible to identify contemporary authority that denies or even questions the principle of the parties' procedural autonomy in international dispute settlement, particularly as related to commercial arbitration. At the same time, however, the parties' autonomy in all developed jurisdictions is subject to the limitations of mandatory national public policies and the protection of due process.[134]

D. Due process and The New York Convention

In the international context, the 1958 New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) is "one of the most successful treaties in history," having more than 140 agreeing to become parties through ratification, succession or accession.[135] States that join up to the New

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[130] *Raffinerie de petrole d'Homs et de Banias v. Chambre de commerce internationale*, Cour d'appel [CA] [regional court of appeal] Paris, May. 15, 1985, reprinted in 1985 Rev. Arb. 141.

[131] *UHC Mgmt. Co.,* 148 F.3d at 997.

[132] *Team Design v. Gottlieb,* 104 S.W.3d 512, 518 (Tenn. Ct. App. 2002). Although vivid, it is not clear that entirely arbitrary or random procedures would be acceptable under most international and national law standards of due process and procedural fairness. In particular, random chance or physical endurance would likely not provide either party with an opportunity to be heard in an adjudicative process, as required under most national and international arbitration regimes.

[133] In re Shaw & Sims, [1851] 17 I.L.T.R. 160 (Ir.).

[134] *Ibid.*

[135] Park & Yanos, *supra* note 125.

York Convention become automatically on notice that a pro-arbitration, including a pro-enforcement of award, approach is normal and required.[136]

The role of the New York Convention in "bringing about the uniform standard for the practice of international arbitration," the proper protection of due process and the "transformation of the judges' initial attitude towards arbitrators from one of confrontation to one of cooperation" cannot be overstated.[137] The requirements of the New York Convention, including those applicable to arbitration agreements and enforcement and recognition of arbitral awards that are foreign now constitute an essential component of arbitration law in all countries that have ratified it.[138] Further, judicial decisions from all over the world which apply the New York Convention also contribute to its international harmonizing effect.[139] "[A]ny national judge can consult [the International Council for Commercial Arbitration's Yearbook on Arbitration] on how his colleagues apply the same treaty in other countries … The jurisprudence arising from the application of the New York Convention in local tribunals has unified the interpretation of its different criteria."[140] In the words of Pieter Sanders, "We are approaching a global system of arbitration" and one of the "main driving forces behind this development are the New York Convention 1958 and the Model Law of UNCITRAL."[141]

Much of the operative language of the New York Convention presents binding terms including article II which states "each Contracting State shall recognize an

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[136] Gary A. Born, *International Commercial Arbitration* (London: Kluwer, 2001) 5 (presenting the general purpose of the New York Convention and the general requirements it imposes on its signatories).

[137] Bernardo M. Cremades, "Overarching the Clash of Legal Cultures: The Role of Interactive Arbitration" (1998) 14 Arb. Int'l 157 at 170.

[138] As an example, the United States included the requirements of the New York Convention in the Federal Arbitration Act. See 9 U.S.C. Sec 201 – 208 (2000).

[139] Pieter Sanders, *Quo Vadis Arbitration?* (London: Kluwer, 1999) 13 at 70-71.

[140] Bernardo M. Cremades, "Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration" (1998) 14 Arb. Int'l 157 at 170-71.

[141] Pieter Sanders, *Quo Vadis Arbitration?* (London: Kluwer, 1999) 13 at 66.

agreement in writing" to arbitrate, while article III states "each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."[142] Any phrasing which could be interpreted to allow deviations from the general pro-enforcement position is presented in permissive, rather than mandatory, language. The duty of a court to enforce and recognize decisions that are foreign under the New York Convention is limited only by those potential objections included in article V,[143] which constitutes the only methods to claim a challenge to the enforcement of a decision on either procedural or substantive grounds. Further, article V provides protection against arbitral procedures executed under the discretion of the arbitral tribunal considered abusive by allowing courts to withhold their support to proceedings determined by them to lack the necessary integrity or present a violation of accepted public policy.[144]

Universal international arbitration law does not exist, there are only national arbitration laws. "It is only through developments in national laws that the diverging approaches to international arbitration [begin] to converge."[145] The success of the New York Convention, UNCITRAL Model Law and other international arbitration standards demonstrates the effectiveness of this approach."[146]

Improvement and harmonization of national laws remains a key factor in the facilitation of international arbitration because of the need for increasing uniformity and predictability of effective arbitral procedures to lower the risks to international commerce and to contribute to overall global economic relations. It assists in curing the adverse effects of disparity between national laws in international cases, avoiding territorial

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[142] New York Convention, articles II-III.

[143] Sanders, *supra* note 181 at 257.

[144] *Ibid* at 258.

[145] W. Laurence Craig, "Some Trends and Developments in the Laws and Practice of International Commercial Arbitration" (1995) 30 Tex. Int'l L.J. 1, 2 at 58.

[146] *Ibid* at 58.

constraints and local peculiarities, and it provides for functioning and fairness of the arbitral process by a universal standard.[147]

Despite its harmonizing effect, the New York Convention approaches due process as an overarching principle that should not be too precise but this results in it being a difficult concept to clearly define with certainty, and what exactly establishes the protection of due process is "not uniform across all the Contracting States."[148] The potential for there to be different approaches to the concepts of due process may have "significant consequences for arbitrations which are conducted in forums where the notions of due process differ substantially" from approaches taken by other Contracting States.[149] Thus, while the protection of due process is essential to ensure the rights of parties are respected throughout the process of international dispute settlement and also to ensure legitimacy of the international dispute settlement system, clarity in what constitutes due process in light of the procedural flexibility and judicial discretion inherent in international dispute settlement is necessary.

Article V(1)(b) of the New York Convention clarifies that "recognition and enforcement of the award may be refused" with proof that "the party against whom the award is invoked was … unable to present his case."[150] However, it is not clear as to what it means for a party to present their case. In some national jurisdictions, the ability to develop and mount one's case is presented as a due process rule that is fundamental if not the most fundamental requirement; however, other national laws require "full opportunity" to present one's case, while alternatively others require only the "reasonable opportunity."[151] There is no clear guidance in the New York Convention as to what is

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[147] United Nations Commission in International Trade Law (UNCITRAL) General Information, United Nations Publications, at www.uncitral.org.

[148] Judith O'Hare, "the Denial of Due Process and the Enforceability of CIETAC Awards Under the New York Convention: the Hong Kong Experience" (1996) 13 J. Int'l Arb. 179, 185 (considering the waiver of due process rights in Hong Kong).

[149] *Ibid* at 184.

[150] New York Convention, art. V(1)(b).

[151] O'Hare, *supra* note 195.

actually required for a party to present their case and given the degree of procedural flexibility in international dispute settlement and the amount of judicial discretion, this lack of guidance on what is required for the proper protection of due process is particularly troubling.

Article V(1)(b) allows for refusal of enforcement of an award on the grounds that a party "was not given proper notice of the appointment of the arbitrator, or of the arbitration proceedings, or was otherwise unable to present [its] case."[152] This is an opportunity for a party to be heard when it was denied a fair hearing or due process, when, for instance, the tribunal failed to treat the parties equally.[153] These defenses are intended precisely to safeguard the parties against injustice and to serve a function similar to that of due process guarantees in domestic litigation.[154] The New York Convention, however, contains no clearly defined requirements for what constitutes proper notice and therefore provides no guidance to a tribunal attempting to use its discretion to protect this component of due process.

Article V(2)(b) of the New York Convention explains "recognition and enforcement of the award may … be refused if the competent authority in the country where recognition and enforcement is sought finds that … the recognition or enforcement of the award would be contrary to the public policy of that country."[155] Complicating matters is the fact that there is no clear definition for the meaning of public policy in the language of the New York Convention, however the reasoning is that it is "the right of the State and its courts to exercise ultimate control over the arbitral process."[156] Further, public policy is an ever changing notion that adjusts over time to reflect a particular

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[152] New York Convention, art. V(1)(b).

[153] Richard Garnett and Michael Pryles,"Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand" (2008) Journal of International Arbitration 25(6): 899-912.

[154] *Ibid* at 901.

[155] New York Convention, art. V(2)(b).

[156] Julian D. M. Lew, *Applicable Law in International Commercial Arbitration* (New York: Oceana Publications, 1978) 26-114.

society's priorities.[157] Article V(2)(b) of the New York Convention clarifies that only public policy of the state where enforcement is to take place is relevant for consideration and foreign public policy is not commonly considered at all.[158] Further, objections based solely on public policy tend to be procedural in nature, typically addressing violations of due process, or substantive.[159] Grounds that have been found to satisfy this provision range from harm to the enforcing countries' national interests or to decisions "obnoxious to internationally accepted standards."[160] Such conduct is present where an award is tainted by fraud, corruption, involves criminal conduct, or some other internationally offensive act.[161] Absence of due process or procedural fairness is arguably the most successful basis for impeaching the award using the public policy exception.[162]

From time to time there are situations where procedural public policy intersects with the due process requirements articulated in article V(1)(b) of the Convention.[163] Additionally, possible procedural public policy grounds include "fraud in the composition of the tribunal; breach of natural justice; lack of impartiality; lack of reasons in the award; manifest disregard for the law; manifest disregard of the facts; annulment at place of arbitration."[164] Irrespective of whether they are procedural or substantive in nature, objections based solely on public policy under the Convention "must be construed narrowly."[165]

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[157] *Ibid.*

[158] *Ibid* at 26-82.

[159] *Ibid.*

[160] *Scherk v. Alberto-Culver Co*., 417 U.S. 506, 517-18 (1974). The US Supreme Court held that, while matters arising out of domestic securities transactions may not be arbitrated, when the contract is international, such disputes are arbitral.

[161] Garnett, *supra* note 200 at 109.

[162] *Ibid* at 115.

[163] International Law Association, Public Policy as a Bar to Enforcement of International Awards (2000). www.ila-hq.org/en/committees/index.cfm/cid/19 (follow link for "conference report New Delhi 2002").

[164] Lew, *supra* note 25 at 26-117.

[165] *Ibid* at 26-114.

Different opinions on the proper parameters of due process can be found in different jurisdictions and this lack of harmonization has the potential to lead to confusion in the enforcement of awards. However, in considering presented objections to enforcement under article V(1)(b) of the Convention, courts are instructed to apply the standards of the jurisdiction from which the procedural law controlled the arbitration, that is, typically the law of the state where the dispute settlement took place.[166]

E. Deriving international due process requirements

For the purposes of this work it is important to derive due process requirements as due process is a fundamental requirement to any form of dispute settlement, be it international or domestic. Oftentimes due process is viewed as a "hard rule of law, a kind of core or foundation for all other procedural rules, the violation or disregard of which will lead to unenforceability of the award of decision given."[167] At the foundation of any form of dispute settlement, the requirement to protect due process underlies the legitimacy of a mechanism and "cannot be contracted out."[168]

As has been explained above, while fixed, clearly defined components to or requirements of the protection of due process have not been developed, general principles of due process, considered basic precepts, underlying the adjudicative processes in the legal system of civilized States have been described in detail in relevant academic literature.[169] Commonly described as "minimum procedural standards,"[170] "principles of

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[166] Osamu Inoue," Note & Comment, The Due Process Defense to Recognition and Enforcement of Arbitral Awards in United States Federal Courts: A Proposal for a Standard" (2000) 11 Am. Rev. Int'l Arb. 247, 247.

[167] Matti S. Kurkela & Hannes Snellman, "Due Process in International Commercial Arbitration" 2nd ed. (Oxford: Oxford University Press, 2010) 1.

[168] *Ibid* at 4.

[169] For thorough discussions regarding the substantive and procedural issues surrounding international litigation, see Kenneth S. Carlston, *The Process of International Arbitration* (New York: Columbia University Press, 1946) 318; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 2006); Gerhard Wegen, "V.S. Mani, International Adjudication: Procedural Aspects" (1982) 6 Ford. Int'l. L. J. 2 at 6.

[170] Carlston, *supra* note 190 at 36.

judicial procedure,"[171] and "fundamental procedural norms,"[172] these concepts have been defined by reference to two essential and commonly shared objectives: 1) the requirement of impartiality of the adjudicative tribunal; and 2) the juridical equality between the parties in their capacity to litigate, or the right to be fairly heard.[173]

As discussed above, the sources of due process principles are varied. In the absence of any fully developed and internationally accepted theory of international procedural law, there is no universally accepted doctrine of international procedural principles.[174]

According to Article 38 of the Statute of the International Court of Justice in determining how an international decision-maker should go about determining what international law to rely on, it is useful then to refer to the approach outlined in the New York Convention, the International Covenant on Civil and Political Rights, and also those established international adjudicative bodies including the Court of Justice of the European Communities ("EC"). Although the EC Court of Justice has previously elaborated a catalogue of fundamental procedural rights based on a vertical reach into the legal systems of the EC Member States, it recently has opted to develop general principles of EC law by reaching horizontally into other international legal systems, such as the European Convention on Human Rights ("ECHR"), rather than to conduct the

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[171] Cheng, *supra* note 190 at 258.

[172] Wegen, *supra* note 190 at 19-21.

[173] Cheng, *supra* note 190, at 290 (characterizing the two objectives as fundamentally important characteristics of a judicial process); Wegen, *supra* note 190, at 20-21 (presenting the two chief considerations used by international tribunals in the application of the "fundamental procedural norms"). Wegen suggests that the principles of the equality of parties and audi alteram partem complement each other and that both principles are fused to the concept of impartiality, Wegen, *supra* note 190, at 13.

[174]H.W.A. Thirlway, "Procedure of International Courts and Tribunals" (1997) 3 Encyclopedia of Public International Law 1128, 1128 (noting that despite the absence of a common governing text of international procedural law, international tribunals and international arbitral bodies are considerably homogenous in their procedures); H.W.A. Thirlway, *Procedural Law and the International Court of Justice, in Fifty Years of the International Court of Justice: Essays in Honor of Robert Jennings* (Cambridge: Cambridge University Press, 1996) 389, 389.

more difficult exercise of performing a sufficiently extensive comparative study of the national legal systems of the EC Member States.[175]

Article 6 of the European Convention on Human Rights provides that everyone has the right to a fair trial in both civil and criminal cases. A party to legal proceedings has the right to be heard by an independent, impartial tribunal, in public and within a reasonable amount of time. Article 6 is not subject to any exceptions, though the procedural requirements of a fair trial may differ according to the circumstances.

Article 6(1) applies to all situations, including public, private and administrative law. Through a series of judgments, the European Court of Human Rights has interpreted civil rights and obligations as including areas such as family law, employment law and commercial law. The principles contained in Article 6(1) may also apply to certain cases involving the relationship between the individual and the state, especially disputes involving money and property. Administrative decisions made by public bodies which are not courts or tribunals, such as a review by a local authority planning inspector, must be compliant with Article 6(1) unless there is a right of appeal to a court or tribunal that does comply with its requirements.

As described above, Article V(1)(b) of the New York Convention is also representative, permitting non-recognition of an award where "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."[176] Article V(2)(b) of the Convention is also potentially applicable in cases of serious procedural unfairness, permitting non-recognition of arbitral awards for violations of local public

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[175] Deirdre Curtin, "Constitutionalism in the European Community: The Right to Fair Procedures in Administrative Law, in Human Rights and Constitutional Law: Essays in Honor of Brian Walsh" (1992) 14 Am. Univ. Inter'l. L. R. 293, 294.

[176] New York Convention, art. V(1)(b).

policy, including procedural public policies addressing the right to a fair trial and the protection of due process.[177]

The European and Inter-American Conventions feature similar provisions. The application of mandatory standards of procedural fairness under these various international instruments has been referred to as "international procedural public policy."[178] However, details regarding what is required to meet mandatory standards of procedural fairness are not included in any of the above. In general, provisions have been interpreted to afford the parties and dispute settlement tribunal substantial freedom to establish the arbitral procedures.[179] Nonetheless, these provisions permit national courts to deny recognition to arbitral awards that are based upon fundamentally unfair, arbitrary, or unbalanced procedures that violate due process.

It is essential therefore to develop a series of fundamental principles or requirements for the protection of due process that cut across a broad spectrum of countries' domestic legislation as it would be extremely difficult, if not impossible, to conduct an analysis to detect general procedural principles common to all national legal systems.

For the purposes of this work in order to establish a foundation for the requirements of due process in the international context the formulation of the primary rules of the fair trial guarantee expressed in Article 6 of the European Convention on Human Rights provide a very good articulation of the general principles or requirements of due process and is consistent with Article V(1)(b) of the New York Convention, The International

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[177] *Ibid* at art. V(2)(b).

[178] Franz Schwarz & Helmut Ortner, *Procedural Ordre Public and the Internationalization of Public Policy in Arbitration in Austrian Arbitration* (Stampfli, 2007) 133; Fernando Mantilla-Serrano, *Towards A Transnational Procedural Public Policy, in Towards a Uniform International Arbitration Law?* (New York: Juris Publishing, 2005) 168 (describing how a great majority of nations has agreed to the same principles of international arbitration procedure, thereby creating a transnational procedural public policy); Stephen M. Schwebel & Susan G. Lahne, *Public Policy and Arbitral Procedure, in Comparative Arbitration and Public Policy in Arbitration* (New York: Juris Publishing, 1987) 206 (discussing the uniform transnational principles within public policy that shape arbitral procedure).

[179] *Ibid* and accompanying text.

Covenant on Civil and Political Rights as well as fundamental concepts of equity as follows:

1) a tribunal must be independent and impartial,[180]

2) the parties must be given adequate notice of the proceedings,

3) the parties must be given adequate opportunity to be heard and present their case,[181]

F. Due process and public policy concerns

While there is no official guidance with respect to how both developing and developed nations are expected to apply public policy exceptions,[182] work towards the harmonization and explanation of national laws has been undertaken. In July 2000, the International Law Association issued a Report on Public Policy as a Bar to Enforcement of International Awards ("ILA Interim Report"), which was intended to be considered in conjunction with the Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards ("ILA Final Report") issued in 2002.[183]

Both these reports strive to provide a practical definition of public policy by referring to "violations of basic notions of morality and justice," however, significantly the reports also also consider how public policy is applied in international agreements, treaties and

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

[181] *Ibid* at sec. 3.

[182] Bruce Harris, Rowan Planterose et al, *The Arbitration Act of 1996: A Commentary* 4th ed (Oxford: Blackwell Publishing, 1996) 155. See also Bruce Harris, Rowan Planterose, *Recognition and Enforcement of New York Convention Awards* (Oxford: Blackwell Publishing, 1996).

[183] International Law Association, Public Policy as a Bar to Enforcement of International Awards (2000) [hereinafter ILA Interim Report], available at http://www.ila-hq.org/en/committees/index.cfm/cid/19 (follow link for "Conference Report London 2000"); International Law Association, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (2002) [hereinafter ILA Final Report], available at http://www.ila-hq.org/en/committees/index.cfm/cid/19 (follow link for "Conference Report New Delhi 2002").

also legislation that is domestic.[184] Domestic legislation vary to a degree, however "it appears that there is one universally accepted definition of public policy. It is clear that [it] reflects the fundamental economic, legal, moral, political, religious, and social standards of every state or extra-national community."[185]

Article V(2)(b) in the Convention explains that the only public policy that is relevant for consideration is that of the state where enforcement is to take place.[186] Thus, foreign public policy is not automatically relevant in enforcement proceedings, "notwithstanding the fact that private international lawyers increasingly discuss the issue of application (or taken into account) of foreign public policy in a favourable manner" in other contexts.[187] Further, objections based on public policy may be procedural, tending to relate to due process issues, or substantive.[188] However, these types of objection that are based on public policy automatically provides grounds that are persuasive for overcoming the presumption of enforceability as presented in the Convention.

When making the determination as to whether the New York Convention's exceptions regarding public policy to enforcement apply, courts must consider their domestic regulations, the law of the state considering enforcement.[189] The scope and form

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[184] Loukas Mistelis, "Keeping the Unruly Horse in Control" or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards" (2000) 2 Int'l L. F. du Droit Internationale 248, 249.

[185] *Ibid* at 260. Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.*H. v. Ras Al Khaimah Nat'l Oil Co. [1987] 2 Lloyd's Rep. 246, 254;* see Lew *supra* note 210, para. 115 (noting constituent elements of public policy); P.B. Carter, "The Role of Public Policy in English Private International Law" (1993) 42 Int'l & Comp. L.Q. 1, 7 (arguing that principles informing public policy are those of general moral application).

[186] *Ibid.*

[187] *Ibid.*

[188] *Ibid.*

[189] New York Convention, art. V(2)(b); Lew supra note 210 at 546 (noting that in enforcement actions that "it is the public policy of the lex fori that is considered by the judge, which entails an examination of the award's conformity with the public policy of his own jurisdiction"); Gunther J. Horvath, "The Duty of the Tribunal to Render an Enforceable Award (2001) 18 J. Int'l Arb. 135, 143 (noting enforcement actions look to the public policy of the enforcing state). Traditionally, the only time the public policy of the lex arbitri would be considered is when a party has brought a motion to vacate or set aside the arbitral award, since motions to set aside or vacate an arbitral award are typically made in the state where the arbitration was seated).

of all judicial review is limited and courts as well as commentators tend to be "unanimous" when making this point, explaining:

> The national judge excludes review of the substance of the arbitration decision. It must relate not to the evaluation made by the arbitrators of the rights of the parties, but rather to the solution given to the dispute, with the award being annulled only insofar as this solution runs counter to public policy.[190]

Only in rare cases has the opposition of awards been successful at the stage of enforcement based solely on grounds of a violation of international public policy.[191] As an example, England did not refuse enforcement of an arbitral award on the grounds of public policy until 1998.[192] South Korea and Switzerland both use a narrow interpretation of public policy, but retain some focus on the interests and beliefs of the enforcing state.[193] In the United States, the prevailing pro-arbitration policy also results in few challenges succeeding on the basis of the public policy exception.[194] Other jurisdictions that have taken a narrow view of the public policy exception include Germany, Luxembourg, The Netherlands, Russia, Italy and India.[195] However, in contrast some jurisdictions - including Turkey, Japan, Vietnam and China - have been criticized for their broad use of the public policy exception.[196]

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[190] *Ibid.*

[191] Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* 4th ed. (Oxford: Oxford University Press, 2009); Stephen M. Schwebel & Susan G. Lahne, *Public Policy and Arbitration Procedure, in Comparative Arbitration Practice and Public Policy* (The Hague: TMC Asser, 1986) 205.

[192] *Soleimany v. Soleimany* [1999] Q.B. 785 (refusing enforcement of an award of public policy grounds)

[193] Lew, *supra* note 213, at 127 (discussing Korean and Swiss case law).

[194] *Parsons Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RAKTA),* 508 F.2d 969, 974 (2d Cir. 1974) (noting "the [New York] Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice").

[195] Harris, supra note 227, at 14-15.

[196] Redfern & Hunter, supra note 230, para. 10-54 (claiming that Japan takes a restrictive view of the public policy exception).

H. The example of the Kadi case

This case is related to economic sanctions against individuals and highlights the necessity to safeguard fundamental due process protections which were lacking on the level of international law in the context of the United Nations. UN Security Council Resolution 1267 (1999)[197] established a "Sanctions Committee" responsible for designating the funds or other financial resources which all States must freeze in order to ensure that those funds or financial resources are not made available to, or for the benefit of, the Taliban or any undertaking owned or controlled by the Taliban. In Resolution 1333 (2000),[198] the UN Security Council instructed the Sanctions Committee to maintain an updated list of the individuals and entities designated as associated with Osama bin Laden, and held that States must freeze funds and other financial assets of these individuals and entities. Mr. Kadi was identified as a possible supporter of Al-Qaida and was included in this updated list. Therefore, he was singled out for sanctions, and in particular for an assets freeze.

The EU implemented this UN Security Council Resolution through a regulation which Kadi then contested before the EU Courts. In the initial case, the General Court (GC) refused to review the EU regulation because in its view this would have amounted to a review of the measure of the UN Security Council. Nevertheless, the GC examined whether the Security Council had respected certain fundamental rights and the GC did not find any such infringement.

In its judgment on appeal, the European Court of Justice (ECJ) pursued a different analysis. It reviewed the lawfulness of the EU regulation implementing the

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[197] S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

[198] S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 13, 2000).

resolution.[199] Its central argument was that the protection of fundamental rights form part of the very foundations of the Union legal order.[200] Accordingly, all Union measures must be compatible with fundamental rights or equity.[201] The Court reasoned that this does not amount to a review of the lawfulness of the Security Council measures. The review of lawfulness in this situation would apply only to the Union act that gives effect to the international agreement at issue and not to the latter.[202]

Having established that, the review for compliance with fundamental rights and equity was relatively simple. Kadi had not been informed of the grounds for his inclusion in the list of individuals and entities subject to the sanctions. Therefore he had not been able to seek judicial review of these grounds, and consequently his right to be heard as well as his right to effective judicial review[203] and his right to property[204] had all been infringed.

With this opinion the Court held that "obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty."[205] However, it is important to note that the ECJ did not establish a new hierarchal structure regarding the interplay between international law and European law. Rather, the Court emphasized the primacy of obligations under the UN Charter. It also highlighted that the European review of lawfulness applies only to Community acts and never to acts of the UN Security Council under Chapter VII of the UN Charter, even if such a review were to be limited to examination of the compatibility of that resolution with *jus cogens*. Thus, at first the ECJ did not challenge the existing hierarchy of norms within the international legal order. But at the same time, by emphasizing the rule of law

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[199] Case C-402/05 P and C-415/05, *P. Kadi and Al Barakaat International Foundation v. Council and Commission* (2008) ERC I-6351.

[200] *Ibid* at paras 303 ff.

[201] *Ibid* at paras 281 ff.

[202] *Ibid* at para. 286.

[203] *Ibid* at paras 384 ff.

[204] *Ibid* at para. 368 ff.

[205] *Ibid* at para. 285.

the Court stated that the judicial review also covers all Community acts, even if they are designed merely to give effect to resolutions adopted by the UN Security Council.

In effect, this approach of reciprocal concessions only works if there is a way to implement UN Security Council resolutions in conformity with the fundamental rights of the EU. If it would only be possible to put a resolution into effect by adopting a Community act which breaches fundamental rights – if there were a significant conflict between obligations arising under the UN Charter on the one hand and EU fundamental rights as "principles that form part of the very foundations of the Community legal order"[206] on the other – EU fundamental rights would then prevail.

Thus, the ECJ's commitment to accept the primacy of UN Charter obligations and the integrity of UN Security Council resolutions ends when there is no discretion to implement such resolutions in a fundamental rights-friendly way. Therefore, a lack of discretion would imply an obligation to give preference to fundamental rights even if this means a breach of UN Charter obligations which could in effect result in a "challenge to the primacy of that resolution in international law," even if the ECJ explained the outcome differently.[207]

The choice by the ECJ of a rather dualist approach in this particular context has to be understood as a reaction to a specific situation that may occur in multilevel systems. In such systems it is possible that the level of protection of fundamental rights guaranteed by a higher level does not attain the level of protection developed and considered indispensable by the lower level. Refusing to accept the primacy of the higher level can be a proper means of responding to this deficiency. The insufficient protection of

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[206] *Ibid* at para. 304.

[207] *Ibid* at para. 288.

fundamental rights at the UN level therefore required the adoption of a dualist conception of the interplay of EU law and international law. [208]

The Court examined in detail the argument presented by the Commission that the Court must not intervene because Mr Kadi had had, through the re-examination procedure before the Sanctions Committee, an acceptable opportunity to be heard within the UN legal system. The Court responded that such an immunity from EU jurisdiction "appears unjustified, for clearly that re-examination procedure does not offer the guarantees of judicial protection."[209]

This demonstrates that the Court did not follow a strictly dualist approach in its judgment. The Court's decision not, at least for the time being, to accord automatic precedence to Security Council measures is understandable, if not essential when considering a broader perspective. Should the EU convey the impression of sacrificing basic constitutional guarantees by accepting the general primacy of Security Council measures, EU Member States, in particular their constitutional courts, would likely feel compelled to take safeguarding these guarantees into their own hands. From an international perspective this would be counterproductive. It would not only put into question the primacy of public international law within the EU legal order but also call into question the primacy of EU law over national law.[210] This would undermine the whole concept of integration through law. Also from this perspective Kadi would hardly have yielded a different outcome.

The judgment of the ECJ in Kadi represents a strong commitment to fundamental rights and the European rule of law. In the words of Advocate General Maduro,

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[208] Martin Schienin, "Is the ECJ Ruling in Kadi Incompatible with International Law?" (2009) 28 Yrbk European L 637-653.

[209] Kadi, *supra* note 126 at para. 322.

[210] Jan Willem van Rossem, "Interaction between EU law and International Law in the Light of Intertanko and Kadi: the Dilemma of Norms Binding the Member States but not the Community" (2009) 40 Netherlands Yrbk Int'l L 183, at 197.

"[M]easures which are incompatible with the observance of human rights … are not acceptable in the Community."[211] We must recognize that finding a proper balance between constitutional core values and effective international measures, particularly those against terrorism, is not an easy task. The Kadi case demonstrates the importance placed on the protection of fundamental rights, particularly the right to a fair trial, the right to be heard and be afforded the opportunity to properly present one's case.

The role of equity is significant throughout the reasoning of the Kadi case as is the fundamental focus on due process protection. While issues of direct effect and primacy of EU law over national law were significant considerations in this case, the invocation of equity in the opinion strengthened the decision. Equity or fairness is used to buttress legal arguments and the exercise of discretion. In the Kadi case, a decision based on technical legal rules was shown to be consistent with principles of justice and fairness. Considered more broadly, it is in this manner that the flexibility which the law contains, and which was discussed above in the context of equity legem, praeter legem and contra legem, can be directed so as to lead to a just conclusion. Taken further, reasoning in terms of equity has great potential to provide justification of the exercise of judicial discretion; however, the flexibility of the law is of little benefit unless there are criteria for choosing among the alternatives available and the role of due process protections continue to be essential.

G. Due process and judicial discretion in the international context

Innovation and flexibility are not only permitted in international dispute settlement, they are encouraged[212] and many respected arbitrators and advocates have recognized that it is good practice to allow proceedings to be individually tailored to the needs of the parties.[213] As the use of judicial discretion is essential to fill the gaps left by the inability

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[211] Op. Advoc. Gen, 3 C.M.L.R. 41 (2008) at para. 31.

[212] W. Mark C. Weidemaier, "Arbitration and the Individuation Critique" (2007) 49 Ariz. L. Rev. 69, 96.

[213] Lew, *supra* note 213 Para. 1-15 (describing how variations in form, structure, application, and procedure may arise in different international arbitrations).

of the parties to reach agreement, subject only to ensuring the protection of due process, due process requirements therefore form the foundation for the proper use of judicial discretion in an international context.

Given that there are no clearly accepted international guidelines on how to develop international dispute settlement procedures that are in line with due process requirements, nor clear guidance on what due process requirements actually require, looking at the currently accepted practice in internationally recognized dispute settlement mechanisms is as close as we can get to guidance in this area. While with respect to interstate dispute settlement the World Trade Organization is rather precise and provides a reasonable guideline, the International Centre for the Settlement of Investment Disputes and the UNCITRAL Rules, also consider due process in their own way which will be presented and considered in detail below.

There has been a proliferation of international dispute settlement mechanisms but in and of itself this is not problematic. In the aftermath of two World Wars, promoting non-violent settlement of disputes was the ideal of many people around the world. Indeed, Article 33 of the UN Charter requires resort to the peaceful settlement of disputes and sets forth various mechanisms that states might employ. Differences in the types of tribunals available to solve international disputes demonstrate innovation on the part of states and private sectors and the coexistence of multiple and varied peaceful mechanisms for the settlement of disputes is theoretically good.

Domestic courts, academics and commercial actors have supported international dispute settlement as the best mechanism for resolving cross-border disputes largely because international dispute settlement, with the many international and regional treaties

on enforcement of awards[214], is much more efficient and reliable than domestic litigation.[215]

Despite its tremendous growth and acceptance, international dispute settlement is not a panacea for cross-border dispute resolution. Any even-handed description of international arbitration must acknowledge that certain challenges intrinsic to the process endure, including the need to make the process acceptable to all who seek to make use of it. In its attempts to invite parties from all nations to the arbitral table and to provide a uniform method for resolving global disputes, international dispute settlement inherently risks ignoring certain cultural or legal traditions and thus marginalizing or even offending at least some participants. The often subtle disparities among national cultures and different legal traditions of the disputants must be given special attention and handled with particular care to avoid the perception or actuality of unjust outcomes. It is essential that each party rightly feel it is equitably participating in the process and often reaching this goal requires that inherent tensions be addressed and compromises reached.

In this context, to test the connection between the exercise judicial discretion and policy options for the protection of due process, and in an effort to initiate the development of guidance for the use of judicial discretion, an analysis of the current practice of three distinct international dispute settlement mechanisms will be undertaken set against the backdrop of the above presented requirements for the protection of due process. During this exercise areas for improvement with broader international application will be identified and developed for further consideration.

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[214]Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38 [hereinafter New York Convention]; European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364.

[215] William W. Park & Alexander A. Yanos, "Treaty Obligations and National Law: Emerging Conflicts in International Arbitration" (2006) 58 Hastings L.J. 251, 257 (arguing that implementation of the New York Convention should facilitate, rather than impede, award recognition).

PART II

COMPARATIVE ANALYSIS OF THE ICSID, UNCTRAL AND WTO SYSTEMS

Chapter 3 Introduction to the ICSID, UNCITRAL and WTO Systems

A. Three very different systems brought together

As international trade grows, actors that previously tended to concentrate on domestic business have begun to advance their interests through the proliferation of cross-border transactions, resulting in an international business community that is sizeable in terms of numbers and transnational capacity. Companies worldwide have expanded to locate their manufacturing and distribution centers, as well as their advertising, beyond their home country's borders. This increased communication and advances in technology, as well as institutional support for cross-border transactions, have created a substantial global business community that handles international transactions no differently from their domestic transactions. The rapid expansion of cross-border commercial transactions has resulted in significant growth of cross-border disputes, and the need for culturally sensitive decision-makers possessing a familiarity with and expertise in international commerce to resolve these disputes. However, private actors and industry are not the only stakeholders with interest in cross-border dispute settlement. Countries themselves also have significant interests, on behalf of the private actors within their borders but also for their own benefits and positioning as well.

At this point, it would be reasonable to question the value of comparing such different international dispute settlement mechanisms; however, the differences between the WTO system and ICISD and UNCITRAL systems are what make the comparison so interesting. If one pulls back to consider the broad spectrum of today's international dispute settlement and the fact that irrespective of idiosyncrasies unique to a particular mechanism, all dispute settlement mechanisms are nonetheless held to the fundamental requirements to protect due process, this type of comparison becomes more reasonable.

The mere fact that international dispute settlement is conducted requires protection of due process and therefore an analysis of how different systems approach this cross-cutting requirement becomes interesting. Further, the fact that the WTO system has such a clearly defined set of rules and developed case law provides a useful point of reference when considering systems that leave much to the discretion of the parties or to the ad hoc tribunal. Caution is advised here because while one might assume that clearly defined dispute settlement rules are the automatic solution to international due process protection, as we will see below, the clearly defined dispute settlement rules of the WTO do not entirely protect it from potential risks of due process violation.

In the coming years, countries with an established international economic presence will likely increase their participation in cross-border transactions, just as the growth of the international economy will bring more emerging economies such as the BRICS countries into the fold. As the world continues to get smaller, the importance and frequency of both private and public interests together in cross-border disputes will increase, and international dispute settlement forums will continue to be the first resort for parties seeking to resolve such disputes. In this context and given the spectrum of interests involved, the preference for international dispute settlement will enhance cultivation of the process, as arbitrators, parties and their counsel seek to strengthen and develop the system to improve efficiency and outcomes.

When considering the variety international dispute settlement mechanisms available to those with a case, there is not a single approach to discretion but a wide spectrum of options. While the WTO system is very structured, the ICSID and UNCITRAL mechanisms exemplify the approach that seeks to maximize flexibility and enable significant procedural tailoring to the preferences of the parties; however, when parties fail to agree significant discretion is left to the ad hoc tribunal members with little guidance from the mechanism dispute settlement rules on how best to exercise that discretion. Case law could be useful to consult in this situation; however, given the emphasis placed on tailoring procedures to the intricacies of a particular dispute, cases more easily become differentiable. Further, a clear mandate for the reliance on case law within a mechanism's rules is often missing.

While this flexibility and tribunal discretion is in line with the current expectations associated with international dispute settlement today, ad hoc tribunals are forced to balance the value of flexibility with the need to protect due process but are left unclear as to what is procedurally required for the protection of due process. Are there areas for systemic improvement? Are there ways to adjust the rules of a particular mechanism to maintain the degree of discretion but provide support to ad hoc tribunals when attempting to use their discretion in a way that is more easily in line with due process?

To this end, the below section will conduct a comparative analysis of three widely accepted international dispute settlement mechanisms: the ICSID, the UNICTRAL Rules and Model Law, and the World Trade Organization Dispute Settlement Understanding. These three dispute settlement mechanisms have been selected because they each represent a different type of dispute settlement: private commercial arbitration, private to state investor disputes, and state to state dispute settlement. Further, each dispute settlement mechanism is internationally accepted as legitimate, has rules to guide the settlement of disputes that are comparatively well developed but at the same time each takes a very different approach with respect to procedural due process. Countries can participate in each system but also private interests, either directly or indirectly, are regularly considered as well. Further, each mechanism relies on ad hoc decision-makers to adjudicate disputes. This is an important consideration because these ad hoc decision-makers are required to exercise their discretion in line with the requirements to protect due process. However, by nature of being ad hoc, these decision-makers may have limited experience in adjudicating international disputes, likely limited institutional knowledge and are not accustomed to working together. Therefore this ad hoc model is more vulnerable to abuse of discretion than are permanently standing tribunals.

The participation of countries in an international dispute settlement mechanism is of importance because public interest, general scrutiny, and the role of public policy are all heightened. While the private sector can freely enter into binding narrowly construed contracts, commonly addressed in ICSID and UNCITRAL, there is a higher standard for

the actions of governments and the mechanisms guiding the settlement of disputes between governments.

As explained above, while due process protection is at the foundation of all dispute settlement, be it national or international, in the international context while it is possible to distill three high-level requirements for the protection of due process, what is procedurally required to meet those due process requirements remains unclear. For example, while it is a due process requirement for a party to have an opportunity to be heard and present their case, in practice what is sufficient opportunity for a party to be heard? Are written submissions enough or should oral hearings be mandatory? Should there be more than one round of oral hearings? With respect to evidence production, to enable the decision-maker to make a decision, is there an obligation on the decision-maker to ensure that all evidence, even evidence contrary to the position of a particular party, be brought out in the open and considered? As a particular dispute settlement process progresses, to what degree of interaction between the parties and the decision-maker is reasonable? Should it be a closed system or are parties entitled to engage in a type of dialogue with the decision-maker throughout the adjudication process enabling them to witness the step-by-step analysis of the decision-maker, giving parties the opportunity to make strategic adjustments to their case before the final opinion is issued? What is the value of case law? Should past precedent guide future decisions? Is consistency valuable? What about appeal mechanisms? Should appellate processes consider substantive issues or is finality to the dispute more valuable and appeals should then be limited to situations of gross abuse?

B. ICSID

1. Subject matter

The ICSID is an autonomous international organization with close links to the World Bank and provides facilities for the arbitration of investment disputes between State parties to the International Convention on the Settlement of Investment Disputes and

nationals of other State parties to the ICSID Convention.[216] ICSID has its headquarters in Washington D.C. and more than 1,000 bilateral investment treaties provide for arbitration of disputes "between a State party to the [ICSID Convention] and nationals of the other State party" through the ICSID Convention.[217] Further, in several instances, national and municipal law may require arbitration of specific disputes and specify arbitration under the ICSID Convention as an appropriate option.[218]

ICSID arbitrations are of particular value because the dispute resolution takes place in a non-judicial non-national venue. ICSID arbitrations resolve international investment disputes stemming from State conduct. Further, the ICSID system reaches beyond dispute resolution in that ICSID tribunals are frequently interpreting and clarifying international investment law and other aspects of international law.

The jurisdiction of ICSID extents to (1) any legal dispute (2) arising directly out of an investment, (3) between a Contracting State (or any constituent subdivision or agency of a Contracting State that has been designated to the Centre by the State) and (4) a national of another Contracting State, (5) which the parties to the dispute consent in writing to submit to the Centre.[219]

The phrase "any legal dispute" refers to the fact that a claimant is required to present a supported legal claim on the basis of some legal right as an ICSID Tribunal cannot be convened to issue advisory opinions or fact-finding reports. That the dispute must "aris[e] directly from an investment" refers to subject matter permissible of the dispute. The term investment is not defined in the ICSID Convention and ICSID

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[216] Convention on the Settlement of Investment Disputes Between States and Nationals of other States, Mar. 18, 1965, ch. 1 § 1, arts. 1, 2, 17 U.S.T. 1270, 1273, 575 U.N.T.S. 159, 162 [hereinafter ICSID Convention].

[217] *Ibid.*

[218] See as an example, 22 U.S.C. § 2370a (2000) (this statute refuses US foreign aid to a country that has expropriated the property of a US citizen where the country has not returned the property or offered compensation or a domestic remedy or arbitration under the ICSID Convention or other agreeable international arbitration procedure).

[219] ICSID Convention, Art. 25.

tribunals have been left to assign meaning to the term on a case-by-case basis.[220] In case law the term has been understood to apply to a flexible concept; however, ICSID's subject matter jurisdiction is clearly limited. ICSID was not designed to address disputes arising from ordinary sales contracts.[221]

Disputes related to issues of jurisdiction but still arising out of an investment may be decided by the arbitration tribunal and appealed to an ad hoc committee created from the panel of arbitrators by the administrative council of the ICSID.[222]

ICSID remains very small, staffed by about twelve lawyers, with the general counsel of the World Bank serving as its de facto part-time Secretary-General.[223] In realistic terms, the responsibilities of the general counsel of the World Bank preclude the holder of that office from focusing exclusively on the responsibilities of the ICSID Secretary-General. These responsibilities include among others, the screening of requests to commence arbitral proceedings, the authority to appoint the presiding arbitrator in cases where the parties are not able to reach agreement as well as the publication of dispute outcomes.[224]

Consequently, ICSID has struggled in the past years to maintain an efficient and highly technical investor-state arbitration process.[225] Moreover, various critics have questioned whether ICSID actually "has the financial backing, governmental support and

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[220] Abby Cohen, "Arbitration before the International Centre for Settlement of Investment Disputes" (2002) 3 Bus. Law Int'l 367 at 369.

[221] See documents Concerning the Origin and the Formulation of the Convention, Vol. II, Pt. 1, 203-04 (1968).

[222] ICSID Convention, Arts. 41, 52.

[223] William Q. C. Rowley "ICSID at a Crossroads" (2006) 1 Global Arb. Rev. 1 at 2.

[224] *Ibid.*

[225] Andrew P. Tuck, "Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rules" (Fall 2007) 13 Law & Bus. Rev. Am. 885 at 886.

'ICSID arbitration focused' senior management required to fulfil its growing responsibilities."[226]

Although the ICSID Convention dictates the operations of ICSID, there are some aspects that are flexible, including financing mechanisms for ICSID. Currently the World Bank provides the budget for ICSID largely as a matter of efficiency.[227] While the exact funding mechanism provided by the Convention (requiring direct contributions from contracting state) may in practice be difficult to implement, there is some room for flexibility.[228] Furthermore, the only clear limit to the Secretariat's size, including administrative and legal staff, is the present budget of ICSID, which is rather small when compared to the budgets of the various components of the World Bank Group in general.

The dramatic increase in arbitration under ICSID's Rules and Regulations prompted ICSID to undertake a number of reforms to its rules in April 2006.[229] The ICSID Convention can be amended only if all contracting states ratify the amendment and therefore not unforeseen that to date the convention has yet to be amended.[230] In contrast, the ICSID Rules and Additional Facility and Arbitration Rules require only a decision of the administrative council.[231] Amendments were adopted in 1984, 1999, and 2002.[232]

The 2006 amendments were the result of 18 months' consultation with ICSID contracting states, the business community, civil society, arbitration experts and other arbitral institutions. The amendments are intended to increase efficiency and

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[226] Rowley, *supra* note 248 at 2.

[227] Samuels, David & Clasper, James, "ICSID Deserves a Full-Time Leader" (2006) 1 Global Arb. Rev. 12.

[228] ICSID Convention, Regulation 18.

[229] Parra, Antonio R., "The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes" (2007) 41 Int'l Law. 47.

[230] ICSID Convention, Art. 66.

[231] ICSID Convention, Art. 6.

[232] Parra, Antonio R., "The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes" (2007) 41 Int'l Law. 47.

transparency in proceedings while bolstering confidence of parties, current and potential, in the arbitral process.[233] The new amendments have enabled the rules to provide for preliminary procedures concerning provisional measures, expedited procedures for dismissal of unmeritorious claims, access of non-disputing parties to proceedings, additional disclosure requirements for arbitrators, and the rapid publication of awards.[234]

2. Potential parties

In order to file a case for ICSID dispute settlement, one party must be a Contracting State while the other party to the dispute is required to be a citizen of another Contracting State. Therefore, citizens of States that are not a ratifying party to the ICSID Convention do not have the option of submitting disputes to ICSID dispute settlement mechanism.

In the terms of natural persons, the requirement has been interpreted to mean that dual nationals (including the nationality of the host State) are not established to permit a national to bring a case against their own government.[235] Recognizing that it is common for host States to require foreign investors to manage their operations through companies that are locally incorporated, the Convention provides that it is possible for parties to agree that such a company in light of the foreign control be treated as a national of another Contracting State for purposes of the Convention.[236]

The ICSID Convention was not established for the purpose of adjudicating disputes between two State parties and the parties to any filed dispute must have previously agreed to submit their claim to the ICSID mechanism in writing.[237] Further, any agreement to submit to dispute settlement under the ICSID must be construed simply

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[233] Finizio, Stephen P., et. al., "Recent Developments in Investor-State Arbitration: Effective Use of Provisional Measures" (2007) European Arbitration Review (Global Arbitration Review, 2007), available at www.globalarbitrationreview.com/ear04icsid.cfm.

[234] ICSID 2006 Regulations and Rules, rules 39, 41, 37, 48, and 6.

[235] ICSID Convention, Art. 25.

[236] ICSID Convention, Art. 25(2)(b).

[237] Smutny, Abby Cohen "Arbitration before the International Centre for Settlement of Investment Disputes" (2002) 3 Bus. Law Int'l 367 at 370.

and in good faith. Importantly, a parties' consent in writing is not required to be expressed in a single document. Additionally, as soon as a party has issued consent it is not possible for either party to withdraw that consent unilaterally.[238]

Under most bilateral investment treaties (BITs) and Chapter 11 of the North American Free Trade Agreement (NAFTA), investors are allowed to choose from three arbitral mechanisms to which to submit their claims: 1) the ICSID Convention, where both the respondent state and the claimant investor's home state have ratified the Convention; 2) the UNCITRAL Arbitration Rules; or 3) ICSID's Additional Facility Rules (AF), where either, but not both, the claimant's home state or respondent state have ratified the Convention. In some situations, the International Chamber of Commerce might also be an option.[239] It is left up to the investor to choose.

Multiple methods exist to guide the formulation of an agreement to submit a dispute to ICSID arbitration which include: (1) including at the time of drafting the contract a clause indicating agreement to submit resulting disputes to ICSID arbitration; (2) the rarely employed method of concluding an agreement to submit an existing dispute to ICSID arbitration; (3) the more common means of accepting a State's "offer" contained in legislation or a treaty to submit to ICSID arbitration.

Given limitations in jurisdiction and other unique features of the ICSID system, it is important to note that the drafting of an acceptable ICSID arbitration clause has the potential to be complex and therefore an ICSID arbitration clause should not ideally be drafted from scratch without clear reference to the Centre's Model Clauses which can be found on the ICSID website.[240] A Contracting State party to the ICSID Convention, by its nature, does not constitute consent by that State to automatically submit a dispute to the ICSID dispute settlement mechanism. It is therefore required to obtain a State's

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[238] *Ibid.*

[239] Lugard, Maurits, "Panel on Implementation, Compliance, and Effectiveness" (1997) 91 Am. Soc'y Int'l L. Proc. 485, 489-90.

[240] http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ModelClausss, last accessed September 2014.

written consent. Today, the most common way to refer a dispute to ICSID arbitration if for a foreign investor to accept, by filing a request for arbitration, the offer by a State contained in an increasing number of bilateral and multilateral investment protection treaties to submit covered disputes to ICSID arbitration.[241]

In contractual relationships an express choice of law is always practical, particularly where parties agree to submit disputes to ICSID. In the absence of clear choice of law indications, the ICSID Convention includes default provisions on the issue of governing law which provide:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.[242]

The ICSID contains an Additional Facility which is intended for use by parties having long-term relationships of economic importance to the state party to the dispute and which involve the commitment of substantial resources on the part of either party.[243] It is important to note that the facility is not intended to service disputes which fall within the ICSID Convention or that are "ordinary commercial transaction" disputes.[244] In order for parties to a contractual agreement to effectively ensure the use of the ICSID Additional Facility, ICSID's Secretary-General is required to provide advanced approval

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[241] Smutny, Abby Cohen, "Arbitration before the International Centre for Settlement of Investment Disputes" (2002) 3 Bus. Law Int'l 367 at 369.

[242] ICSID Convention, Art. 42(1).

[243] ICSID Additional Facility Rules, Apr. 10, 2006.

[244] ICSID Additional Facility Rules, Arts. 2(b), 4(3).

of an agreement considering its use.[245] The facility has its own arbitration rules,[246] which closely mirror those of the ICSID.[247]

C. UNCITRAL

The UNCITRAL Arbitration Rules 1976 were designed in the 1970s for use as a procedural template in *ad hoc* commercial international arbitrations between private parties. The intention of the UNCITRAL Working Group on International Arbitration that produced the first set of UNCITRAL Rules was to provide a neutral framework for the flexible and efficient resolution of disputes between parties from different jurisdictions.

Since coming into force in 1976, the UNCITRAL Rules have gained widespread acceptance as the procedural benchmark for *ad hoc* international arbitration between private parties, evidence of which can be found in their regular incorporation in the dispute resolution clauses of cross-border contracts between private parties and even in negotiated investment treaties.

In order to produce the new UNCITRAL Rules, the working group worked in close cooperation with interested inter-governmental and non-governmental organizations over eight sessions, from September 2006 to February 2010. The new UNCITRAL Rules were pre-released on 12 July 2010. The text of the new UNCITRAL Rules reflects a range of recent changes in relevant law and the implementation of dispute settlement that is international and between private parties. The modern prevalence of arbitration as a method of resolving international disputes, both in contractual and non-contractual settings, has generated a number of rules and customs that were either absent or in their early stages of development when the 1976 UNCITRAL Rules were drafted. Many of these contemporary rules and practices are accounted for in the new

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[245] ICSID Additional Facility Rules, Art. 4.

[246] *Ibid.*

[247] The 1976 UNCITRAL Arbitration Rules also influenced the Additional Facility Rules.

UNCITRAL Rules, as are some of the pervasive problems of modern international arbitration.

1. Subject matter

UNCITRAL Rules were developed to focus on commercial transactions between private parties and therefore private commercial arbitration, and were not specifically developed for the resolution of disputes involving investor-state claims, or to consider claims for breach of customary or international law – other international dispute settlement mechanisms exist for those purposes.[248] From a procedural perspective, disputes in which a state is a party involve questions of law or public interest that are different from an arbitration between private commercial parties because there exists significantly more flexibility for private parties to specifically tailor their contracts while contracts involving state actors are bound to a certain degree by fundamental public policy that cannot be contracted out of. This basic difference between state and commercial arbitrations has direct implications for the conduct of the arbitration.[249] As an example, it may be necessary for specific procedural arrangements which could include separate phases on jurisdiction and admissibility before the submission of a statement of claim, amicus curiae briefs, and consolidation of claims and hearings.[250]

Numerous ad hoc arbitrations are conducted every year under the Model UNCITRAL Arbitration Rules,[251] which have become "the most widely accepted set of procedures for . . . ad hoc arbitration proceedings."[252] The drafters of the UNCITRAL Rules envisioned a potential conflict between different legal traditions in arbitration and attempted to soften possible effects by providing an option for dispute settlement that

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[248] Article 1(1) of the UNCITRAL Rules refers only to "dispute in relation to [a] contract."

[249] *Ibid.*

[250] Paulsson, Jan & Petrochilos, Georgios, *Revision of the UNCITRAL Arbitration Rules 10,* (2006), www.uncitral.org/pdf/english/news/arbrules-report.pdf.

[251] UNCITRAL Arb. R., at www.uncitral.org/eng-index.htm (adopted Dec. 15, 1976)

[252] James H. Carter, "The International Commercial Arbitration Explosion: More Rules, More Laws, More Books, So What?" (1994) 15 Mich. J. Int'l L. 785, 787.

aimed to be "culturally neutral"[253] and flexible enough to enable parties to the dispute from different legal backgrounds to feel relatively comfortable. To this end, the UNCITRAL Rules have in effect established a universally applicable procedural format for the arbitral tribunal while eliminating the extremes of both Continental European and Anglo- American legal traditions.[254]

According to the UNCITRAL Rules, much discretion is left to the individual arbitral tribunal which is able to "conduct the arbitration in such manner as it considers appropriate."[255] This wide discretion is limited only by the explicit agreement of the parties and the mandatory requirement that each party is treated with equality and awarded an opportunity to be heard.[256] Within its scope, the tribunal may order discovery of documents[257], consider written witness statements instead of oral presentations[258], appoint expert witnesses[259], and determine the manner in which witnesses may be examined.[260] These flexible provisions allow for the tailoring of the proceedings to the needs of a specific dispute.

The UNCITRAL Rules are used not only in ad hoc arbitration but they also assert influence over the procedures of a number of arbitration institutions. The UNCITRAL Rules are applied by such diverse arbitration institutions as the Inter-American Commercial Arbitration Commission; Regional Centers of the Asian-African Legal Consultative Commission in Kuala Lumpur, Cairo and Nigeria; the Australian Arbitration Commission; the Hong Kong International Arbitration Center; and the

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[253] Alan Scott Rau & Edward F. Sherman, "Tradition and Innovation in International Arbitration Procedure" (1995) 30 Tex. Int'l L.J. 89, 94.

[254] Thomas E. Carbonneau, National Law and the Judicialization of Arbitration: Manifest Destiny, Manifest Disregard, or Manifest Error, in International Arbitration in the 21st Century at 123.

[255] UNCITRAL Arb. R., art. 15.1.

[256] *Ibid.*

[257] *Ibid* at Art 24.3.

[258] *Ibid* at Art 25.5.

[259] *Ibid* at Art 27.1.

[260] *Ibid* at art 25.4.

Singapore International Arbitration Center, to name only a few. As a result, the UNCITRAL Rules have gained even wider acceptance as a model procedural code for conducting international arbitration and have contributed directly to the harmonization of international arbitration rules in general.[261]

The UNCITRAL Rules cover notice requirements, representation of the parties, evidence, hearings, challenges of arbitrators, the location of arbitration, statements of claims, language, defenses, pleas to the arbitrator's jurisdiction, provisional remedies, experts, rule waivers, applicable law, settlement, interpretation of award and costs, among others. Further, the UNCITRAL Rules provide that the parties shall determine an "appointing authority;" however, in the event that the parties are not able to reach agreement the Secretary-General of the Permanent Court of Arbitration at the Hague will make the appropriate choice.[262]

2. UNCITRAL Model Law

In addition to the 1976 Model Arbitration Rules, UNCITRAL has also developed the Model Law on International Commercial Arbitration.[263] The intent behind the creation of the UNCITRAL Model Law was to provide a foundation and a set of rules that would be acceptable throughout the world and which could be progressively adopted by national legislators in situations relevant to international commercial arbitration.[264] The application of the Model Law is restricted to commercial matters and to international cases; however, the text could be an appropriate model if a country wanted to extend the coverage of the Model Law to certain non-commercial disputes.[265]

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[261] Pieter Sanders, *supra* note 195 at 14.

[262] UNCITRAL Rules, Art. 6.

[263] UNCITRAL Model Law on International Commercial Arbitration, 24 I.L.M. 1302 (1985) [herinafter UNCITRAL Model Law].

[264] G.A. Res. 40/72, 40 GAOR Supp. No. 53, U.N. Doc A/40/53 (Dec. 11, 1985).

[265] Sekolec, Jernej, and Getty, Michael B., "Symposium: The UMA and the UNCITRAL Model Rules: An Emerging Consensus on Mediation and Conciliation" (2003) J. Disp. Resol. 175 at 186.

The drafters of the UNICTRAL Model Law focused on the expectations of parties as expressed in their arbitration which, prior to the drafting of the Model Law was oftentimes frustrated by mandatory provisions of applicable law applied by the tribunal to the arbitration proceedings.[266] Among the objectives of the Model Law were to devise a fairly complete and generally acceptable set of non-mandatory provisions, closely patterned after, but at times distinguished from, UNCITRAL Rules.

The UNCITRAL Model Law was created as a means to provide a potential solution to address the many disparities in national laws related to dispute settlement and is intended to complement the UNCITRAL Arbitration Rules. In national laws based on the UNCITRAL Model Law, the text tends to almost literally repeat a number of provisions in the New York Convention.[267] The growing number of adoptions and adaptations of the Model Law leads to increasing predictability and uniformity in the application of the New York Convention – the core document of the entire modern system of international commercial arbitration.

The UNCITRAL working group that drafted the Model Law considered providing for assistance in taking evidence during foreign proceedings. The vision was to create something similar to rules of discovery; however, the concept was abandoned, and assistance was limited to domestic proceedings, this was a facilitated agreement between those in favor of international assistance and those who considered any court assistance contrary to the private nature of arbitration.[268] The middle ground – those in favor of assistance for domestic but not foreign proceedings – held that "[a]n acceptable system of international court assistance could not be established unilaterally through a model law since the principle of reciprocity and bilaterally or multilaterally accepted

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[266] Slate II, William K., and Leiberman, Seth H., et al, "UNICTRAL: Its Workings in International Arbitration and a New Model Conciliation Law" (Fall 2004) 6 Cardozo J. Conflict Resol. 73 at 85.

[267] See Model Law articles 34 – 36.

[268] Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (London: Kluwer, 1989) 550 at 738.

procedural rules were essential conditions for the functioning of such a system."[269] Therefore directly addressing the need for assistance in conducting discovery during international arbitration proceedings under the UNCITRAL was left for another time.

The Model Law does "establish a universal procedural format for the arbitral trial"[270] while eliminating the extremes of both Continental and American legal traditions. It has even been noticed that by accepting the Model Law, a number of common law jurisdictions used it as a tool to "get away from their origins in this field."[271] It can be attributed to this reason that the Model Law does not contain strict rules regarding arbitration procedure, such as discovery, cross-examination, of documentary evidence. Instead, the Model Law provides for flexibility of proceedings which the parties or arbitrators can adjust to the needs of a particular dispute.

Article 1(1) states that the Model Law relates to international commercial arbitration but is subject to all agreements in force between states or a state. The geographic scope of the Model Law is determined by the place of arbitration under Article 1(2). The Model Law applies if the place of arbitration is a Model Law state. Model Law Article 4 is patterned after Article 30 of the UNCITRAL Rules as it discusses objections to jurisdiction and clarifies that if a parties' objection is not timely, it loses the right to claim that a provision of the Model Law or any clause of the arbitration agreement has not been complied with.

The Model Law defines an arbitration as international in Article 1(3) in that the parties to an arbitration agreement have, at the time of acceptance of the agreement, their business operations headquarters located in different States, or one of the following

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[269] *Ibid* at 737.

[270] Thomas E. Carbonneau, *National Law and the Judicialization of Arbitration: Manifest Destiny, Manifest Disregard, or Manifest Error* in International Arbitration in the 21st Century (London: Kluwer, 1994) at 123.

[271] Allan Philip, A Century of Internationalization of International Arbitration: An Overview, in the Internationalization of International Arbitration: The LCIA Centenary Conference (Oxford: Oxford University Press, 1994)49 at 29.

places is located beyond the borders of the State in which the parties maintain business operations: 1) the venue of the arbitration if agreed to and articulated in the terms of the binding arbitration agreement; or (2) any other venue where a significant portion of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (3) agreement has been clearly reached by the parties that the subject matter of the arbitration agreement relates to more than one country.

The requirement for the arbitration agreement is stated in Article 7(2), but the definition of writing is broadened and adapted to modern commercial practices. Article 8 provides for the court to refer the parties to arbitration, unless the agreement is found null and void, inoperative or incapable of being performed. Also, the Model Law allows arbitration to proceed concurrently as the issue is being considered by a court with national jurisdiction. Article 9 sets forth the grounds for court-ordered interim measures.

UNCITRAL Model Law Article 16 addresses the competence of the tribunal and states that the arbitral tribunal may rule on its own jurisdiction. Any claim contesting the jurisdiction of the arbitral tribunal must be raised no later than the submission of the statement of defense.[272] Article 16 continues to explain that a party is not blocked from initiating this type of plea by the fact that they have appointed, or participated in the appointment of an arbitrator. A claim that the Tribunal is mobbing beyond the scope of its authority must be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.[273]

With respect to ruling on claims that the arbitral tribunal has exceeded its scope, under UNCTIRAL Model Law the tribunal has the power to decide on such a plea either as a preliminary question or in an opinion addressing the substantive aspects of the case.[274] In the event that the tribunal rules as a preliminary question that it indeed has

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[272] UNCITRAL Model Law, Article 16(2).

[273] *Ibid.*

[274] *Ibid* at Article 16(3).

jurisdiction, within thirty days any party may request an external court to review the matter. During the time that this type of request is being considered, the arbitral tribunal has the authority to move forward with the arbitral proceedings and even issue an opinion addressing the merits of the case.

As to the role of national courts in interpreting the awards from international arbitration proceedings carried out under the UNCITRAL Model Laws, the Ontario Court of Appeal in Ontario Canada was asked to review UNCITRAL case number 509: *Dalimpex ltd. v. Janicki; Agros Trading Spolka Z.O.O.,* the Court of Appeal was asked to review whether the arbitral tribunal moved beyond the scope of its mandate as outlined in the arbitration clause of a sales contract. On the issue of the scope of the arbitration clause in question, the court strongly endorsed a limited role for courts in second guessing the determinations made by the Arbitral Tribunal. The court found that this was consistent with UNCITRAL Model Law Articles 8(1) and 16.

The Ontario Court of Appeal went on to explain that in cases where the existence and interpretation of the arbitration clause is not clear, "it may be preferable to leave any issue related to the existence or validity of the arbitration agreement" for the determination by the arbitral tribunal in the first instance under article 16 of the Model Law.[275] The court further stated that this deferential treatment of the Arbitral Tribunal is consistent with the initial decision of the parties to submit to international arbitration in the first place and it is not for domestic courts to intervene into this contractual relationship.

3. Potential Parties

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[275] UNCITRAL Case Number: 509, *Dalimpex ltd. v. Janicki; Agros Trading Spolka Z.O.O.*, May 30, 2003.

Under the UNCITRAL Rules and the Model Law, it is possible for submission to arbitration to be ad hoc for a particular dispute; however, most commonly arbitration is established in advance through a general submission to arbitration clause included during the contracting phase although the 2010 UNCITRAL Rules no longer require the existence of a contract between the parties. Further, nothing in the Rules limits their use to nationals of states that are member states of the United Nations.[276] 2010 UNCITRAL Arbitration Rules Article 1, Scope of Application, clarifies that the UNCITRAL Arbitration Rules apply where parties have agreed that disputes between them, contractual or not and in writing or not, shall be referred to UNICTRAL Arbitration and subject to modifications as agreed upon by the parties.

The very presence of a state as a party in a dispute heightens the degree of public interest because nationals and residents of that state have a vested interest in how the government acts during the arbitration and in the outcome of the arbitration. Further, the existence of this public interest has direct implications for the conduct of the arbitration: good governance and accountability in a democratic society require that government activities be transparent and open to public participation.[277] Further, many state arbitrations, particularly those arising under investment protection, involve direct allegations of government misconduct. Therefore it is reasonable and expected for there to be a high level of public interest to understand the allegations, facts and outcome of the case.

D. World Trade Organization

WTO dispute settlement provides a particularly interesting system for analysis because the WTO is a member organization and only governments can become WTO Member

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[276] See FAQ-UNCITRAL and Private Disputes/Litigation, www.uncitral.org/uncitral/en/uncitral texts/arbitration faq.html.

[277] Leon, Barry & Terry, John, "Special Considerations When a State is a Party to International Arbitration" (2006) 61 APR Disp. Resol. J. 69, 72-74.

States. [278] Moreover, it is the only system so far with a fully developed appeal mechanism. The primary goal of WTO dispute settlement is to ensure national compliance with multilateral trade rules and specifically the WTO covered agreements. While technically the dispute settlement mechanism is open only to a WTO Member State to bring a claim against another WTO Member State for the violation of a WTO covered agreement, in practice oftentimes the interests that are raised are those of the business community. In these situations, the private actors lobby their government to bring on their behalf before the WTO Dispute Settlement Body a claim that another Member State has violated a WTO covered agreement or series of agreements.

While private interests do tend to be considered in WTO dispute settlement, it is important to note that only those private interests that can reasonably be linked to the actions of a WTO Member State in violation of the WTO covered agreements are applicable in that only the WTO member State can choose to bring a claim. WTO dispute settlement would not be appropriate for private interests related to the violation of a contractual relationship between two parties for example. This is a very important point of distinction between WTO dispute settlement and dispute settlement within the ICSID and UNCITRAL systems. UNCITRAL and ICSID dispute settlement mechanisms derive their authority in an ad hoc way from the specific voluntary consent of parties to place their disputes before one of these mechanisms. Further, the ICSID and UNCITRAL do not have covered agreements and their dispute settlement systems focus solely on contract enforcement. The parties must have entered into a contractual arrangement and have decided to voluntarily submit to this method of dispute settlement through the inclusion of an arbitration clause in the contractual agreement that forms the basis for the international dispute.

In the WTO system, by virtue of being a member, Member States have already agreed to comply with the requirements of WTO covered agreements and have provided consent to submit themselves to WTO dispute settlement. From a contractual

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[278] This work builds upon a previously published article: James Headen Pfitzer & Sheila Sabune, "Burden-Shifting in WTO Dispute Settlement: The Prima Facia Doctrine, *Bridges*, 12 No.2, 18 (March 2008). www.ictsd.org.

perspective, all Members of the WTO, upon becoming a member, have entered into a contract to abide by the WTO covered agreements and that contract contains a clearly defined dispute settlement mechanism. Making the WTO system further unique is the fact that the procedural aspects of the WTO dispute settlement mechanism are articulated in very specific detail, leaving very limited flexibility for significant tailoring to the specificities of a particular dispute.

1. Subject matter

The power to settle international disputes with an authority that is binding distinguishes the WTO from most other intergovernmental institutions. The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) gives the WTO unprecedented power to resolve trade-related conflicts between Members and to assign penalties and compensation to parties involved. Unlike the jurisdiction of other international State-to-State dispute settlement mechanisms, such as the International Court of Justice, the WTO jurisdiction is: 1) compulsory; 2) exclusive; and 3) only contentious.[279] The jurisdiction of the WTO is compulsory because by virtue of membership in the WTO a Member has no choice but to accept the jurisdiction of the WTO dispute settlement system.[280] Regarding exclusivity, Article 23.1 of the DSU states:

> When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.[281]

Under this provision, a complaining member of the WTO is obliged to bring any dispute arising under the covered agreements to the WTO dispute settlement system. This

[279] Peter Van den Bossche, Werner Zdouc, et al, *The Law and Policy of the World Trade Organization, 3rd Edition* (Cambridge University Press 2013).
[280] DSU Art 6.1.
[281] DSU Art 23.1.

obligation was further clarified by the panel in *US – Section 301 Trade Act (2000)* when it ruled that Article 23.1 of the DSU:

> Imposes on all Members [a requirement] to 'have recourse to' the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations.[282]

Article 23.1 of the DSU ensures both the exclusivity of the WTO as related to other international dispute settlement systems and protects the multilateral system from unilateral conduct.[283] With respect to contentious WTO jurisdiction, unlike the International Court of Justice or the International Tribunal for the Law of the Sea, the WTO dispute settlement system has only contentious, and not advisory, jurisdiction. In *US – Wool Shirts and Blouses (1997),* the Appellate Body held:

> Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.[284]

Therefore, the WTO dispute settlement system can only be called upon to clarify WTO law in the context of an actual WTO Member dispute.[285]

As dispute settlement under the GATT, at least in the beginning, tended to be more negotiation-based, dispute resolution was characterized by the flexibility of procedures, the control of the dispute by the parties and the freedom to accept or reject

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[282] Panel Report, *US – Section 301 Trade Act (2000),* para. 7.43. See also Peter Van den Bossche, Werner Zdouc, et al, *The Law and Policy of the World Trade Organization, 3rd Edition* (Cambridge University Press 2013).
[283] See Panel Report, *EC – Commercial Vessels (2005),* para. 7.193.
[284] Appellate Body Report, *US – Wool Shorts and Blouses (1997)*, 340.
[285] Peter Van den Bossche, Werner Zdouc, et al, *The Law and Policy of the World Trade Organization, 3rd Edition* (Cambridge University Press 2013).

opinions and proposed settlements.[286] These diplomatic solutions were favored by those Members who valued flexibility and looked upon international trade disputes as inherently political. Conversely, the WTO dispute settlement system is adjudication-based and strives for legalistic, impartial and objective procedures which lead to heightened predictability and precise definitions of obligations and effective means of implementation.[287]

The creation of the WTO DSU was a substantial step in the gradual shift from a diplomatic and power-based approach to the settlement of international disputes to a more legalistic, law-based approach.[288] Dispute settlement procedures are central in the WTO's mechanisms designed to ensure the reduction of tariffs and nontariff barriers to trade as well as the elimination of discriminatory treatment in trade relations.

WTO dispute settlement is administered by the Dispute Settlement Body (DSB). Among its powers, the DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the WTO agreements. The dispute settlement system aims to resolve disputes by clarifying the rules of the multilateral trading system because the WTO cannot legislate or directly promulgate new rules or regulations without explicit Member consent.

The DSB has jurisdiction over any dispute arising out of the WTO Agreements. If a Member State determines that another Member State is not complying with its WTO obligations, for example, by imposing tariffs or other trade restrictions, the aggrieved member state can bring the dispute to the DSB. The disputing parties are given up to sixty days to resolve the dispute through consultation.[289] If the parties fail to reach a

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[286] *Ibid.*

[287] Jeffrey J. Schott, *The WTO After Seattle* (New York: Institute for International Economics, 2000) at 3-7.

[288]Michael K. Young, "Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats" (1995) 29 Int'l Law 389-399.

[289] DSU art. 4.7.

resolution by diplomatic means at the end of this period, the DSB appoints a Panel of three (or in some cases five) arbitrators to review the case and issue a report.[290] The report of the Panel is then adopted by the DSB, unless there is a consensus against adopting it.[291] Officially the job of the Panel is to give recommendations, but because of the high threshold for rejecting a Panel's report (unanimity of members, including the losing state), the reports are extremely difficult to overturn. However, the Panel's report can be appealed in the Appellate Body.

2. Potential parties

The WTO system is for members only in that only a WTO Member State can bring another WTO Member State before the WTO Dispute Settlement Body for claimed violations of the WTO Agreements. When the attempt to create an international trade organization in the late 1940s failed, the successfully-negotiated trade agreement, the GATT, was left without a well-defined institutional structure. Only a few clauses with regard to dispute settlement were contained in the original GATT, most of which centered around Article XXIII. The article states that a Member country may request consultations with another Member country should it consider that the other Member country's trade measure may lead to the nullification or impairment of its own expected benefit. Despite the rather skeletal framework of Article XXIII, dispute settlement in the early stages of the GATT worked rather well, partially due to its small and homogenous membership. Since its inception in 1947, the GATT evolved into a comprehensive framework of international trade laws as it exists today under the WTO. In 1995, the WTO was established following the completion of the Uruguay Round negotiations and the new dispute settlement procedures under the WTO altered several features of the previous GATT mechanism.

While the diplomatic method of the GATT tended to be easier and less expensive for developed countries than for other WTO members, the strengthening of the dispute

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[290] DSU art. 8.

[291] DSU art. 16.4.

settlement mechanism improved the situation of developing countries by better insulating them from the pressures of power politics.[292] Developing countries commonly find themselves at a disadvantage during political bargaining because they often rely upon developed countries for aid, military assistance or technical transfers and are therefore afraid to "bite the hand that feeds them". A developing country also has a smaller impact on a developed country's economy because bilateral trade is more likely to be a greater percentage of the developing country's gross domestic product than that of the developed country's.[293] The development of a neutral dispute settlement system under the WTO has helped to level the playing field by limiting the scope of debate to the legal merits of the specific case and therefore offers increased judicial protection to a developing or least developed country litigant against more powerful developed country adversaries.[294]

E. Due process in the ICSID, UNCITRAL and the WTO

While in general in their respective rules and case law the ICSID and UNCITRAL systems do not spend much time addressing procedural due process requirements but rather leave much to the discretion of the parties or the decision-makers with little guidance, in the WTO context due process has been the subject of significant consideration in both the Covered Agreements and respective case law which demonstrates the complexity often encountered when the principles of due process are applied to international settings.

Application of the principles of due process falls within the jurisdiction of a WTO panel unless such principles are already incorporated in provisions of the DSU or other Covered Agreements. The DSU provides significant guidance to WTO Tribunals as to how dispute settlement proceedings should be conducted - therefore ensuring that the

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[292] *Ibid.*

[293] Constantine Michalopoulos, "Developing Countries in the WTO" (2001) 22 The World Economy 1, 34, 117-143.

[294] *Ibid.*

case a Member is required to answer is clearly presented,[295] that parties have sufficient opportunity to present their positions,[296] and that WTO Tribunals appropriately address the arguments posed by Members.[297] Of importance to note is that some constituent rules of due process are not explicitly covered in the DSU. Examples include the ability of a party to secure non-governmental representation or to raise a defense after it has made its first submission. Careful analysis by the panel of the application of due process is necessary to come to appropriate conclusions that ensure the protection of the rights of the parties.

The application of due process depends largely on the forum in which it is applied. In the international setting, there is no universally accepted approach to due process protection and in the WTO context it merely guides the way in which the panel exercises its functions in coming to factual and legal determinations under the Covered Agreements.[298] Further, as case law of the Appellate Body has demonstrated, the DSU is predicated on WTO Tribunals acting in accordance with due process. More broadly

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[295] DSU arts. 4.4, 6.2 (requiring measures at issue to be specified in the request for consultations and panel request respectively); DSU. arts. 12.6, 15.1 (requirements for submissions to be made to and received by panels). The Appellate Body has held that, pursuant to Article 6.2 of the DSU, a panel request must specifically identify the relevant WTO provisions and, in some cases, the relevant sub-provisions, and clearly specify the measures at issue. Appellate Body Report, Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products, P 124, WT/DS98/AB/R (Dec. 14, 1999); Appellate Body Report, India - Patents, supra note 36, PP 90-93. This "fulfils an important due process objective - [the panel request] gives 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." Appellate Body Report, Brazil - Measures Affecting Desiccated Coconut, at 22, WT/DS22/AB/R (Feb. 21, 1997).

[296] DSU art. 12.1, app. 3 (panel to conduct two meetings with the parties unless otherwise agreed and parties to provide written submissions); DSU art. 15 (panels submit to parties the whole of their draft reports for interim review); Working Procedures for Appellate Review, Jan. 4, 2005, WT/AB/WP5h,§§21, 22, 27, available at http://www.wto.org/english/tratop_e/dispu_e/ab_e.htm (last visited Mar. 13, 2010) (allowing parties to make submissions and attend hearings on appeals).

[297] DSU art. 7.2 (requiring panels to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute"); DSU art. 12.7 (requiring panels to "set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes"); DSU art. 17.12 (requiring the Appellate Body to "address each of the issues raised ... during the appellate proceeding").

[298] Peter Van den Bossche, Werner Zdouc, et al, *The Law and Policy of the World Trade Organization, 3rd Edition* (Cambridge University Press 2013).

speaking, international tribunals may be required to exercise their inherent jurisdiction to apply general principles of law that protect fundamental procedural norms consistent with due process protection.[299] For example, Carlston states with respect to international tribunals:

> Express provisions are usually made in rules of procedure with a view to safeguarding fundamental procedural rights (due process) ... While observing the provisions of the instrument - which is the basic law for the tribunal - the tribunal is also expected to conform its operations to the basic procedural norms. Accordingly, the fundamental procedural norms, whether or not expressly provided for, comprise (1) "certain fundamental rules of procedure" (2) which are "inherent in the judicial process," and (3) generally recognized in all procedure.

Under this line of reasoning, to maintain essential legitimacy, all international dispute settlement mechanisms have the inherent power and obligation to observe the requirements of due process even without specific provisions empowering or requiring them to do so.[300] For the purpose of the comparative analysis between the WTO, ICSID and UNCITRAL systems, it will then be taken as a given that they each have the obligation to respect due process protection and therefore the three requirements that compose due process protection as established above. In the context of the WTO additional analysis of the exactly how due process fits into the WTO DSU is included in the rather expansive jurisprudence on the subject and provides interesting background particularly as comparable articulation is not present in the case law of either the UNCITRAL or ICSID systems.

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[299] Cheng, *supra* note 80, at 291. See also *Durward v. Sandifer*, Evidence Before International Tribunals 44 (revised ed. 1975) ("It might be going too far to say that a tribunal is bound, in the absence of provisions in the arbitral agreement, to follow these rules."). Although commentators call these rules "procedural," this does not detract from the proposition that they have no autonomous substantive content.

[300] Cf. Panel Report, European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries, P 7.8, WT/DS246/R (Dec. 1, 2003) [hereinafter Panel Report, E.C. - Tariff Preferences] (relying on certain DSU provisions to explain this "inherent authority").

F. Article 11 of the WTO DSU and due process

Due to the robustness of relevant case law in this field, the WTO will continue to be referred to in order to exemplify one approach to the protection of due process in international dispute settlement. In line with their judicial function, WTO panels have the obligation to conduct an "objective assessment" of the dispute they are considering. Article 11 of the DSU provides in relevant part 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.[301]

While in some cases an application of this provision in the due process context appears to be reasonable, at times there seems to be a reluctance of WTO panels to embrace their inherent jurisdiction which has led to what can be described as some inappropriate interpretations of the "objective assessment" requirement.

G. Wilful disregard by WTO panels to conduct an objective assessment results in due process violation

The application of the “objective assessment” requirement under Article 11 may be interpreted so as to reasonably yield the same result of the proper application of principles of due process because fundamentally both are seeking to protect the basic rights of the parties, consistent with the three requirements of due process protection. A particular example is the appeal in *E.C. - Hormones*, the European Communities made the claim that the initial panel "disregarded or distorted" evidence and therefore was

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[301] DSU art. 11.

unable to effectively conduct an objective assessment as required by Article 11.[302] The E.C. argued that the panel failed to take into consideration opinions of identified experts, mischaracterized and even misquoted some statements.[303] The Appellate Body analyzed that the Article 11 requirement that panels make an objective assessment of the facts presented includes "an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence."[304] Any panel deliberately disregarding or willfully distorting or misrepresenting evidence fails to make an objective assessment, resulting in the denial of "fundamental fairness, ... due process of law or natural justice." [305] With respect to the current case, the Appellate Body determined that while the panel may have misinterpreted evidence, the presence of this misinterpretation alone does not rise to the level of arbitrarily ignoring or manifestly distorting evidence in violation of Article 11.[306]

The language from the Appellate Body in this case is important because it clearly links the requirement that a panel objectively consider the facts and evidence presented and the deliberate failure of a panel to do so with the violation of due process. However, at this point the Appellate Body seems to be considering only willful or deliberate behavior of the panel. What about a situation where the panel unknowingly makes a mistake?

H. Due process protection is implicit in an objective assessment

There is some debate as to how far beyond an objective assessment under Article 11 the panel analysis should proceed when considering applications of the due process concept and whether some panels or even the Appellate Body have exceeded the authority of the DSU. In the Appellate Body case *Chile - Price Band System*, Chile presented a case that

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[302] Appellate Body Report, E.C. - Measures Concerning Meat and Meat Products (Hormones), P 152 n.138, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter Appellate Body Report, E.C. - Hormones], P 131

[303] *Ibid.*

[304] *Ibid.*

[305] *Ibid.*

[306] *Ibid* at para 253(e).

the panel violated due process by holding that a measure violated a provision of the Covered Agreements not mentioned in Argentina's Request for Panel Establishment.[307] The Appellate Body presented and clarified that the relationship between due process and Article 11 is as follows:

> In making "an objective assessment of the matter before it" [as required by Article 11], 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.[308]

In this case, the Appellate Body seems to be putting the complete content of the principle of due process into Article 11, however at the same time into the requirement of an "objective assessment," or, at the least, into the text of the Covered Agreements. The reference to due process as an "obligation inherent in the WTO dispute settlement system," however, suggests, contrary to the Appellate Body's explicit reasoning, that panels must accord due process and that the Appellate Body may review the panel's conduct in this regard independently of Article 11 and its requirement of "objective assessment." Following this line of reasoning, the Appellate Body and panels may directly apply the principles of due process because the WTO dispute settlement system requires it both for legitimacy and to ensure that judicial process is maintained appropriately.

The Appellate Body's view that due process is implicit in Article 11 seems to have been confirmed in the *Canada - Hormones Suspension* decision. In this case the Appellate Body was considering "the European Communities' claims that the panel failed to respect the principle of due process and, consequently, also failed to make an objective

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[307] Appellate Body Report, Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products, PP 176-77, WT/DS207/AB/R (Sept. 23, 2002) [hereinafter Appellate Body Report, Chile - Price Band System].

[308] *Ibid* at para 176.

assessment of the matter under Article 11 of the DSU."[309] The Appellate Body stated that it "has found that due process is required by Article 11 of the DSU"[310] and quoted its statement to this effect in the *U.S. – Gambling* case as follows: "as part of their duties, under Article 11 of the DSU, to "make an objective assessment of the matter' before them, panels must ensure that the due process rights of parties to a dispute are respected."[311]

In the earlier *Canada - Hormones Suspension* case, the Appellate Body provided the following explanation regarding the application of due process principles:

> The Appellate Body has previously found that the obligation to afford due process is "inherent in the WTO dispute settlement system"[312] and it has described due process requirements as "fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings".[313] In our view, the protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU.[314] Due process protection guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute.[315]

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[309]Appellate Body Report, Canada - Continued Suspension of Obligations in the E.C. - Hormones Dispute, P 415, WT/DS321/AB/R (Oct. 16, 2008) [hereinafter Appellate Body Report, Canada - Hormones Suspension] (emphasis added). This is despite the E.C.'s own submissions referring to due process directly, para 425 (where the United States also seems to treat due process as a separate norm from Article 11 of the DSU).

[310] *Ibid* at para 434.

[311] Appellate Body Report, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, para 273, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Appellate Body Report, U.S. - Gambling].

[312] Appellate Body Report, Canada - Hormones Suspension, *supra* note 311, para 433 (quoting Appellate Body Report, Chile - Price Band System, *supra* note 309, para 176); see also Appellate Body Report, Mexico - Corn Syrup (21.5 - U.S.), *supra* note 324, para 107.

[313] Appellate Body Report, Canada - Hormones Suspension, *supra* note 311, para 433 (quoting Appellate Body Report, Thailand - H-Beams, *supra* note 313, para 88).

[314] Appellate Body Report, Canada - Hormones Suspension, *supra* note 311, para 433.

[315] *Ibid.*

Further, in agreeing in *Canada - Hormones Suspension* with the E.C. that the appointment of an expert who was not impartial would breach due process, the Appellate Body referred to "due process protection" [316] and "due process rights,"[317] instead of the need for "objectivity." The Appellate Body held that the manner in which the panel had used the evidence of two experts was "not compatible with the due process obligations that are inherent in the WTO dispute settlement system."[318] The Appellate Body determined that "the Panel infringed [on] the European Communities' due process rights."[319] In *U.S. – Gambling*, the Appellate Body provided more detail with respect to due process and Article 11 when it clarified that the principle of due process "obliges a responding party to articulate its defense promptly and clearly" and may oblige a panel either to refuse to consider a defense to which "the complaining party had no meaningful opportunity to respond"[320] or to adjust its timetables to allow additional time to respond.[321]

In some cases, it seems that due process requirements have the potential to preclude the exercise of judicial economy. For example, in the appeal in *E.C. - Sugar*, the Appellate Body referred to the requirement in Article 11 of the DSU that panels "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."[322] Here, the Appellate Body found that the panel failed to comply with this requirement and therefore exercised inappropriate judicial economy because in not ruling on certain claims under Article 3 of the Agreement on Subsidies and Countervailing Measures (ASCM), the panel eliminated

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[316] *Ibid* at para 436.

[317] *Ibid* at paras 480-81.

[318] *Ibid* at para469 (emphasis added). The Appellate Body was of this view because the experts concerned had been involved in a prior comparator risk assessment, which was said to compromise their objectivity. *Ibid.*

[319] *Ibid* at para 481.

[320] Appellate Body Report, U.S. - Gambling, *supra* note 313, paras 272-73.

[321] *Ibid* at para 273.

[322] Appellate Body Report, European Communities - Export Subsidies on Sugar, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (Apr. 28, 2005) [hereinafter Appellate Body Report, E.C. - Sugar], paras 330-31

the potential for the complainants to obtain the special remedy under Article 4.7 of the ASCM available for successful claims under Article 3.[323]

PART III

ANALYSIS OF THE ICSID, UNCTRAL AND WTO SYSTEMS' VARYING APPROACHES TO DUE PROCESS PROTECTION

In an attempt to further develop what in practice is required to ensure the protection of due process in international dispute settlement, the below comparative analysis will examine the three dispute settlement mechanisms in light of the three requirements for due process protection as established above as a framework. The three requirements for the protection of due process are as follows:

1. The tribunal must be independent and impartial,
2. The parties must be given adequate notice of the proceedings, and
3. The parties must be given adequate opportunity to be heard and present their case

The analysis will attempt to identify and compare how each mechanism's dispute settlement rules procedurally address the requirements of due process, consider allowances for procedural flexibility, identify areas for improvement and then propose systematic alterations through the development of international due process protecting principles.

Given that there are fundamental differences between each of the three mechanisms selected for comparison, a "one size fits all" solution will not be possible and the need to develop policy options becomes evident. The proposed policy options for the protection of due process will seek to take lessons or effective practices from one of the considered mechanisms and suggest their application to another mechanism. The policy options for the protection of due process are intended to rise above an individual

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[323] *Ibid* at para 335.

dispute settlement mechanism and provide guidance from a broader perspective, presenting a bundle of basic concepts applicable to all forms of international dispute settlement.

Chapter 4 The independent and impartial tribunal

Questions about the professional qualifications of panel members and time, effort and control that can be expected from panelists serving in ad hoc, part-time capacity often arise. While in WTO dispute settlement panel members are usually well-versed in relevant policy and procedures, and are generally persons who have reputations for good judgment among their fellow peers, many lack the legal training or experience to render professionally competent judgments on complex legal issues. In ICSID dispute settlement, panelists are considered to be in their private capacity, typically international lawyers that are practicing or international law professors. Difficulties arise because many government lawyers appointed as panelists may be handling international arbitration for the first time and have limited international litigation experience. Developing country parties may not have the resources to hire leading North American and European law firms with substantial experience and therefore find themselves at a disadvantage to their developed country counterparts. This concern is relevant also to WTO and UNCITRAL dispute settlement.

The ICSID Convention requires arbitrators to be persons "who may be relied upon to exercise independent judgment" and permits challenge of an award for "departure from a fundamental rule of procedure." Although litigants under the ICSID Convention might decide to waive impartiality as a matter of contract, in so doing they may well remove their dispute from the legal framework applicable to arbitration in general.

While the WTO DSU does not structurally guarantee the independence of the potential panelists, in practice independence and conflict of interest is something closely considered by the parties and the Secretariat. The ICSID Convention Article 14 requires a certification of independence be made by the arbitrator at the beginning of the proceedings. In the UNCITRAL system, a party may challenge an arbitrator only if circumstances exist that give rise to concerns that are reasonable or if that arbitrator does not have specific qualifications which the parties had agreed to.

In the situation of WTO dispute resolution, much legitimacy comes from the existence of the Appellate Body and the fact that Appellate Body members must be "individuals with recognized standing in the field of law and international trade, not affiliated with any government." In the WTO appellate process, however, the WTO DSU does not address the issue of an Appellate Body member being a national of one of the disputing parties and commonly appointments tend to be political with the US, EU and China having what could practically be considered permanent representation.[324] While this requirement does exist at the WTO panel level, it may not have been seen as necessary at the Appellate Body level due to the fact that the Appellate Body considers only issues of law and how it was applied to the current case. Issues of fact are left to the panel to address.

Arbitrator conflicts of interest typically can be captured in one of two categories: lack of independence and lack of impartiality. In traditional usage, independence refers to the absence of improper connections, while impartiality addresses matters related to prejudgment.[325] The common assumption is that an arbitrator in international dispute settlement must possess both impartiality and independence.

Lack of independence derives from what might be considered problematic relationships between the arbitrator and one party or its legal representation. Often these

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[324] Loretta Malintoppi, "Independence Impartiality, and Duty of Disclosure of Arbitrators" in Peter Muchlinski et al. *Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 789.

[325] *Ibid.*

result from financial dealings including business transactions and various investments, ties sentimental in nature (including friendships and family), or links of group identification (for example, shared nationality). Potential arbitrators should decline appointment should they have doubts regarding their ability to act impartially or independently, or if facts exist such as to raise reasonable concerns on either side.

Even if no special relationship or financial link exists with either side, a second category of concerns arise if an arbitrator appears to have prejudiced some matter. An arbitrator might be technically independent but may still possess internal opinions which prejudice his ability to act impartiality which may include prejudice, bigotry, and discrimination among others.

More subtle examples of prejudgement include the issuance of a procedural order that presumes contested facts on which evidence has not yet been heard.[326] Another example could be a situation where an arbitrator might have written an article or delivered a speech taking a firm position on otherwise open questions that remain central and controversial in the dispute.[327]

A. Is it possible for parties to wave arbitrator integrity?

In the context of the ICSID and UNCITRAL systems, a question of particular importance is whether independence or impartiality may be waived by fully informed litigants. As submission to WTO dispute settlement is not contractually based in the same sense as for the ICSID and UNCITRAL systems, this is not an issue in WTO dispute settlement. In some instances the answer appears to be "yes" with some conditions at least with respect to independence. The International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) contain a "Red List" of prohibited relationships that bifurcates into waivable and non-waivable relationships. The former include the situation where an arbitrator would act for a litigant in the case, or is a

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[326] William W. Park, "Arbitrator Integrity: The Transient and the Permanent" (2009) 46 San Diego L. Rev. 629 at 636.

[327] *Ibid.*

member of the same firm as counsel to one side. The latter contains an arbitrator's service as director in a corporation that is party to the case or as advisor to his or her appointing party.[328] Independence therefore seems to lend itself to waiver up to the point where the litigant actually becomes the judge of his own case.

Prejudgment is not the same thing as independence. Although similar, prejudgment would act to impede the corner stone of the arbitral process, that being the presumption of a quasi-judicial function of deciding legal claims after weighing evidence and argument.[329] The lack of independence may create an imperfect arbitration; however, the presence of prejudgment renders the process a sham formality at an unjustifiable social cost.

B. Arbitrator bias

Parties choose arbitrators with "shared nationality or legal, political, or economic outlook."[330] Depending upon a particular arbitrator's view of his role in relation to the party selecting him, he may well believe that his function is not limited to that of independent arbiter of law and fact, but also that of advocate. Under arbitral rules, arbitrators are to be disinterested and independent of the parties, there are no guidelines on what this actually means in practice.[331] Party-appointed arbitrators may well have been interviewed prior to their selection,[332] or may have had a personal or professional relationship with the appointing disputant, and therefore will hold some degree of gratitude for that side for the prestige and financial compensation that will accrue from sitting on an international arbitration panel.

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[328] IBA Guidelines in Conflicts of Interest in International Arbitration Gen. Standard 1, 2 (2004), available at www.ibanet.org/document/default.aspx?.

[329] Park, *supra* note 346 at 640.

[330] Rene Lettow Lerner, "International Pressure to Harmonize: the US Civil Justice System in an Era of Global Trade" (2001) 4 B.Y.U. L. Rev. 229 at 283.

[331] Carlos, G. Garcia, "All The Other Dirty Little Secrets: Investment Treaties, Latin America, And the Necessary Evil of Investor-State Arbitration" (June 2004) 16 Fla. J. Int'l L. 301 at 353.

[332] Andres F. Lowenfield, "The Party-Appointed Arbitrator in International Controversies: Some Reflections" (1995) 30 Tex. Int'l L.J. 59.

The notion of adjudicator as advocate for one side is unseemly, particularly in international proceedings involving a state party. Once the pleadings are closed, and the matter proceeds to hearing, investor-state arbitration takes on the essence of common law litigation, including adversariness. In the WTO context, panels are composed of three persons unless the parties to the dispute agree, within ten days from the establishment of the panel, to a panel composed of five panellists. The Secretariat proposes nominations for the panel to the parties to the dispute[333] and potential candidates must meet certain requirements in terms of expertise and independence.

C. Impartiality of the arbitral tribunal or panel members

Impartial rulings made by independent tribunal members help ensure that no political or special interest groups prejudice rulings in favor of one party.[334] The WTO DSU sets forth detailed provisions regarding the independence of the tribunals' composition and deliberations.[335] The DSU thereby specifically ensures that the proceedings of the WTO dispute settlement system are free from any undue influence of interested parties or WTO political divisions.[336]

Dispute settlement in the WTO, however, is not a process that is entrusted in totality to the adjudicators. It would be wrong to qualify it as a purely judicial process because while the actual procedures are judicial, all results must be adopted by the DSB making the WTO rather more a quasi-judicial mechanism or hybrid system.[337] WTO panels are obliged to follow the Working Procedures set out in Appendix 3 of the DSU.

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[333] DSU Art 8.6.

[334] Ruth Mackenzie & Philippe Sands, "International Courts and Tribunals and the Independence of the Inter-national Judge" (2003) 44 HARV. INT'L L.J. 271, 276-84. See also Eric A. Posner & John C. Yoo, "Judicial Inde-pendence in International Tribunals" (2005) 93 CALIF. L. REV. 1, 29-54 (statistically analyzing the practices of international tribunals, including the WTO, and rejecting the correlation between the independence and the effectiveness of the tribunals).

[335] WTO Dispute Settlement, Working Procedures for Appellate Review, art. 6.2, WT/AB/WP/5

[336] DSU art. 6.1

[337] Steve Charnovitz, "Judicial Independence in the World Trade Organization" in Laurence Boisson de Chazournes et al, *International Organizations and International Dispute Settlement: Trends and Prospects* (Oxford: Oxford University Press, 2002) 219.

They are however entitled to exercise their discretion to make adjustments to the Working Procedures as they deem fit after consulting the parties to the dispute. It is important that panel procedures provide sufficient flexibility so as to ensure high-quality panel reports, while not unnecessarily delaying the panel process. As a general rule, the panel process should not exceed six months (in cases of urgency three months). In no case should the panel process exceed nine months.[338] In practice, however, panel proceedings often times take longer. However, compared with other quasi-judicial procedures, WTO dispute settlement proceeds relatively fast.

WTO panellists may be selected from an indicative list[339] of governmental and non-governmental individuals nominated by WTO members, although other names can be considered as well. The WTO Secretariat maintains this list and periodically updates it according to any modifications or additions submitted by WTO members. When the WTO Secretariat proposes qualified individual nominations to be panellists, the parties are able to screen the views and experience of proposed panellists; however, parties must not oppose such nominations except for compelling reasons. This is clearly articulated in Article 8.10 of the DSU "the Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons." In practice, many Members make extensive use of this clause and oppose nominations frequently and in such situations there is no review regarding whether the reasons given are truly compelling. Rather, the Secretariat simply proposes alternate names.

As panels have to be established for a particular case, their members are selected ad hoc. The DSU tries to guarantee their independence, while they are performing their duties. However, the DSU contains absolutely no rules that guarantee structurally this independence. If one considers that being appointed as a panellist is an honour and a personal distinction, it is therefore not surprising that a panel member might be interested

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[338] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 1, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments - Results of the Uruguay Rounds, vol. 31, 33 I.L.M. 1226 (1994) [hereinafter DSU]. Art. 12.8.

[339] See current WTO indicative list of governmental and non-governmental panellists as of 27 September 2016, WT/DSB/44/Rev.35.

in being reappointed and serving again as a panellist. It is not impossible that a panellist could be influenced by this wish while serving on a given panel which may therefore affect his decision making process and potentially the entire panel process for that case.

The independence of panels would be strengthened if they were assisted by staff working exclusively for them. The reality is different: Panels are assisted by officials of the WTO Secretariat.[340] These officials (and the administrative units to which they belong) are not exclusively at the service of panels, but perform a variety of other duties. Panellists depend on the services rendered by these officials to varying degrees, due to their different professional training, experience, commitments and the specific subject matter of the case at hand. It is reasonable to assume that the influence of these WTO Secretariat officials on the work of individual panels has the potential to be considerable.[341] If panels could rely on the assistance of a group of officials who would work exclusively for them and who were functionally detached from the rest of the WTO Secretariat the above concerns regarding inappropriate influence over the panel process would be removed. The WTO Appellate Body's Secretariat provides a useful example of this total separation.

Impartiality of ICSID arbitrators is of particular importance because of the flexible nature of dispute settlement under the ICSID and in light of the number of procedural aspects left to the interpretation of the individual arbitration panel. The application of such aspects oftentimes has a direct link to the outcome of the case. ICSID dispute settlement presumes a minimum level of impartiality in the arbitrator's respect for the parties' to be heard.[342] The ICSID Convention requires arbitrators to be persons

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[340] DSU art. 27.1.

[341] Merit Janow, The Role of the WTO Secretariat in Dispute Settlement, Paper Presented at the 2002 World Trade Forum: Dispute Settlement and Decision-Making in the Multilateral Trading System: Current Operation and Options for Reform (Aug. 16-17, 2002).

[342] Convention Article V(1)(b) provides for non-recognition when the losing party was "unable to present his case." New York Convention, art. V(1)(b).

"who may be relied upon to exercise independent judgment" and permits challenge of an award for "departure from a fundamental rule of procedure."[343]

In ICSID investor-state arbitration, Article 14 of the ICSID Convention is of particular importance when considering issues related to impartiality. Article 14 speaks of the individual's ability to "exercise independent judgment."[344] This requirement is supplemented by a certification of independence made by the arbitrator at the beginning of the proceedings.[345]

As highlighted above the fact that while the rules of both the ICSID and the WTO dispute settlement systems do have impartiality requirements, structurally there is no mechanism to ensure that the decision-makers are actually impartial and capable of appropriately executing their duties. To a certain degree this situation creates some systematic vulnerability for the potential violation of the first requirement of the protection of due process. While attempts to address this vulnerability through decision-maker disclosure and disqualification have been developed, issues surrounding the effect of potential gratitude a selected decision-maker may feel for being selected and potential impacts of this gratitude remain very real and difficult to quantify.

D. Arbitrator disclosure and disqualification

The expansion of disclosure requirements for potential arbitrators has increased in importance with the large number of new cases being registered by ICSID and the increased scope for potential conflicts of interest. ICISD Convention Articles 14(1) and 40(2) require all ICSID arbitrators to be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon

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[343] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, arts. 14(1), 52(1)(d), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

[344] ICSID Convention, Art. 14(1).

[345] ICSID Arbitration Rule 6.

to exercise independent judgement. Rule 6 functions to better ensure arbitrator impartiality and independence.[346]

ICSID Rule 6 requires the potential arbitrator to disclose, in addition to past or present relationships with the parties, any circumstances likely to give rise to justifiable doubts as to the arbitrator's reliability for independent judgment.[347] Under a former version of rule 6, it was only required for the arbitrator to disclose any past or present professional, business, and other relationships (if any) with either party.[348] Moreover, the current Rule 6 extends the period of time over which disclosures must be made by requiring that the obligation continue throughout the entire proceeding rather than only being in effect at its initiation.

Further, ICSID Arbitration Rule 6(2) requires each arbitrator, prior or during the Tribunal's first session, to sign a declaration affirming that the individual will "judge fairly as between the parties, according to the applicable law" and attach a statement of past and present professional, business, and other relationships with the parties as well as any other circumstances that might cause the arbitrator's reliability for independent judgement to be questioned by a party.[349] In signing the declaration, the arbitrator assumes a continuing obligation to promptly notify ICSID of any such relationship that subsequently arises during the proceedings.[350]

A party to the ICSID arbitration may propose disqualification of an arbitrator on account of any fact indicating a "manifest" inability to meet that standard. Article 57 of the ICSID Convention provides that any party may request to a Tribunal or Commission the "disqualification of any of its members on account of any fact indicating a manifest

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[346] ICSID Working Paper at 12.

[347] ICSID Convention, Arbitration Rules, rule 6(2).

[348] ICSID Discussion Paper at 12-13.

[349] ICSID Arbitration Rule 6(2).

[350] *Ibid.* Available at http://icsid.worldbank.org/ICSID.

lack of the qualities required by paragraph (1) of Article 14."[351] Moreover, a party to an arbitration proceeding may request that an arbitrator be disqualified on the ground that he was "ineligible for appointment to the Tribunal under Section 2 of Chapter IV.[352]

Should a dissatisfied party contest a single arbitrator's fitness on an ICSID proceeding, the remaining arbitrators typically determine whether the individual lacks the capacity to exercise independent judgment.[353] According to Article 58, the challenged arbitrator would first be given the opportunity to "furnish explanations."[354] In the event that the challenge relates to a majority of the arbitral tribunal, or if the remaining two members are divided equally, the disqualification decision will be left to the Chairman of the ICSID Administrative Council.[355] This post is filled automatically by the President of the World Bank.[356] Any review of the resulting award would be made by an ICSID-appointed panel rather than national judges who might conduct their own review of independence and impartiality.[357]

In the 2010 UNCITRAL Arbitration Rules, Article 11, imposes a continuous duty of disclosure, under which arbitrators are required to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence as and when they arise during the proceedings. Articles 12 and 13 address challenging arbitrators if circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality or independence.

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[351] ICSID Convention, Art. 57.

[352] *Ibid.*

[353] *Ibid.*

[354] ICSID Convention, Art. 58.

[355] *Ibid.*

[356] ICSID Convention, Art. 5.

[357] ICSID Convention, Art. 52.

Article 10 of the UNCITRAL Model Law explains that the parties are free to determine the number of arbitrators; however, it further clarifies that in the absence of such an agreement, the number of arbitrators shall be three. With respect to the appointment of arbitrators, Article 11 states that no person shall be precluded from being appointed an arbitrator by reason of their nationality, unless otherwise agreed by the parties. Further, the parties are free to agree on a procedure for appointing the arbitrators.

Article 12 and 13 of the UNCITRAL Model Law address the grounds for challenging an arbitrator and the relevant procedure. When a person is approached in connection with the possible appointment as an arbitrator, he is required to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator may be challenged only if circumstances exist that give rise to concerns that are justifiable or if he does not possess qualifications agreed to by the parties. A party is free to challenge an arbitrator appointed by him, only for reasons of which he has become aware after the appointment has been made. Article 13(3) requires the prospective or appointed arbitrator to disclose all circumstances that might cause doubt on his impartiality or independence.

E. Composition of arbitral tribunal or panel

Because so many procedural aspects of ICSID dispute settlement are left to the discretion and interpretation of the individual arbitration panel, the composition of the ICSID arbitration panel is very important and highly defined by the ICSID Arbitration Rules. There are several unique aspects to composition of an ICSID arbitral tribunal. First, before a party may appoint an arbitrator, the parties must agree on the number of arbitrators and how each will be appointed.[358] Should the parties fail to reach agreement within 60 days after the initial filing of the arbitration Request; the traditional default rules relating to a three person tribunal are then applied.[359]

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[358] ICSID Arbitration Rule, 1-2.

[359] ICSID Convention, Art. 37.

Under ICSID dispute settlement, after the number of arbitrators and method of their appointment is agreed by both parties involved in the case, parties are then free to appoint an arbitrator directly and are not limited to the Panel of Arbitrators maintained by the Centre. However, there are some limitations regarding the nationality of arbitrators selected. The ICSID Convention provides that unless all members of the Tribunal are appointed by agreement of the parties, the majority of arbitrators must be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute.[360] In other words, as explained in the ICSID Arbitration Rules, a party is not allowed to appoint a co-national as an arbitrator. This feature of ICSID arbitration was designed with the intent to create a non-political forum for dispute resolution.

The relevant provisions of the ICSID Convention on the requirements and qualifications in respect of the selection of arbitrators for ICSID tribunals (first instance) and ad hoc annulment committees are found in articles 12-14, 39-40, and 52(3). ICSID tribunal arbitrators may come either from the ICSID's Panel of Arbitrators as appointed by each of the contracting states, or from outside in which case they are required to possess the same qualities as those of the panel of arbitrators as set out in article 14(1):

> Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the Fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.

Competence in the Field of law shall be of particular importance in the case of persons on the Panel of Arbitrators. Under article 52(3), the three ad hoc annulment committee members are all to come from the panel of arbitrators, and are not to be nationals of either the disputing state party or of the state of the disputing investor.

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[360] ICSID Convention, Art. 39.

Besides these restrictions, the competence and moral character requirements are identical as between the two types of panels.[361]

The most important players, the arbitrators, are private agents, typically practicing international lawyers or professors of international law. The ICSID Convention itself leaves the selection to the parties, and, in the usual case where the arbitral tribunal is composed of three members, the chairman of the panel will be chosen either by consent of the disputants or the two-already selected arbitrators, or by another trusted agent such as the Secretary-General of the ICSID or the President of the International Court of Justice.[362] Traditionally, the chairman cannot be a national of either party.

Two problems are common to this type of approach. First, the impression of each disputant that party-selected arbitrators are partial, and secondly a lack of assurance in advance that the president is an appropriate choice. Investment treaties can easily avoid these problems by having the state parties select at the outset of ratification a roster of panellists who are third party nationals. These persons could then be selected for service on specific claims at random to preside on panels, serve sole panellists, or even make up the entire three members of the panel. Having the state parties choose a respected group of jurists in advance would could serve on multiple occasions, for a fixed period of time, would also help to add stability and consistency to a particular treaty's jurisprudence

While the ICSID Centre itself performs administrative functions, and has a list of arbitrators from subscribing parties, tribunals may consist of entirely non-listed panellists, and in practice, arbitrations proceed in very much the same manner as other "pure" ad hoc mechanisms such as those under the UNCITRAL Arbitration Rules.

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[361] Carlos, G. Garcia, "All The Other Dirty Little Secrets: Investment Treaties, Latin America, And the Necessary Evil of Investor-State Arbitration" (June 2004) 16 Fla. J. Int'l L. 301 at 344 and footnote 156.

[362] *Ibid* at 313.

With respect to the WTO, there are concerns that the WTO panel procedure is in need of greater legal rigor than in the past to enable it to address the increased complexity of the cases being filed, to satisfy the more rigorous standards that are being applied to its decisions by the Appellate Body, and so that its decisions will have the requisite legitimacy needed to justify their automatically binding character. [363] The first issue that tends to be raised in connection with such concerns is the ad hoc, part-time nature of the panel itself, particularly as it relates to (a) the professional qualifications of the panel members and (b) the time, effort, and control that can be expected from panel members serving in an ad hoc, part-time capacity.

The DSU contains detailed rules on the composition of panels and clarifies necessary steps and the role of the WTO Director General should parties fail to agree on the panel's composition. Under the GATT dispute settlement system, only government officials served on panels; however, today the WTO allows well-qualified non-government individuals to serve on a panel and DSU Article 8.1 forbids a potential panel member from serving on a panel if he or she is a citizen of a Member-state party to the dispute, or a citizen of a third party, unless the parties agree otherwise.[364]

Today's panel members are usually well-versed in WTO policy and procedures, and are generally persons who have a reputation for good judgment among their fellow diplomats. However, many lack the legal training or experience to render professionally competent judgments on complex legal issues. Since the early 1980s, the majority of panel members have tended to rely on the advice of the Secretariat's legal staff on such legal issues. While most panel members have insisted on exercising their own judgment at the end of the day, Secretariat legal advisors have exercised considerable influence over the process.

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[363] Robert E. Hudec, “The New WTO Dispute Settlement Procedure: An Overview of the First Three Years” (Winter 1999) 8 Minn. J. Global Trade 1at 16.

[364] Kantchevski, Petko D., “The Differences Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement” (2006) 3 BYU Int'l L. & Mgmt. Rev. 79, at 97 .

The degree of influence exercised by the WTO Secretariat has opened the door to critics which claim that Secretariat officials have no mandate to perform this quasi-decision-making role and are not accountable to the government community because they take no visible responsibility for what is decided. The criticism is real however the effects are limited because the Appellate Body has the final responsibility for the outcome in most cases.

In recent years, the WTO Secretariat has attempted to strengthen the capacities of panel members by repeatedly proposing a number of repeat panellists when suggesting possible panellists to the parties. Some of these repeat panellists can be considered legal experts while others are simply very well-respected diplomats who understand the dispute settlement process and have demonstrated good judgment in previous cases. The effort to increase the participation of this particular group of panel members has met with some success, while the inherent limitations of this strategy are real as there are limits to the number of cases repeat panellists can handle while maintaining their primary professional occupations.

To further complicate matters, the demand for panel members has increased substantially over the years. The considerable increase in the number of WTO cases has led to an overall increase in panel formation each year - from about seven panels per year at the end of the 1980s to about twelve per year at present. This means the WTO must staff thirty-six panels every three years, which in turn means 108 panel members have to be found every three years. At the same time, the supply of panel members acceptable to governments is decreasing. A major limitation on the supply of new panellists is the general rule against appointing nationals of a disputing party or nationals of other interested parties. This rule excludes the rather large supply of qualified European Community and United States citizens from a very large number of panels. The recent expansion of the European Community has further reduced the remaining list of recognized neutrals available.[365] These serious supply limitations have recently been compounded by the tendency of parties to object to panellist appointees. The more

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[365] Thomas J. Schoenbaum, "WTO Dispute Settlement: Praise and Suggestions for Reform" (1998) 47 Int'l & Comp. L.Q. 647-658.

important WTO litigation becomes, the more sensitive government officials seem to be about potential allegations of careless panel selection or, perhaps, the more they try to improve a losing hand by manipulating panel selection.

Many government lawyers may be handling investor-state arbitration for the first time. They will unlikely even have litigation experience outside their own countries. In either case, they will have little or no familiarity with the common law features that tend to govern the final stages of the oral proceedings, including oral submissions, questions from the panel, and witness examination. This problem of little experience is further expanded when developing country parties are not able to hire leading North American and European law firms staffed with lawyers with ample experience, many of whom will professionally and personally know the presiding arbitrators. Further, respondent host countries will be forced to rely on government officials from home as their key witnesses who will in turn be subject to cross examination during the oral hearing. Other than what they may have seen on English-language television, these persons will likely have little familiarity with this and other litigation devises, all of which may come as quite a shock. In contrast, most senior officials from major companies, at least in the United States, will likely have been personally subject to some kind of interrogation during the course of their careers and will be much more at ease with the process and will thus be far more effective witnesses.

F. Ad hoc nature undermines due process protection

When considering what it takes to ensure independence and impartiality for a tribunal in an international dispute settlement context, the Statute of the ICJ is particularly useful to reference and provides an illustration of the practical ways in which the potential for impartiality and bias can be managed in the appointment of its judges, for example.[366] Article 2 of the ICJ Statute provides that "the Court shall be composed of a body of independent judges elected regardless of their nationality from among persons of high moral character who possess the qualifications required in their respective countries for

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

appointment to the highest judicial offices or are juriconsults of recognized competence in international law."[367] Once elected, the judges' independence is protected by a nine-year term,[368] during which time the judges may not exercise any national political or administrative function or engage in any other occupation of a professional nature.[369] Furthermore, the collegiality of the judges, registrar, and staff, as well as the deliberate solemnity with which the Court's business is conducted, all contribute to counterbalance bias a judge might be prone to.[370] As one legal scholar noted about the ICJ, "once elected the Court is granted every facility to maintain the proper degree of judicial independence."[371]

Additionally, Article 20 of the ICJ Statute requires every member of the Court to make a solemn declaration that he will to the best of his ability exercise his powers "impartially and conscientiously" before taking up the duties of his position.[372] It is important to note that with respect to contentious cases, the ICJ decides in accordance with international law, disputes of a legal nature that are submitted to it only by states and the jurisdiction is based upon the consent of the states to which it is open. Judges of the International Criminal Court (ICC) must be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices."[373] Judges on the International Tribunal for

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[367] *Ibid.*

[368] *Ibid* at art. 13.1.

[369] *Ibid* at art. 16.1.

[370] Franck, *supra* note 333, at 322 (pointing out the safeguards of judicial independence for the ICJ).

[371] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005* (London: Brill, 2006) 165.

[372] ICJ Statute, *supra* note 322, art. 20.

[373] Article 36(3)(a) of the Rome Statute of the International Criminal Court, at www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf, visited 30 November 2014.

the Law of the Sea (ITLoS), must be "persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea."[374]

When considering the stringent standards clearly applied by the ICJ, ICC and ITLoS to ensure impartiality and neutrality of its judges, the three tribunals considered above do not have safeguards that rise to a level similar. One of the largest vulnerabilities comes from the ad hoc nature of these mechanisms. The WTO, with the exception of the Appellate Body, the ICSID and UNCTRIAL dispute settlement mechanisms do not have permanently standing tribunals but instead create their panels on an as needed basis for the life of a particular case. Concerns surrounding this process relate to the ability of the dispute settlement mechanism to ensure the impartiality and independence of the panelists considering the time, effort and control that can be expected from panel members serving in an ad hoc, part-time capacity. Further cause for concern comes from the fact that under the ICSID and UNCITRAL Rules a lawyer may act as counsel in one case and as arbitrator in another case going forward at the same time. In no democratic country is a practicing lawyer permitted to be a member of the judiciary as well. Judges cannot create decisions that might in some way aid their firm's clients or partners in another case. There would be no legitimacy in their decisions if they did. However, arbitrators appointed under the ICSID and UNCITRAL Rules currently suffer from no such constraints.

While each of the three mechanisms do require potential decision-makers to disclose potential conflicts of interest before the initiation of the case, and even during the adjudication of the case should they be discovered at that time, there is little clear guidance on enforcement of the disclosure requirement and how to proceed in the event that impartiality or bias is discovered. We must recall that the WTO DSU does not structurally guarantee the independence of the potential panelists. The ICSID Convention requires a certification of independence be made by the arbitrator at the beginning of the proceedings and in the UNCITRAL system an arbitrator may only be

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[374]Article 2(1) of the Statute of the International Tribunal for the Law of the Sea, at www.itlos.org/start2_en.html, visited 30 November 2014.

challenged if circumstances exist that give rise to concerns that are justifiable or if they do not possess specific qualifications agreed to in advance by the parties. To a certain extent this situation creates some serious vulnerabilities and opens the door to potential violation of the first requirement for the protection of due process.

While it is clear that some attempts to address this vulnerability through decision-maker disclosure and disqualification have been developed, issues surrounding the effect of potential gratitude a selected decision-maker may feel for being selected and potential impacts of this gratitude remain very real and difficult to quantify. Returning to the ICJ, ICC and the ITLoS example, the issue of gratitude on the part of its judges is addressed through the establishment of a 9-year term during which the judges are essentially isolated as they are not entitled to engage in activities outside the scope of their engagement with the ICJ, ICC or ITLoS respectively.

While it is clear that in order to ensure the protection of due process it is essential for any dispute settlement mechanism to guarantee the independence and impartiality of the tribunal, there is no clear guidance on how to actually ensure this in practice and what impartiality and independence means in light of the ad hoc nature of the three considered international dispute settlement mechanisms.

Chapter 5 Adequate notice of the proceedings

Proper and timely notice is an essential component to assuring due process protection. While the method of service is not an inherently difficult concept, it does require that which is reasonable under the particular circumstances. Proper and effective notice to a single individual may be easily accomplished; however, achieving proper and effective notice for a potential state party, with its many organs, may be substantially more difficult.

The traditional manner of providing notice is through personal service - hand delivery of the summons to the defendant by a sheriff, marshal or someone similarly authorized by law. However, the difficulties of personally serving international parties to an action has led to permissibility of substituted service rather than personal service. Substituted service includes leaving the process at the defendant's home, mailing the process to the defendant, or, under limited circumstances publishing the content of the summons in a newspaper. Generally, when the name and address of an affected party are reasonably ascertainable, notice by mail or other means certain to ensure actual notice has become generally accepted practice.

The need for effective notice is critical because international dispute settlement under the ICSID and UNCITRAL systems is based upon party consent, not obligation. The viability and enforceability of international dispute settlement outcomes, irrespective of the forum, presupposes genuine consent and thus effective and proper notice to all parties involved is essential in assuring effective consent. In the WTO context, this is different because by being a member of the WTO the Member State has automatically provided consent to participate in the WTO Dispute Settlement Mechanism.

The content of the notice is also important to the protection of due process. Just as other aspects of due process, there is no set yardstick for determining whether the content of the notice is sufficient; however, notice should at least inform the recipient of the impending dispute in terms which the layman can understand.

With respect to effective notice provided to parties, each of the dispute resolution mechanisms considered have a different approach. The ICSID Convention, while detailing some aspects of procedure, delegates a great deal of interpretative power to the members of the panel of a particular case. The UNCITRAL rules require that the complaining party provide adequate notice in a means that provides a record of its transmission and the arbitral proceedings shall begin on the date the notice is received by the respondent. The WTO has a very developed approach for the initiation of the dispute settlement mechanism and ensuring that proper notice is given to all potential parties.

A. Preparing the ICSID claim – proper registration

Initiating ICSID arbitration is a process with two steps. The claimant must first lodge a Request for Arbitration with the ICSID. However, the arbitration will not be considered commenced until the Secretary-General registers the Request. The Secretary-General's obligation to register Requests represents a "screening power" requiring the Secretary-General to conduct a prima facie jurisdictional review of the claim submitted. The ICSID Convention provides that the Secretary-General "shall register the request unless he finds, on the basis of the information contained in the Request that the dispute is manifestly outside the jurisdiction of the Centre."[375] To this end, parties seeking to commence ICSID arbitration should pay particular attention to demonstrate that each element of jurisdiction is satisfied to ensure that the Request will be registered. At this point it is important to note the use of the prima facie standard in ICSID dispute settlement. Here, the prima facie standard is used in the initial jurisdictional screening process but does not reach down to the analysis of the merits of the case. This approach to the prima facie standard is very different to the one used by the WTO which will be further discussed below.

The ICSID Secretary-General's decision on registration is not appealable. While potential respondents are able to argue against registration of the Request by the Secretary-General by presenting evidence against jurisdiction; however, any formal objections to jurisdiction must be left to the determination of an ICSID Tribunal.[376]

Most investor-state proceedings, including those submitted to the ICSID, bear no resemblance to the genteel world of state-to-state dispute resolution before such bodies as the WTO where only government counsels are permitted to appear, and where fact-finding plays a limited role. Investor claims can regularly be hotly contested and as

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[375] ICSID Convention, Art. 36(2).

[376] Smutny, Abby Cohen, "Arbitration before the International Centre for Settlement of Investment Disputes" (2002) 3 Bus. Law Int'l 367 at 372.

aggressively litigated as any US-type domestic civil suit, with each side accusing the other of serious impropriety.[377]

B. UNCITRAL notice requirements

Article 2 of the UNCITRAL Rules does not specifically address service on states. In practice, claimants initiating arbitrations against states serve Notices of Arbitration to the respondent state's Ministry of Foreign Affairs, the head of the government, other ministries, an ambassador of the respondent state, or autonomous state agencies. This practice is rather confusing, incoherent and does not assist states in receiving notice of proceedings in a timely manner. The Paulsson & Petrochilos UNCITRAL Report proposed that article 2 be revised to clarify that a state is sufficiently notified of arbitral proceedings initiated against it if notice is delivered to an organ of that state, capable of receiving service, under its laws.[378]

Pursuant to UNCITRAL article 3(1), the party initiating arbitration is required to give the other party a notice of arbitration and the notice is required to include the following:

(a) A demand that the dispute be referred to arbitration;

(b) The names and contact details of the parties;

(c) Identification of the arbitration agreement that is invoked;

(d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such a contract or instrument, a brief description of the relevant relationship;

(e) A brief description of the claim and an indication of the amount involved, if any;

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[377] Carlos, G. Garcia, "All The Other Dirty Little Secrets: Investment Treaties, Latin America, And the Necessary Evil of Investor-State Arbitration" (June 2004) 16 Fla. J. Int'l L. 301 at 356.

[378] UNCITRAL Report at P 43.

(f) The relief or remedy sought;

(g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed to them.

Interestingly, the revised 2010 UNCITRAL Arbitration Rules clarify in Article 3(5) that the constitution of the arbitral tribunal shall not be hindered by any controversy regarding the sufficiency of the notice of arbitration. Further, Article 3 does not require that the notice of arbitration be made known to the public and provides no additional information on the form of service or sufficiency of service, as long as a record of transmission of service is generated.

Article 4 requires that within 30 days of the receipt of the notice of arbitration, the respondent is required to communicate to the claimant a response which includes the following:

(a) The name and contact details of each respondent;

(b) A response to the information set forth in the notice of arbitration;

(c) Any plea that the arbitral tribunal to be constituted lacks jurisdiction;

(d) A brief description of the counterclaims or claims for the purpose of a set-off, if any, including were relevant, an indication of the amounts involved, and the relief or remedy sought.

C. WTO consultations

The initial step to adjudicating a case before a WTO panel is for the complaining Member to bring a formal request for consultations.[379] Consultations are intended to enable the parties to gather relevant information so that they can attempt to reach a mutually agreed solution and in practice many disputes are settled informally through negotiated settlements prior to even convening the required consultations. In situations

[379] David Palmeter & Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure*, (Cambridge: Cambridge University Press, 2004) 86.

where the parties are unable to agree consultations enable them to present accurate information to the panel.[380] Through consultations, parties are informed of the existence of the potential dispute, exchange information, assess the merits of their positions, and work to narrow contested issues.[381]

The DSU requires a Member to respond to a request for consultations within ten days, and the Member is further required to engage in consultations within thirty days. In the event that consultations after 60 days from the receipt of the request fail to yield outcomes that are mutually agreeable, Members may request the establishment of a panel to resolve the dispute. The consultation process is conducted without prejudice to the rights of any Member in relation to the panel process and DSU Article 4.6 explains that confidential information received during the consultation process cannot be used in the panel procedure as evidence against the other parties.

Requests for consultations should be in writing and a copy should be provided to the DSB in addition to the relevant WTO councils and committees for each case.[382] A Member State's request for consultations should specify the relevant WTO agreements and the particular articles under which consultations are sought.[383] Article 4.4 of the DSU requires that a complaining party "give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint."[384] Article 6.2 of the DSU requires that the request for the establishment of a

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[380] *Ibid* at 87, citing Panel Report, Korea- Taxes on Alcoholic Beverages, WT/DS75/R, WT/DS84/R, adopted Sept. 17, 1998, para. 10.23 [hereinafter Korea-Alcoholic Beverages], modified, Appellate Body Report, Korea- Taxes on Alcoholic Beverages, WT/DS75/AB/R, WT/DS84/AB/R adopted Jan. 18, 1999.

[381] *Ibid* at 89, citing Appellate Body Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States-Recourse to Article 21.5 of the DSU by the United States, WT/DS132/AB/RW, adopted Oct. 22, 2001 [hereinafter Mexico-Corn Syrup].

[382] *Ibid*. at 87.

[383] *Ibid.*

[384] DSU, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 2, Legal Instruments - Results of the Uruguay Round vol. 33, *33 I.L.M. 112 (1994)* [hereinafter DSU]. Art. 4.4.

panel indicate whether consultations have been held and identify the specific measures at issue.[385] It is important to note that the relationship between Article 4.4 and 6.2 is not entirely clear. While it seems clear that there is an obvious and necessary connection between these two requirements, it is not clear however to what extent the two requests must be identical.[386]

This analysis is important from a jurisdictional perspective, because it contributes to the explanation of how panels and the Appellate Body develop their terms of reference and the extent to which WTO decision makers will consider new claims.[387] There is an important link between WTO adjudicators' initial analysis of what measures are to be covered in its jurisdiction at the time of the request for the establishment of the panel (in cases where these measures were not raised in the consultations) and their later analysis, regarding what measures are to constitute part of its jurisdiction during the course of proceedings (when measures are amended or withdrawn). The adjudicators' initial analysis typically relates to those measures not included in consultations but included in the request for the panel, while the latter analysis usually includes measures that were part of the consultations but arguably no longer part of the panel's terms of reference as they were either amended or withdrawn.

In determining whether and on what basis to exclude or include particular measures within its jurisdiction (i.e. terms of reference), panels and the Appellate Body are required to address issues related to due process in both their initial and subsequent analyses. The following cases illustrate how the panels and Appellate Body have tended

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[385] The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

[386] Palmeter & Mavroidis, *supra* note 397, at 87-88.

[387] This question first arose in US-DRAMS when the United States claimed that it should be able to refer a claim to a panel if it was actually raised during consultations despite the fact that it had not been included in the written request for consultations. However, no response to this question was ever reached by the Panel since it was able to make a ruling without reaching this issue. Panel Report, United States-Anti-Dumping on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, WT/DS99/R, adopted Mar. 19, 1999, para. 6.8 [hereinafter US-DRAMS]

to deal with this initial analysis. In *Japan-Agricultural Products II*, the requests for consultations used the phrase "including, but are not limited to" Articles 2, 4, 5 and 8, yet the Panel accepted the subsequent inclusion of Article 7 in the request for the establishment of the panel, even though the article was not listed in the consultation request (the language "not limited to" was apparently sufficient in that case).[388]

A different question was posed in *Brazil-Aircraft*.[389] Here there were no consultations about the specific measures at issue.[390] The Panel held that the measure at issue that was neither included in the request for consultations nor in the actual discussions but included in the request for the panel was deemed to be within the Panel's jurisdiction. The Appellate Body, in affirming the Panel's decision, stated:

> We do not believe ... that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the SCM Agreement, require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel.[391]

In *Brazil-Aircraft*, both the panel and Appellate Body concluded that the measures in question were merely subsequent regulatory measures dealing with the same underlying subsidies which had been identified in the consultation request and which formed the actual subject matter of the consultations.[392] The Panel stated: "we consider that the consultations and request for establishment relate to what is fundamentally the

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[388] Palmeter & Mavroidis, *supra* note 397, at 88, citing Panel Report, Japan-Measures Affecting Agricultural Products, WT/DS76/R, adopted Mar. 19, 1999, para. 8.4, modified, Appellate Body Report, Japan-Measures Affecting Agricultural Products, WT/DS76/AB/R, adopted 22 February 1999. See India-Patent Protection For Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R, adopted Dec. 19, 1997, para. 90 [hereinafter Appellate Body India-Patents].

[389] Brazil-Export Financing Programme for Aircraft, WT/DS46/R, adopted Apr. 14, 1999, [hereinafter Brazil-Aircraft], modified, Appellate Body Report, WT/DS46/AB/R, adopted Aug. 2, 1999 [hereinafter Appellate Body Brazil-Aircraft].

[390] Palmeter & Mavroidis, *supra* note 397, at 89.

[391] Appellate Body Brazil-Aircraft, *supra* note 407, at para. 132

[392] *Ibid* at para 196.

same 'dispute', because they involve essentially the same issues."[393] In this case the Panel never eliminated the requirement that there be a relationship between Article 4.4 and 6.2 in substance since the measures at issue were in substance the same as those that had been included in the request for consultations and discussed at that time.

The requirement that the request for establishment of the panel be strictly limited to the matters explicitly set forth in the request for consultations tends not to be strictly enforced by WTO adjudicators.[394] First of all, Article 4.3 of the DSU allows for Members to request a panel if the respondent Member does not respond to the request for consultations or does not engage in consultations within a certain timeframe.[395] This suggests that adjudication can go forward without consultations. The DSB has not found any prejudice to parties' rights from a lack of consultations to be harmful enough to justify impeding the litigation. This point was considered by the Appellate Body in *Mexico-Corn Syrup* where it noted that "the DSU has explicitly recognized circumstances where the absence of the consultations would not deprive the panel of its authority to consider the matter referred to it by the DSB."[396] Further the notion that consultations are not necessary for the establishment of the panel is also acknowledged in Article 6.2 DSU, which states that the request for the establishment of the panel shall indicate whether consultations were held.[397] Accordingly, Article 6.2 may be satisfied "by an express statement that no consultations were held" and therefore it "envisages the possibility that a panel may be validly established without being preceded by consultations."[398]

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[393] Brazil-Aircraft, *supra* note 407, at para 7.11.

[394] Support for this view can be found in DSU, supra note 8, articles 4.3 and 6.2, and in Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States-Recourse to Article 21.5 of the DSU by the United States, WT/DS132/AB/RW, adopted Oct. 22, 2001 [hereinafter Mexico-Corn Syrup] at paragraph 63.

[395] DSU art. 4.3.

[396] Mexico-Corn Syrup*, supra* note 399, at para 63 (emphasis omitted).

[397] DSU, supra note 14, art. 6.2.

[398] Mexico-Corn Syrup, *supra* note 399, at para. 62 (emphasis omitted).

Opinions of panels and the Appellate Body have emphasized the importance of the inter-relatedness between the request for consultations, the consultations themselves, and the requests for the establishment of the panel.[399] In particular, the Appellate Body has highlighted the importance of consultations in shaping the substance of the panel proceedings, emphasizing that the demands of due process implicit in the DSU make full disclosure of facts during consultations especially important. "The claims that are made and the facts that are established during consultations do much to shape the substance and scope of subsequent panel proceedings." [400]

The Appellate Body's view however, does not automatically eliminate the claim that the request for the establishment of the panel should not be strictly limited to the matters explicitly set forth in the request for consultations. Indeed, the very fact that consultations can shape the panel proceedings should be reason to allow a more flexible approach to the requests for the establishment of the panel, which should be influenced by, and not limited by the previous consultations.[401]

D. Request for establishment of a WTO panel

The initiating Member's request for the establishment of a panel plays an important role in determining the subject matter jurisdiction of the panel as it is incorporated into its terms of reference.[402] Importantly, the request for establishment of a panel fulfills the due process objective of placing the responding party and any potential third parties on notice regarding the claims at issue.[403]

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[399] India-Patent Protection For Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R, adopted Dec. 19, 1997, para. 87 and para. 94. [hereinafter Appellate Body India-Patents]

[400] Palmeter & Mavroidis, *supra* note 397, at 91 (quoting Appellate Body India-Patents, *Ibid*, at para. 94).

[401] Support for this view can be found in the DSU, Articles 4.3 and 6.2, DSU, supra note 14, and the Mexico-Corn Syrup case, supra note 24, at para. 63

[402] Palmeter & Mavroidis, supra note 397, at 94.

[403] *Ibid.*

The formal requirements of a request for the establishment of a panel are set out in Article 6.2 of the DSU and include the following:

> (a) a request must be in writing;
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> (b) it must indicate whether consultations were held;
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> (c) it must identify a specific measure at issue;
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> (d) it must provide a brief legal basis for the complaint sufficient to present the problem clearly and invoke the pertinent legal provisions.[404]

The "measure at issue" requirement refers to a law or regulation, or an action that applies to a law or regulation which is the subject of the dispute.[405] The "legal basis for the complaint" or the "claim" together with the "measure at issue" make up the "matter" before the panel, which is referred to in the standard terms of reference set out in Article 7.1 of the DSU.[406]

With respect to the terms of reference of a panel, Article 7.1 of the DSU states that, unless the parties agree otherwise within twenty days from the establishment of the panel, a panel is given the following standard terms of reference:

> To examine in the light of the relevant provisions in (name of the covered agreements cited by the parties to the dispute), the matter referred to the DSB by (name of the party) in document … and makes such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).[407]

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[404] DSU, *supra* note 14, art. 6.2.

[405] Palmeter & Mavroidis, *supra* note 394, at 97.

[406] *Ibid* at 97, citing Appellate Body Report, Guatemala-Anti-Dumping Investigation Regarding Portland Cement from Mexico, WT/DS60/AB/R, adopted Nov. 25, 1998, para. 75.

[407] Peter Van den Bossche, Werner Zdouc, et al, *The Law and Policy of the World Trade Organization, 3rd Edition* (Cambridge University Press 2013) at p. 215.

In determining claims WTO panels act similarly to international courts in that they function independently.[408] WTO panels establish the scope of the dispute they are considering, analyse all the submitted evidence, apply the laws that are appropriate in a particular situation, apply relevant law to the facts, and develop an opinion.[409] In short, WTO panels are judicial tribunals which are required to follow a clearly defined judicial process. This was articulated by the Appellate Body in its decision in the *Mexico - Soft Drinks* case. The Appellate body explained:

> WTO panels have certain powers that are inherent in their adjudicative function. Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction. In this regard, the Appellate Body has previously stated that "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it." Further, the Appellate Body has also explained that panels have "a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated."[410]

In this statement, the Appellate Body has effectively acknowledged the inherent powers (or inherent jurisdiction)[411] of the WTO panel, but also the panels' direct application of

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[408] DSU art. 11.

[409] See DSU arts. 11-12; see also Jeff Waincymer, *WTO Litigation - Procedural Aspects of Formal Dispute Settlement* (London: Cameron May, 2002) 286. ("As with any adjudicatory body, the Panel seeks to evaluate the facts before it, identify the relevant legal principles and apply the law to those facts.").

[410] Appellate Body Report, Mexico - Tax Measures on Soft Drinks and Other Beverages, WT/DS308/AB/R (Mar. 6, 2006) [hereinafter Appellate Body Report, Mexico - Soft Drinks], P 45 (internal citations omitted) (emphasis added). On the ability of WTO Tribunals to ensure that they have jurisdiction, see infra Part III.A.1. see also Peter Van den Bossche, Werner Zdouc, et al, *The Law and Policy of the World Trade Organization, 3rd Edition* (Cambridge University Press 2013) at p. 219.

[411] Joseph Weiler, "The Rule of Lawyers and the Ethos of Diplomats - Reflections on the Internal and External Legitimacy of WTO Dispute Settlement" (2001) 35 J. World Trade 191, 201 (stating that "the Appellate Body is a court in all but name"). "Here we refer to the inherent jurisdiction of panels, although we would argue that this analysis applies mutatis mutandis to the Appellate Body

the international legal "rule" of la competence de la competence. While this ability of the panel is not explicitly provided for in the text of any of the WTO Covered Agreements, Article 1.1 of the DSU states, in relevant part:

> The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the 'covered agreements').

The WTO dispute settlement system therefore has jurisdiction over disputes between WTO Members arising from the covered agreements which include the WTO Agreement, the GATT 1994 and all other multilateral agreements on trade in goods, the GATS, the TRIPS Agreement, the DSU and the plurilateral Agreement on Government Procurement.[412] When considered in its entirety, the scope of WTO jurisdiction is very broad as it ranges from disputes over measures regarding customs duties, disputes regarding sanitary measures, disputes regarding subsidies, disputes regarding measures affecting market access for services, to disputes regarding intellectual property rights and respective enforcement measures.

A panels' and the Appellate Body's "inherent ... adjudicative function" is real and WTO Tribunals are therefore judicial – irrespective of the fact that some features of WTO dispute settlement are not typical of other international dispute settlement mechanisms. These features that are unique to WTO dispute settlement include the requirement that reports must be adopted by the Member States for them to become binding as well as the possibility of consensus not to adopt a report.[413] These aspects do not impede the WTO from judicial legitimacy as these features do not limit the fact-finding or decision making ability of WTO panels and the Appellate Body.

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itself. Parties have an appeal as of right (on points of law and legal interpretations) to the Appellate Body." DSU art. 17.1. Like those of panels, the Appellate Body's reports are automatically adopted by the Dispute Settlement Body (DSB) absent negative consensus, art. 17.14. The DSB acts in a judicial manner in conducting hearings and in making its reports.

[412] Peter Van den Bossche, Werner Zdouc, et al, *The Law and Policy of the World Trade Organization, 3rd Edition* (Cambridge University Press 2013) at p. 163.

[413] DSU art. 16.

The Appellate Body's opinion in *Mexico - Soft Drinks* clarified the fact that inherent jurisdiction flows from the nature of the judicial function rather than the necessity for it to be clearly spelt out in the WTO Covered Agreements or included in specific provisions of the instruments establishing the court or tribunal (here the DSU and WTO Agreement).

The scope of a panel's jurisdiction depends upon both the subject matter of the dispute and the parties to that dispute[414] and the request for the establishment of the panel determines its jurisdiction.[415] Any dispute as to what should or should not be included in the panel's jurisdiction is ultimately decided by a WTO adjudicator and not the DSB as the latter decides only whether the panel should be established in the first place.[416] In the *India – Patents* case, the Appellate Body stated that "a panel has the discretion to determine the claims it must address in order to resolve the dispute between the parties - provided that those claims are within that panel's terms of reference." [417] The Appellate Body further clarified:

> A panel's terms of reference are important for two reasons. First, terms of reference fulfill 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. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.[418]

WTO jurisprudence has considered the question of the required level of specificity in a panel request for adequate identification of both the measure and the claim at issue. In the *Japan – Film* case, Japan claimed that eight measures listed in the

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[414] *Ibid* at 17.

[415] *Ibid.*

[416] *Ibid* at 108.

[417] Appellate Body India-Patents, supra note 336, at para. 87

[418] *Ibid*, quoting Appellate Body Report, Brazil-Measures Affecting Desiccated Coconut, WT/DS22/AB/R, adopted Feb. 21, 1997, at 22 [hereinafter Appellate Body Brazil-Coconut].

panel request were inadmissible as they were only mentioned for the first time in the United States' first written submission to the Panel.[419] The Panel disagreed, stating that Article 6.2 requirements are met when a measure is a subsidiary of or so closely related to another measure specifically identified so that the responding party can reasonably have had adequate notice of the claims asserted by the complaining party.[420] This opinion is limited, however. In *Indonesia - Autos*, the Panel held that a loan, not identified in the panel request, was not within its terms of reference, despite the fact that it was one aspect of the larger program which was at issue before the Panel.[421]

With respect to the claim or legal basis of the complaint, the Appellate Body has stated that the phrase "including but not limited to" is not sufficient to meet the complainant's burden to identify the specific measures at issue and provide a brief summary of the legal basis of the complaint to present the problem clearly, as required by Article 6.2 of the DSU.[422] Further, while it is necessary for the panel request to identify the provisions that constitute the basis of the Member's claims, simply listing the provisions also may not be sufficient.[423] It is important that this be determined on a case-by-case basis, taking "into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed provisions claimed to have been violated." [424]

In the *EC-Bed Linen* case, when faced with a failure in the request for a panel to list a specific treaty article alleged to have been violated, the Panel held that claims based

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[419] Palmeter & Mavroidis, *supra* note 394, at 97, citing Panel Report, Japan-Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R and Corr.1, adopted Feb. 19, 2002, para. 10.2 [hereinafter Japan-Film].

[420] *Ibid* at 98 (citing Japan-Film, supra note 50, at para. 10.8).

[421] *Ibid* at 98 (citing Panel Report, Indonesia-Certain Measures Affecting the Automobile Industry, WT/DS54/R, WT/DS55/R, WT/DS59/R and Corr.1, 2, 3, and 4, adopted Dec. 19, 2002, para. 14.3 [hereinafter Indonesia-Autos]).

[422] Appellate Body India-Patents, *supra* note 336, at para. 90

[423] Palmeter & Mavroidis, *supra* note 394, at 99, citing Appellate Body Report, Korea-Definitive Safeguards Measure on Imports of Certain Dairy Products, WT/DS98/AB/R, adopted Jan. 12, 2000, para. 124 [hereinafter Appellate Body Korea-Dairy].

[424] *Ibid* at 99 (quoting Appellate Body Korea-Dairy, *supra* note 353, at para. 127).

on that article were outside its terms of reference, even if the omission was unintentional.[425] It apparently was of no interest to the Panel that the article had been listed in the request for consultations, discussed in consultations, and covered in the complaining party's first written submission.[426] The Panel argued that a "failure to state a claim in even the most minimal sense, by listing the treaty Articles alleged to be violated, cannot be cured by reference to subsequent submissions."[427]

While the general rule is that a party asserting a particular claim carries the burden of proof,[428] a party invoking an exception to justify action that would otherwise be inconsistent with its WTO obligations shifts the burden on to itself.[429] The question therefore becomes whether proving or disproving prejudice in these cases (where the adjudicator has ruled that the complaining party's request is not sufficient) should be viewed as a general rule or an exception. There is room to argue that it is an exception because it is the complaining party that has not complied correctly with DSU procedures yet still wants to maintain its claim. In such cases, it would be unfair, as well as a waste of scarce judicial resources, to ask the responding party to prove prejudice in the face of the possibility that the claim itself may not stand.

Despite this suggestion, however, the Panel in *United States-Shrimp* broadly interpreted the terms of reference and placed the burden of proof on the responding party.[430] Malaysia argued in favor of expanding the jurisdiction of the panel by asking it to review the United States' action in relation to relevant GATT articles, in addition to the

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[425] *Ibid* at 101 (citing Panel Report, European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/R, adopted Oct. 30, 2000, para. 6.17 [hereinafter EC-Bed Linen EC-Bed Linen, at para. 6.17). *Elsinore Union Elementary Sch. Dist. v. Kastorff, 353 P.2d 713, 717 (Cal. 1960).*

[426] Palmeter & Mavroidis, *supra* note 394, at 101 (citing EC-Bed Linen, supra note 55, at paras. 6.14, 6.15)

[427] *Ibid* (quoting EC-Bed Linen, supra note 55, at para. 6.15).

[428] *Ibid* at 143.

[429] *Ibid* at 148.

[430] Panel Report, United States-Import Prohibitions of Shrimp and Shrimp Products-Recourse to Article 21.5 by Malaysia, WT/DS58/RW, adopted June, 15 2001 [hereinafter United States-Shrimp], paras. 3.4 and 5.9

rulings and recommendations of the DSB. In holding that it was fully entitled to address all Malaysia's claims under the above GATT articles, the Panel noted that the United States did not argue that Malaysia's claims were insufficiently specific or that its request for the establishment of an Article 21.5 panel otherwise failed to meet the requirements of Article 6.2 of the DSU.[431] Citing the Appellate Body's decision in *Canada-Aircrafts (21.5)*, it stated:

> [A] panel [under Article 21.5] is not confined to examining the measures taken to comply from the perspective of the claims, arguments and factual circumstances that related to the measure that was subject to the original proceedings. [...] Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. [...] It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the "measures to comply" will not, necessarily be the same as those which were pertinent in the original dispute.[432]

This decision clarifies that, at least in Article 21.5 proceedings, the jurisdiction of the panel may not be limited to the terms of reference of the original panel. Given that the United States was the responding party, and thus Malaysia, as the complaining party, was arguing for this exception, the burden of proving that the terms of reference were pleaded with sufficient specificity and that they complied with the panel's original terms of reference should have been Malaysia's.[433]

In general, with respect to ensuring the proper protection of due process related to effective notice, the WTO system provides a good example of a system that ensures

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[431] *Ibid* at paras. 3.4, 5.9.

[432] *Ibid* at para. 5.8, quoting Appellate Body Report, Canada-Measures Affecting the Export of Civil Aircraft-Recourse by Brazil to Article 21.5 of the DSU, WT/DS46/AB/RW, adopted Aug. 4, 2000, para. 41 [hereinafter Appellate Body, Canada-Aircraft (21.5)] (alterations in original).

See Palmeter & Mavroidis, *supra* note 394, at 143 ("In the WTO, as in any mature legal system, the party asserting a fact, whether claimant or respondent, is responsible for providing proof of that fact.").

[433] *Ibid.*

the provision of proper notice because for a complaining party to initiate dispute settlement it must first bring a formal request for consultations and then a request for the establishment of a panel. As explained above, the initiating Member's request for the establishment of a panel plays an important role in determining the subject matter jurisdiction of the panel as it is incorporated into its terms of reference. Importantly, the request for the establishment of a panel fulfills the due process objective of placing the responding party and any potential third parties on official notice regarding the existence of a dispute and the claims at issue.

Under the WTO system, by virtue of being a member, Member States have already agreed to comply with the requirements of WTO dispute settlement, the basic principles employed by the WTO system and the fact that the mechanism is clearly defined with little flexibility is important and makes the WTO unique. While flexibility in international dispute settlement is important, flexibility with respect to providing proper and effective notice to potential parties that a dispute exists may not be necessary and in fact may serve to undermine the legitimacy of the particular system itself. A system that does not properly ensure the protection of due process from the very beginning may call into question the value of the outcomes of its dispute settlement process.

Chapter 6 The right to be heard

Procedural requirements for the proper protection of the right to be heard requirement of due process in international dispute settlement vary widely depending upon the tribunal but also upon the basis for the mechanism's authority. Adjudicating a case based on the UNCITRAL system is completely voluntary and based upon a contractual agreement between the parties, which can be states or individuals, and the parties' providing specific consent to resolving their dispute in accordance with the UNCITRAL system. The ICISD system is also voluntary and only open to Contracting States of the ICSID Convention and to nationals of States that are also members of the ICSID Convention. Submission of a case to the ICSID dispute settlement system requires specific consent by

both parties. In contrast to the UNCITRAL and ICSID systems, the WTO Dispute Settlement System is only open to WTO Member States, not individuals, and consent to submitting a case to the WTO Dispute Settlement System is automatic and based upon the membership of a State to the WTO.

Of the tribunals considered, the UNCITRAL dispute settlement process is the most flexible and delegates the most to the discretion of the tribunal itself. The arbitral Tribunal is basically free to conduct the arbitration in any manner it considers appropriate and specific procedure tends to differ greatly from case to case. A large degree of discretion is conferred upon the parties themselves or, if they fail to agree, to the decision-makers, in determining the rules of procedure. Autonomy of the parties in determining the rules of procedure of their arbitration is of particular importance as it allows the parties to select or tailor the rules according to their specific wishes or needs. The UNCITRAL Rules do require the Tribunal to respect a specific formulation of due process and the decision-maker's discretion is limited through the requirement that the Tribunal must ensure that parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity to be heard and present their case. The UNCITRAL rules do not provide specific guidance as to what appropriate procedural due process requires or what it means for a party to be given a full opportunity to be heard and to present their case.

ICSID investor-state arbitration allows for significant discretion on the part of the arbitrators but requires that as early as possible after the constitution of the Tribunal, the president of the Tribunal to begin the process of determining the views of the parties regarding procedure. Typically the parties meet with the President to discuss issues related to procedure and the parties and the tribunal have substantial discretion with respect to procedure including: number and sequence of pleadings, whether to hold oral hearings, etc.

In contrast to the UNCITRAL and ICSID systems, the WTO panel process is clearly defined in the Dispute Settlement Understanding. In WTO dispute settlement,

there is little flexibility with respect to the procedure and all evidence in the case is submitted and evaluated before any interim findings of fact, applicable law, or WTO violations are made by the panel. Like any tribunal of first instance, WTO panels make findings of fact, applicable law, and, applying such law to the facts, violations of law.

A. General procedure

1. ICSID and general procedure

The ICSID Arbitration Rules lay out a dispute settlement procedure based upon that typically found in international tribunals involving State parties. In short, after the Request for Arbitration is registered, there is no requisite "answer" to be filed by the respondent. Rather ICSID Arbitration Rule 20 establishes a preliminary procedural conference between the parties and the tribunal.[434] The claimant will then file a Memorial which normally includes all the documentary and other evidence upon which it will rely.

Next, the respondent will file a Counter-Memorial, again, together with all supporting evidence; and where the Tribunal determines necessary, a Reply and Rejoinder may follow.[435] Following this "written phase" of the proceeding, there will be an "oral phase," or hearing.[436]

Chapter III of the *ICSID Convention, Regulations and Rules*, addresses general procedural provisions and states that the Tribunal shall have the power to make orders as necessary to conduct the proceeding.[437] Rule 20, Preliminary Procedural Consultation, addresses procedural issues relevant to the initial stages of the dispute settlement process. Rule 20 requires that as early as possible after the constitution of the Tribunal, its President will begin the process of determining the views of the parties regarding

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[434] ICSID Arbitration Rule, 20.

[435] ICSID Arbitration Rule, 31.

[436] ICSID Arbitration Rule, 32.

[437] ICSID Arbitration Rule, 19.

procedure. Typically the parties meet with the President to discuss issues which include but are not limited to:

> (a) the language to be used in the proceedings;
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> (b) the number and sequence of the pleadings and the time limits within which they are to be filed;
>
> (c) the number of copies desired by each party of instruments filed by the other;
>
> (d) the possibility of dispensing with the written or the oral procedure;
>
> (e) the manner in which the record of the hearings shall be kept.

Rule 20 further clarifies that during the proceedings that follow, the Tribunal shall apply any preliminary agreement between the parties on procedural matters obtained during the procedural consultation, except as otherwise provided in the Convention.

In addition to the preliminary procedural consultation, it is possible to hold an official Pre-hearing Conference at the request of the Secretary-General or at the discretion of the President of the Tribunal. This conference between the Tribunal and the parties may be held to arrange for an exchange of information and the stipulation of uncontested facts in order to expedite the proceedings.[438]

Rule 23 addresses copies of instruments and clarifies that except as otherwise provided by the Tribunal after consultation with the parties and the Secretary-General, every request, pleading, application, written observation, supporting documentation, or other instrument shall be filed in the form of a signed original with the number of copies agreed upon by the parties during Preliminary Procedural Consultation.

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[438] ICSID Arbitration Rule, 21.

With respect to the inclusion of supporting documentation, Rule 24 stipulates that it ordinarily shall be filed together with the instrument to which it directly relates. Additionally, the filing of supporting documentation shall be within the time limit fixed for the filing of such instrument.[439] Rule 25 allows for the correction of accidental errors to any instrument or supporting document with the consent of either the parties or the Tribunal and allows approved corrections to be made at any time before the final award is rendered.

Time limits are set by Rule 26 which states that where required, time limits shall be fixed by the Tribunal. Moreover, the Tribunal has the power to extend any time limit that it has fixed and any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and providing support for the decision, decides otherwise.[440]

Rule 41 paragraph (5), grants to the tribunal the discretion to dismiss all or part of a claim, on the merits and at the request of a party, on an expedited basis.[441] In the US judicial system, this would be tantamount to a summary judgment. To obtain expedited dismissal, it is necessary for a party to file an objection that a claim is manifestly without merit. In order to obtain expedited review, this objection must be filed within 30 days of the creation of the tribunal and before the tribunal's first session. Additionally, notable is the fact that the denial by the tribunal of a party's request does not prejudice other objections that party might be compelled to make at a later time.[442]

Published ICSID awards vary in terms of their structure, detail and presentation of factual and substantive issues. Some awards, even ones that are entered after a full evidentiary hearing on the merits, are relatively short and concise.[443] Awards tend to provide a brief recitation of the procedural history and the facts, and then apply the facts

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[439] ICSID Arbitration Rule, 24.

[440] ICSID Arbitration Rule, 26.

[441] ICSID Working Paper, at 7; see also ICSID Convention, Arbitration Rules, rule 41(5).

[442] *Ibid.*

[443] Wena Award, Maffezini Award, Waste Management Award.

to the law. In certain instances, however, factual details are not included (presumably for confidentiality reasons). In some respects, ICSID awards resemble US judicial decisions in their approach and style.

ICSID awards have begun to increasingly cite to other ICSID awards and decisions of other international tribunals.[444] It is important to note that the current trend of ICSID awards citing the decisions of other international tribunals does not mean that a formal system of precedent is in place, in which one tribunal is duty bound to follow the holding of another tribunal.[445] Instead, Tribunals are more likely seeking guidance from decisions of other Tribunals in analysing applicable legal issues as well as in determining aspects of procedure because so much is left to the discretion of the individual arbitration tribunal.[446] In addition, it is rather difficult to draw any precedent based guidance from published ICSID awards because for every award ruling on a particular issue in a particular way, there is another award handling a similar issue differently.

2. UNCITRAL and general procedure

Article 17, General Provisions, explains that subject to the 2010 UNCITRAL Arbitration Rules, the arbitral Tribunal is free to "conduct the arbitration in such a manner as it considers appropriate." The Rules do require the Tribunal to respect a form of due process in that Article 15(1) provides for the limitation of the Tribunal's discretion through the requirement that the Tribunal ensure that "parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting their case."[447] Further, Article 17 explains that the arbitral tribunal, in exercising its discretion, "shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

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[444] See footnote 447.

[445] An arbitral award under NAFTA Chapter 11 "shall have no binding force except between the disputing parties and in respect of the particular case." NAFTA art. 1136(1).

[446] Mondev, Award at 119.

[447] UNCITRAL Arbitration Rules, Article 15(1).

The UNCITRAL Rules do not provide specific guidance as to what appropriate procedural due process requires in particular circumstances. The principles of equal treatment and opportunity to be heard have been invoked under UNCITRAL Article 17(1) before the Iran-US Claims Tribunal, for example, in a variety of circumstances that are illustrative, including the enforcement of filing or document production deadlines, the conduct of hearings, the translation of documents and the testimony of witnesses.[448]

UNCITRAL Rules Article 33(2) authorizes the president of the arbitration to decide questions of procedure on his own only "when there is no majority or when the arbitral Tribunal so authorizes and subject to review by the Tribunal."[449] However, Article 33(2) does not define what constitutes a procedural issue, subject to unilateral determination by the chairman, as opposed to substantive issue, requiring a majority decision of the Tribunal. These distinctions are left to the general discretion of the tribunal and tend to differ greatly from case to case.

With respect to the waiver of rules, according to Article 32 of the 2010 UNICTRAL Rules, a party who knows that any provision or requirement of the Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

Article 18 of the UNCITRAL Model Law addresses the equal treatment of parties which is a mandatory provision as well as the full opportunity to present their case; however, no specific guidance is provided as to what is procedurally required to ensure that parties are given the full opportunity to present their case. A large degree of discretion is conferred upon the parties or, if they fail to agree, to the arbitrators, in determining the rules of procedure which are covered in Article 19. The parties' freedom is restricted only by mandatory provisions. It is important to note that the power

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[448] Van Hoff, Jacomijn, J., Commentary On the UNCITRAL Arbitration Rules: The Application By the IRAN-US Claims Tribunal 103-08 (1991).

[449]UNCITRAL, Article 31(2).

conferred on the arbitral tribunal expressly includes the power to determine the admissibility, relevance, materiality and weight of any evidence.[450]

Autonomy of the parties in determining the rules of procedure of their arbitration is of particular importance as it allows the parties to select or tailor the rules according to their specific wishes or needs. This freedom is unimpeded by traditional and possibly conflicting domestic regulations. This in turn substantially reduces the chances of surprise or frustration on the part of a party unfamiliar with domestic black letter law. Further, under the UNCITRAL Model Law, the Tribunal is given the discretion to tailor the conduct of the proceedings to the specific features of the case without being constrained by traditional local law of the State, including any domestic law relating to the admissibility of evidence.

The place of arbitration (UNCITRAL Model Law Article 20) is an important factor in that it directly affects the determining of applicable national law, and for the purpose of setting aside, recognizing or enforcing arbitral decisions. Article 20 and 31(3) outline the procedure of designating the place of arbitration and for rendering the award at the place so designated legal.

UNICTRAL Model Law Article 23 addresses statements of claim and defense in that within a period of time agreed by the Tribunal, the claim shall state: (1) the facts supporting his claim; (2) the points at issue; and (3) the relief or remedy sought. The respondent shall be required to state his defense in respect of these particulars, unless the parties have agreed otherwise as to the required elements of such statements. With respect to the submission of evidence, the parties are invited to submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they plan on submitting in the future.[451] Unless otherwise agreed by the parties, either party may amend or supplement his claim or defense during

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[450] UNCITRAL Model Law, Article 19(2).

[451] UNCITRAL Model Law, Article 23(1).

the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to potential delay.[452]

3. WTO and general procedure[453]

When a WTO Member believes that another Member has taken an action that impairs benefits accruing to it, both directly or indirectly, under the Uruguay Round Agreements, it may request consultations to resolve the conflict through informal negotiations. The consultations procedures is a mandatory first step to the WTO dispute settlement process and is codified and further developed by the DSU. The DSU requires written requests for consultations clearly stating reasons for the request, the legal basis for the complaint and an explanation of the measures in question.[454]

WTO Consultations aim at assisting disputing Members to reach a mutually-agreed solution; however, consultations must be conducted in good faith before resorting to further action available to Members under the DSU.[455] Additionally, the consultation process provides potential parties to a dispute the opportunity to discuss and exchange relevant information and opinions, all of which are intended to enable the panel process to flow as smoothly as possible.

WTO panelists hear and consider evidence and then provide the DSB with a report which recommends a course of action within six months. Interestingly, in practice, the WTO panel will request both parties to the case to comment on the report prior to submission to the DSB where the DSB either adopts the report or decides by consensus not to accept it. Alternatively, if one of the parties involved decides to appeal the

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[452] *Ibid* at Article 23(2).

[453] This work builds upon a previously published article: James Headen Pfitzer & Sheila Sabune, "Burden-Shifting in WTO Dispute Settlement: The Prima Facia Doctrine, *Bridges*, 12 No.2, 18 (March 2008). www.ictsd.org.

[454] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments - Results of the Uruguay Round, 33 I.L.M. 1225 (1994) (hereinafter DSU), Art. 3.1.

[455] *Ibid.*

decision, the report will not be considered for adoption until the completion of the appeal by the WTO Appellate Body. An Appellate Body report is adopted unconditionally unless the DSB votes by consensus not to accept its findings within 30 days of circulation to the membership. As stipulated in DSU Article 11, a WTO panel is required to 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 covered agreements.

B. Written procedure

1. ICSID and written procedure

Chapter IV of the ICSID Convention addresses written procedures. Rule 29 states that in the absence of a specific agreement between the parties, the proceeding shall be comprised of two phases: a written procedure followed by an oral one. As soon as the Tribunal is established, the Secretary-General shall transmit to each tribunal member a copy of the request for the proceeding, all supporting documentation, notice of the registration and any communication received from either party in response to any document filed.[456]

In addition to the initial request for the arbitration, Rule 31 dictates that the written procedure consists of the following pleadings to be filed within the time limits set by the Tribunal:

(a) a memorial by the requesting party;
(b) a counter-memorial by the other party.

Only if the parties agree or the Tribunal deems necessary a reply by the requesting party and a rejoinder by the other party may also be filed within specific time limits which are set by the Tribunal.[457] Rule 31 (3) explains that a memorial consists of:

(a) a statement of the relevant facts;
(b) a statement of the law;

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[456] ICSID Arbitration Rule, 30.

[457] ICSID Arbitration Rule, 31 (c), (d).

(c) and the submissions.

A counter memorial, reply or rejoinder shall contain:

(a) an admission or denial of the facts stated in the previous pleading;

(b) any additional facts, if necessary;

(c) observations concerning the statement of law in the previous pleading;

(d) a statement of law in answer;

(e) the submissions.

2. UNCITRAL and written procedure

Articles 20 to 22 of the 2010 UNCITRAL Rules provide for statement of claim and defense submissions. Statements submitted under these articles tend to be of a skeletal nature and frequently do not include the evidentiary material or legal argumentation required for a full understanding of the claims and defenses.[458] The Tribunal is therefore required to request for additional information.

With respect to the statement of the claim, Article 20 of the 2010 Arbitration Rules requires that the claimant communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of time to be determined by the tribunal. The claimant has the option to elect that the notice of arbitration be treated as the statement of claim provided that the notice of arbitration complies with all requirements. The statement of claim is required to include the following under Article 20(2) of the 2010 Arbitration Rules:

(a) The names and contact details of the parties;

(b) A statement of the facts supporting the claim;

(c) The points at issue;

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[458] Baker, Stewart A, and Davis, Mark D., *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (London: Kluwer Publishers, 1992) at 96.

(d) The relief or remedy sought;

(e) The legal grounds or arguments supporting the claim.

Further, the statement of claim should, as much as possible, include all documents and other evidence relied upon by the claimant, or contain references to them. However, in practice parties rarely provide detailed information at the early stages of the arbitration.

Article 21 of the 2010 UNICTRAL Arbitration Rules addresses the requisite statement of defense from the respondent and explains that within a period of time to be determined by the Tribunal, "the respondent shall communicate his statement of defense in writing to the claimant and to each of the arbitrators."[459] According to Article 21, it is requisite for the statement of defense to reply specifically to the same particulars as are required in the statement of claim. Further, the respondent may annex to this statement the documents upon which they intend to rely for the defense or may add a reference to the documents or other evidence intended to be submitted at a later time.

In the statement of defense it is also possible for the respondent to present a counter-claim arising out of the same contract or set of facts. In the event that a counter-claim is presented, the same requirements which guide the sufficiency of the initial claim apply to potential counter-claims as well.[460]

With respect to amendments, 2010 UNCITRAL Article 22 prescribes that either party may amend or supplement their claim or defense during the course of proceedings, "unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances."[461] Article 22 indicates, however, that a claim may not be amended in

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[459] UNCITRAL 2010 Arbitration Rules, Article 21.

[460] UNCITRAL Arbitration Rules, Article 21(3).

[461] UNCITRAL Arbitration Rules, Article 22.

such a way as to allow it to fall outside the scope of the arbitration clause or separate arbitration agreement which sets the scope for the proceedings.

UNCITRAL Rules Article 24 authorizes the Tribunal to decide whether to require that the parties provide written statements in addition to the statements of claim and defense and shall fix the periods of time for communicating such statements. Article 25 clarifies that the time periods should be 45 days unless the arbitral tribunal decides to extend the time if it considers that an extension is justified. As described above, the propensity for parties to submit initial submissions lacking in detail causes the Tribunal to request additional written statements often.

UNCITRAL Model Law Article 24 specifically presents guidance with respect to hearings and written proceedings. Subject to any contrary agreement by the parties, "the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials."[462] However, unless the parties have mutually agreed to have no hearings, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. Of important note is the fact that Article 24(1) addresses only the general entitlement of a party to oral hearings, as an alternative to proceedings conducted entirely on the basis of documents and other materials. This article does not provide guidance on procedural aspects of the oral hearing including the length, number or timing of oral hearings.

The arbitral proceedings may continue in the absence of a party, provided that proper notice has been given. Model Law Article 25 contains a default rule on the wayward party in that unless otherwise agreed to by the parties, if, without showing sufficient cause:

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[462] UNCITRAL Model Law, Article 24(1).

(a) The claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;
(b) The respondent fails to communicate his statement of defense in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such a failure in itself as an admission of the claimant's allegations;
(c) Any party fails to appear at a hearing or to produce documentary evidence the arbitral tribunal may continue to proceedings and make the award on the evidence before it.[463]

As it is not uncommon for one of the parties to an international arbitration proceeding to have little interest in cooperating or expediting matters, provisions which enable the Tribunal to continue with adjudicating the case without a party's participation provide international arbitration under the UNCITRAL Model Law necessary effectiveness while at the same time respecting the limits or fundamental requirements for procedural justice and due process.

Article 26 addresses the tribunal-appointed experts, though on a less detailed basis than in the UNCITRAL Arbitration Rules. The Model Law explains that unless otherwise agreed by the parties, the tribunal is free to appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal. Further, the arbitral tribunal may require a party to give to the expert any relevant information or to produce, or to provide access to, any relevant documents, goods, or other property for his inspection.[464] Unless otherwise agreed to by the parties, if any party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to pose questions to him and to present expert witnesses of their own in order to testify on the points at issue.

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[463] UNCITRAL Model Law, Article 25.

[464] UNCITRAL Model Law, Article 26(1)(b).

3. WTO and written procedure

The WTO panel process consists of two sets of submissions, two sets of rebuttals, two oral hearings, with accompanying questions and answers throughout, before the panel makes its interim report to the parties.[465] Thus, all evidence in the case is submitted and evaluated before any interim findings of fact, applicable law, or WTO violations are made by the panel. Further, the WTO panel is empowered to develop any additional procedures it reasonably determines to be necessary for the adjudication of the case.

According to the WTO DSU, each party is required to submit to the Secretariat for immediate transmission to the panel and the other party or parties to the dispute, written submissions in which they present the facts of the case and their arguments. The complaining party is required to submit its first submission before the responding party unless the panel decides that the parties should submit their first submissions simultaneously. Each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel are made available to the other party or parties of the case.

C. Production of Evidence

The ICSID and UNCITRAL rules lack detailed evidentiary standards and leave much to the individual tribunal to interpret on a case by case basis. The guiding principle for both dispute settlement mechanisms is: the Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

ICSID and UNCITRAL arbitration function as an ad hoc process. As demonstrated above, the ICSID and UNCTIRAL rules are quite flexible and the tribunal has considerable discretion to organize the proceedings as they deem appropriate. There are no precise guidelines for those details in ICSID and UNCTIRAL dispute settlement

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[465] Marceau, Gabrielle, "Consultations and the panel process in the WTO Dispute Settlement System, in Key Issues" in Rufuf Yerxa and Bruce Wilson, *WTO Dispute Settlement System, the First Ten Years* (Cambridge: Cambridge University Press, 2005) at 39.

most similar to US-based Law and Motions issues of standard national civil courts. While the tribunal will apply general principles of law, all the ICSID and UNCITRAL arbitration rules associated with the different evidentiary mechanisms speak in very general terms, reserve near-complete discretion to the arbitral panel, and fail to set out clear and firm procedural requirements backed up by the threat of sanction in the event of noncompliance. Further, an UNCITRAL tribunal is allowed to continue with the dispute settlement process even in the event that a party refuses to participate.

1. UNCITRAL and production of evidence

It is important to note that the UNCITRAL working group that drafted the UNCITRAL Model Law considered providing for assistance in taking evidence during dispute settlement proceedings. The vision was actually to create something similar to rules of discovery; however, the concept was eventually abandoned and no guidance developed in favour of maintaining the free and flexible nature of this dispute settlement mechanism.

UNCITRAL Model Law Article 25(6) grants the Tribunal broad authority with respect to the admissibility of evidence offered in that the tribunal "shall determine the admissibility, relevance, materiality and weight of the evidence offered."[466] This is the extent of the guidance from the UNCITRAL Rules; however, this broad flexibility is consistent with the traditional flexibility granted to arbitral tribunals in admitting evidence in international arbitrations.

In the UNCITRAL case *Walter Bau Ag (in liquidation) (Claimant) v. The Kingdom of Thailand (Respondent)*, the request for arbitration was filed on 21 September 2005 but due to disagreement among the parties the arbitral terms of reference were not adopted by the tribunal until 20 July 2006 and accepted by the parties until 10 Aug 2006. The oral hearings took place during October 2008, but it was not until 1 July 2009 that the award was issued.

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[466] UNCITRAL Arbitration Rules, Article 25(6).

This case addressed investment issues under the 1965 treaty between the Federal Republic of Germany and the Kingdom of Thailand. The Terms of Reference developed by the parties to guide the scope of the arbitration identified that the UNCITRAL Arbitration Rules "except as excluded, supplemented or varied by agreement of the parties, the relevant provisions (if any) of the treaty and/or such specific orders or instructions of the Tribunal are to be the applicable procedural rules"[467] of the arbitration.

For the most part, the adjudication of this case proceeded as usual with relevant submissions made by both parties and a series of oral hearings and the presentation of detailed expert witness testimony and cross examination. However, while the tribunal was in deliberations and before the issuance of the award, the Chairman of the Tribunal received a letter from a firm of lawyers purporting to write on behalf of the Respondent advising that the Claimant had initiated an ICC arbitration against the Respondent at an earlier time but related to the same subject matter. The letter stated that the Respondent believed that the Claimant had proceeded with the current arbitration hearing in bad faith and had violated its obligations under the said agreement by seeking two separate forums at the same time. The letter further explained that the Kingdom of Thailand "strongly believes that it would be fair and equitable that the Tribunal take into consideration the above information."[468]

The Chairman acknowledged the receipt of the letter but pointed out that the Tribunal had received no advice from the Respondent's attorneys of record. The Chairman continued to explain that the Tribunal was due to confer within a few days and that the time for receiving further evidence had long since passed. Further, the Chairman opinioned that the letter came nowhere close to the proper application to admit further evidence and invited the counsel on record for both parties to file submissions. Within

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[467] *Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand*, Award 1 July 2009, para 1.26. ICC arbitration applying the UNCITRAL Arbitration Rules.

[468] *Ibid* at para. 1.76.

days the Claimant submitted a detailed brief; however, the Respondent's counsel of record submitted nothing further. On 28 April 2009 the Tribunal decided not to take any action on the letter submitted and further explained that it would ignore it when considering its Award. The reasoning of the Tribunal was summarized as follows:

1. The letter was submitted by a law firm that was not of record representing the Respondent.
2. Contrary to the assertion of the law firm purporting to represent the Respondent, the letter was one of the many documents before the Tribunal at the substantive hearing. No reference was made to the document during the hearing. The Tribunal was not asked to examine its terms and no submissions were made that referenced this specific document. There were literally thousands of documents placed before the Tribunal and if any one document had been of particular significance, then the Tribunal considers that counsel would have referred to it either at the hearing or in post-hearing submissions.
3. This Tribunal is not in any position to comment on the issues that will fall to be considered by ICC arbitrations.
4. The hearing of evidence in the instant arbitration closed on 17 October 2008. Very strong grounds would be needed for the Tribunal even to consider, let alone grant, an application to call further evidence at a stage when the issue of award is imminent. This is especially so when the evidence sought to be addressed was before the Tribunal at the time of the substantive hearing and not referenced in any way.
5. Accordingly, the Tribunal will proceed to consider the claim on the merits unaffected by the letter.[469]

This case exemplifies the types of procedural issues regularly considered by a Tribunal applying UNCITRAL Arbitration rules and also the UNCITRAL Model Law. It

[469] *Ibid* at para. 1.85.

is important to note that the analysis tends to address specific issues of the particular case at hand, rather than looking at the legal aspects of the law applied to the case.

The fact that decisions and issues considered by the Tribunal are so case specific highlights the difficulty in reconciling case law and extracting any type of precedence from such adjudication. Further, note should be taken of the complex issues related to party participation and the willingness of a party to participate in the arbitration process. In national courts, for example, issues related to a party's representation by counsel, particularly the change of counsel of record, would be essential to address clearly before substantive issues can be considered in something similar to a Law and Motions proceedings. In any event, the parties are required to formally notify the court of such changes. In contrast, there is no such clear requirement under UNCITRAL arbitration and therefore the Tribunal is forced to devote substantial time to the processing of issues that tend to be more administrative in nature.

Up to this point in ICSID, WTO and UNCITRAL dispute settlement, all written evidence has been produced by the parties on a voluntary basis. There are no clear and firm mandates governing ICSID, WTO and UNCITRAL arbitrators and parties insofar as their rights and duties with respect to ensuring that documents that may be unfavourable to a party's position are presented for consideration by the Tribunal. Matters of production are left entirely to the discretion of the Tribunal and the Tribunal has no clear powers of document compulsion, particularly with respect to relevant documents, the existence of which might not be known to the Tribunal.

D. Compelling the production of evidence

1. ICSID and compelling the production of evidence

ICSID Arbitration Rule 33 explains that within the time limits fixed by the Tribunal, each party shall be required to communicate to the Secretary-General, for the transmission to the Tribunal and the other party, precise information regarding the evidence which it

intends to produce and that which it intends to request the Tribunal to call for.[470] Further, the party must clearly indicate the points to which evidence will be directed. Rule 34(2) enables the Tribunal, if it deems necessary at any stage of the proceedings, to call upon the parties to produce documents, witnesses and experts. Further, the Tribunal may visit any place connected with the dispute or conduct inquiries there.

Rule 34(3) states that parties shall cooperate with the Tribunal in the production of the evidence and in the other measures associated with the Tribunal's request for the production of evidence. In the event that a party fails to produce requested evidence, Rule 34(3) enables the Tribunal to take formal note of the failure of a party to comply with its obligations to provide evidence in response to the explicit request of the Tribunal in light of any reasons given for such failure.

The ICSID Tribunal does have the clear mandate to direct production of specific evidence and if it desires it may reasonably include an admonition that the failure to produce may lead to the appropriate adverse inference. With respect to further details defining what the drafters of the ICSID Arbitration Rules intended by "formal note" or even specifically allowing the Tribunal the explicit power to make adverse inferences in response to the failure of a party to produce requested evidence, the rules are silent. Further, whether or not (and how and when) documents are called upon by the arbitrators to be produced will usually depend on the president's background and expertise related to the particular topic at hand.

The result of this procedural flexibility in document production is endless haggling over the scope of requests and orders to produce as ICSID arbitrators have no formal power of compulsion to order document inspection. This is further compounded with the fact that under ICSID dispute resolution there exists no formal participant-based discovery or deposition process to allow individual parties to ferret out the existence or nonexistence of classes of documents held by the other side, there is no reasonable degree

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[470] ICSID Arbitration Rule, 33.

of assurance that all relevant materials have been disclosed by all sides. Parties are able to simply omit documents or alternatively deny the existence of essential documents, and unless the denial is patently untenable, the documents will remain undisclosed, at no cost to the concealing side.

2. UNCITRAL and compelling the production of evidence

The 2010 UNCITRAL Rules do not contain a provision that clearly empowers the Tribunal to force a party to produce evidence or additional information. The closest the 2010 UNICTRAL Rules come to providing for discovery and the compelling of production is in the third paragraph of Article 27 - listed under "Evidence." Article 27(1) states that each party shall have the burden of proving the facts relied on to support its claim or defense. This implies that the parties will have the obligation to provide all relevant evidence. Interestingly, there is no explicit requirement that a party present evidence adverse to his position.

The Tribunal's discovery of actual adverse evidence to a party's position is authorized only under 2010 UNCITRAL Rules Article 27(3) which empowers the tribunal, at any time during the arbitral proceedings, to "require the parties to produce documents, exhibits or other evidence," in addition to that presented in support of their claims, within such a period of time as determined reasonable by the tribunal.[471] Further, Article 27(4) clarifies that the arbitral tribunal shall have the power to "determine the admissibility, relevance, materiality and the weight of the evidence offered."

In theory, Article 27(3) should provide the UNCITRAL Tribunal with the power to compel parties to produce evidence in their possession, including that which is adverse to their position; however, there is no clarification as to what the repercussions would be if a party refuses to produce such evidence or to even admit that such evidence exists. Further, there are no guidelines directing the level of particularity in the Tribunal's request for additional information.

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[471] 2010 UNCITRAL Arbitration Rules, Article 27(3).

Of important note is the fact that Article 27 does not distinguish between evidence intended for use at the hearing and the discovery of general information, which might include that which "appears reasonably calculated to lead to the discovery of admissible evidence."[472] The Tribunal, nevertheless, may find sufficient authority to compel disclosure of specific information under the provisions governing the Tribunal's general authority over the proceedings.[473]

It is difficult to extract clear precedence from the UNCITRAL case law on this point because there is no consistency in arbitration clauses subjecting the parties to arbitration or the interpretation of applicable law by the Tribunal. Each case tends to create a unique situation of its own and much is left to the discretion of the Tribunal. With respect to the details surrounding the Tribunal's power to compel production, procedures and practices differ widely as to the conditions under which the arbitral tribunal may require a party to produce documents. Therefore, the arbitral tribunal might consider it useful, when the agreed arbitration rules do not provide specific conditions, to clarify to the parties from the beginning, the manner in which it intends to proceed with respect to production. However, the ad hoc nature of this further contributes to diverging case law.

The UNCITRAL Rules enable the arbitral tribunal to establish time-limits for the production of documents if deemed necessary. If the requested party duly invited to produce documentary evidence fails to do so within the established period of time, without demonstrating sufficient cause for such failure, the arbitral tribunal is free to draw its conclusions from the failure and may make the award on the evidence before it.

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[472] US Fed. R. Civ. P. 26(b)(1).

[473] Willenken, Louis, H., "The Often Overlooked Use of Discovery in Aid of Arbitration and the Spread of the New York Rule to Federal Common Law" (1979) 35 Bus. Law. 173.

Article 30 addresses a party's default and identifies specific instances of noncompliance which include a party's failure to submit a statement of claim or defense; to appear at the hearing or to produce evidence requested or ordered by the Tribunal. Further, this article provides that the Tribunal may proceed with the arbitration notwithstanding the defaulting party's failure to participate in the proceedings. It is important to note, however, that this rule does not authorize the Tribunal to issue any award on default. The practical effect of this rule is that if a party fails to submit a statement of defense, the Tribunal must nevertheless proceed to a hearing and invite the defaulting party to that hearing; if the defaulting party also fails to appear at the hearing or fails to produce evidence at the hearing, the Tribunal must nevertheless proceed to hear the claimant's evidence.

In practice, an alternative method for the UNCITRAL Tribunal to attempt to compel the production of evidence is through the appointment of an expert to research and present a report on specific points at issue. Under 2010 UNCITRAL Rules Article 29, the arbitral tribunal may, after consultation with the parties, appoint one or more experts to report to it, in writing, on specific issues to be determined and further communicated by the tribunal.[474] Further, according to Article 29, the parties to the arbitration proceedings are required to give to the expert "any relevant information or produce for his inspection any relevant documents or goods that he may require of them."[475] Additionally, any dispute that may arise between a party and the expert as to the relevance of the required information or production shall be addressed directly by the arbitral tribunal.

It is important to note here that this could be seen as a method for the tribunal to compel production of evidence. Rather than always directly requesting the parties to produce information to the tribunal itself, the tribunal could retain the services of an expert and then draft the terms of reference in such a way as to empower the expert to collect all known and even unknown relevant information as an agent of the tribunal.

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[474] UNCITRAL Arbitration Rules, Article 29.

[475] *Ibid.*

Once the expert has gathered all necessary information, the expert then generates a report which is submitted to the tribunal and then shared with the parties. The parties then have the opportunity to express, in writing, their opinion of the report and a party has the right to examine directly any evidence relied upon by the expert in developing his report. At the request of either party, after submitting his report, the expert may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, each party may present their own expert witness in order to testify on points of issue.

3. WTO and compelling the production of evidence

WTO panel proceedings usually involve a struggle to develop the necessary information and legal understanding to decide the case properly. Parties to a WTO dispute settlement proceeding tend to be very happy to present the panel with all the information favourable to its side. However this changes when it comes to presenting any information that can help the other side. In ordinary civil litigation the adverse party usually manages to present the contrary side of the case. The same is true in WTO litigation, but the panel process has certain limitations in that regard. Governments do not have powers of discovery to obtain information from opposing parties, and so often they can only offer undocumented opinions. Likewise, panels themselves do not have the time or the procedural expertise to conduct long hearings with witnesses.

The most effective way to develop the facts is to obtain the parties' agreement to them. This usually requires questioning by the panel to fill in the gaps. What complicates matters is that questions tend to focus on those facts and issues that the party being questioned would often prefer not to answer fairly and fully. Full development of the legal side of the case often requires similar questioning, just as judges in civil litigation find it valuable to sharpen their understanding of legal issues by probing apparent weak points in each party's legal arguments. To be effective, such factual and legal questioning requires a good foundation in the submissions of the parties, careful preparation of those materials, and above all, tenacity and patience. The sooner the legal and factual records

are established, the more time the panel will have to refine its understanding, and the more opportunity it will have to cover missing ground. In a time-limited proceeding, saving time is a very important consideration.

The present panel procedure is not structured in a way that allows panels to develop cases in a very aggressive manner. The Secretariat officials have an outline of a schedule and a process they lay before the parties, but the process, which is based on traditional practice, is not very efficient.

Although the WTO DSU grants panels broad authority to seek information, it is silent on what to do if a party fails to provide the panel with the information specifically requested. In the situation where a party fails to comply with a panel's request for information, the panel should draw adverse inferences with regard to the missing information; however, clear guidance on this is scarce and a review of relevant WTO case law is necessary.

The panel in the *Turkey--Textiles* case used its authority to seek information by submitting a series of questions to the EU, a WTO Member but neither a party nor third party to the specific dispute at hand. In *Canada--Measures Affecting the Export of Civilian Aircraft*, the panel concluded that the DSU permitted it to seek information from Canada with regard to defenses it had not raised and information from Brazil with regard to matters on which it had not established a prima facie case or raised in its complaint. Further, in *U.S.--Lead-Bismuth*, the panel concluded it had the authority to compel submission of parties' business confidential data from the Department of Commerce.

Although the DSU grants panels broad authority to seek information, it is silent on what to do if a party fails to provide the panel with the information specifically requested. It was suggested in *Canada--Aircraft* that, in the situation where a party fails to comply with a panel's request for information, the panel should draw adverse inferences with regard to the missing information. In an effort to determine whether Canada was engaging in export subsidies, the panel requested that Canada submit information on transactions involving certain loan guarantees. Canada refused to provide the requested

information and Brazil pushed the panel to adopt 'adverse inferences' where Canada had expressly refused to provide information specifically requested by the panel. The panel refused to draw specific adverse inferences on the basis that Brazil had not made out a prima facie case that Canada had granted subsidies in the form of loan guarantees. The panel stated, however, that in "certain circumstances we consider that a panel may be required to make inferences on the basis of relevant facts when direct evidence is not available. This is especially true when direct evidence is not available because it is withheld by a party with sole possession of that evidence."[476]

Brazil appealed the panel's refusal to draw adverse inferences to the Appellate Body. The Appellate Body declined to reverse the panel's decision, reasoning the record was insufficient to conclude that the panel made an error in its application of law, or abused its discretionary authority. The Appellate Body did make two findings with regard to the drawing of inferences. First, the Appellate Body rejected the panel's statement that a party must establish a prima facie case in order to request that a panel draw inferences. The Appellate Body maintained that the establishment of a prima facie case was an issue of the allocation of the burden of proof and the drawing of inferences is an inherent and unavoidable aspect of a panel's basic task of finding and addressing the facts making up a dispute. Secondly, the Appellate Body agreed with the panel's statement that, under certain circumstances, the drawing of inferences was appropriate. It noted that the drawing of an adverse inference was not properly considered a punitive inference, but rather "merely an inference which in certain circumstances could be logically or reasonably derived by a panel from the facts before it."[477] The Appellate Body concluded that the drawing of inferences was "an ordinary task" of the panels and in accordance with "general practice and usage of international tribunals."[478] Finally, the Appellate Body warned that parties' refusal to comply with panel and Appellate Body requests for

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[476] Report of the panel, *Canada – Measures Affecting the Export of Civilian Aircraft,* WT/DS70/RW (2000).

[477] Report of the Appellate Body, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (2000)

[478] *Ibid.*

information had the "potential to undermine the functioning of the dispute settlement system" and instructed future panels to take "all steps open to them to induce the parties to the dispute to comply with their duty to provide information deemed necessary for dispute settlement."[479]

E. Sanctions

In WTO case law, after *Canada--Aircraft*, a panel's authority to seek information from Members and its responsibility to assess the matter before has been clearly articulated. Yet, in addition to drawing adverse inferences from a Member's refusal to provide requested information, there is no clear mechanism available to a panel to compel the production of specifically requested evidence. Interestingly, for some Members, the issue of refusal to provide specifically requested information may be linked to the legal authority to release certain confidential information to the WTO, even if done so in confidence, rather than acting in bad faith.

The ICSID rules do not expressly authorize sanctions or methods to specifically compel the production of evidence. Under the rules, however, the tribunal has the power to determine that, as to a certain portion of the proceeding, one of the parties should bear the related arbitration expenses.[480] As Schreuer observes, the imposition of a disproportionate share of costs could be "a sanction against what [the tribunal] saw as dilatory or otherwise improper conduct."[481] There is significant ICSID case law on this type of sanction used by the Tribunal to compel a party to produce specified information or to behave in a specific way. A brief review of this case is helpful.

In the ICSID case *American Manufacturing & Trading, Inc (Complainant) v. Democratic Republic of the Congo (Respondent)*[482], as an example, respondent Zaire did

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[479] *Ibid.*

[480] ICSID Arb. R. 28(b)(1).

[481] Schreuer. Christoph H., *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001) 540 at 1227.

[482] ICSID Case No. ARB/93/1.

not have representation at the merits hearing nor did it take advantage of the Tribunal's offer to attend a supplemental hearing.[483] The supplemental hearing was conditioned upon Zaire's payment, up-front, of the fees and expenses of the arbitrators and the administrative fees related to the hearing.[484] The requirement of upfront payment by Zaire could be seen as a type of sanction to compel Zaire's participation. Regardless of this, in the end the final award in favour of the claimant in *American Manufacturing* simply ordered the parties to share equally in all of the arbitration fees and expenses, so in effect Zaire was not ever actually "sanctioned" for its non-appearance or its lack of participation.[485]

In the *Metalclad Corporation (Claimant) v. United Mexican States (Respondent)*[486] case, a motion for sanctions was filed.[487] In this case, claimant *Metalclad* (a Delaware corporation) moved for sanctions against respondent Mexico due to its "untimely" filing of a counter-memorial and failure to submit translations by the due date.[488] *Metalclad* sought to have the counter-memorial and the documents struck from the record.[489] The motion prompted a flurry of written submissions and within a month, the tribunal ended the side-issue by denying the motion on the grounds that the result sought would have been "excessive under the circumstances," and upon a finding that *Metalclad* was unable to establish any direct harm due to the delay.[490] In *Metalclad*, the claimant prevailed but was still required to bear its own costs of arbitration.

In the *Benvenuti & Bonfant (Claimant) v. People's Republic of Congo (Respondent),* the Tribunal explained that with respect to sanctions in a case of an abuse

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[483] Am. Mfg., Award 3.23 - 3.26.

[484] *Ibid* at 3.25.

[485] *Ibid* at 7.21.

[486] ICSID Case No. ARB(AF)/97/1.

[487] Metalclad, Award, at 16. The legal basis of the motion for sanctions was not specified.

[488] *Ibid.*

[489] *Ibid.*

[490] *Ibid.*

of rights, ICSID tribunals can award costs against parties as a sanction against what they see as dilatory or otherwise improper conduct in the proceeding.[491] Further, in the *Liberian Eastern Timber Corporation (Claimant) v. Republic of Liberia (LETCO)(Respondent)*, the Government did not appear nor present any case. Additionally, the Government instituted proceedings in its own courts in respect of the same dispute. In the *LETCO* case, the Tribunal found that the procedural misconduct of nonappearance combined with instituting additional parallel proceedings sufficient to substantiate the finding of misconduct of the degree necessary to justify the allocation of all costs on the Republic of Liberia.[492]

In the 2009 case, *Cementownia "Nowa Huta" S.A.(Claimant) v. Republic of Turkey (Respondent),* the Claimant initiated the arbitration on 28 September 2006 and the Request for Arbitration was registered by the Secretary-General of ICSID on 16 November 2006. On 11 May 2007, the Arbitral Tribunal was constituted and the first session to address procedural matters was held on 23 August 2007.[493] During this session, the Arbitral Tribunal decided on fees, records of the hearings, means of communication, decisions of the Tribunal, procedural language, place of arbitration, and written and oral procedures. Additionally, the Tribunal established the procedural timetable for the parties to follow in submitting their written submissions as follows:

(a) Claimant's Memorial on or before 1 March 2008;
(b) Respondent's Counter-Memorial on or before 8 September 2008;
(c) Claimant's Reply on or before 19 December 2008;
(d) Respondent's Rejoinder on or before 17 April 2009;
(e) Hearing in September 2009.[494]

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[491] *Benvenuti & Bonfant v. People's Republic of Congo*, ICSID Case No. ARB/77/2, award August 15, 1980.

[492] *Liberian Eastern Timber Corporation v. Republic of Liberia* (LETCO), ICSID Case No. ARB/83/2, award of March 31, 1986.

[493] ICSID Case No. ARB(AF)/06/2 at para. 32.

[494] *Ibid.*

On 18 December 2007, the Respondent filed the first request for the production of documents and on 30 December 2007 the Claimant replied to the request of the Respondent, opposing them in their entirety and sought the first extension of time to file its Memorial. On 25 January 2008, the Tribunal issued its first Procedural Order No. 1, whereby, among other things, with respect to the Respondent's first request for production, it decided:

With respect to the request for the production of documents, the Respondent is at liberty to renew the request with greater precision at a later stage if judged necessary and the Claimant will be given the opportunity to respond to any such request.[495]

Following the Tribunal's Procedural Order No. 1, the Claimant and Respondent engaged in a series of procedural requests, renewed requests for document production and requests for extensions of time, among others, and the Tribunal issued an additional eleven procedural orders, and in Procedural Order No. 12 requested the Claimant to file a detailed identification of specific classes of documents that were requested by the respondent on 6 July 2009. The Claimant did not file any submission and the proceeding was declared closed on 1 September 2009.[496] For this case, over three years were devoted to this arbitration and the Claimant never submitted the documents requested by the Respondent and the case was finally closed without a proper adjudication of the claims because the Claimant refused to participate in the process.

The Tribunal in *Cementownia* found that the Claimant's conduct in bringing the claim "failed to meet the requisite standard of good faith conduct . . . [and] the claim [was] manifestly ill-founded."[497] The Tribunal continued to find that the "misconduct of an arbitration proceeding leads generally to the allocation of all costs on the party in bad

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[495] *Ibid* at para. 36.

[496] *Ibid* at para. 97.

[497] *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, September 17, 2009 at para. 157.

faith."[498] The Tribunal explained that as the activities of the Claimant lead to "an accumulation of liabilities – abuse of process and procedural misconduct – there is good cause for the Arbitral Tribunal to go beyond the general sanction and to declare that the Claimant has brought a fraudulent claim against the Republic of Turkey."[499] Any details with respect to monetary fines or the amount of the Respondent's arbitration expenses the claimant was expected to pay were not addressed by the Tribunal however.

F. Formalized Discovery

While WTO, ICSID and UNCITRAL have different approaches to submission of evidence and in the case of ICSID and UNCITRAL, much is left to the discretion of the trier of fact and agreements between the parties, in order to ensure the proper protection of due process and that parties have a sufficient understanding of their rights, the formalization of a discovery-type process that can be applied to international dispute settlement may be helpful along with options for the decision-maker to compel the production of evidence that are stronger than simply making adverse inferences as in the WTO and UNICTRAL systems or adjusting the apportionment of costs as is the standard in the ICSID system.

Discovery is generally understood as meaning the disclosure by a party of facts, titles, documents, or other things which are in his exclusive knowledge or possession, and which are necessary to the party seeking the discovery or to be brought in another court, or as evidence of his rights or title in such proceeding.[500] Although discovery is traditionally considered a common law feature, there is no uniformity as to how it is conducted between common law countries. Continental lawyers are accustomed to a different kind of discovery, or rather disclosure: lawyers for each side voluntarily produce all relevant documents to support their claim or defense, and the judge (or an arbitrator) may question witnesses, appoint experts, and, in a number of countries, also

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[498] *Ibid a*t para. 159.

[499] *Ibid.*

[500] Gary B. Born, *International Commercial Arbitration in the United States* (London: Kluwer Law and Taxation Publishers, 1994) at 82.

order a party to produce relevant information.[501] In the United States, three essential features are (a) counsel's cross-examination of witnesses; (b) discovery of the parties' documents; and (c) the use of parties, or their representatives, as witnesses. Historically, international arbitration has been based on the European civil law system, which does not include cross-examination, document discovery and witness testimony from a party or its representative, resulting in a more passive and voluntary method of information exchange.[502]

G. Oral procedures

1. ICSID and oral procedures

Oral procedure is addressed in ICSID Rule 32 and explains that it shall consist of the hearings by the Tribunal. The parties, their agents, counsel and advocates, and witnesses and experts are specifically allowed to attend. Further, unless there is an explicit objection by either party, the Tribunal, after consultation with the Secretary-General, may allow other persons to attend or observe all or part of the hearings. In such cases, the Tribunal is responsible for developing additional procedures that are necessary for the proper protection of proprietary or privileged information and to make appropriate logistical arrangements.[503] This requirement is in line with article 48(5) of the ICSID Convention, which prohibits the publishing of an award "without the consent of the parties."[504]

Traditionally, hearings associated with the ICSID arbitration process have been held behind closed doors and only the parties were allowed to attend. Opening the oral hearings to others than the parties is particularly useful in that they would provide the public with greater transparency and a better understanding of ICSID's investor-state arbitration process. To accomplish this goal, in 2006 ICSID made revisions to rule 32 to

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[501] *Ibid* at 27.

[502] Karamanian, Susan L., "Overstating the "Americanization" of International Arbitration: Lessons from ICSID" (2003) 19 Ohio St. J. on Disp. Resol. 5 at 11.

[503] ICSID Convention, Arbitration Rules, rule 32(2).

[504] ICSID Convention, Art. 48.

expressly bestow upon the tribunal the discretion to permit persons besides the parties, their agents, etc., to attend the hearings or even open them to the public.[505] It is important to note the language of Rule 32 does not specifically define which additional other persons may be allowed to attend the oral hearings nor does it address whether this includes the public or members of the media. Presumably these issues are left up the individual Tribunal itself to interpret as it deems appropriate.

Further note should be taken of the fact that the opening of a hearing to the public is the sole decision of the tribunal unless there is a clear objection of the parties. Specific consent of the parties to the arbitration is not necessary, provided the tribunal considers the views of the parties and consults with the Secretariat.[506] Under the original version of Rule 32, the tribunal had the discretion to allow other persons to attend the hearings only with the specific consent of the parties.

During the oral hearings, the members of the Tribunal are entitled to put questions to the parties, their agents, counsel and advocates[507]. Moreover, the Tribunal is allowed to ask for any additional clarifications as necessary. Witnesses and experts are allowed to be examined before the Tribunal during the oral hearings by the parties themselves under the control of the Tribunal President.[508] Questions may also be put to witnesses and experts by any member of the Tribunal.

In addition to the above procedures relating to the oral hearings, under Rule 36, Witness and Experts: Special Rules, the Tribunal has the explicit power to admit evidence provided by a witness or expert in a written deposition; and, with the consent of both parties, arrange for the examination of a witness or expert in an alternative manor

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[505] ICSID Discussion Paper at 10.

[506] ICSID Working Paper at 10; ICSID Convention, Arbitration Rules, rule 32(2).

[507] ICSID Arbitration Rule, 32(3).

[508] ICSID Arbitration Rule, 35(1).

than before the Tribunal itself.[509] The Tribunal shall define the subject of the examination, the time limit, the procedure to be followed and other particulars and the parties may participate in the examination.[510]

While the parties are allowed to participate during the examination of witnesses and experts, note should be taken of the fact that the ICSID Arbitration rules do not explicitly address whether a party has the right to cross-examine the witness or expert of another party. Rule 36(b) gives parties the right to participate in the examination of witnesses and experts which has been authorized to commence outside the presence of the Tribunal; however whether participation of the parties allows the right to cross-examine is not clear. Further, during hearings which take place in the presence of the Tribunal, Rule 35(1) indicates that witnesses and experts can be examined by both the parties and the Tribunal; however in the text of the ICSID Arbitration Rules, it is not clear whether adverse parties are clearly entitled to cross-examine witnesses and experts of another party.

As explained above, ICSID proceedings are divided into a written and then oral phase. During the written phase, witness statements are submitted along with other documents and pleadings. Statements are prepared entirely by the party, and its legal representation, furnishing the testimony. Prior to the oral phase, although not explicitly included in the ICSID Arbitration Rules, the Tribunal traditionally calls upon the parties to indicate which witnesses of the other side they wish to cross-examine.

This approach has several shortcomings. First, statements are carefully prepared with the assistance of counsel, leaving the opponent without a genuine sense of whether the substance of a witness' testimony requires cross-examination, let alone consideration of other indications of credibility that would come from a deposition of some other pre-

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[509] ICSID Arbitration Rule, 36(b).

[510] *Ibid.*

hearing encounter.[511] Time constraints during the oral hearing, each side is typically allotted the same amount of time, make it impossible for parties to call all witnesses and they are left to select only those key participants on the basis of an inauthentic sense of their knowledge of the facts.

An additional serious problem is that of the non-attending witness, and what to do with the testimony submitted in the written witness statement. In principle, the Tribunal should disregard such witness' statement, and proceed on the basis as if it did not exist. However, this approach is not uniformly followed and the ICSID Tribunal reserves the discretion to accept the written evidence, notwithstanding the witness' refusal or inability to appear for examination or cross-examination. There are no firm and binding principles guiding a Tribunal in these circumstances,[512] and one side may well face the prospect of having to challenge evidence without ever having had the opportunity for any form of confrontation. Again, as with document production, the root of the problem rests in the absence of a genuine subpoena power at the disposal of the ICSID arbitration tribunal.

With no prior ability to depose or otherwise acquire information from opposing-side witnesses, ICSID disputants effectively face them cold at the oral hearing. While witness statements are supposed to be complete and contain all information to be relied on by the presenting side, in practice they rarely do. Witnesses are invariably granted the opportunity to include in their statements additional evidence that the other side might be hearing for the first time.

ICSID claims often present radically opposing versions of fact, including on sensitive and material matters that tribunals must eventually issue a ruling on. However, ICSID arbitration tribunals tend to shy away from making clear findings against a

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[511] Bockstegal, Karl-Heinz, “Presenting Evidence in International Arbitration” (Spring 2001) ICSID Rev. Foreign Investment L.J. 1, 2.

[512] The IBA Rules codify this approach in article 4(8): "If a witness who has submitted a Witness Statement does not appear without a valid reason for testimony at an Evidentiary Hearing, except by agreement of the Parties, the Arbitral Tribunal shall disregard the Witness Statement unless, in exceptional circumstances, the Arbitral Tribunal determines otherwise."

witness' credibility even where the circumstances clearly indicate the necessity for such. This hesitance regularly results in a muddling of the key factual elements of a claim. During ICSID oral hearings, witnesses are left free to amble from the truth as ramifications from perjury under the ICSID rules are weak or nonexistent. Witnesses are sworn in although not to a judicial or quasi-judicial officer, but before the proceeding generally and upon their honour and conscience to tell the truth.[513]

2. UNCITRAL and oral procedures

Oral hearings are not automatic under the 2010 UNCITRAL Arbitration Rules: however, Article 28(2) requires the Tribunal to hold a hearing for witness testimony or oral argument if either party so requests. In the absence of such a request, the Tribunal has the discretion to determine whether it would like to hold oral hearings based on its own initiative. In making the decision whether or not to initiate oral hearings, the Tribunal will tend to base the decision on factors which may include the fact that it is usually quicker and easier to clarify points at issue pursuant to a direct confrontation of arguments rather than on the basis of correspondence balanced with the fact that travel and other costs of holding hearings are expensive, and that the need of finding acceptable dates for the hearings might delay the proceedings. Alternatively, in the absence of a request by the parties for oral hearings, the Tribunal may proceed on the basis of documents and other materials as the Tribunal deems necessary.[514]

In the event that there are oral hearings and oral examinations of witnesses, Article 28 requires the Tribunal to give the parties adequate advance notice, and if witnesses are to be heard, at least fifteen days before the hearing each party is required to communicate to the Tribunal and to the other party the names and addresses of the witnesses intended to be presented. Further, each party is required to communicate the

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[513] ICSID Arbitration Rule, 35.

[514] UNCITRAL Arbitration Rules, Article 28(2).

subject and issues the witness statements will relate to and the language in which the witness will present.[515]

Article 28 allows the Tribunal to determine the manner in which witnesses will be examined. A common practice in international arbitration under the UNCITRAL Rules is for a witness' direct testimony to be presented in the form of a written witness statement with reply and rebuttal evidence reserved for the oral hearings. At the hearing, the witness is required to reaffirm their previous written statements and direct examination is limited to testimony rebutting the written witness evidence of the opposing party, followed by cross-examination, redirect and questions from members of the Tribunal.

With respect to the duration of hearings, under the UNCITRAL Rules the length of a hearing primarily depends on the complexity of the issues to be argued and the amount of witness evidence to be presented. The length also depends on the procedural style used in the arbitration. Some practitioners prefer to have written evidence and written arguments presented before the hearings, which thus can focus on the issues that have not been sufficiently clarified. This method is not compulsory however.

Regarding confidentiality of hearings, UNCITRAL Articles 28(3) and 34(5) provide only that hearings be held in camera and that the award be made public only once the parties' have provided consent. In practice, these provisions essentially require only that certain portions of the proceedings remain private, typically those related to trade secrets and sensitive business information, without imposing a more general duty of confidentiality. In certain cases, however, it could be useful to open hearings to the public as in arbitrations where the state is a party to the dispute. Open hearings would provide the public with greater transparency of arbitrations under the UNCITRAL Rules.[516]

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[515] UNCITRAL Arbitration Rules, Article 28.

[516] *Ibid* at 8.

Accordingly, the Paulsson & Petrochilos UNCITRAL Report proposed that article 28(3) be clarified to give the tribunal the express power, after consulting the disputing parties, to allow third parties to attend hearings and to issue directions for the protection of business or confidential information as necessary.

In UNCITRAL case number 659 – *Germany: Oberlandesgericht Naumburg,* was a situation where the successful party attempted to have the arbitration award enforced in German national court. In an effort to block the enforcement of the award, the respondent claimed that his rights during the arbitration were violated because despite the fact that the respondent requested oral hearings, the single arbitrator informed both parties that he would decide the case on the basis of documents only without holding oral hearings of any kind.[517] In national court proceedings initiative by the claimant in order to have the arbitral award declared enforceable, the respondent raised the defense of procedural irregularities, referring on the grounds of UNCITRAL Model Arbitration Law Article 36 (1)(a)(iv) and alleging that the refusal of the arbitral tribunal to hold an oral hearing violated his due process, in particular his right to be heard. From a procedural aspect, the German national court found that the respondent was precluded from relying on this procedural irregularity as he did not object immediately when the arbitrator announced his intention not to hold oral hearings.[518]

On this issue, the German national court continued and held that refusal of an oral hearing by the single arbitrator did not constitute a violation of the party's right to be heard. The court continued to explain that the principle of oral hearings in the context of an international arbitration is not the same as that of oral hearings in national courts. With respect to international arbitrations, the court clarified that the right of parties to be heard is respected if the parties have at least the possibility to file a written statement of

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[517] UNCITRAL Case No. 659 – *Germany: Oberlangesgericht Naumburg*, 10 Sch 8/01, 21 February 2002.

[518] UNCITRAL Model Arbitration Law, Article 4.

defense and that the particular manner in which the right if defense is exercised, either in written or oral form, cannot be unilaterally decided by a party.[519]

3. WTO and oral procedures

Within the WTO system, after the first written submissions are exchanged between the parties, there is a first oral hearing or substantive meeting with the parties. During the oral hearing, following oral statements from all parties, the parties respond to questions from the panel in order to clarify the legal and factual issues of concern. The time allocated to the oral hearings is limited and after the hearings conclude, the panel begins internal deliberations, reviews the matter, and makes an objective assessment of the relevant factual questions and legal issues.

Initially, the panel asks the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought is then asked to present their point of view. Further, all third parties involved are also invited to present their views. Formal oral rebuttals to the initial position statements are made at the second oral hearing or substantive meeting of the panel. The party complained against has the right to take the floor first to be followed by the complaining party. The parties are required to submit before the second substantive meeting formal written rebuttals. The panel may at any time put questions to the parties and ask them for explanations either during the oral hearings or separately in writing.

Traditionally, the parties at the first hearing do little more than restate their first written submissions. Little if any further elaboration is expected in oral exchanges or in questioning by the panel or by each other. The low expectations for the first hearing tend to become self-fulfilling; both parties and panellists tend to limit their preparations to an introductory level. The low level of accomplishment at the first hearing reduces the effectiveness of the second hearing a month or so later. Cases tend to develop in ragged fashion, governed by whatever the parties submit and when they submit it.

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[519] The German national court in interpreting UNCITRAL Model Arbitration Law, Article 24(1).

The lower level of expectation throughout the oral proceeding tends to reduce the value of questioning by the panel. The panel does have the possibility of questioning the parties on factual and legal issues, but representatives of the parties are often not prepared to answer without further instruction. Oral questioning tends to be limited to less complex subjects, with limitations on the extent of follow-up questions. For these reasons, and also because of a desire to make a better record, primary reliance tends to be placed on written questions, and written questions, of course, are easier to avoid unless they are written with great care.

The somewhat passive and slow-moving process of WTO disputes settlement is attributable in part by the way that power is structured in the model panel that the WTO inherited from GATT. The traditional view of GATT panels centered on the idea that the panel was a body created by the parties to help them resolve a legal dispute. In the beginning, panels were created by agreement of the parties. Panel members were selected by agreement of the parties. Panels were assisted by GATT Secretariat officials, and the Secretariat always presented itself as a servant of the governments rather than an independent body. Even though the new WTO procedure makes the panel process compulsory, panellists are still approved by the parties, Secretariat officials are still servants of the governments, and the governments still have the traditional expectation of party control.

With this perception of the roles and relationships in a panel proceeding, it is difficult for panellists or Secretariat officials to force a higher standard of practice on the parties. The Secretariat legal staff is perhaps best qualified to initiate a more rigorous standard of practice, having the greatest experience in how panels operate and what they need to accomplish. Yet the Secretariat is not only the servant of governments, but it is also the servant of the panel, and as such finds it rather difficult to persuade the panel to do things that may lead to conflict with the parties. The panel members themselves are still only occasional, ad hoc participants, invited to participate with the consent of the parties. Thus they usually find it more comfortable to follow whatever guidance they are given by the parties. As a consequence, panel members nor Secretariat advisors exert much force in guiding the eventual development of the case.

The subject of opening WTO oral hearings to the public has been one of emotional discussion over the past few years. Significantly more case law presenting the analysis that led to allowing public access to hearings exists in the WTO system than does in either the UNCITRAL or ICSID systems. A brief review of this jurisprudence is useful because the fundamental reasoning behind opening WTO hearings to the public is also applicable to the UNCITRAL and ICSID. Additionally, the role of the Appellate Body in interpreting the legal text of the WTO DSU to enable it to open Appellate Body hearings to the public is particularly interesting here because it highlights the value an appellate mechanism brings to the overall legitimacy and functioning of a particular dispute settlement system.

More than simply acting as a court of second review, the WTO Appellate Body regularly interprets and re-interprets the language of the WTO DSU and enables WTO dispute settlement to adjust to the ever changing needs of its Members. This ability, unique to the WTO, is essential to ensure continued relevance and effectiveness of the system over time. In considering the UNCITRAL and the ISCID, perhaps the inherent flexibility of their systems and the significant delegation to tribunal discretion addresses this need and only with time will it become clear which approach is more effective.

While in WTO dispute settlement only WTO Members are directly subject to the mandatory adjudication, no matter how small this community may be, it is essential for Members to have confidence in the WTO which is fostered by allowing WTO Members who have seldom or so far never used the WTO dispute settlement system to have the opportunity to follow dispute settlement hearings directly. The fact that dispute settlement hearings at the WTO have traditionally taken place behind closed doors has directly contributed to motivations for certain civil society to cultivate misperceptions

and doubts about the unbiased and fair manner in which panels and the Appellate Body conduct trade disputes.[520]

Historically, public access to hearings is a fundamental feature of legitimate judicial systems dating back to the French Revolution which introduced public scrutiny as a means to eliminate arbitrary trial outcomes. Further, public scrutiny brings many benefits to a judicial process, among them including the ability to prevent or reveal abuses including corruption and incompetence. Additionally, public scrutiny strengthens trust and confidence in fair justice and thereby the judiciary's legitimacy though the public which is required to accept its decisions.

In 2005, the EC, the United States and Canada were the first WTO Members to jointly request that a panel open its hearings to the public. In response to this request, on 1 August 2005, the first panels in the parallel disputes *US - Continued Suspension of Obligations (Hormones)* and *Canada - Continued Suspension of Obligations (Hormones)* decided that the public was allowed to observe the hearings along with the parties.

Article 12.1 of the DSU refers to a non-compulsory standard working procedure which panels can modify after consulting the parties and obtaining their consent. The panels further determined, and the parties agreed, that Article 14.1 of the DSU does not prohibit open hearings by stipulating that panel "deliberations" must be conducted confidentially. The panel then interpreted "deliberations" to refer only to the panel's internal work in deciding on the issues of the case, including the internal process of decision formulation. The panel therefore determined that Article 14.2 was not applicable to the formal panel proceedings with the parties and that the hearings could then be opened to viewing by the public.[521] Despite the resistance of many third parties,

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[520] L. Ehring, "Public Access to Dispute Settlement Hearings in the World Trade Organization" (2008) 4 Journal of International Economic Law 11 at 1023.

[521] *US and Canada - Continued suspension of obligations*, Communication from the Chairman of the Panels of 1 August 2005, WT/DS321/8, 2 August 2005.

the panel agreed to the request and in doing so ended the consistent practice of over sixty years of GATT/WTO dispute settlement proceedings behind closed doors. [522]

During the first open panel hearings, the public and other WTO Members were, for the first time, able to directly witness the hearings with the exception of the third party session, through a closed-circuit broadcast of picture and sound to a separate room at or near the WTO in Geneva. This method was chosen for reasons of room capacity as well as to minimize any risks of interference by the public to the proceedings. [523] Additionally, it was important to the panel to retain the ability to interrupt the broadcast at any time should it become necessary. At the beginning of the first hearing, slightly over 200 persons were present. [524] The attendance later dropped to around 60, among which were many delegates from WTO Members.

With respect to concerns about open panel hearings, there was no discernible effect on the conduct of the hearings, in particular no "trial by media", no security or other incident, no additional pressure on the panelists or the parties, and particularly no effect on the serenity and professionalism with which the litigators argued their case before the panel. [525] Moreover, following the proceedings it was determined that the passive public observation did not change the intergovernmental nature of the WTO or the government-to-government nature of dispute settlement, as was previously anticipated.[526]

The next series of cases before the panel with substantial media interest were the EC and US *Large Civil Aircraft* cases; however, due to the considerable amounts of commercially sensitive business information associated with the cases, they did not lend

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[522] *Ibid.*

[523] Frederico Ortino, *Basic Legal Instruments for the Liberalization of Trade* (London, Bloomsbury, 2004) at 425.

[524] *Ibid.*

[525] *Ibid* at 1026.

[526] *Ibid.*

themselves to public access. Nevertheless, the EC and the US sought the maximum level of transparency that was practically possible, that being videotaping the non-confidential portions of the hearings and then showing the tape a few days later which allowed for the possible editing if necessary. More commonly, other cases before the panel have operated with the closed-circuit real-time broadcast to a separate room at the WTO; however, twice already the public has been allowed to sit in the gallery in the room of the panel hearing.

To date, the regular attendance at recent panel hearings has substantially decreased from the first open panel meeting in 2005. This decrease is to be expected given the rather specialized and technical subject matter of many WTO disputes. The low level of actual attendance tends to be expected in domestic lawsuits and in no way detracts from the importance of open access, the purpose of which is to give those interested the opportunity to observe a hearing within existing capacity constraints. [527]

When the *US/Canada - Continued Suspension of Obligations (Hormones)* case reached the Appellate Body in late May 2008, the EC, the US, and Canada decided to continue pushing for increased transparency through open Appellate Body hearings.[528] The successful experience with many recent open panel hearings was a good basis from which to start; however, the WTO law with respect to hearings of the Appellate Body is substantially different from that governing panel proceedings.

The moment the Appellate Body first opened its hearings to the public in July 2008, the parties to nine subsequent panel procedures agreed on the opening of their respective hearings. [529] The first public WTO appellate proceeding took place by using simultaneous a closed-circuit broadcast system to a separate room at the WTO. The Appellate Body allowed third parties to choose whether to make their interventions

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[527] Ortino, *supra* note 533 at 365.

[528] *US - Continued Suspension of Obligations*, Appellate Body Report, 31 March 2008, Doc. WT/DS320/AB/R, paras 6.19-6.31.

[529] *Ibid* at 1028.

publicly or confidentially and most made their choice in accordance with their previously expressed positions at the panel level, however only Brazil and India actually made non-public interventions during the hearing.

With respect to public Appellate Body hearings, it is important to note that a substantial majority of WTO Members have never seen or participated in an Appellate Body session. As of the beginning of 2008, only 66 WTO Members had participated directly or indirectly as third parties in an appellate review.[530] Although the *US/Canada - Continued Suspension of Obligations (Hormones)* case was the first opportunity for many WTO Members, academics, WTO Secretariat officials and others to see the Appellate Body in action, the late notice and short registration deadline, combined with the then intensive Doha negotiations resulted in a rather small turnout.

Issues related to the legal justification for public Appellate Body hearings surround Article 17.10 of the DSU. It stipulates that "the proceedings of the Appellate Body shall be confidential," and therefore many Members believed that it would not be possible for the Appellate Body to open their hearings to the public.[531] To further complicate matters, the Appellate Body in *Canada - Aircraft* had already, although superficially, interpreted the term "proceedings" in Article 17.10 to include the oral hearing. [532] That interpretation, however, was differentiable because it addressed a request for additional procedures for the protection of business confidential information. Further, to the Appellate Body, the concept that it lacked the ability to do something that was possible for panels made no sense from a policy perspective; however, it also could not withstand the more detailed legal enquiry into the text, context, object and purpose, as well as the negotiating history of Article 17.10. It was necessary for the Appellate Body to strike a balance.

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[530] Appellate Body Annual report for 2007, WT/AB/9, 30 January 2008 at 33.

[531] WTO, *Handbook on the WTO Dispute Settlement System, A WTO Secretariat Publication Prepared by the Legal Affairs Division and the Appellate Body* (2004), 70.

[532] *Canada - Aircraft*, Appellate Body Report, 20 August 1999, WT/DS70/AB/R, paras 141-147 and *Brazil - Aircraft*, Appellate Body Report, 20 August 1999, WT/DS46/AB/R, paras 119-125.

The specific Appellate Body enquiry took place at the beginning of the two merged appeals in *US/Canada - Continued Suspension of Obligations (Hormones)*. It lasted more than a month and involved in total of nearly 120 pages of primarily legal submissions by the parties and third parties.[533] Additionally, a special (closed) oral hearing took place before the Appellate Body announced its decision on this issue.

In a succinct procedural ruling of 10 July 2008, the Appellate Body decided that the DSU permitted open Appellate Body hearings. In doing so, the Appellate Body set aside the vigorous opposition by Brazil, China, India, and Mexico. To achieve this end, the Appellate Body provided a rather flexible interpretation to the confidentiality requirement of Article 17.10 of the DSU, by rejecting that this requirement entails the same in all relations, is absolute and incapable of adaptation. [534] Based on a contextual reading of Article 17.10, the Appellate Body agreed with the EC, United States, and Canada in their interpretation that parties are free to forego confidentiality for themselves and their statements during Appellate Body hearings. The Appellate Body also relied heavily on other indications demonstrating that complete hearing confidentiality is not possible due to the fact that Appellate Body reports are always published as are notices of appeals and other appeals, as well as letters to the Dispute Settlement Body in all cases where the appeal lasts longer than sixty days.[535]

In determining that Appellate Body hearings should be open to the public and given that the standing Appellate Body is a more judicially legitimate institution than the *ad hoc* composed panels, it would have been unusual had the Appellate Body been barred from doing what panels had already been doing for three years. It is important to recall that rulings of the Appellate Body obtain a higher level of authority than do those of a panel. Additionally, Appellate Body rulings are directly relevant for the entire

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[533] *US/Canada - Continued Suspension of Obligations, op. cit.* paras 31-33 and Annex IV

[534] *US/Canada - Continued Suspension of Obligations, op. cit.* Annex IV.

[535] *Ibid.*

Membership of the WTO. The decision of the Appellate Body to hold open hearings consolidated the panel practice, which it indirectly confirmed and made unnecessary to appeal.

H. Procedural flexibility and precedent

In principle, a court cites precedent when an issue has been previously brought to the court and a ruling already exists on the exact issue. In practice, if a judge agrees with the interpretation of the law in a previous case, the judge should simply state the present case is controlled by the prior precedent and reaffirm.[536]

Given that WTO is backed by strong centralizing institutions[537], WTO case law firmly establishes a system of precedence and procedure, ICSID and UNCTRAL systems do not take this clearly defined approach. It is important to recall that the ICISD and UNCITRAL are voluntary dispute mechanisms and both parties must freely consent to submit their cases to this method of dispute settlement. The WTO, in contract, is a mandatory dispute settlement mechanism and the consent to subject oneself to the WTO system is automatic when a country becomes a Member of the WTO. The fact that WTO dispute settlement is not voluntary enables the imposition of stricter procedural standards and the existence of binding precedence.

Often it is the flexibility of the procedural conduct of international dispute settlement proceedings, in the case particularly the ICSID and UNCITRAL systems, that is the main factor that leads parties to agree to submit their disputes to these mechanisms. In general, parties find particularly attractive the fact that ICSID and UNCITRAL mechanisms use fair neutral procedures which are flexible, efficient and capable of being tailored to the specific needs of their individual disputes.

In the ICSID and UNCTIRAL systems, the development of procedures for a particular case through discussions between the parties and the tribunal members may

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[536] Robert Barnhart, "Principled Pragmatic Stare Decisis in Constitutional Cases" (2005) 80 Notre Dame L. Rev. 1911.
[537] Thomas Cottier, "Future of the World Trade Organization" (2015), 18 Journal of International Economic Law, 1, 3-20.

include establishing an expedited "fast-track" arbitral procedure used only for the instant case, or emphasizing particular types of evidence (e.g., technical, site inspection), or employing innovative evidence-taking procedures (e.g., witness-conferencing, meetings of experts).[538] Alternatively, it may involve using relatively conventional litigation procedures, much like those in some national courts, to hear the parties' submissions and evidence. In all cases, however, the parties' autonomy and the tribunal's discretion are intended to be used to adopt procedures designed to permit the most efficient, reliable, and sensible presentation of the parties' evidence and arguments in a particular case. To achieve this, many of the procedural protections that are designed for national litigation involving individual litigants are removed and instead efficient procedures that are streamlined are adopted with the view to attaining practicable results.[539] This is well described in the UNCITRAL Notes on Organizing Arbitral Proceeding and ICSID takes a similar position:

> This [procedural flexibility] is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute.[540]

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[538] Michael Kerr, "Concord and Conflict in International Arbitration" (1997) 13 Arb. Int'l 121.

[539] Born, *supra* note 5, at 66 (noting that parties usually agree on arbitration because it provides efficiency in resolving a future dispute); *Ballentine Books, Inc. v. Capital Distrib. Co., 302 F.2d 17, 21 (2d Cir. 1962)* ("A fortiori an arbitrator should act affirmatively to simplify and expedite the proceedings before him, since among the virtues of arbitration which presumably have moved the parties to agree upon it are speed and informality."); Arbitration Act, 1996, c. 23, § 33 (Eng.) (imposing duty on the tribunal to "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters failing to be determined").

[540] U.N. Comm'n on Int'l Trade Law [UNCITRAL], UNCITRAL Notes on Organizing Arbitral Proceedings P 4, available at http://www.uncitral.org/uncitral/en/uncitral texts/arbitration/1996Notes proceedings.html; see also UNCITRAL, Report of the UNCITRAL on the Work of its Twenty-Ninth Session, P 15, U.N. Doc. A/51/17 (Aug. 14, 1996), available at http://daccessdds.un.org/doc/UNDOC/GEN/N96/206/41/PDF/N9620641.pdf?OpenElement

It is this procedural flexibility in the ICSID and UNCITRAL systems – the ability to specifically tailor the procedural mechanisms to the unique eccentricities of a particular case that undercuts strong adherence to precedence. The more specifically tailored the procedures become to a specific case, the more easily differentiable that particular case becomes to a spectrum of future cases.

In ICSID and UNCITRAL dispute settlement, unlike in the WTO system, given that there is no clear mandate for the consideration of precedent in the respective rules, decision-makers often find themselves isolated and forced to forge their own path free from the safety of precedent to ground their decisions. While procedural flexibility is not inherently negative and should not be eliminated entirely from the UNCITRAL and ICISD systems, procedural flexibility should not be ad hoc or unbridled. It is the uncertainty that comes from ad hoc and unbridled procedural flexibility that directly contributes to the potential for violations of due process, specifically the due process requirement to ensure that parties have adequate opportunity to be heard and present their case. If procedures are flexible, how then does the decision-maker ensure that those creative and flexible procedures adequately ensure that the party has the opportunity to be heard and present their case? Considerations surrounding the potential institutionalization of a balanced or limited adherence to precedent as related to the UNCITRAL and ICSID systems would automatically provide guidance to future decision makers on how to appropriately manage procedural flexibility and in a way that protects due process rather than endangers it. While the WTO level of adherence to precedent may not be ideal or even possible for the UNCITRAL and ICSID systems, clarification in the form of a recommendation to UNCITRAL and ICISD decision-makers that precedent should be considered and even referenced when developing flexible procedures would be helpful.

I. Rules on admissibility, sufficiency of evidence and the burden of proof

The ICSID rules lack detailed evidentiary standards and leave much to the individual tribunal to interpret on a case by case basis. Under rule 34(1) of the ICSID Arbitration Rules, the "[t]ribunal shall be the judge of the admissibility of any evidence adduced and

of its probative value." The effect of this lax rule combined with the lack of any other complementary jurisprudence or doctrine, is that neither party has any real sense in advance of how the tribunal will assess the weight of any particular kind of evidence. In particular during the oral hearing portion of the dispute settlement process, this concept is being tested because the current trend is for many witnesses to appear at the oral hearing and although not explicitly called for in the ICSID Arbitration Rules, cross-examinations are becoming more detailed and intrusive.

Admissibility in its traditional context is a non-issue in ICSID dispute settlement because everything is admissible. Although not explicitly included in the ICSID Rules, arbitration tribunals do tend to follow the basic principle that it is for the party that asserts the fact to prove it. However what will be required for a particular fact to be proven is left to the individual ICSID arbitration tribunal to determine and apply.

At the conclusion of the ICSID dispute settlement process, the Tribunal may, before the award has been issued, reopen the proceeding on the ground that new evidence is forthcoming "of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points."[541] However, further details clarifying how the Tribunal should justify such actions are left to the discretion of the particular Tribunal.

In the 2006 ICSID case, *F-W Oil Interests, Inc. (Claimant) v. The Republic of Trinidad and Tobago (Respondent),* in the procedural portion of the final award the Tribunal explained that an oral hearing was conducted for ten days and during the hearing the parties were represented by counsel who made presentations of their respective cases to the Tribunal and also examined witnesses from their side and put questions to witnesses from the opposing side.[542] Further, fifteen witnesses were presented by both Claimant and Respondent during the oral hearings and although no explicit notation is

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[541] ICSID Arbitration Rule, 38(2).

[542] F-W Oil Interests, Inc v. The Republic of Trinidad and Tobago, ICSID Case No. ARB/01/14, March 3 2006 at para. 45.

included by the Tribunal, presumably each witness was examined by both sides and even by the Tribunal.[543]

Despite challenges, the parties and the ICSID tribunals have not routinely resorted to basic US-type evidentiary principles and practices; however, ICSID case law tends to lack detailed insight into what happens during the oral hearings and how the tribunal bases its decisions. Therefore, it is difficult to address whether evidentiary objections and tribunal rulings on the objections are routine in ICSID hearings. The tenor of published decisions suggests they are not. Nevertheless, Tribunals are addressing issues related to absent witnesses and credibility of witness statements. They are also applying relevancy standards to the issue of documents a party should produce and methods to compel production including the threat of drawing adverse inferences.

In at least one ICSID case, the tribunal actually excluded evidence that arguably could have been relevant. This decision deviates from the traditional practice in arbitration of admitting the evidence and then addressing any objectionable aspects to the evidence in terms of its weight. In the *Robert Azinian and others (Complainant) v. United Mexican States (Respondent)*[544] case, the Claimant submitted witness statements. The Respondent then contacted the Claimant-designated, non-party witnesses to interview them. The Claimant claimed that the witness contact violated ICSID AFR article 43, which authorizes the parties to arrange for a witness examination outside the Tribunal's presence.[545] In the *Azinian* award the Tribunal refused to restrict a party from interviewing the witnesses, subject to certain conditions, but it held that "[s]tatements made by a witness during any such interview shall not be received into evidence" and the "only testimony to be given probative value is that contained in the signed written statements or given orally in the presence" of the Tribunal.[546]

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[543] *Ibid.*

[544] ICSID Case No. ARB(AF)/97/2.

[545] ICSID Arb. R. 36(b), ICSID AFR art. 43(b).

[546] Azinian, Award, supra note 87, at 56.

The *Azinian* ruling, however, should be contrasted with the ruling in the *Tradex Hellas S.A. (Complainant) v. Republic of Albania (Respondent)*[547] case, in which the Claimant vaguely alleged that the Respondent had interfered with Claimant's designated witnesses. The tribunal refused to hold the evidence inadmissible, and instead stated that it "shall take into account the objections raised by the Parties insofar as the Tribunal considers that the evidence objected to its relevant for the award on the merits."[548]

Application of evidentiary principles in a US fashion appears to occur but it is not common in ICSID arbitrations. The current system gives substantial authority to the tribunal on evidentiary matters and requires little justification from the tribunal as to why it decided to proceed the way it did. This approach reduces the need for the tribunal to make difficult evidentiary decisions.

While this flexible approach to admissibility of evidence poses uncertainty to the parities, it enhances the likelihood that the tribunal can hear all aspects of the case. Since the tribunal is the decision-maker in all respects, including as to evidentiary matters, the harm in having all of the evidence presented is not as great as if a jury were deciding the case. While in the US system full discovery minimizes surprise, in arbitrations surprise is more common.

J. UNCITRAL burden of proof

The traditional notion of the burden of proof is addressed in 2010 UNCITRAL Article 27(1) which expressly provides that "each party shall have the burden of providing the facts relied on to support his claim or defense." Further, Article 27(4) clarifies that the arbitral tribunal shall have the power to "determine the admissibility, relevance, materiality and the weight of the evidence offered."

There are several problems with these rules in that they fail to state and define the burden of proof or the standards of proof to be applied and offer no guidance on how

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[547] ICSID Case No. ARB/94/2.

[548] Tradex, Award, supra note 487, at 83.

the tribunal should determine admissibility and weight of the evidence offered. Generally, everything is left to the discretion of the tribunal which leads to the non-transparent application of burden shifting and the actual decision making process of the tribunal itself.

K. WTO burden of proof[549]

The determination of the appropriate burden of proof and the standard of review specify the rules under which a decision-maker proceeds in the face of uncertainty. Standards of review and the question of applying the proper such standard come into play under the WTO in two ways. Firstly, they arise at the panel level, specifically when a panel is required to review a domestic administrative determination and decide if such a domestic ruling is in compliance with WTO rules and obligations. Put differently, the question addresses "the degree to which, in a GATT (and now WTO) dispute settlement procedure, an international body should 'second guess' a decision of a national government agency concerning economic regulations that are allegedly inconsistent with an international rule"

The second context in which standard of review arises in WTO dispute settlement is when the Appellate Body reviews decisions of a panel. In this situation, the issue becomes how much deference, if any, should the Appellate Body give to panel findings and interpretations of law, as opposed to facts. Standards of review and the determination of which standard of review to apply to a certain case are substantially different from the application of and determination of burdens of proof and standards of proof, further explained below.

Throughout WTO jurisprudence issues related to the burden of proof and the approach of WTO dispute settlement with respect to the burden of proof have been significantly addressed. Interestingly, despite the substantial volume of case law on this

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[549] This work builds upon a previously published article: James Headen Pfitzer & Sheila Sabune, "Burden-Shifting in WTO Dispute Settlement: The Prima Facia Doctrine, *Bridges*, 12 No.2, 18 (March 2008). www.ictsd.org.

subject confusion remains. Given that the ICSID and UNCITRAL systems do not address the burden of proof in detail and leave great flexibility and discretion to the individual tribunals, a review and consideration of the WTO approach provides useful incite to inherent complexities in this area. Importantly, as the burden of proof analysis is central to any dispute settlement process, a thorough understanding of a particular dispute settlement system's approach to the burden of proof is essential to ensuring that a party has been given the adequate opportunity to be heard and properly present their case.

The burden of proof in dispute settlement has been referred to as "the law's response to ignorance"[550] It "compensates for the many uncertainties of litigation, allowing the judicial system to reach determinate outcomes in the absence of relevant information"[551] In international law the generally-accepted rules relating to the burden of proof are relatively straightforward. Simply stated, "[e]ach party . . . has to prove its claims and contentions."[552] It is here that the UNCITRAL and ICSID dispute settlement systems stop and leave the rest of the analysis to the individual tribunal. In contrast, however, the WTO dispute settlement system continues significantly further.

The main source of confusion relating to the burden of proof lies in the terminology used to express these rules as well as in the distinction between burden of proof and the presentation and evaluation of evidence.[553] Additionally, differences in the way the burden of proof and the *prima facie* standard are defined in both common law and civil law jurisdictions can further contribute to this confusion.

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[550] Gaskin, Richard, H., "Burdens of Proof in Modern Discourse" (1992) 4 Yale L. R. 4.

[551] *Ibid.*

[552] Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (Oxford: Oxford University Press, 2004). See also Rutsel Silvestre J. Martha, "Presumptions and Burden of Proof in World Trade Law" (March 1997) 14 Journal of International Arbitration 67.

[553] Pauwelyn, J., "Evidence, Proof and Persuasion in WTO Dispute Settlement, Who Bears the Burden?" (1998) Journal of International Economic Law 227 at 228.

In the WTO context, issues related to the burden of proof were less significant during the application of the original GATT dispute settlement system. This is most likely because disputing parties often presented panels with already agreed-upon facts.[554] Under the old GATT, the burden of proof was actually considered "more of an intellectual concept than a practical one" because panels directly questioned both parties, giving neither the benefit of the doubt.[555] The evolution of the burden of proof in the GATT relates substantially to "nullification and impairment". Originally, under GATT Article XXIII, a breach of obligation alone was not enough to bring an action.[556] Proof of "nullification or impairment" was required of the complaining party which was described as the "negotiation oriented approach"[557] Gradually, GATT panels eliminated this confusing approach and held that any violation of GATT would be considered "*prima facie* nullification or impairment"[558]

As explained by Appellate Body member, David Unterhalter, the burden of proof in WTO dispute settlement "answers two questions that are central to most forms of adversarial litigation that rests upon the proof of facts. First, which party must satisfy the decision-maker on a particular issue once all the evidence has been adduced? Second, what standard of proof must be met to satisfy the decision-maker on that issue"[559] The WTO DSU incorporated at least two rules relevant to the burden of proof from the old GATT system. First, the complaining party is required to prove all violations alleged by

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[554]Kantchevski at 129.

[555]Plank, Rosine, "An Unofficial Description of How a GATT Panel Works and Does Not" (1987) 4 Int'l Arb. 53, 95-96.

[556]General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S 194.

[557]John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Boston: Massachusetts Institute of Technology, 1997), 109, 114.

[558]*Ibid.*

[559] Unterhalter, *supra* note 558 at 543.

it. Second, a respondent who invokes general exceptions under GATT Article XX is obliged to prove that the necessary requirements for the exceptions are satisfied.[560]

In the WTO panel process, the question of who bears the burden of proof is quite essential because, unlike during the time of the GATT, the disputing parties to a WTO case often contest numerous facts and evidence in the panel proceedings.[561] The allocation of the burden of proof has a substantial impact on the substantive rights and obligations of the parties and may directly determine the outcome of the case.

The determination of the correct burden of proof can be closely linked to the concept of presumption. Presumptions, in basic pretext, require or at times allow the trier of fact upon the proof of *X* to proceed on the basis that *Y* is true.[562] Where the presumption is irrefutable, then *Y* follows as a rule of law and will not be undermined by the presentation of additional evidence. Alternatively, where the presumption is refutable, then the truth of *Y* remains open to further determination on the basis that there is additional evidence to eventually disprove *Y*.[563]

Presumptions may directly affect the burden of proof in that a presumption, by creating a commitment to proceed in a particular fashion, may determine which party is burdened with the obligation to present proof for a particular issue.[564] Just as a presumption favours one party to the dispute and shifts the burden of proof, the successful refutation of that presumption by an opposing party may be sufficient to persuade the trier of fact that what has been initially presumed is not the case.[565] There

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[560]Pauwelyn, Joost, "Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?*"* (1998) 1 J. Int'l Econ. L. 227.

[561]Kantchevski at 130.

[562] Unterhalter, *supra* note 558 at 545.

[563] *Ibid.*

[564] *Ibid.*

[565] *Ibid.*

is a shift in the burden of proof, but only in the sense that the opposing party is now at risk and should it fail to produce sufficient evidence, it will lose the case.

As explained above, ICSID and UNCITRAL tribunals have the authority to decide for themselves which evidence is admissible and what standards to apply while assessing the probative value of each item of material evidence submitted.[566] Moreover, they make the determination as to which party shall bear the burden of proof.[567] The concept of burden of proof in international procedure has been regarded as: "the obligation of each of the parties to a dispute before an international tribunal to prove its claims to the satisfaction of, and in accordance with, the rules acceptable to the tribunal"[568] This perception of burden of proof relates to the burden of persuasion in common law jurisdictions and civil law's singular notion of burden of proof.

Although limited guidance is provided in the respective rules, in execution ICSID and UNCITRAL tribunals will require parties, regardless of which side they represent, to prove against an agreed standard of proof each claim or fact they submit to the tribunal for consideration. In essence then, the burden of proof does not shift. Additionally, the scope of burden of proof is generally limited only to issues of triable fact. There is no obligation on the parties to prove to the tribunal matters of law. The arbitrators are presumed to already have sufficient knowledge relating to issues of law in a way that is similar to national courts in both common law and civil law jurisdictions.

For the purpose of deciding whether a particular claim is well founded in law, the principle *jura novit curia* signifies that the court is not solely dependent on the arguments of the parties before it with respect to the applicable law, but should make its own determinations and interpretations.[569] The ability of ICSID and UNCITRAL tribunals to

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[566] Pauwelyn, *supra* note 572 at 230.

[567] *Ibid* at 231.

[568] Osche, *supra* note 564 at 30.

[569] *Judgment on the Merits of 25 July 1974*, ICJ Reports 9 (1974) para. 17.

effectively conduct an independent analysis of the applicable law is unfortunately undermined by the inherent flexibility of their systems in that the more a particular case is specifically tailored to the needs of the parties, the less that case contributes to precedent as it becomes more differentiable from other situations. Significant pressure is then placed upon the individual members of the tribunal as they are required to conduct an independent analysis of applicable law with little to rely upon to support their decision making process. Further, as ICSID and UNCTRAL tribunals have great latitude in determining which standard of proof to apply to a particular case with little guidance, the burden placed upon the members of a tribunal is therefore heightened.

L. Standards of Proof

Despite the limited guidance in the rules, before an ICSID or UNCITRAL tribunal can be prepared to determine whether the burden of proof has been discharged, it is necessary for that tribunal to first make a determination relating to the applicable standard of proof. The standard of proof is a subjective measure under the discretion of the tribunal that is subject to human judgment.[570] *Prima facie* evidence, proof beyond a reasonable doubt and preponderance of the evidence are all types of standards used to measure the sufficiency of proof presented for the purposes of determining whether the ultimate burden of persuasion has been met. The US Supreme Court held in 1991 that "because the preponderance-of-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake'"[571]

Kazazi explains that, "[d]ischarging the burden of evidence does not necessarily imply that the burden of proof has been discharged as well. Satisfying the first will allow the hearing to continue. . . that does not mean that the trier of fact may at the end of the hearing find that the proponent has provided sufficient evidence to discharge the overall

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[570] Mojtaba Kazazi, *Burden of Proof and Related Issues* (London: Kluwer, 1996) 377.

[571] *Grogan v. Garner,* 111 Sup.Ct. 654, 659 (1991), in James, Hazard, and Leubsdorf, *Civil Procedure* 5th ed (New York: Foundation Press, 2001) 339.

burden of proof resting on the proponent"[572] Following this reasoning, the judgment will not automatically be given in favour of the party which has been successful in merely establishing a *prima facie* case, but instead will go to the party which satisfies the ultimate burden of persuasion.

Traditionally, the primary purpose of *prima facie* evidence is to reduce the burden of production and the burden of evidence. Wherever provided, *prima facie* evidence shifts the burden of evidence from the proponent of the burden of proof to the other party. Before this stage, the opposing party is not bound to respond to the case, mere silence may indeed be sufficient. However, in the WTO system, after one party has provided *prima facie* evidence, it will be deemed to have discharged its burden of production and will no longer be required to carry the burden of proof until the other party rebuts the *prima facie* evidence established by the proponent. Both the ICSID and the UNCITRAL do not go into this level of detail in their respective rules or jurisprudence. In some municipal jurisdictions, *prima facie* evidence is accepted as the required standard for satisfying the burden of proof. International tribunals have often accepted claims on the basis of *prima facie* evidence in instances where it remains unrebutted; however, the most common standard of proof applied in international tribunals is the preponderance of the evidence standard.[573]

M. WTO prima facie standard

Prima facie is a standard of proof without a finite definition; however, it has been defined in general by international tribunals as evidence "which, unexplained or uncontradicted is sufficient to maintain the proposition affirmed"[574] The Latin term *prima facie*, or "at first appearance," means "the evidence sufficient to render reasonable conclusion in favour of the allegation he asserts" [575] This definition, nevertheless, only emphasises the

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[572] Kazazi, *supra* note 582 at 25-26.

[573] *Ibid* at 333.

[574] Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study of Evidence Before International Tribunals* (London, Kluwer Law International, 1996) 328.

[575] Tom Herlitz, "The meaning of the Term "Prima Facie"" (1994) 55 La. L. Rev. 391, 392, 395.

importance of the subjective element inherent in issues relating to the standard of proof and begs the question: what is the evidence which, unexplained or uncontradicted, is sufficient to maintain a claim?[576]

Historically, use of a *prima facie* standard was utilised by GATT panels in the context of deciding whether a certain act or measure by a GATT contracting party constituted nullification or impairment in the sense of GATT Article XXIII.[577] As GATT jurisprudence evolved, a finding by a panel of a GATT violation constituted *prima facie* nullification or impairment of GATT concessions. Such a finding was rebuttable by the responding party. If not successfully rebutted however, the initial *prima facie* finding of nullification and impairment became final along with all the legal consequences that followed under GATT Article XXIII.[578]

The WTO introduced a more structured and formal system for resolving disputes than that of the GATT. The WTO system arose out of dissatisfaction with aspects of the GATT procedures although it is important to note that dispute settlement under the WTO system has not divorced itself from the former rules in the GATT Agreement. GATT Articles XXII and XXIII remain central to dispute settlement under the WTO today.[579]

WTO panels and the WTO Appellate Body frequently cite the decisions of other international tribunals in order to bolster support for their own decisions. In *US – Gasoline,* the WTO Appellate Body identified decisions of the European Court of Human Rights, the Inter-American Court of Human Rights and others, as authorities for its determination that Article 31 of the *Vienna Convention on the Law of Treaties* had

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[576] *Ibid* at 329.

[577] Thomas Cottier, Matthias Oesch and Thomas Fischer, *International Trade Regulation* (London: Cameron May, 2005) 162.

[578] *Ibid*

[579] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law,* (New York: Cambridge University Press, 2003) 500.

attained the status of a rule of customary international law.[580] This practice has continued for the most part without interruption.[581] While at times the ICISD and UNCITRAL tribunals do cite decisions of other international dispute settlement mechanisms, this practice is not consistent nor thoroughly documented.

The typical standard of proof applied by WTO panels has been presented in *Indonesia – Autos* namely that it is for the complainant to establish a *prima facie* case of inconsistency with the provision before the burden of showing consistency with that provision is shifted to the defendant. The Appellate Body in *EC – Hormones* states with respect to the meaning of a *prima facie* case "that it is well to remember that a *prima facie* case is one which in the absence of effective refutation by the defending party requires the panel, as a matter of law, to rule in favour of the complaining party"[582] However, the question remains: in order to discharge the burden of proof, what degree of evidence is required?

In response to this concept McGovern explains that "[g]iven that panels have a margin of discretion in the assessment of fact, it might be better to speak of a case that entitles (rather than requires) the panel to reach a conclusion"[583] In his evaluation of the *prima facie* standard as presented by the Appellate Body in *EC - Hormones* with respect to the burden of proof, McGovern queries whether it is still meaningful to even speak of a *prima facie* case, while observing that in deciding whether such a case has been established, not only is the evidence of the party who is charged to present a *prima facie*

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[580] Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (20 May 1996).

[581] Palmeter and Mavroidis, *supra* note 496 at 79.

[582]Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS48/R/CAN, 1997, para 104.

[583]Edmond McGovern, *International Trade Regulation* (Exeter: Globefield Press, 2008) 2.23-50.

case taken under consideration *prima facie*, but also the evidence presented by independent experts along with "at least some responses from the other party"[584]

Traditionally, establishing a *prima facie* case serves the purpose of demonstrating that a case exists and allowing the case to move forward from the initial phase where the claimant is required to present to the adjudicator evidence supporting the claim, to the point where the responding party is required to rebut the evidence presented by the claimant. Throughout WTO jurisprudence, the Appellate Body attempts to shift the burden of evidence to the responding party only once the complainant has established a *prima facie* case. However, confusion related to when the Appellate Body determines that it is actually appropriate to shift the burden is apparent upon a review of the relevant case law.

WTO panels are not confined to the factual record as presented by parties. Lawyers with a background in common law find this troubling because, contrary to what takes place in most common law proceedings, Article 13 of the DSU authorises a panel to seek information "from any individual or body which it deems appropriate"[585] This information may then be used to supplement that provided by the parties. In this respect, WTO panels follow the practice of courts in civil law systems, as do the ICSID and UNCITRAL systems.[586]

It is possible to trace some of the confusion related to the application of the *prima facie* standard to differences between the common law and civil law systems. This is because each system has an innately different approach to the application of burden of proof. Moreover, when taking part in any international dispute settlement mechanism, participants bring with them preconceived ideas from their own domestic system relating to the application of burden of proof. This further contributes to the confusion of burden

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[584] *Ibid.*

[585] DSU Article 13.1, §§ 4.09 [2] – 4.09 [4].

[586] David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization, Practice and Procedure* (Cambridge: Cambridge, 2004) 144.

of proof generally and its application within the WTO Dispute Settlement System specifically.

N. Interaction between parties and decision-makers

In the ICSID and UNCITRAL systems, the rules allow for the parties to spend significant time before the trier of fact to address and discuss how the tribunal will manage the adjudication of their dispute. This high degree of interaction between the tribunal and the parties is largely due to the fact that there is significant flexibility in the rules of both the ICSID and UNCITRAL systems and much is left to the discretion of either the parties or the tribunal. For this reason, much discussion must take place between the decision-makers and the parties in order to establish the methodology of how the tribunal will handle the case before the merits of the case can be considered. This interaction, though not always formalized, could be compared to the pre-hearing or pre-trial conferences in the US court system.

In contrast to the ICISD and UNCITRAL systems, the WTO system is highly structured and leaves little time or opportunity for a dialogue type of interaction between the parties to a dispute and the panel or appellate body. While oral hearings are clearly included in WTO dispute settlement, they come at a point in the process where the case has already been developed, after evidence has been prepared and written submissions have been exchanged and considered. Given the way the WTO system approaches the burden of proof and the prima facie standard in the shifting of the burden of proof, this limited interaction between the parties and the panel or appellate body causes problems for the parties in that they have limited information upon which to base their case management decisions. Further, parties to WTO dispute settlement have little opportunity to adjust their argumentation or their strategy once the dispute settlement process has begun. Consideration of proposed adjustments to WTO dispute settlement procedures to enable increased dialogue between parties and panels throughout the dispute settlement process, particularly at the early stages of the process, may be useful.

O. Issuance and publication of the award or opinion

ICSID Arbitration Rule 46 indicates that the award, including any individual or dissenting opinion, shall be drafted and signed within 120 days after closure of the proceedings. Should the Tribunal deem it necessary, it has the option to extend this period by a further 60 days. The award is required to be in writing and to include the following:

> (a) a precise designation of each party;
> (b) a statement that the Tribunal was established under the Convention, and a description of the method of its constitution;
> (c) the name of each member of the Tribunal, and an identification of the appointing authority of each;
> (d) the names of the agents, counsel and advocates of the parties;
> (e) dates and place of the sittings of the Tribunal;
> (f) a summary of the proceedings;
> (g) a statement of the facts s found by the Tribunal;
> (h) the submissions of the parties;
> (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and
> (j) any decision of the Tribunal regarding the cost of the proceeding.[587]

The rapid publication of awards issued by ICSID tribunals has become particularly important in light of the increasing number of cases and the fact that it is not uncommon for several cases addressing similar issues are pending at the same time.[588] In order to facilitate the timely publication of awards, ICSID Rule 48 makes their early publication mandatory. Article 48(5) of the ICSID Convention and the first sentence of Rule 48(4) provide that ICSID shall not publish an award without party consent. If ICSID does not obtain the mandatory consent of both parties for publication of the full text of the award, and the award is not published by another source, ICSID must

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[587] ICSID Arbitration Rules, 47((1).

[588] ICSID Discussion Paper at 7, 9.

promptly publish excerpts of the legal conclusions of the tribunal.[589] The ICSID website publishes many ICSID awards and other submissions in ICSID arbitrations.[590] Many ICSID awards appear in ICSID Review-Foreign Investment Law Journal, International Legal Materials, or ICSID Reports. Additionally, the US Department of State maintains transcripts of some ICSID hearings on its website as well as some party submissions.[591]

Previously, a former version of ICSID Rule 48 authorized, but did not make mandatory, the publication by ICSID of excerpts from the awards. Further, there was no provision addressing the timeliness of publication of excerpts of the main holdings while ICSID waited to receive the consent of both parties for the publication of an award.[592] Obtaining such approval occasionally took several months.[593]

Article 33 and 34 address the award under the 2010 UNCITRAL Arbitration Rules. Article 33(1) requires that a majority of the arbitrators in a Tribunal make any award. The primary drawback of the majority rule is that it may result in deadlock if no majority is available or, alternatively, may pressure one of the arbitrators to compromise their position and judgment in an effort to obtain a majority.

Article 34(2) requires that the award "shall be final and binding on the parties" and that "the parties undertake to carry out the award without delay." Those provisions are designed to enhance the enforceability of the award by confirming the finality of the award and emphasizing the parties' contractual commitment to comply with the award. Additionally, the arbitral tribunal is required under Article 34(3), when drafting the award, to state the reasons upon which the award is based, unless the parties have

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[589] ICSID Convention, Arbitration Rules, rule 48(4).

[590] Mariott, Arthur, "The Arbitrator's Responsibilities for the Proper Conduct of Proceedings" in A. J. van den Berg, *International Arbitration and National Courts: The Never Ending Story* (London: Kluwer, 2001) 80 - 109.

[591] *ADF Group Inc. v. United States*, ICSID Case Ns. ARB (AF)/00/1 (Apr. 15-18, 2002) transcripts of the hearing on Competence and Liability available at www.state.gov/s/l/c3754.htm.

[592] ICSID Discussion Paper at 8-9.

[593] *Ibid.*

specifically agreed that no reasons are to be given. Article 34(4) requires the award to contain "the place where the award was made."

Article 34 (5) addresses publication of the award and explains that an award "may be made public only with the consent of both parties." Additionally, if the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with the requirement within the period of time required by the relevant law. Further, Article 34(5) allows for the publication of an award to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority. Details regarding the method of publication, length of time before publication, translation, etc. are not addressed by the 2010 UNCITRAL Rules.

With respect to the publication of adopted panel reports, the WTO has a substantial history of promoting openness in relation to such documents and information; however, timeframes and practicality of access have only substantially improved in recent years with the advancement of the WTO website. Additionally, the time necessary for translation into the three WTO official languages may directly contribute to delays in publication of documents, including adopted panel reports. In general, panel reports are directly published after their adoption through the Dispute Settlement Body. For adopted Appellate Body reports, the WTO includes all adopted Appellate Body reports on the WTO website; however, timeframes and practicality of access have only substantially improved in recent years. As with panel reports, the time necessary for translation into the three WTO official languages directly contributes to delays in the publication of Appellate Body reports as does their relatively lengthy nature.

P. Confidentiality

ICSID proceedings are usually conducted in secret, with no easy public access available to the pleadings, let alone the oral hearings.[594] Practically, unless the tribunal and the disputing parties are in agreement, the hearings, pleadings, and the very existence of the case may very likely not be available to the public.

Articles 28 and 34(5) of the 2010 UNCITRAL Arbitration Rules address confidentiality of hearings and awards respectively, however there are no rules addressing the confidentiality of the proceedings as such or of the materials (including pleadings) before the tribunal.[595] Therefore, the Paulsson & Petrochilos UNICTRAL Report proposed an explicit provision on confidentiality which clarifies that any materials used in the arbitration are confidential, with an exception for the submission of amicus briefs, in order to conform to revised article 15(5).[596]

While an explicit rule on confidentiality might prove beneficial in commercial disputes between private parties, the Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD) argue the inappropriateness of such a rule in investor-state arbitrations since it prevents a government from making its own submissions available to the public, which is contrary to the principles of good governance.[597] Moreover, access to documents produced in arbitration proceedings are necessary to effectively apply provisions regarding amicus submissions. As an example, a non-disputing party requesting leave to submit an amicus brief to a tribunal would not be able to justify why its perspective, knowledge or insight is different from that of the disputing parties or useful to the tribunal if the record is kept

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[594] Garcia, Carlos, G., "All The Other Dirty Little Secrets: Investment Treaties, Latin America, And the Necessary Evil of Investor-State Arbitration" (June 2004) 16 Fla. J. Int'l L. 301 at 353.

[595] UNCITRAL Report, P 143.

[596] UNCITRAL Report, P 147, 148.

[597] CIEL and IISD submitted a joint paper to UNCITRAL aimed at increasing transparency, accountability and public participation in investor-state arbitration. See CIEL & IISD, *Revising the UNCITRAL Arbitration Rules to Address State Arbitrations* 7 (2007).

confidential.[598] Further, it would not be possible for a non-disputing party to prepare a specifically tailored submission when access to the pleadings is denied.[599]

With respect to public access to WTO DSU documents, the WTO has made great strides in de-restricting documents and making information available online on its ever expanding website, in particular on the so-called Dispute Settlement Gateway. There is now so much information available on the WTO website that it has become difficult to find specific pertinent information, much less keep up to date with the most recent developments. The most distinctive features of the WTO website are full text search of derestricted WTO documents, including panel and Appellate Body reports, the texts of the WTO Agreements, and schedules of WTO meeting as well as announcements of public panel and Appellate Body hearings. The availability of these dispute settlement documents has to be seen in the context of the de-restriction policy of WTO documents adopted by the General Council.[600]

In spite of the general trend towards publication of WTO documents, full pleadings of parties or communications by third parties in Appellate Body and panel proceedings both during the dispute settlement process and after the issuance of the opinion are not independently published by the WTO Secretariat. According to Article 18.2 of the DSU a party's submissions are confidential except if a party decides to make its submissions available to the public on its own. The United States (US), Canada, and the European Communities (EC), for instance, publish their submissions on a regular basis and at an early stage of the dispute. They are therefore also in favour of increased transparency through public submissions in the DSU review. The current practice of the

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[598] *Ibid* at 10.

[599] *Ibid.*

[600] Procedures for the circulation and de-restriction of WTO documents (WWT/L/160/Rev.1) were adopted by the General Council on 18 July 1996 and were applied retroactively to all WTO documents circulated after the date of entry into force of the WTO Agreement, and also apply to all documents circulated up to and including 14 May 2002. These procedures are described in the following document: WWT/L/160/Rev.1. Revised procedures for the circulation and de-restriction of WTO documents (WT/L/452) were adopted by the General Council on 14 May 2002. These procedures are described in the following document: WT/L/452.

WTO Secretariat, however, is for panels and the Appellate Body to include summaries, or at times even full text versions, of party submissions and questions as annexes to the final panel report which is made public directly after adoption, delays depending sometimes on translation issues.[601]

Q. Speed and costs of dispute settlement

If one of the parties to ICSID arbitration is intent on dragging its feet, there will be ample opportunity for doing so. It may take months before the constitution of the arbitral tribunal is settled, and even afterwards there may be resignations and the necessity to reconstitute. One has even heard of resignations on a prearranged basis if one of the parties has deliberately appointed an arbitrator who is not independent.[602]

Investment claims are notoriously long and expensive. While each party is required to pay its own legal fees and disbursements under any judicial regime, under ICSID arbitration they are also required to pay for the hourly services of the decision-makers. There is also travel and lodging expenses associated with bringing together a panel from all over the world to attend hearings and deliberations in some of the world's most expensive cities (in the case of ICSID based arbitration, usually Washington DC or Paris). Further these cases can involve thousands of pages of documents, at least two rounds of complete legal pleadings, with usually several others if there are judicial challenges or requests for interim measures. Further there is at least one complete oral hearing. The arbitrator fees and expenses are now typically amounting to about US$ 1 million per case, which is shared by each side and paid up-front as the case proceeds. The slow pace at which the proceedings progress and decisions are drafted can be equally frustrating for all sides. Matters of logistics, the lack of strict time rules for the bringing of claims to hearing and issuing awards, and any number of intangible factors make the average resolution time form the date the claims are initially registered to the date of dispatch of the final award almost over two years, and regularly beyond that.

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[601] *Ibid.*

[602] Kerr, Justice, "International Arbitration v. Litiation" (1980) J. Bus. L. 164, 175 - 76.

As private lawyers and law professors, investor-state arbitrators are paid by the hour at rates commensurate with their reputations and experience, and to some extent, with what they bill out other client matters. Fees range from a low-level of $2400 per day per arbitrator as set by the ICSID in its most recent Schedule of Fees,[603] up to, $800 per hour in cases where the parties agree to top-off the ICSID rates. Arbitrators' allegiances are to their own firms. Their billing requirements make it impossible for them to approach a case in the same way a judge or other decision-makers do when they have no financial stake either in the existence of the claim itself, or in its prolonged duration.

In itself, the generous remuneration of the arbitrators is not automatically a problem because significant expertise is needed. Nevertheless, it can be argued that the ICSID arbitration system, in paying its adjudicators by the hour and without overall time limits, financially rewards the continuation and prolonging of proceedings.

Pursuant to ICSID's financial and administrative regulation 14, the Secretary-General sets standard daily fees for members of conciliation commissions, arbitration tribunals, and annulment committees.[604] However, in accordance with article 60(2) of the Convention, parties and the commission, tribunal or committee may agree on a different rate of remuneration than the stated fee.[605] In an effort to provide further clarification, ICSID Rule 14 states that requests for increases in the applicable rate will only be made in exceptional circumstances and must be made through ICSID. Rule 14 specifically responds to situations where tribunal members objected at the beginning of a proceeding to ICSID's standard hourly rate of $350 and requested substantially more, sometimes on

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[603] ICSID Schedule of Fees, available at www.worldbank.org/icsid/schedule/fees.pdf.

[604] ICSID Convention, Arbitration Rules, regulation 14.

[605] *Ibid* at Art. 60(2).

the order of $500-$800 an hour.[606] Rule 14 is intended to make it much more difficult for arbitrators to make such demands.[607]

In the 2009 case *EDF (Services) Limited (Claimant) v. Romania (Respondent)*, on 14 June, 2005, the ICSID received from the Claimant a request for arbitration proceedings and the request was registered on 29 July 2005 by the Secretary-General of ICSID and the Tribunal was constituted on 20 December 2005.[608] In subsequent months, the parties engaged in a back and forth filing of requests for production of documents, squabbling over the scope of such requests, and the filing of submissions, observations, replies and rejoinders. After several rescheduled attempts, the evidentiary hearing was held from 22 September 2008 to 26 September 2008 at the headquarters of the World Bank in Washington, D.C. During the evidentiary hearing, sixteen witnesses and seven experts from both the Claimant and Respondent were examined.[609] On 8 June 2009, the Tribunal declared the proceeding closed, but it was reopened on 27 July 2009, to allow both parties to update their respective statements on costs to take account for further submissions after the closing of the proceeding, and the dispatch of the award occurred on 8 October 2009.[610] Over four years were devoted to this dispute.

With respect to costs in the *EDF (Services) Limited* case, the claimant incurred costs of US$ 2,761,308 and the Respondent US$ 18,574,624.[611] The Tribunal took note of the material disproportion between the Claimant's and Respondent's arbitration costs; however, the Tribunal noted that the traditional position in investment arbitration, in contrast to commercial arbitration, has been to "follow the public international rule which does not apply the principle that the loser pays the costs of the arbitration and the costs of the prevailing party . . . rather, the practice has been to split the costs evenly, whether the

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[606] Born, Gary, et al., *Investment Treaty Arbitration: ICSID Amends Investor-State Arbitration Rules,* (WilmerHale 2006), www.wilmerhale.com/publications.

[607] ICSID Discussion Paper at 14-16.

[608] ICSID Arbitration, Case No. ARB/05/13.

[609] *Ibid* at para. 38.

[610] *Ibid* at para. 43.

[611] *Ibid* at para. 321.

claimant or the respondent prevails."[612] The Tribunal cited the *Metalclad v. Mexico* case where the claimant (investor) prevailed but was still required to pay its own costs.[613] Further, the Tribunal explained that this same approach of splitting all costs evenly has been adopted in cases in which the State was the winning party.[614]

In allocating costs, the Tribunal determined that the dispute was fairly brought by the Claimant and in good faith was evidenced by each side. The Tribunal explained that the disputing parties presented their cases well in both the written submissions and the oral presentations at the hearings. The Tribunal held that, "given the material disproportion between the parties' respective costs, the Tribunal holds that Claimant and Respondent should share equally the costs of the arbitration, and . . . that Claimant should pay all of its own costs and contribute to Respondent's costs . . . for the amount of US$ 6,000,000.[615]

In its decision the Tribunal in *EDF (Services) Limited* explained that the investment arbitration tradition of dividing the costs evenly may be changing. The Tribunal cited the 2005 NAFTA case of *Methanex Corp. v. The United States* where all of Methanex's claims were dismissed and Methanex was ordered to pay the costs of the arbitration as well as the US's reasonable legal costs.[616] The Tribunal further explained that in the 2006 case of *Thunderbird v. Mexico*, the Tribunal's majority said that the same approach as to costs should apply to international investment arbitrations as to international commercial arbitration and therefore allocated the costs on a 75:25 basis against the losing party.[617]

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[612] *Ibid* at para 322.

[613] 5 ICSID Rep. 209 NAFTA/ICSID (AF), 2000)

[614] *Ibid.* See *Tradex v. Albania* (5 ICSID Rep. 43 (ICSID, 1999)), and the NAFTA case *ADF v. United States* (6 ICSID Rep. 449, 536-237 (NAFTA/ICSID)(AF) in which the loosing investors were not ordered to pay the costs of the winner, but rather each party had to pay its own legal costs and to share the costs of the arbitration.

[615] *EDF (Services) Limited v. Romania* at para. 329.

[616] *Ibid* at para. 325, citing *Methanex Corp. v. the United States* (NAFTA/UNCITRAL, 2005).

[617] *Ibid* at para 326.

In WTO dispute settlement, with respect to the costs associated with dispute settlement, the DSU clarifies that all panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council. Further, if necessary, the WTO Secretariat will make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This WTO expert will assist the developing country Member throughout the dispute settlement process but will ensure the continued impartiality of the WTO Secretariat. The WTO Secretariat will also conduct special training courses for interested Members concerning the dispute settlement procedures and practices to facilitate Members' experts to be better informed and able to navigate the WTO system. Regarding additional expenses associated with WTO dispute settlement, the DSU is silent, creating the presumption that each disputing Member is responsible for its own expenses.

Article 40 through 42 of the 2010 UNCITRAL Arbitration Rules addresses the costs associated with an UNCITRAL arbitration and require that the tribunal fix the costs of the arbitration in its award and clarifies that the term costs includes only:

1) The fees of the arbitrational tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself;
2) The travel and other expenses incurred by the arbitrators;
3) The costs of expert advice and of other assistance required by the arbitral tribunal;
4) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
5) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

6) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.[618]

Article 41 clarifies that all fees and expenses associated with the UNICTRAL arbitration process must be reasonable and take into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case. As quickly as possible after establishment, the arbitral tribunal is required to inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is unreasonable or inconsistent with the UNCITRAL Arbitration Rules, it shall make any necessary adjustments which will be binding upon the arbitral tribunal.

With respect to arbitrator compensation, Article 41 of the 2010 UNCITRAL Rules recognizes the need for flexibility, given the variety of factors that may affect what amounts to fair remuneration, by stipulating a test of reasonableness.[619] The UNCITRAL rules attempt to balance this flexibility by providing a list of factors to be taken into account in deciding the question of reasonableness which include namely: the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case. Also to be taken into account in certain circumstances are analogous schedules of fees, if available.[620] UNCITRAL Article 41(4) also provides for consultation with an appointing institution before the fixing of fees under appropriate circumstances.

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[618] UNCITRAL Arbitration Rules, Article 38.

[619] The drafters of 2010 UNCITRAL Article 41 considered and rejected a fixed schedule of fees precisely because it could not take into account factors such as "location, nature, complexity and length" of the dispute. See Baker & Davis at 208-9.

[620] UNCITRAL Rules, Article 39(2).

Article 42 of the 2010 UNCITRAL Rules presents the tradition that generally "costs of the arbitration shall in principle be borne by the unsuccessful party."[621] However, the arbitral tribunal has the power to apportion each of such costs between the parties if it determines that apportionment is the most reasonable option and in taking into account the circumstances of the particular case. Additionally, the arbitral tribunal does not have the ability to charge additional fees for interpretation, correction or completion of its award. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on the allocation of costs. Further, the arbitral tribunal, on its establishment, may request the parties to deposit an equal amount as an advance to cover costs associated with the dispute settlement process and during the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal will inform the parties in order that one or more of them may make the required payment and if such payment is not made, the arbitral tribunal has the authority to order the suspension or termination of the arbitral proceedings. After a termination order or final award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

R. Brief summary

In the above comparative analysis of the WTO, ICSID and UNCITRAL international dispute settlement mechanisms, we have seen that while procedural flexibility is important and much discretion is left to the decision-makers in one form or another, the protection of due process is essential to insure the legitimacy of the respective system and that discretion is not abused. We have seen that while defining specifics surrounding the concept of due process is rather complex, fundamental requirements for the protection of due process can be identified. However, in the international context what is required to rise to a level that effectively meets the fundamental requirements of due process remains

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[621] UNCITRAL Rules, Article 40(1).

largely unknown and with surprisingly little guidance. In the complex world of international dispute settlement, a world outside the dominating force of domestic law or the reach of proscribing legislators, competing interests create an environment ripe for the abuse of due process and while the fundamental requirements for the protection of due process provide some assistance, it is not enough.

Procedure and due process requirements in international arbitration differ significantly from procedure and due process requirements in national court litigation. While a party's right to present his case may be more circumscribed in international arbitration than in domestic litigation, US courts for example, have tended to uphold arbitral awards subject to attack on due process grounds without insisting that all the requirements of due process under US law be met, so long as a party opposing confirmation has received a fair hearing. There is arguably a greater emphasis in international dispute settlement than in domestic litigation on the equal treatment of the parties during the proceedings owing to the consensual nature of arbitral jurisdiction.

Of the tribunals considered, a broad spectrum of degree of delegation of authority to the decision-maker or parties themselves emerged. The UNCITRAL dispute settlement process is the most flexible, leaving significant discretion to the parties themselves to specifically tailor the procedures of the adjudication of their case to their specific needs and the arbitral tribunal is basically free to conduct the arbitration in any manner it considers appropriate and specific procedures tend to very greatly from case to case. At the other end of the spectrum is the WTO dispute settlement process with clearly defined procedure from the WTO DSU. In WTO dispute settlement, when compared to the UNCITRAL system, there is actually little procedural flexibility and all evidence in the case is submitted and evaluated before any findings of fact, applicable law or WTO violations are made by the panel.

While there are similarities and differences between each of the three mechanisms considered, a single system with the perfect approach to all issues has not emerged. Quite the opposite has been observed, within each of the three systems areas

for improvement have been identified and although different, each system can use the other systems as an example for improvement.

PART IV

POLICY GUIDANCE FOR PROTECTING DUE PROCESS

While fundamental requirements of due process protection must be respected in any form of dispute settlement, be it international or domestic, with respect to international dispute settlement there is no single generally accepted international treaty containing detailed procedural rules and guidance on how those fundamental requirements of due process protection should be implemented. While there is a substantial body of international law and customary international law to refer to and international dispute settlement mechanisms could also refer to their past decisions as a form of precedent or guidance for future decisions, there is no clear solution and in practice interpretation of due process protection in the international context becomes largely ad hoc. To this end, the development of policy options for the protection of due process in the international context which highlight simple methods to ensure the fundamental requirements of due process are effectively protected would be a welcome addition to the body of international law.

Factors favoring the development of policy guidance for the protection of due process include the lack of a common procedural background shared by international dispute settlement participants, as well as the absence at the international level of the safeguards for the protection of due process found in national law derived from historical

and social influences of national public policy.[622] Further, policy guidance for the protection of due process will seek to provide support for the avoidance of an international dispute settlement tribunals' adoption of the lowest common denominator of a procedural rule, that being the selection of the procedural rule that is simplest to implement, a potential result of unguided procedural flexibility.[623]

Based upon the analysis of how the three above considered dispute settlement mechanisms address the protection of due process, the development of common rules relating to discovery in an effort to ensure that all evidence is made available to the decision maker is identified as the primary existing gap with the greatest impact potential. Additional policy guidance developed highlights the benefits of a clearly defined substantive appeals mechanism and also the practice of looking to past precedent in order to ground future decisions.

The below sections provide a more detailed analysis of each of the proposed policy options for the protection of due process and considers their application to the three international dispute mechanisms analyzed above. As a starting point for the development of due process protecting policy options, the comparative analysis of the procedural jurisprudence of the three international dispute settlement mechanisms considered above provides an effective source of reference. Reference to the UNCITRAL Arbitration Rules and Model Law, the ICSID system and the World Trade Organization Dispute Settlement Understanding, for example, have served as remarkably solid foundations for both the statutes of the many other standing tribunals, as well as for

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[622] H.W.A. Thirlway, "Evidence Before the International Courts and Tribunals" (1995) 2 Encyclopedia of Public International Law 302, 302.

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

the procedural law of other dispute settlement bodies.[624] This broad collection of jurisprudence has been described as "the most important means for the determination of the rules and principals of international law."[625] These sources have resulted in a notable degree of "homogeneity" in actual practice - especially in the absence of a fully developed doctrine of international procedural law for the implementation of the protection of due process.[626]

Chapter 7 Development of common rules related to discovery

The WTO, ICSID and UNCITRAL dispute settlement mechanisms commonly involve a struggle to develop the necessary information and legal understanding necessary to properly decide the case before them. This can be attributed to the fact that while a party tends to be very happy to present all the information favorable to its side, this collegial attitude changes when it comes to voluntarily presenting any information that can be useful to the opposing party. To address this issue, policies around the development of common rules or practices related to discovery in international dispute settlement would significantly contribute to ensuring that all evidence, whether favorable to a party's position or not, is presented to and considered by the decision-maker, therefore safeguarding the decision-maker's ability to make an informed decision. Further, discovery practices would bolster due process protections as it would provide assurances that parties in actuality have an adequate opportunity to be heard and present their case.

With respect to general procedure, while both the UNCITRAL and the ICSID are procedurally flexible, all three mechanisms do require the parties to submit filings presenting their respective positions, making their arguments and providing evidence upon which they plan to rely for the adjudication of their case. Of importance is the fact

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[624] Thirlway, International Courts and Tribunals, *supra* note 123, at 1128 (noting that the procedures of the PCIJ and the ICJ serve as a benchmark for the procedures of other tribunals).

[625] *Ibid.*

[626] *Ibid.* (attributing the "homogeneity" to the manner in which tribunals and other international bodies have developed in this century, and also to the nature of the field of procedure).

that in all three dispute settlement mechanisms the tribunal is significantly reliant upon the parties to voluntarily submit all the evidence upon which the decision-maker will ultimately base their decisions. There is no clear mandate insofar as to the rights of the decision-maker to ensure that documents that may be unfavorable to a party's position are presented for balanced consideration. Matters of production are left entirely to the discretion of the tribunal but the tribunal has no clear power of document compulsion.

A. What is discovery?

Discovery is a legal mechanism designed for gathering information about either party to a case. During the discovery phase of dispute settlement, there are five common practices used to obtain information from the parties before progressing to the substantive analysis of the case. If used properly, parties can use the discovery phase to determine what arguments the other party intends to make and upon which evidence it will rely on to justify their position. The five basic discovery methods are as follows:

1. Disclosure – both parties request certain items from the other party. The list of items is sent to the other side and they typically have up to 30 days to respond.

2. Interrogatories –This is a list of questions sent for written completion from one party to the opposing party.

3. Admissions of fact – This written list of facts is sent from one party to the opposing party. The party receiving the list of facts is asked either to admit or deny each fact.

4. Requests for production – Used to obtain documents and other materials from the opposing party.

5. Depositions – sworn testimony taken from a witness by a party and anything said during a deposition can be used in court.

With respect to discovery practices, many American lawyers find it difficult to imagine filing a lawsuit only to be later informed that there will be no pre-trial discovery. Nevertheless, such is often the case in international dispute settlement as discovery is not contemplated in the rules and it may come as a rather rude surprise to US practitioners to find that their expectations for document discovery may not be realized.

For most of Europe, which bases its legal systems on civil law tradition, discovery as Americans understand it is considered intrusive, unnecessary and unfair. In international dispute settlement, which borrows aspects of its procedure from both civil law and common law traditions, discovery is not allowed on a level comparable to what is standard within the American legal practice, if allowed at all. To a very limited degree, international dispute settlement tribunals order the production of documents, but depositions, even of party witnesses, are almost never allowed.

B. Common law and civil law approach to discovery

The United States is a common law country and US rules on discovery are aimed at accomplishing the goals of preserving relevant information, ascertaining and isolating issues, and finding out what evidence is out there to assist in the adjudication of the case.[627] To achieve the goal of maximizing the attainment of relevant information to aid in the legal process, the scope of the discovery rules is extremely broad.[628] In a US civil case, a party is entitled to broad discovery of any information sought if it appears "reasonably calculated to lead to the discovery of admissible evidence."[629] Therefore parties may engage in a virtual fishing expedition of documents in order to find the evidence they need to prove their claims. In the United States there is no requirement that parties specifically identify the documents, individuals, or information they are seeking.

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[627] Fed. R. Civ. P. 26(b).

[628] *Ibid.*

[629] Fed. R. Civ. P. 26(b)(1).

It is important to pause a moment to understand how broad the American concept of discovery actually is and how foreign this concept is to current practice in the WTO, ICISD and the UNCITRAL systems, where evidence production is limited in most cases to voluntary production. In Article 43, the TRIPS Agreement considers the production of evidence and clarifies that judicial authorities have the power to order production of specified evidence but little guidance is provided as to what level of specificity is required and what options are available to compel a party to produce evidence.[630] In any event, while the TRIPS Agreement does consider the production of evidence it does not provide guidance similar to the concept of discovery procedures that are found in the American judicial system.

Under the American concept of discovery, the fact that a party does not have the obligation to specifically identify documents, individuals or information which they are seeking to compel is a very powerful concept. When approached aggressively, virtually any information is within the realm of request. This is further highlighted when the language "reasonably calculated to lead to the discovery of admissible evidence" is considered which creates a very low bar to the justification of relevance. Here the important concept to note is the fact that the information requested does not have to be admissible itself; however it must only be reasonably linked to the expectation that if that information is produced it will lead to the discovery of some other information, unknown at the time of request, that will be material and admissible. Following this line of reasoning, virtually anything can and often is requested. Within the United States legal system and true to its adversarial nature, parties often use discovery as a weapon, or at least for intimidation purposes. Before a party brings a case to court they must be prepared in advance to open their private secrets up to public record and scrutiny. The concept that a party to a case before the WTO, ICSID or UNCITRAL dispute settlement mechanisms could simply request information that could be reasonably calculated to lead to the discovery of some other evidence that is admissible, and the party requested to produce would actually be compelled to produce, has not been contemplated.

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[630] Trade-Related Aspects of Intellectual Property Rights, the TRIPS Agreement, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

The US Federal Rules of Civil Procedure provide a wide range of pre-trial discovery mechanisms, including oral depositions, written depositions, written interrogatories, written requests for admissions, and physical and mental exams.[631] In general, in the US system, the discovery process is time consuming and the majority of discovery takes place at the beginning of the adjudication process to bring forth all evidence possible before the merits of the case are actually considered. Initial discovery requests are served in the form of interrogatories and requests for production of documents and things.[632] Next, plaintiffs may serve subsequent sets of requests, as many as they wish, as they become aware of more specific evidence they wish to obtain.[633] Finally, depositions under Rule 30 may be conducted on a person, whether a party to the litigation or not.[634] Within the United States, subpoenas under Rule 45, compel or force individuals to testify before the court as well as to bring any relevant documents in their possession determined to be relevant.[635]

Germany is an example of a civil law country.[636] Unlike countries with a common law tradition, German courts have no authority to adopt general rules on civil procedure. On constitutional grounds this task is reserved for the legislature. The German law of civil procedure has a variety of statutory sources, its main source being the Code of Civil Procedure (Zivilprozessordnung or ZPO). Since its enactment in 1877, the Civil Procedure Code has been amended several times, but its basic structure and characteristic features have endured.

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[631] Fed. R. Civ. P. 26(a)(5).

[632] Fed. R. Civ. P. 33, 34.

[633] *Ibid.*

[634] Fed. R. Civ. P. 30(a)(1). ("A party may take the testimony of any person, including a party, by deposition upon oral examination … .").

[635] Fed. R. Civ. P. 45(a)(1). ("Every subpoena shall … (C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person … .").

[636] The leading English-language treatise on German sivil procedure is Murray and Sturnder 2004.

A number of guiding principles inform civil trials in Germany, some of which are firmly rooted in the German constitution.[637] According to the principle of party control (*Dispositionsmaxime*), all relevant aspects of the proceedings are determined by the parties.[638] The principle of party control of facts and the means of proof (*Verhandlungsgrundsatz* or *Beibringungsgrundsatz*) means that parties are responsible for presenting the facts and relevant evidence to the court. In consequence of the *Verhandlungsgrundsatz*, the German civil trial is adversarial and not inquisitorial, as has been alleged by some commentators. Nonetheless, in comparison with the common law, judges play a more active role. The constitutional right to be heard (*Recht auf rechtliches Gehor*) is considered to be the most important principle of German law of civil procedure, guaranteed not only by the German constitution but also by the European Convention on Human Rights (Article 6 [1]).[639] It guarantees a litigant, as well as every other person directly affected by the result of a law suit, "an opportunity to address the court in support of its own claims and proof and in opposition to the assertions and proof of the opponent"[640]. Conversely, the judge is under an obligation to take into account the allegations and arguments presented by the parties.[641]

German procedure protects the litigants from surprise by requiring each party to identify the evidence upon which it relies, including the witnesses and what they are expected to say, in advance of any evidentiary hearing. The scope of witness interrogation in Germany is much more limited than in common law countries, such as the United States.[642] The taking of evidence in German trials is governed by a strict standard of relevancy. This standard includes a requirement of "substantiation," pursuant to which the court may "order testimony only where a party can generally describe the

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[637] Foster and Sule (2002, 110-26); H. Hoch and Diedrich (1998, 26-39).

[638] *Ibid.*

[639] Article 103(1) GG.

[640] Peter L. Murray, Rolf Sturner, *German Civil Justice* (Carolina: Carolina Academic Press, 2004) 188.

[641] *Ibid* at 366.

[642] Robert Fiche, “Recent Developments in West German Civil Procedure” 1983) 6 Hastings Int’l and Comp. L. Rev. 221.

facts that the evidence is intended to prove."[643] The "substantiation" requirement is intended to prevent a party from using the courts to "probe" or "fish" for evidence of which the party has no concrete knowledge. This is very much in contrast to the approach taken in the United States as discussed above. The traditional principle in German courts is that "no party is required to provide, for his opponent's victory in court, material which the opponent did not already have at his disposal."[644] While there is considerable debate today in Germany concerning how concrete a party's suspicions have to be to justify taking a witness's testimony, and while some situations give rise to a duty to disclose certain information, the "substantiation" requirement demonstrates a rather restrictive attitude toward discovery in civil law jurisdictions.[645]

In looking at common law and civil law practices together, the general concern for properly balancing and controlling the scope of discovery has two aspects. Firstly, there is a concern that discovery conducted only by a magistrate or judge may not be as thorough as discovery conducted by the parties' lawyers. The concern stems from the fact that judges and magistrates are subject to institutional pressures to limit long discovery in an attempt to more rapidly clear their dockets and address more cases. The US system of discovery conducted by attorneys working on an hourly or contingency fee basis "aligns responsibility with incentive."[646]

Discovery by a judicial officer may result in what could be considered an unhealthy state intrusion into the private arena. With respect to the US system, it is important to note that while discovery is mandated by the court, it is actually led and conducted by the individual parties and their representatives. Authors on both sides of the Atlantic have suggested that with respect to the German system, the reluctance to develop vigorous tools for forcing parties and witnesses to divulge information and documents in litigation stems at least partially from a desire to minimize governmental

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[643] *Ibid.*

[644] *Ibid.*

[645] *Ibid.*

[646] *Ibid.*

intrusions into areas of personal privacy.[647] It seems undeniable that putting strong discovery tools in the hands of the judiciary would pose more of a danger of unwarranted state intrusion into personal privacy than does the US present system of party-driven and attorney-led discovery.[648]

In the German system it is the judge or magistrate that actually executes depositions. This is in contrast to the US system where the party attorneys execute depositions according to a strict protocol. Having a judge or parajudge participate in every discovery deposition -- and not just participate, but in fact take the lead in the questioning -- means adding another person who has to prepare for each witness interview. It means adding another person who has the right to prolong the process of questioning each witness. It means adding another person whose conflicting obligations have to be taken into account in scheduling each new witness interview. Adding a judge or parajudge to the process of actual witness examination and record building in the discovery phase thus seems to add a substantial additional delay factor. On balance, however, there is the potential for it to expedite the conduct of individual depositions by eliminating many of the games attorneys play during discovery depositions.

Even without the US expansive rules of discovery, the German system at times has difficulty in controlling delay in a system of judge-centered fact production.[649] The German system tends to proceed in a series of hearings until the judge or judges are satisfied that the crucial factual questions have been explored as fully as possible. This system is subject to delay because a party could always argue for one more hearing to examine a new witness or a new issue, and judges tend to find it difficult to resist the pressure to stretch out the proceedings. The response has been to require that evidentiary proceedings be concentrated as much as possible into one principal hearing but in practice this is not easy to achieve.

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[647] *Ibid* at 126.

[648] Cf. Sturnder at 781-81

[649] Fiche at 221.

C. Discovery through examination of witnesses

Discovery can be a very useful procedural device, especially in cases in which one of the parties does not have access to the necessary evidence for reasons beyond its reasonable control.[650] Recognizing its usefulness, many civil lawyers and arbitrators now accept this procedure as long as it does not allow "fishing expeditions."[651] In practice, a type of blended discovery is becoming common – a situation that is acceptable to both common law and civil law attorneys.

Traditionally, due to the presence of the jury, oral presentation of evidence and examination and cross-examination of witnesses by the parties' counsel constitute a major part of a common law trial. However, in a Continental hearing, oral presentation of evidence, including witness examination, is less important as greater weight is usually awarded to document evidence than witness statements as the majority of evidence is already in the file.[652] Most civil lawyers are not skilled in the art of cross-examination and view it "with abhorrence."[653] The civil-law trial concentrates on legal argument and is controlled by the judge or an arbitrator.

The WTO, UNCITRAL and ICSID follow the Continental model in conducting the hearing. The arbitral tribunal exercises "complete control" over the process,[654] and in effect reduces the role of counsel. Use of comprehensive written submissions in international arbitration is also commonplace.[655] Rather than a "short and plain statement

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[650] *Ibid* at 31.

[651] Siegfried H. Elsing & John M. Townsend, "Bridging the Common law-Civil Law Divide in International Arbitration" (2002) 18 Arb. Int'l 59, 59.

[652] *Ibid* at 62.

[653] Howard M. Holtzmann, "Balancing the Need for Certainty and Flexibility in International Arbitration Procedures" in Richard B. Lillich & Charles N. Brower, *International Arbitration in the 21st Century: Towards Judicialization and Uniformity?* (New York: Brill, 1993).

[654] IBA R. Evid, art. 8.1.

[655] Dr. Julian D.M. Lew & Laurence Shore, "International Commercial Arbitration Harmonizing Cultural Differences" (August 1999) 1 Disp. Resol, J.20 at 35.

of the claim"[656] typical for Anglo-American litigation, international arbitration typically begins with a detailed claim supported by all (or most) of the documents on which the claimant intends to rely.[657] The parties also provide detailed witness statements[658] and expert reports.[659] Therefore, international arbitral proceedings tend to be more document-oriented, similar to the civil law tradition, than Anglo-American civil procedure.[660] The WTO, ICSID and UNCITRAL follow this pattern.

Whether clearly defined or not in the rules of procedure for a particular dispute mechanism, both arbitrators and counsel are entitled to ask questions, and the order of questioning is either established in advance by the parties, often in the course of a pre-hearing conference, or determined by the arbitral tribunal. A certain degree of blending of practices between common law and civil law approaches is starting to take place. Many lawyers with a civil law background now recognize that oral witness examination of some type can be very useful, and lawyers and arbitrators from common law countries are also softening their approach to oral examination.[661] This blended approach to questioning involves counsel conducting examination, and cross-examination, of witnesses before the tribunal starts asking their own questions. Thus, examination-in-chief and cross-examination are not separated into two phases as in the common law tradition.[662] In WTO, ICSID and UNCITRAL settings, both common law and civil law parties tend to feel satisfied that their procedural traditions have been followed in the arbitral proceedings and formalization of practice might not be too difficult.[663] These harmonized practices that have begun to emerge may indicate that the time is ripe to

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[656] Fed. R. Civ. P. 8(a).

[657] Elsing & Townsend at 60.

[658] *Ibid* at 63.

[659] *Ibid* at 64.

[660] Reed & Sutcliffe at 44.

[661] Peter R. Griffin, "Recent Trends in the Conduct of International Arbitration: Discovery Procedures and Witness Hearings" (Apr. 2000) 1 J. Int'l Arb.19 at 26.

[662] Rene David, *Arbitration in International Trade* (London: Springer, 1985) 296.

[663] Lew & Shore, *supra* note 715 at 35.

formalize discovery practices in WTO, UNCITRAL and ICSID dispute settlement, something that this work advocates for.

The scope of cross-examination as employed in international arbitration differs from that typically seen in the United States, where cross-examination is limited to the scope of direct examination.[664] In ICSID and UNCITRAL, although there is no clear guidance on how cross-examination should be conducted – if at all, common practice has yielded a method where cross-examination covers all of the issues the witness covers in his written statement.[665] Moreover, cross-examination tends not to be as hostile as in the US courts, which makes its use in international arbitration less objectionable to Continental lawyers.[666] In the WTO system, cross-examination is not relevant because WTO dispute settlement does not use party witness oral statements.

In the US system, a party conducts a direct examination of the witness. Immediately thereafter, the other party cross-examines the witness. Cross-examination assumes the witness is present at an oral hearing, which itself is significant because it is not clearly required in ICSID or UNCITRAL for the witness to be present at the hearing. However today, evidence and argument in international dispute settlement are increasingly presented at oral hearings. Further, cross-examination is important in that it produces facts not disclosed in direct examination, which presumably the questioning attorney did not elicit because they are harmful.[667] Cross examination also allows the development of facts that could challenge the witness's credibility.[668]

The International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration provide for an innovative technique related to witness questioning in arbitration: "confrontation testimony" (also called "witness

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[664] Griffin, *supra* note 782 at 28.

[665] *Ibid.*

[666] David, *supra* note 783 at 296.

[667] Wigmore, John Henry, "Evidence in Trial at Common Law" (1961) 75 Harv. L. R. 2 441-456.

[668] *Ibid.*

conferencing").[669] In confrontation testimony, witnesses testify on the same issue together, not one after another. If the witnesses contradict each other, they can be examined regarding their controversies on the spot.[670] Confrontation testimony is neither American nor Continental and seems to fit international arbitration quite well to further extend the number of procedural options acceptable to parties and counsel from different legal traditions. Formalizing the IBA Rules of Evidence related to confrontation testimony could be a good option for WTO, UNCITRAL and ICSID dispute settlement.

The IBA Rules of Evidence further allow the party himself, or the party's officer, to be heard as a witness.[671] In the case of international arbitration, the justification for this would center around the concept that the source of information does not matter. Arbitrators are the judges of the admissibility, relevance, materiality, and weight of evidence.[672]

When following the American litigation style of procedure, it is typical for the parties to present their own experts as witnesses. In the Continental legal system, experts are usually neutral and appointed by the court or the arbitrational tribunal itself.[673] However, in international arbitration, both party-appointed and tribunal-appointed experts are now common, and their reports are provided in writing and may be heard during the hearing.[674] Further, both parties and the tribunal have the right to question the experts at the hearing which proves to be a blend of common and civil law practices.[675]

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[669] Wolfgang Peter, "Witness 'conferencing'" (2002) 18 Arb. Int'l 47, 48.

[670] IBA R. Evid., art. 8.2.

[671] *Ibid,* art 4.2.

[672] *Ibid,* art 9.1.

[673] Elsing & Townsend, at 63-64.

[674] Elena V. Helmer, "International Commercial Arbitration: Americanized, "Civilized" or Harmonized" (2003) 19 Ohio St.J. on Disp. Resol. 35 at 55.

[675] *Ibid.*

Parties in civil disputes in US courts can take a pre-trial deposition through oral examination of any person, including non-parties.[676] The deposition procedure is subject to several rules, including the requirement that proper notice of the deposition be given to all parties.[677] Restrictions are placed on the person before whom the deposition can be taken,[678] the number of depositions a party can take[679] and the length of any single deposition.[680] As all aspects of US discovery, depositions must address relevant matters as set forth under Rule 26 (b)(1) of the US Federal Rules of Civil Procedure.

A pre-trial deposition serves multiple purposes. It allows a party to learn about the witness's account of the events. A deposition prevents surprise at trial and gives the parties a sense of the case for purposes of settlement evaluation. A party can also pin down the witness so that if the witness's trial testimony differs from the deposition testimony, the witness can be impeached. Further, a deposition preserves evidence. If the witness is not available for trial, e.g., the witness is incapacitated or not within the court's subpoena power, the deposition could be used at trial. Depositions remain uncommon in international dispute settlement,[681] and not addressed in WTO, UNCITRAL or ICSID dispute settlement but could be a useful tool in gathering evidence.

In Germany, judicial control over all witness examination, coupled with the rules requiring substantiation and identification, puts the burden on the party seeking disclosure. As a result, Germany does not know the wholesale exchange of documents

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[676] Fed. R. C. P. 30(a)(1) (providing that attendance at a deposition can be compelled by a subpoena issued under Federal Rule 45).

[677] Fed. R. C. P. 30(b)(1) (setting forth the requirement of a written notice and specifying the notice requirements); see also Fed. R. C. P 30(b)(2) (specifying other requirements of notice).

[678] Fed. R. C. P. 30(b)(4) (providing that, absent the parties' agreement, a deposition can "only be conducted before an officer appointed or designated under [Federal] Rule 28").

[679] Fed. R. C. P. 30(a)(2)(A) (providing that, absence leave of court, a party can only take ten depositions).

[680]Fed. R. C. P. 30(d)(2) (providing that, unless otherwise ordered or agreed upon by the parties, a deposition is limited to one, seven-hour day).

[681] Alan Scott Rau & Edward F. Sherman, “Tradition and Innovation in International Arbitration Procedure” (1995) 30 Tex. Int'l L.J. 89, 95 (describing "common law jurisdiction" of international arbitration).

nor the extensive grilling of large numbers of potential witnesses that characterize discovery in the United States. The German system recognizes the importance of truth for the fact-finding process and the importance of protecting areas of personal or business privacy from unreasonable invasion, but the Germans' system of specific disclosure duties and expansive privileges demonstrates a preference for protecting privacy interests over the concern for finding the truth. The German model is similar to current practice in WTO, UNCITRAL and ICSID dispute settlement; however, the formalization of discovery through clearly defining procedural aspects related to witness testimony, deposition and cross-examination would contribute to the ability of a party to present their case and ensure that the trier of fact is fully informed to decide the case.

D. Discovery through document production

In the US adversarial system, parties are given access to each other's non-privileged documents that are relevant to a claim or defence in the case. Discovery, including relatively liberal document access, allows the parties "to narrow and clarify the basic issues" in dispute and permits the unravelling of facts related to the issues.[682]

The US Federal Rules of Civil Procedure (Federal Rules) authorize the discovery of another party's documents.[683] The threshold for discovery, including the production of documents, is whether the requested matter, not privileged, "is relevant to the claim or defence of any party."[684] The relevant information need not be admissible at trial so long as the "discovery appears reasonably calculated to lead to the discovery of admissible evidence."[685]

In a lawsuit's early stages, each party must make an initial disclosure, which requires the production of "a copy of, or a description by category and location of, all

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[682] *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (describing the purpose of discovery as authorized under the Federal Rules of Civil Procedure).

[683] *White v. Money Store,* 1997 U.S. Dist. LEXIS 3042, at 13 (N.D. Ill. Mar. 18 1997) (denying motion to compel documents on the grounds that the plaintiff was on a fishing expedition).

[684] Fed. R. Civ. P. 26(b)(1).

[685] Fed. R. Civ. P. 26(b)(1).

documents" that the disclosing party may use to support a claim or defence.[686] The initial disclosure must also reveal documents relevant to any damages calculation and any insurance agreement that would cover the judgment.[687] Up to this point there are similarities to the WTO, UNCITRAL and ICSID dispute settlement systems where parties are also required to produce or reference the documents upon which they intend to rely; however, the United States system continues a substantial step further by allowing parties to request for the production of documents from another party without the requirement to define those documents with specificity. In effect, in the US system, parties can ask for documents that they do not know with certainty to actually exist.

Under Rule 34 of the Federal Rules, a party can submit a request for production of documents to the opposing party.[688] A general or broadly worded request is not acceptable but the request must identify, "with reasonable particularity," the requested document or category of documents.[689] A party can then cause the issuance of a subpoena duces tecum requesting that a non-party produce documents under Rule 34.[690]

Under the Federal Rules, a party or person from whom discovery is sought can resist abusive discovery. A person can move for a protective order to prevent or limit discovery that is an "annoyance, embarrassment, oppression, or undue burden or expense."[691] A party can object to a Rule 34 request if the requested documents are not discoverable under Rule 26(b)(1).[692] Moreover, a court has the power to limit discovery that is "unreasonably cumulative or duplicative, or is obtainable from some other source

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[686] Fed. R. C. P. 26/a)(1)(B). Documents used "solely for impeachment" are not subject to initial disclosure. Id.

[687] Fed. R. C. P. 26(a)(1)(C), (D). (providing that the party is to make these documents available for inspection and copying under Rule 34).

[688] Fed. R. C. P 34(a).

[689] F. R. C. P. 34(b).

[690] F. R. C. P. 34(c) and F. R. C. P. 45.

[691] F. R. C. P. 26(c) (providing that a motion for protective order can only be filed if it is "accompanied by a certification that the moving party has in good faith conferred or attempted to confer with other affected parties" to try to resolve their differences).

[692] F. R. C. P. 34(b).

that is more convenient" or for other reasons.[693] The US system encourages the parties to cooperate in discovery but as discussed above, when determining whether to uphold requests for the production of documents US courts tend to place more prominence on full disclosure than they do on privacy and parties are expected to attempt to confer in good faith to resolve discovery disputes before bringing them to the court.[694]

In the German system, a party has only limited rights to seek specifically identifiable documents in the possession of the other party or nonparties, relating to specific legal, generally contractual, relationships.[695] Outside of these limited rights, a party cannot force the opposing party or any nonparty to provide documents, which might support its case or cast doubt on its opponent's case. There has been some discussion in Germany over whether the courts have fashioned a duty to cooperate, at least for parties, by shifting the burden of proof or drawing unfavorable inferences against parties who fail to come forward with certain types of evidence and this limited duty remains highly controversial.[696] Expansive testimonial privileges complement these limits against the general discovery of evidence in the German system. These privileges protect confidential relationships and private spheres of interest, most notably business secrets, to a much greater extent than in the United States.

E. Compelling the production of evidence

A significant issue arises when a party refuses to submit evidence and the tribunal does not have the power to compel a party to produce evidence within its exclusive control. This situation is particularly relevant when one party is significantly less advantaged than another, developing countries for example, which already face an uphill battle to produce their own evidence. If a wealthier counterparty can further manipulate the disparity in resources by "failing" to provide evidence, it further heightens disparities.

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[693] F. R. C. P. 26(b)(2).

[694] F. R. C. P. 37(a)(2)(A).

[695] Sturner, *U.S. "*amerikanisched und europaisches Verfahrensverstandnis" in *Festechrift* for *Ernst C. Stiefel* 763, 770-71 (M. Lutter, W. Oppenhoff, O. Sandrock, H. Winkhaus, eds. 1987).

[696] *Ibid.*

The US Federal Rules of Evidence apply to civil proceedings in US courts.[697] While the rules are to be "construed to secure fairness" so that "the truth may be ascertained and proceedings justly determined,"[698] they nevertheless establish specific guidelines as to what can and cannot be admitted in a civil proceeding. The Federal Rules of Evidence also impose obligations on parties to object or move to strike evidence that is inadmissible and to obtain a ruling on the objection or motion.[699] The rules are critical to the US adversarial process because they determine the facts that will be presented to the trier-of-fact (in many cases a jury). As a result, lawyers appearing in US courts spend considerable energy and time determining the evidence needed to prove a claim or defence and assuring its admission before the court. Likewise, through objections, they seek to prevent the opposing side's use of inadmissible evidence. The court, in turn, makes frequent rulings on admissibly based on the Federal Rules of Evidence.

WTO, UNCITRAL and ICSID dispute settlement, however, are not governed by "hard and fast rules" concerning "the character and weight of evidence."[700] Instead, without strict guidance from arbitration rules, this dispute settlement tends to be flexible and "admit virtually any evidence." The evidence's "relevance, credibility, and weight" is then considered in their deliberations.[701] This is inherently not a bad situation; however, common rules related to discovery would need to ensure that all evidence is properly brought before the decision maker, not just that is favourable to each party.

F. ICSID, UNCITRAL and WTO compelling production

In sum, in ICSID arbitration any discovery of evidence beyond voluntary disclosure is firmly in the control of the tribunal. Parties to ICSID proceedings cannot expect

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[697] Fed. R. Evid. 101.

[698] Fed. R. Evid. 102.

[699] Fed. R. Evid. 103(a)(1).

[700] Charles N. Brower, “Evidence Before International Tribunals: The Need for Some Standard Rules” (1994) 28 Int'l Law. 47, 47.

[701] *Ibid* at 48.

extensive, US-style document discovery and depositions are not heard of. If a party fails to cooperate in the evidentiary process, ICISD tribunals can only take formal note of such failure and any reasons given by the party. The ISCID provides in Arbitration Rule 34(2)(a) that "[t]he Tribunal may, if it deems it necessary at any stage of the proceeding: call upon the parties to produce documents, witnesses and experts." Unlike WTO panels, which cannot compel parties to act but only "seek information" under DSU Article 13.1, ICSID arbiters can order a party to produce evidence; however, there is no guidance on how ICSID arbiters should go about this process or what should happen if the requested party refuses. A party's uncooperative conduct may lead the tribunal to draw adverse inferences from that lack of participation and may affect the assessment of damages and allocation of costs. In ICSID case *AGIP v. Congo,* the government of Congo's failure to comply with the provisional measure ordering it to produce documentation was reflected in the tribunal's assessment of damages; however, there was no indication that the party's refusal to provide the requested documentation had any more substantial effect on the outcome of the case.[702]

The UNCITRAL Tribunal's discovery of actual adverse evidence to a party's position is authorized only under 2010 UNCITRAL Rules Article 27(3) which empowers the tribunal, at any time during the arbitral proceedings, to "require the parties to produce documents, exhibits or other evidence," in addition to that presented in support of their claims, within such a period of time as determined reasonable by the tribunal.[703] Further, Article 27(4) clarifies that the arbitral tribunal shall have the power to "determine the admissibility, relevance, materiality and the weight of the evidence offered." In theory, Article 27(3) should provide the UNCITRAL Tribunal with the power to compel parties to produce evidence in their possession, including that which is adverse to their position; however, there is no clarification as to what the repercussions would be if a party refuses to produce such evidence or to even admit that such evidence exists. Further, there are no

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[702] *AGIP S.p.A v. The Government of the People's Republic of the Congo*, ICSID Case No. ARB/77/1, Award (30 November 1979), ICSID Reports 1 (1993): 306, 317-318.

[703] 2010 UNCITRAL Arbitration Rules, Article 27(3).

guidelines directing the level of particularity in the Tribunal's request for additional information.

Can international dispute mechanisms make use of national courts to assist them in compelling the production of discoverable evidence? Because they draw their adjudicative powers from a contract, UNCITRAL and ICSID arbitrators can only issue orders directed at parties to the arbitration and such orders, unlike orders made by national courts, are not self-enforcing. Consequently, the powers enjoyed by arbitral tribunals in relation to the determination of the facts of a case are limited in two ways: first, they are powerless to order non-parties to provide evidence; second, the parties to the arbitral proceedings cannot be compelled by arbitral tribunals to comply with evidentiary orders made against them.[704] In order to ensure that these limitations on arbitral tribunals' powers will not prevent them from considering evidence relevant to the issues in dispute, UNCITRAL article 27 allows courts to provide assistance in relation to evidentiary matters. Such assistance may be requested either by the arbitral tribunal itself, or by a party with the approval of the arbitral tribunal. It is important here to recall that as the ICSID is removed from national court systems, assistance from national courts in the gathering of evidence is not considered in the ICSID system.

UNCITRAL Article 27 states "[t]he arbitral tribunal or a party with the approval for the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence." Article 27 may be relied upon to seek the national court's assistance to compel a person to produce evidence at the arbitral proceedings, during which the merits of the case are to be considered by the tribunal. Regarding discovery practices, where local rules of procedure applicable in the context of judicial proceedings allow the parties to seek the court's assistance to compel a party to provide documents, testimony, or other information that the parties may subsequently choose to produce as evidence at the trial, can such processes be linked to evidence taking within

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[704] *Jardine Lloyd Thompson Canada Inc v. SJO Catlin,* Alberta Court of Appeal, Canada, 18 January 2006, [2006] ABCA 18 (CanLII), available at http://canlii.ca/t/1mch7.

the scope of Article 27? Phrased another way, can Article 27 be relied upon in the context of pre-trial discovery or disclosure? Over the past few years there have been several cases on this point not all reaching consensus.

The question arose in an English case decided in 2003: *PNB Paribas and others v. Deloitte and Touche LLP.*[705] While England is not considered as a UNCITRAL Model Law jurisdiction, its law on arbitration was to a significant extent inspired by the Model Law. For that reason, the party seeking the court's assistance in that case argues that the relevant English provisions ought to be interpreted in light of article 27, which was said to be broad enough to allow courts to intervene in the context of pre-trial discovery or disclosure. However, the court found the argument's premise to be flawed on the basis that article 27 is limited and "is dealing with the taking of evidence and not with the disclosure process" and that "there is nothing in the Model Law which suggests that the Court should assist with the process of disclosure."[706]

In another case, a Canadian appellate court explicitly disagreed with that English decision and concluded in *Jardine Lloyd Thompson Canada Inc v. SJO Catlin* that article 27 was broad enough to contemplate judicial assistance sought in the context of pre-trial discovery or disclosure. Relying on domestic precedents tending to show that the concept of evidence includes both evidence produced at trial and evidence obtained through pre-trial discovery, the court pointed out that article 27 "speaks of assistance in taking evidence," that it would be inappropriate "to add, by implication or otherwise, the words at the hearing," and that "if drafters of Article 27 had intended that assistance would only be given for taking evidence at the hearing, they could have expressly said so."[707]

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[705] Rules of Commercial Court, England, 28 November 2003, [2003] EWHC 2874 (Comm).

[706] *Ibid.*

[707] *Jardine Lloyd Thompson Canada Inc v. SJO Catlin,* Alberta Court of Appeal, Canada, 18 January 2006, [2006] ABCA 18 (CanLII), available at http://canlii.ca/t/1mch7.

Finally, a Hong Kong decision dating from 1994, *Vibriflotation A.G v. Express Builders Co. Ltd.*[708], may also be interpreted as implicitly standing for the proposition that article 27 can be relied upon in the context of pre-trial discovery or disclosure. The applicant, while pursuing discovery in relation to the arbitration, sought the court's assistance under article 27 to obtain potentially-relevant documents from a person who was not a party to the arbitration. While the application was ultimately dismissed, the court did it not because it considered that article 27 did not allow it to intervene in the context of pre-trial discovery or disclosure, but rather because the local rules of civil procedure invoked by the applicant were held not to allow discovery to be obtained against non-parties.[709]

As WTO, ICSID and UNCITRAL proceedings usually involve a struggle to develop the necessary information and legal understanding to decide the case properly and although the tribunals have broad authority to seek information, there is real silence an no meaningful guidance on what to do if a party fails to provide information specifically requested. In general, the tribunal should draw adverse inferences; however, there is little to no guidance on how this is to be accomplished. Irrespective of the fact that the WTO Appellate Body's clarification in the case *Canada - Aircraft*, that parties to a dispute are required to respond fully to a panel's request for information, from time to time, parties continue to ignore this request. While a WTO panel is authorized draw adverse inferences from such a failure to produce evidence, they have shown a reluctance to do so.

For the purposes of the UNICTRAL system, it would seem that parties and the tribunal have the option to rely on domestic courts to enforce requests for discovery and disclosure; however this is not codified anywhere. In any event, the relevant case law addressing the value of pre-trial discovery and disclosure does provide a basis upon

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[708] [High Court – Court of First Instance, Hong Kong] 15 August 1994, HKCFI 205, available at www.hklii.hk/eng/hk/cases/hkchi/1994/205.html.

[709] *Ibid.*

which to rely for the formalization of a type of blended discovery system within the UNCITRAL system at least.

G. Disclosure and equal treatment of parties

With respect to the disclosure component of discovery, the interpretation of UNCITRAL article 18, equal treatment of parties, provides an interesting perspective in that full disclosure to all parties to a case is fundamental to ensure that parties are treated equally. While this is also the case in WTO and ICSID dispute settlement, the below UNCITRAL cases demonstrate the importance of the obligation of disclosure, on the part of the parties and also the arbitral tribunal and the formalization of disclosure in the discovery process would only serve to facilitate the effective exchange of information to avoid potential surprises at the time of the consideration of the merits of the case.

The purpose of UNCITRAL article 18, as interpreted in the *Re Corporacion Transnacional de Inversiones, SA de CV et al. v. STET International, S.p.A. et al* case,[710] is to protect a party from egregious and injudicious conduct by an arbitral tribunal but it is not intended to protect a party from its own failures or strategic choices. Further, the principles of article 18 apply to all aspects of UNCITRAL arbitral proceedings, and breech of these principles may lead to the challenge of the award or application to set aside the award by an unsuccessful party. In the *Attorney-General v. Tozer (No. 3)* case, the UNCITRAL arbitral award in issue was actually set aside in part because a document submitted by a party to the arbitral tribunal had been inadvertently omitted from the file given to the applicant.[711] It was not clear whether this was as a result of a mistake on the part of the tribunal or a deliberate strategy of the opposing party. Nonetheless, the award was set aside because the party in question was not fully informed of all the material evidence. In the *A's Co. Ltd. v. Dagger* case in New Zealand, an arbitrator who allowed a party to develop a different case to that anticipated and permitted evidence on issues that the other party did not expect to have addressed, was held to have failed to give the

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[710] Ontario Superior Court of Justice, Canada, 22 September 1999, [1999] Can LII 14819 (ON SC).

[711] High Court, Auckland, New Zealand, 2 September 2003, M1528-IM02 CP607/97.

other party an opportunity to effectively participate in the hearing.[712] This particular case underlies the importance of discovery and the contribution formalizing discovery practices would make to the equal treatment of parties. By formalizing discovery, parties would be more empowered to search out their own evidence from the other side and surprises at the time of trial would be more easily avoidable.

The obligation to treat parties with equality requires the arbitral tribunal to apply similar standards to all parties and their representatives throughout the arbitral process. This principle extends to both evidence and submissions on the facts and on the law. According to the case *Trustees of Rotoaira Forrest Trust v. Attorney-General*, the principle is complied with where: each party is afforded a reasonable opportunity to fully state its case; each party is given an opportunity to understand, test and rebut its opponent's case; if there are hearings, proper notice is given thereof, and the parties and their advisors have the opportunity to be present throughout the hearings; and each party is given reasonable opportunity to present evidence and argument and evidence in support of its own case.[713] To succeed in an argument that a party has been deprived of the opportunity to present its case, it must be shown that: a) a reasonable litigant in the applicant's position would not have foreseen a reasoning on the part of the arbitral tribunal of the type laid down in the award and b) with adequate notice, it might have been possible to convince the arbitral tribunal to reach a different result. An English court in the *OAO Northern Shipping Company v. Remolcadores de Martin SI* case suggested that an arbitral tribunal has to give the parties an opportunity to present arguments on all of the "essential building blocks" of the tribunal's conclusions and the award was set aside on such failure.[714] The notion of being able to reasonably anticipate the arbitral tribunal's findings is also reflected in the Swiss Federal Court where it annulled an award on the basis that the arbitral tribunal had based its decision on a

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[712] High Court, Auckland, New Zealand, 5 June 2003, M1482-SD00.

[713] High Court (Commercial List), Auckland, New Zealand, 30 November 1998, [1999] 2 NZLR 452.

[714] Court of Appeal, Commercial Court, England, 27 July 2007, [2007] 2 Lloyd's Rep 302, [2007] EWHC 1821 (Comm).

legislative provision which the court found was "manifestly non-applicable" to the circumstances of the arbitration and could not therefore have been anticipated by the parties, ruling that the arbitral tribunal in doing so had deprived the claimant of its right to be heard.[715]

H. Risks associated with the development of common rules related to discovery

Nothing is perfect and several potential drawbacks from developing common rules related to discovery in international dispute settlement can be identified which must be considered. Formalizing the discovery process would likely lead to delays in the overall dispute settlement process. If arbitrators required a party to produce evidence, and sanctions were issued due to lack of compliance (this could take the form of financial fines), this would only increase the time required to settle the dispute. In systems were rapid dispute settlement is highly prized, increasing the time required to settle disputes may not be looked upon as a positive change. Formalizing the discovery process would also increase the costs of dispute settlement for all participants. If disputes take longer to resolve, this translates into more billable hours for the legal staff.

Further, in the WTO context *over-legalization* of the WTO dispute settlement system may be a concern. As the WTO remains a diplomatic forum, less restrictive procedural rules allow for flexibility in the context of political negotiations. Although not as politically sensitive, the procedural flexibility inherent in the ICSID and UNCITRAL systems is also valued and may cut against the increased procedural requirements necessary to develop common rules related to discovery.

The discovery of documents may be considered a critical element of fact-finding, truth seeking and decision making in many types of dispute settlement. The advantages of discovery are said to include:

> Fairness to both sides, playing will at the cards face up on the table, clarifying the issues between the parties, reducing surprise at trial and encouraging settlement.

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[715] Federal Supreme Court, Switzerland, Decision of 9 February 2009, Decision 4A_400/2008, (ASA Bull, 3/2009, p. 495).

> Any system of disclosure should have as a broad rationale the just and efficient disposal of litigation. It is against this broad rational that any reforms to discovery systems should be considered.[716]

However, parties to disputes in systems with strong discovery procedures may find that the benefits of discovery come at a comparatively high cost. Yet, as discussed below, it is not just the amount of money spent on discovery that causes pause for reflection. Rather, it is the low value for money that prompts criticism of the discovery process – in terms of the cost of discovery relative to the utility of discovered documents in the context of the dispute settlement or litigation.

The high price of a discovery process was noted in the Victorian Law Reform Commission's *Civil Justice Review,* which found that "the objectives of the discovery process are either not being achieved or can only be achieved at great cost."[717] There are concerns that the high costs of discovery are pricing litigants out of the court system. Australian Chief Justice James Spigelman of the New South Wales Supreme Court has noted that "when senior partners of a law firm tell me, as they have, that for any significant commercial dispute the estimate for discovery is often AUS$ 2 million, the position is not sustainable."[718] Moreover, the commercial realities of discovery at this order may represent a significant barrier to justice for many litigants.

E-discovery costs can also include expensive computer software and hardware. Acting Justice Ronald Sackville of the New South Wales Supreme Court, formerly a judge of the Federal Court of Australia, remarked on the discovery process:

> It is here that extraordinary and disproportionate costs are frequently incurred by parties to litigation. Far too often the search for the illusory smoking gun leads to squadrons of solicitors, paralegals and clerks compiling vast libraries of materials, much of which is of no significance to the issues in the proceedings.

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[716] Paul Matthews and Hodge M. Malek, *Disclosure* (New York: Sweet & Maxwell, 2007), 4-103.

[717] Victorian Law Reform Commission, *Civil Justice Review,* Report 14 (2008), 434, Australia.

[718] J. Spigelman, "Access to Justice and access to Lawyers*"* (2007) 29 Australian Bar Review 136.

> The problem has been compounded, not alleviated, by the exponential growth of electronic communications which can be tracked and often reconstructed after deletion.[719]

The sheer volume of data that must be managed in modern trade and commerce can blow out the cost of searching through electronic material for the purposes of discovery, resulting in costs disproportionate to the value of the documents discovered – in terms of their use in litigation. The increasing amount of information which contemporary litigants must deal with was recently highlighted in the Australian case *Betfair v. Racing New South Wales.*[720] In this case, for example, one source of discoverable documents was an electronic data warehouse containing the electronic records of over 2.52 million customers and occupying some 21 terabytes of memory growing at 70 gigabytes per day. One terabyte is estimated to contain 500 million printed pages.[721]

In the United States, the use of discovery has been criticized as favoring the wealthier side, in that it enables parties to drain each other's financial resources in a war of attrition. For example, one can make information requests, which are expensive and time-consuming for the other side to complete, produce hundreds of thousands of documents of questionable relevance to the case, file requests for protective orders to prevent the deposition of key witnesses, and so on and so on. In a critique of the US legal profession, attorney and writer, Cameron Stracher described a variety of unpleasant tactics common in the United States, and concluded:

> With the noble sentiment of leveling the playing field so that no party has an undue information advantage, the writers of the discovery rules created a multilevel playing field where the information-rich can kick the information-poor in the head and escape unscathed. Discovery is anything but … Hundreds of thousands of dollars to maintain the status quo, to preserve the information-rich

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[719] R. Sackvile, *Mega.* "lit: Tangible Consequences Flow from Complex Case Management" (2010) 48(5) *Law Society Journal* 47.

[720] 2010, FCA 603.

[721] *Ibid.*

> at the expense of the information-poor. Thousands of lawyer hours to keep the discovery process as unrevealing as possible. The best minds of a generation thinking of new ways to manipulate, distort and conceal.[722]

I. Recommendations for Discovery policy in the context of ICSID, UNCITRAL and WTO dispute settlement mechanisms

Notwithstanding the risks outlined above, the recommendation of this section is for the international community to consider developing policy on common rules related to discovery. In the context of the analysis of the ICSID, UNCITRAL and WTO systems, such policy could see how to adopt an approach to document production more similar to that of the United States, rather than the German or civil law approach where the adjudicator alone decides which documents to request. Giving parties the power to specifically request the production of documents would be a significant step towards ensuring that the trier of fact is fully informed before a decision is made. An important limitation to this recommendation, however, would be to impose a degree of restraint on the scope of discovery in international dispute settlement which is more limited than that applied in the United States.

There is push back in international dispute settlement mechanism case law against a US style of discovery. In the ICSID case *Railroad Development Cooperation v. Republic of Guatemala,*[723] when deciding on a request for provisional measures related to compelling the production of documents, the tribunal upheld the respondent's claim that the request for production was a US-style pre-trial discovery fishing expedition which has no place in international arbitration. The tribunal further agreed with the respondent's claim that the request included "four broad categories of documents starting with the words all documents referring or relating to or all declarations which include sixteen

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[722] Cameron Stracher, *Double Billing: A Young Lawyer's Tale of Greed, Sex, Lies and the Pursuit of a Swivel Chair* (New York: William Morrow, 1998) 125-126.

[723] Decision on Provisional Measures, ICSID case No. ARB/07/23, October 15, 2008.

broad document sub-categories."[724] The tribunal agreed with the respondent that the expansive nature of the request was overbearing. In this holding, the tribunal cited the ICSID case *Biwater Gauf v. United Republic of Tanzania,*[725] and agreed with the decision that overly broad and potentially burdensome document requests should be circumscribed to include only the obligation to produce clearly identified documents. In looking at this analysis, it is clear that a one size approach to discovery will not be appropriate in international dispute settlement and some type of limited US-style discovery will be needed.

As discussed above, the United States system takes a very broad approach to the scope of discovery and what information is considered discoverable. This extremely broad attitude is not necessarily desirable in an international context. The fact that a party can request information through discovery that is not admissible in the particular case combined with the fact that the United States system allows for a party to request a broad spectrum of information, information that they are not required to describe with any degree of particularity, is too broad for an international dispute settlement setting, particularly for the WTO, UNCITRAL and ICSID systems considered here. This unnecessarily broad scope to discovery would heighten the adversarial nature in a particular mechanism to a potentially undesirable level. It is important to recall the motivations parties have for choosing a particular international dispute settlement mechanism and oftentimes the collaborative approach to dispute settlement is a factor. It is important to note here that a degree of adversarialness between the parties is not bad, and can even be considered necessary, as it contributes to ensuring that the parties' cases are argued thoroughly. It is only in the event that the adversarial nature of the dispute threatens to eclipse a party's motivation for submitting their claim to that dispute settlement mechanism in the first place that requires restraint.

Reasonably limiting the scope of what is discoverable in the international dispute settlement context would be feasible. A useful example, and potential policy option, of a

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[724] *Ibid.*

[725] ICSID case No ARB/05/22.

limited or restrained discovery approach, and one that could prove useful in formalizing discovery in WTO, UNCITRAL and ICSID systems, is Article 3 of the Rules on the Taking of Evidence in International Commercial Arbitration adopted in 1999 by the International Bar Association.[726] Although the word discovery is omitted from the IBA Rules of Evidence, Article 3 provides for submitting "all documents available to [the party] on which it relies," to the other party and the tribunal.[727] In addition, a party may submit to the arbitral tribunal a Request to Produce,[728] which should contain:

> (a)(i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail … of a narrow and specific requested category of documents that are reasonably believed to exist;
>
> (b) a description of how the documents requested are relevant and material to the outcome of the case; and
>
> (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why the Party assumes the documents requested to be in the possession, custody or control of the other Party.[729]

This approach effectively limits the scope of information that is discoverable in that it requires that the party requesting the information to be presented be familiar enough with that information to describe it in detail. This approach is significantly different from the one established under the United States' Federal Rules of Civil Procedure described above because in the US system parties can request for and compel the production of evidence if they can broadly describe its category and type. In effect, parties in the US system can request and force the production of materials that they don't know to exist at the time of requesting it. In the context of international dispute settlement, perhaps this

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[726] IBA R. Taking Evid. Int'l Com. Arb., at www.ibanet.org/pdf/rules-of-evid-d.pdf (adopted June 1, 1999).

[727] *Ibid* at art. 3.1.

[728] *Ibid* at art. 3.2.

[729] *Ibid* at art. 3.3.

more limited approach to discovery is a reasonable middle ground for ensuring sufficient evidence is produced for effective resolution of the case and a good starting point in the development of common rules related to discovery.

Another way to limit information that can be discovered is to consider the scope of information that a party may be justified in requesting to be produced by the opposing party. As presented above, in a US system, a party is entitled to broad discovery of any information sought if it appears "reasonably calculated to lead to the discovery of admissible evidence." While this statement might be too broad for the purposes of international dispute settlement systems, including the UNCITRAL, WTO and ICSID systems, perhaps the scope can be adjusted to satisfy both common law and civil law lawyers participating in the system. The scope of discoverable information could be significantly limited, for example, by removing the latitude inherent when the scope is phrased to allow evidence to be discovered if it is reasonably calculated to lead to the discovery of other evidence that would be admissible. That is, perhaps the scope of discovery in international dispute settlement could be limited only to the "discovery of admissible evidence." This would significantly constrain the scope of discoverable evidence in that a party would only be able to request the production of evidence that would be admissible to the international dispute settlement mechanism and no longer have the wide flexibility to request for any information, admissible or not. Further, this approach would significantly reduce the adversarial component common to the US approach to discovery in that parties would not be able to use the discovery mechanism as a weapon or to harass the opposing party.

An additional option for limiting the application of the US discovery policy would be to employ components from the German approach, requiring effective substantiation of discovery requests. This is based upon the concept that a party should not be forced to provide evidence to make the case of their opposing party. In requiring substantiation, the requesting party would be faced with a burden to substantiate the reasons why they reasonably need the evidence. Additionally, in effect the substantiation requirements forces a degree of specificity upon the requesting party because in order to substantiate that evidence is needed, that evidence must be described with a degree of

specificity. This substantiation requirement could be formulated into a necessity test and in a sense, the substantiation requirement or necessity test is already included in the IBA text above.

Tensions can arise, however, when parties to a dispute come from separate legal traditions, such as when a common law party brings a case against a civil law party in an international dispute settlement setting. The ensuing tension between either a common law or civil law approach can prove unsatisfactory to at least one party. A common law attorney representing a party would most likely expect substantial pre-trial discovery. In contrast, a civil law attorney would likely prefer, or at least be more at comfortable with, minimal or no discovery, such as a procedure disallowing depositions and permitting only a limited exchange of documents.

It remains a challenge for the international dispute settlement community to develop a satisfactory solution to these opposing approaches. Hopefully, as the international dispute settlement community continues to develop its best practices, such tensions between common law and civil law traditions will be eased and parties will implement discovery procedures that incorporate elements of both common and civil law as described above. The time is ripe for this to happen.

Chapter 8 Common Policy on the Value of a Substantive Appeals Process

A. Appeal and review of decisions

It has been widely assumed that parties submit to voluntary dispute settlement mechanisms to resolve their disputes at least in part because such awards offer an effective and early end to the dispute in a way that a court judgment does not. However, a swift and final resolution is only an advantage if the dispute settlement mechanism makes no mistakes, or the stakes are small enough that mistakes are acceptable in the interest of continued relations between the parties. In contrast to the WTO system, which does have a very well developed substantive appeals mechanism, the ICSID and UNCITRAL systems, while they do have limited options for review of awards based only

on procedural defects, do not include a system that conducts a substantive review. The development of common policy in the international community on the value of an appellate mechanism with the mandate to consider substantive issues, rather than those that are merely procedural – something similar to that of the mandate of the WTO Appellate Body, would significantly contribute to due process protections in international dispute settlement by creating a safety net for parties that find themselves the victim of substantive error.

B. ICSID

Under the ICSID Arbitration Rules, rules for recourse against arbitral awards are contained in Chapter VII of the Rules governing "Interpretation, Revision and Annulment of the Award."[730] Under these provisions the losing party may request that the Chairman of ICSID's Administrative Council designate a three-member annulment committee to review an award. While the scope of the review is significantly limited, the procedural rules used during annulment hearings are identical to those used during the main case, with no particular provision for expediting appeals.[731] The ICSID Convention further provides for complete waiver of judicial recourse, providing in Article 53 that "the ICSID award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention."[732] As discussed below, this situation today is changing as evidenced by the EU-Canada Economic and Trade Agreement and the EU-Viet Nam free trade agreement where provisions were included replacing prevailing ad hoc arbitration systems.

The ICSID Convention is removed entirely from any domestic legal system and it is therefore not possible for a party to resist recognition and enforcement of an ICSID Convention award in a national court. It is important to note that this is not the case for awards rendered under the Rules of ICSID's Additional Facility. Such awards, which now include the NAFTA Chapter 11 cases brought before the Centre, are subject to

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[730] ICSID Arbitration Rules, Rules 50-55.

[731] *Ibid.*

[732] Washington Convention, Art. 53.

enforcement under the provisions articulated in the New York Convention and the arbitration laws of the location of the actual arbitration proceeding. Further, the only remedies available against an award rendered under the ICSID Convention are those contained in the Convention.[733]

In the ICSID system, if a dispute arises between the parties as to the meaning or scope of an award, either party may request an interpretation of the award.[734] In addition, the Convention further allows either party to request a revision of the award under Article 51 on the grounds of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was reasonable.

With respect to award enforcement, Article 53 of the ICSID Convention dictates that an ICSID award is "binding on the parties and shall not be subject to any appeal." Article 54(1) mandates that "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment in a court in that State."[735] In dictating this automatic link to domestic judgments rather than foreign, ICSID in effect eliminates all opportunity for review. From this perspective, the enforcement mechanism of the ICSID appears to be much more efficient than the regime under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[736] which provides both procedural and substantive exceptions to the recognition of an arbitral award.[737] When a State does not comply with an award voluntarily, however, obtaining recognition by a national court of the award most likely will not be sufficient. Parties may wish to resort to attachment of assets, but where State parties are involved, sovereign

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[733] ICSID Convention, Art. 53.

[734] ICSID Convention, Art. 50.

[735] ICSID Convention, art. 54(1).

[736] U.N. Convention on Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S.38 [hereinafter the New York Convention].

[737] New York Convention, Art. V.

immunities become an issue. The process of obtaining attachment of assets is referred to as execution of an award, and here is where the special protections of the ICSID Convention end. Execution of an ICSID award is governed by the laws concerning the execution of judgments in the State in whose territory execution is sought and the laws of that State relating to immunities.[738]

C. Annulment in ICSID

Article 52 of the ICSID Convention creates the possibility for either party to seek annulment of the award on the basis of one or more specified grounds which include: (1) that the tribunal was not properly constituted; (2) that it manifestly exceeded its powers; (3) that one of its members was corrupt, (4) that there was a serious departure from a fundamental rule of procedure; and (5) that the award failed to state the reasons on which it was based.[739] The ICSID grounds for annulment are roughly equivalent to the narrow grounds for non-recognition provided in the New York Convention. In fact, the ICSID grounds for annulment are narrower than those in the New York Convention as there is no provision for annulment based upon any violation of public policy

Annulment is a limited remedy - it is not a remedy against an incorrect decision. An ICSID *ad hoc* annulment committee may not reverse findings of fact or law or conduct a substantive review of the case as it does not have the powers of a court of appeal in the traditional sense.[740] Additionally, a new tribunal adjudicating the merits of a resubmitted case is not bound by the reasons given by the *ad hoc* annulment committee for annulling the original award.[741]

The entire ICSID framework fails to consider the important necessity of intra-body review in that there is no hierarchal relationship between the reviewing and first

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[738] ICSID Convention, Art. 55.

[739] ICSID Convention, Art. 52.

[740] *Amco Asia et al. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (10 May 1988), 3 ICSID Rev-FILJ 166 (1988).

[741] *Ibid.*

instance decision-makers. Annulment committee members, like the tribunal arbitrators whose work they are reviewing, are composed from essentially the same group of private lawyers and law professors, and are not required, nor even expected, to have any additional expertise in matters of international law or arbitration.[742] Although annulment committee members are required to be listed on the ICSID Panel of Arbitrators, in practice these listed individuals often sit also as the first instance tribunal members on other claims.[743] The very same persons can sit or have sat simultaneously as arbitrators in regular ICSID proceedings and on the annulment committees. Thus, it is virtually the same lawyers and professors reviewing each other's work, without even the patina that the appellate group has any greater claim to wisdom in decision-making, as implicitly is assumed in any adjudicative system that includes an internal appeal mechanism.

In analysing the ICSID case law with respect to grounds for annulment, three cases are of particular importance which includes: *Maritime International Nonineed Establishment (MINE) (Complainant) v. Republic of Guinea (Respondent)*[744], *Wena Hotels Limited (Complainant) v. Arab republic of Egypt (Respondent)*[745], *and Suez, Sociedad General de Agual de Barcelona S.A and Vivendi Universal S.A (Complainant) v. Argentine Republic (Respondent).*[746]

In principle ICSID arbitrators have the duty to explain the reasons on which their decisions are based in a clear and straightforward manner to enable the parties to understand them. However, the interpretation in the ICISD case law with respect to what clearly explained reasoning and analysis conducted by the tribunal in practice requires is inconsistent and leads to confusion. The requirement to present reasoning and analysis is clearly stated in the *MINE* case where the Decision notes that in the ICSID Convention,

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[742] ICSID Convention.

[743] Garcia, Carlos, G., *All The Other Dirty Little Secrets: Investment Treaties, Latin America, And the Necessary Evil of Investor-State Arbitration,* 16 Fla. J. Int'l L. 301 (June 2004) at 345.

[744] ICSID (W. Bank), Case No. ARB/84/4 (1988)

[745] ICSID Case No. ARB/98/4.

[746] ICSID Case No. ARB/03/19.

annulment under Article 52 is limited, but also "the only remedy against unjust awards."[747] It adds that the minimum requirement just mentioned "is in particular not satisfied by either contradictory or frivolous reasons." This last qualification seems to imply at least some examination of the degree of relevance or adequacy of the reasons mentioned in the award is necessary. This is perhaps in contradiction to another statement in the same *MINE* decision, where the Ad hoc Annulment Committee stressed that "the adequacy of the reasoning is not an appropriate standard of review" because it would serve to draw the annulment committee into the domain of appeals.[748]

With respect to annulment based on the claim that the tribunal made a serious departure from a fundamental rule of procedure (Article 52(1)(d)), the *Wena* case quotes the *MINE* case in stating that this ground for annulment would only be met if the violation caused the tribunal to reach a result substantially different from the one that would have otherwise prevailed. The Tribunal in the *Wena* case explained:

> In order to be a serious departure from a fundamental rule of procedure, the violation of such rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such rule been observed. In the words of the ad hoc Committee's Decision in the Matter of *MINE*, "the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide."[749]

Regarding annulment based on the ground that the tribunal failed to state sufficient reasoning or analysis to support how they arrived at the final decision, which is included in Article 52(1)(e) and relates to Article 48(3), for the purposes of whether an annulment of the decision is appropriate it is irrelevant as to whether the reasons

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[747] MINE at para 4.05.

[748] In a decision on annulment issued on 19 October 2009, an ad hoc committee rejected challenges – based on manifest excess of power and failure to state reasons – to an award rendered in favor of Ecuador (ICSID Case No ARB/03/06.

[749] *Wena #58 quoting MINE # 5.05.*

presented by the initial tribunal are correct or convincing – all that is in question is whether reasons are present in the text of the decision; otherwise, the ad hoc committee determining whether annulment of the decision is appropriate would be drawn into a review of the merits of the case. This test for grounds for annulment based on the presence of reasoning is automatically met as long as the reader is able to follow the analysis used by the tribunal to arrive at their decision, even if clear mistakes in fact or law are present in the text of that decision. This approach is originally set out in the *MINE* case and further quoted in the *Wena* case. Further these approach was presented in the *Vivendi* case most succinctly when the annulment committee stated:

> [...] the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact or law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph 1(e), because it almost inevitably draws an ad hoc Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention.[750]

Although the *Wena* and *Vivendi* annulment committees concurred on the general approach for annulment of an ICSID award based on lack of tribunal reasoning as stated in Article 52 of the ICSID Convention, they diverged on their implementation. Under *Vivendi,* the Tribunal observed that reasons upon which the decision is based may be stated by the tribunal "succinctly or at length" and annulment should only occur in a clear case, that is, when the failure to state reasons leaves the "decision on a particular point essentially lacking any expressed rationale" and that point is "necessary to the tribunal's decision."[751]

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[750] *MINE #5.08, Wena #77, Vivendi 64.*

[751] *Vivendi ## 64-65.*

The reasoning of the annulment committee in the *Wena* case is significantly less demanding on the initial tribunal. The annulment committee in *Wena* explained that the reasoning and analysis of a tribunal may be implied or assumed to have taken place "provided the reasoning be reasonably inferred from the terms used in the decision." Following this logic, a tribunal is then assumed to have used sufficient reasoning and logical analysis to support the outcome of the case if the terms used in the text of the decision appear to have derived from logical reasoning or analysis; however, the detailed presentation of the reasoning and analysis used by the tribunal to arrive at the final decision need not be clearly articulated in the text of the final decision. Further, according to the *Wena* annulment committee, if the award is lacking reasoning, the "remedy need not be the annulment of the award." The *Wena* annulment committee continued to explain that the missing reasoning to support the decision can be supplied by the annulment committee considering whether to annul the decision whenever the annulment committee is in a position to do so on the basis of its knowledge of the dispute.[752]

It remains to be seen how future ad hoc annulment committees will deal with this difference. As the *Wena* committee noted, the purpose of the duty to state reasons is that the parties are entitled to understand the tribunal's line of thinking and why they are found to be right or wrong.[753] The purpose is met if the committee supplies the reasons from the context of the award and the record. Remanding the award back to the tribunal would only yield the same result at a higher cost and after a longer period of time.

Partial annulment was granted in both the *MINE* and *Vivendi* cases.[754] *Vivendi* specified that it was not open to the respondent to "counterclaim" for total annulment when the claimant had filed a request for partial annulment only, but that it was for the ad hoc annulment committee to determine the extent of the annulment. The reason for the

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[752] *Wena ## 81-83.*

[753] *Ibid.*

[754] MINE ## 4.07 and 8.01, and Vivendi ## 67 – 70 and 109.

committee's power to decide the scope of the annulment is simply that certain grounds for annulment affect the award as a whole, while others affect only a part of it.[755]

D. ICSID Annulment is not a sufficient appellate mechanism

The ICSID annulment process falls significantly short of being a genuinely effective review process because annulment committees are blocked from conducting a review of the substantive issues of the case. Further, annulment grounds under article 52 offer no remedy against tribunals who err, even patently, in their interpretation and application of the law, much less their conclusions regarding facts. Besides the injustice inflicted on the disputing parties, facially erroneous investor-state awards bring disrepute to the system as a whole, and wreak havoc on future tribunals and litigants faced with bad law awards that invariably will be cited by future parties, and must then be either disingenuously distinguished, or deliberately disavowed.[756] An ambitious and dramatic improvement to the current standard under the ICSID system would include the establishment of some form of appellate body to review the substantive components of decisions. The creation of such a remedy would affectively amend existing BITs, and would require a new treaty and perhaps a protocol to the ICSID Convention. While ambitious, it is certainly feasible, particularly given the successful example set by the WTO.

The ICSID contracting states, particularly capital-exporting states and the investors represented by them, place a great deal of value on the high degree of finality to the current ICSID arbitration process and a formalized appellate process would serve, in their mind, to reduce this finality. The finality to ICSID awards can be viewed as central to ICSID's purpose of acting as a neutral venue providing an effective and rapid remedy for investors. An appellate process could be viewed as an additional and somewhat unnecessary delay to a needed outcome.

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[755] *Vivendi # 68.*

[756] Garcia, Carlos, G., "All The Other Dirty Little Secrets: Investment Treaties, Latin America, And the Necessary Evil of Investor-State Arbitration" (June 2004) 16 Fla. J. Int'l L. 301 at 344.

In the absence of a clear mandate to establish an ICSID appellate process, ICSID's existing annulment procedure will continue in providing limited grounds for the review of awards. Further, the establishment of an ICSID appellate procedure would raise difficult policy and technical issues in that only some ICSID arbitrations would be subject to further review while others are not.

E. UNCITRAL

Under the UNCITRAL system, with respect to corrections to the award, within thirty days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award and any award interpretation shall form part of the award.[757] With respect to corrections to the award, within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or anything else similar in nature.[758] Additionally, the arbitrational tribunal, within thirty days of the issuance of the award, may make such corrections on its own initiative. This appears to be the only place the UNCITRAL Rules address changes to the award after issuance and further appears to be the full extent of possible review or appeal under the UNCITRAL Rules.

Should either party request, within thirty days of the issuance of the initial award and upon notice to the other party, the tribunal has the power to issue an additional award under Article 39. A party may request the arbitral tribunal to issue an additional award as to claims presented in the arbitral proceedings however omitted in the initial award. The tribunal is not obliged automatically to produce an additional award and will only do so if it considers the request for an additional award to be justified and further considers that the omission can be rectified without any further hearings or evidence.[759] There is no

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[757] UNCITRAL Rules, Article 38.

[758] UNICTRAL Rules, Article 37.

[759] UNCITRAL Rules, Article 37(2).

guidance in the UNCITRAL Rules as to how the tribunal is required to proceed if there is a need for additional hearings or evidence.

While the UNCITRAL Rules are rather limited with respect to a formalized appeal process that contemplates the review of the substantive merits of a particular case, both the Rules and the Model Law provide more detailed guidance on the ability of a party to contest the national enforcement of an award. Significantly different from the ICSID or WTO systems, under UNCITRAL dispute settlement, enforcement of awards is often interpreted by or challenged in national court.

The disparity found in national laws with respect to a party's options or recourse against an arbitral award underlies a major obstacle in the harmonization of international arbitration legislation. Considering the potential impact of setting aside an arbitral award, Article 33 represents one of the essential objectives of the UNCITRAL Model Law as compared to the UNCITRAL Arbitration Rules. First, the Model Law calls for the application for setting aside an award to be made within three months after the receipt of the final award. This application is the only available means of recourse to challenge the award. Article 33 explains that within thirty days of receipt of the award, unless another period has been agreed upon by the parties:

(a) A party may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or other similar errors;
(b) If so agreed by the parties, a party may request that the tribunal provide an interpretation of a specific point or part of the award.[760]

Further, the arbitral tribunal is able to correct any errors based on its own initiative. Unless otherwise agreed upon by the parties, a party may also request the tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted

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[760] UNCITRAL Model Law, Article 33(1).

from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.[761]

Article 34 of the Model Law addresses a party's recourse to a court against an arbitral award which may be made within three months of the receipt of the award, through an application for setting aside the award, and in accordance with the following:

> (a) the party making the application for setting aside the award furnishes proof that:
>
> (1) a party to the arbitration agreement was under some incapacity;
>
> (2) the party making the application was not given proper notice or was otherwise not able to present his case;
>
> (3) the award addresses a dispute not contemplated within the terms of the submission to arbitration, or contains decisions beyond the scope of the submission to arbitration;
>
> (4) the composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties.
>
> (b) the court finds that:
>
> (1) the subject-matter of the dispute is not capable of settlement by arbitration;
>
> (2) the award is in conflict with the public policy of the State.[762]

Of importance to note is that fact that a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility at the time of drafting the arbitration clause of their contract. The list of grounds to vacate an award is substantially the same as those in Article V of the New York Convention and include: (1) lack of capacity of the parties to conclude the arbitration agreement; (2) lack of a valid arbitration agreement; (3) lack of notice of the appointment of arbitrators; (4)

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[761] UNCITRAL Model Law, Article 33(3).

[762] UNCTRAL Model Law, Article 34(2).

inability of a party to present its case; (5) issuance of awards dealing with matters not covered by the submission to arbitration; (6) composition of an arbitral tribunal or conduct of arbitral proceedings contrary to an effective agreement of the parties, or failing agreement, to the Model Law; (7) non-arbitrability of the subject-matter of the dispute; and (8) the violation of public policy.[763] Further, the court when asked to set aside an award, may suspend the setting aside proceedings to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take on another action that will in the arbitral tribunal's opinion eliminate the grounds for setting aside the award.[764]

Article 35 and 36 of the UNCITRAL Model Law address the recognition and enforcement of awards under UNCITRAL arbitration. An arbitral award, irrespective of the country where it is rendered, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced.[765] With respect to the refusal of a State to recognize an award, Article 36(1) explains that at an arbitral award may be refused only if:

> (a) at the request of the party against whom it is invoked, if that party provides proof that:
>
> > (1) a party to the arbitration agreement was under some incapacity;
> >
> > (2) the party against whom the award is invoked was not given proper notice and was unable to present his case;
> >
> > (3) the award addresses a dispute not contemplated by or not included within the scope of the submission to arbitration;
> >
> > (4) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;

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[763] II, William K., and Leiberman, Seth H., et al, "UNICTRAL: Its Workings in International Arbitration and a New Model Conciliation Law"(Fall 2004) 6 Cardozo J. Conflict Resol. 73 at 88.

[764] UNICTRAL Model Law, Article 34(4).

[765] UNCITRAL Model Law, Article 35(1).

(5) the award has not yet become binding on the parties or has been set aside or suspended by a competent court;

(b) if the court finds that:

(1) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State;

(2) the recognition or enforcement of the award would be contrary to public policy.[766]

In the UNCITRAL case number 391, *Re Corporacion Transnacional de Inversiones v. STET International*, the claimant challenged the enforcement of the UNCITRAL arbitral award before an Ontario court and sought to have the award set aside while the respondent requested its enforcement. The claimant contended that the award should be set aside on the grounds that they had been denied equality of treatment and opportunity to present their case in direct contradiction to UNCITRAL Model Arbitration Law Article 18. Further, the claimant stated that the award was in conflict to the public policy in Ontario.

The Ontario court held that under Article 34 of the UNCITRAL Model Law, the claimant had the onus of proving that the award should be set aside and that if the claimant fails to do so, then Articles 35 and 36 require the court to recognize and enforce the award automatically. The court further noted that the grounds for proper refusal of enforcement of an arbitral award under the UNCITRAL Model Law are to be construed narrowly and that the public policy ground for resisting enforcement should apply only where enforcement would violate basic notions of morality and justice of which corruption, bribery or fraud are examples.[767] The court further explained that the due process protection of Article 34(2) included both procedural and substantive fairness which may overlap with the public policy defense.[768]

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[766] UNCITRAL Model Law, Article 36(1).

[767] UNCITRAL Model Law, Article 34(2)(b)(ii).

[768] UNCITRAL Model Law, Article 34(2)(a)(ii)

After reviewing the facts of the case, the Ontario court found that the claimant had failed to establish sufficient grounds to set aside the arbitral award. With respect to equal treatment and opportunity for a party to present their case, the Ontario court explained that a party that refuses to participate in an arbitration is deemed to have forfeited the opportunity to be heard under the UNCITRAL Model Law, Article 25. The court explained that the purpose of Model Law Article 18 is to protect a party from egregious and injudicious conduct by a tribunal. The court explained that this article is not intended to protect a party from its own failures or strategic choices. Further, the court explained that the fact that the award might be legally or factually wrong was not, in and of itself, sufficient grounds for setting it aside. With respect to compelling a party to present testimony, the court explained that the arbitral tribunal had no power under Article 27 of the Model Arbitration Laws to compel such testimony and failure of the applicant to seek judicial assistance cannot be imputed to the tribunal.

In UNCITRAL Case Number: 868 – *Germany: Bayerisches Oberstes Langesgericht,* where the German National court was tasked with considering the grounds upon which an award from an arbitral tribunal conducted under the UNCITRAL rules could be set aside on the grounds of public policy. The court held that an arbitral award could only be set aside for infringement of public policy, if the award was contrary to basic legal values. The court clarified that the fact that the award in this situation possessed a degree of factual incorrectness was not sufficient to justify setting it aside based alone on a claim of the violation of public policy. The court further explained that the procedures for setting aside the award of an arbitral tribunal were not meant to scrutinize the award's content.[769]

F. Appeal grounded on public policy

In the UNCITRAL system a substantive appellate mechanism does not exist; however, a party can claim in national court for the award to be vacated on grounds similar to those

[769]UNCITRAL Case Number: 868 – *Germany: Bayerisches Oberstes Langesgericht*, 20 March 2003.

for appeal in the ICSID system but public policy is also specifically a consideration which is highly problematic. Public policy is an ever-changing concept and risks misapplication particularly when considered through narrow-minded cultural lenses. This becomes further apparent when a court in one cultural context attempts to consider what is appropriate public policy for nationals of other countries and cultural contexts.

While public policy analysis is unavoidable when judges seize property, such a malleable notion may not be necessary or even appropriate in the international setting. For example, if German and Italian companies choose New York to arbitrate a dispute that has not effect in the United States, it might be best to leave European judges the task of deciding whether the award is compatible with whatever public policy might be relevant to their particular context. In contrast, procedural defects such as excess of authority and denial of the right to be heard, being more universally understood, lend themselves less to disruptive application.[770]

There are some public policy violations that do justify judicial intervention. As an example, a U.S. judge might decide to vacate an award allowing racial or religious discrimination even if allowed under relevant foreign law. The issue here is not necessarily about the existence of public policy as grounds for appeal; but, it is the temptation to invoke this excuse in a what that is abusive. Further the lack of guidance of judicial discretion in the development of what public policy is acceptable for application in situations beyond the comprehension of the current court's jurisdiction is also worrying.

An interesting method in addressing this issue is to adopt explicitly the French distinction between public policy applicable to domestic and international cases.[771] While both international and domestic public policy are considered in French courts, the latter addresses policies relevant only in contexts that are within French borders. The

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[770] *Westacre Investments v. Jugoimport,* (2000) 1 Q.B. 288 (Eng.)

[771] N.C.P.C. Art, 1502(5)(Fr.); Bernard Addit, *Droit International Prive,* section 302 (1991) (suggesting that a better terminology might be "public policy in the sense of private international law").

former implicates cross-border rather than purely French interests. The concept, referred to as international public policy, would be constituted not by any supra-national norms, but rather by the policy applied by national courts to cross-border transactions with no direct impact on the forum.

G. Value of substantive appeal process

The fact that both the ICISD and UNCITRAL systems to do not currently offer potential users a review mechanism that considers substantive issues has the potential to be troublesome. It could create a disincentive for potential users to engage in ICSID or UNCITRAL dispute settlement out of concern for the absence of a mechanism to correct erroneous substantive errors. There are many practitioners and clients that are under the impression that by choosing international dispute settlement as the exclusive mode for resolution, parties are largely forsaking the right to relief from even an egregious arbitral error.

The first instance of appeal for a losing party to international dispute settlement tends to be the tribunal itself. However, in systems other than the WTO which has a very developed appellate mechanism that considers substantive issues of law in the review process, a petition to alter or re-examine an award is highly unlikely to be successful as most international dispute settlement mechanisms strictly circumscribe arbitrators' powers to change their final award after it is signed.[772] The UNCITRAL and ICISD systems follow this practice of limited review as demonstrated above. The ICISD and UNCITRAL rules establish a one-tier system, whereby awards are final, subject only to corrections of form or clerical error by the deciding tribunal. These provisions tend to be narrowly construed by arbitrators, such that modification will generally be granted only where the tribunal would have included the modification in the original award had it been aware of the inaccuracy.

Furthermore, without the explicit provision in the parties' agreement for continuing jurisdiction or formation of a new tribunal for appellate review, at least under

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[772] ICC Rules of Arbitration (1998), Art 29(1); London Court of International Arbitration Rules (1998), Art. 27.

US law, an arbitration tribunal becomes *functus officio* and without authority to act as soon as the final award is rendered in a particular case.[773] Parties therefore have little basis upon which to argue that arbitrators have an implied or inherent power to revisit their own awards on substantive grounds, if the applicable arbitration rules and agreement are silent on the matter.

H. A lack of a substantive appellate process does not bring finality

In general, the absence of a substantive appeals process in international dispute settlement, not considering the WTO, in actuality does little to guarantee that an arbitrator's award will mean the end of the dispute. Because arbitral awards require the confirmation of a national court at the place of enforcement in order to attach assets in the face of resistance from the losing party, and international arbitration treaties provide legitimate bases upon which awards can be challenged, the rendering of an arbitral award may be only the first step in a chain of court litigation in a variety of different jurisdictions. In fact, where the only form of recourse to international arbitral awards is in national courts, it is possible and even likely for the national court appeal process to include more than one phase of case presentation, as the losing party attempts to establish its claims to vacate the award and pursues its contentions up the scale of courts in the national judicial system.[774] It does seem reasonable, however, that there is a portion of actions in national courts to set aside arbitration awards that would not be brought if there were a substantive form of appeal within the initial international dispute settlement mechanism.

I. The WTO approach

In the situation of the WTO, much legitimacy comes from the existence of the Appellate Body which forms a highly developed substantive review mechanism and is established in a way that is more similar to that outlined by the ICJ. The WTO Appellate Body acts

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[773] Gary Born, *International Commercial Arbitration in the United States* (London: Kluwer, 2010) 546-577.

[774] William H. Knull, III and Noah D. Rubins, "Betting the Farm on International Arbitration: Is It Time To Offer an Appeal Option?" (2000) 11 Am. Rev. Int'l Arb. 531.

as a type of safety net, providing a judicial body of second instance capable of addressing issues related to the independence or impartiality of the panel of first instance, among other issues. In the WTO system, the Appellate Body is an essential component to ensure that due process protection with respect to ensuring the integrity of the decision maker is secure. Further, although not usually a concern in WTO dispute settlement, should there be issues regarding the notice provided to the parties the Appellate Body has the competence to address such issues.

The WTO system has a very advanced appellate process; either party can appeal the report of the Panel to the WTO Appellate Body. Of important note is that appeals can only be based on the Panel's application of WTO law to the case in controversy, and not a re-evaluation of the facts of the case.[775] The WTO Appellate Body consists of seven permanent members, appointed for four-year terms, which are renewable only once.[776] An Appellate Body member therefore may have a fixed appointment of up to 8 years, as opposed to Panel members, who are appointed ad hoc for each dispute. The Appellate Body members must be "individuals with recognized standing in the field of law and international trade, not affiliated with any government."[777] Over the years Appellate Body members have come from a variety of backgrounds, and include retired government officials and judges, international law academics, international lawyers, international courts and tribunal judges, and others.[778]

With respect to the composition of Appellate Body divisions, the DSU limits itself to the rule that appeals from panel cases are to be decided by only three members of the Appellate Body, that these three members are to be determined by a system of rotation and that "such a system of rotation shall be determined in the working

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[775] DSU art. 17.6.

[776] DSU art. 17.2 .

[777] World Trade Organization, Information and Media Relations Division, Understanding the WTO (3d ed. 2005), http://www.wto.org/english/thewto e/whatis e/tif e/understandin g text e.pdf, at 61.

[778] For a complete list of Appellate Body members, past and present, including their biographies, see WTO Dispute Settlement: Appellate Body Members, http://www.wto.org/english/tratop e /dispu e/ab members descrp e.htm (last visited June 16, 2011).

procedures."[779] One of the three members presides over each division by election. While a division is responsible for hearing and deciding a specific appeal, the other four members are also consulted in a session of all seven members called an Exchange of Views, which normally lasts for two or three days.

While explicitly addressing the problem of nationality of panellists with respect to WTO Members that are parties to the dispute,[780] the DSU says nothing for the Appellate Body process. According to the Working Procedures, "the Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin."[781]

A division must decide the appeal within ninety days from the filing of the appeal. Of those ninety days, exchanges of written submissions by the parties and third-party participants take thirty days or more. As the translation of final draft of the opinion into the other two official WTO languages takes two weeks, fewer than forty-five days remain for a division to do its work. The work of a division includes preliminary deliberations, an oral hearing (normally lasting one or two days in which the division asks the parties questions requiring immediate answers), the Exchange of Views, and finally further deliberation and the drafting of a report for submission to the DSB.

WTO appellate review is limited to legal points in a matter similar to the review of the highest national courts. It does not extend to a review of fact-finding by the panel below unless an error of fact is so significant that it constitutes a legal error. The assembly of all Member States must adopt the Appellate Body's recommendation for the recommendation to become conclusive and binding.

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[779] DSU art. 17.1.

[780] DSU art. 8.3.

[781] WTO Appellate Body, Working Procedures for Appellate Review, WTO Doc. WT/AB/WP/3, para. 6 (Feb. 28, 1997)

When a WTO Member State decides to initiate appellate proceedings, the respective notice will usually be published within three to four days on the Appellate Body homepage. However, the content of the appeals notice is not always clearly formulated, neither for the public nor WTO Members. In the *Shrimp-Turtle* case, for instance, India, Pakistan and Malaysia had previously complained that the United States' notice of appeal had been too "vague and cursory".[782] Some developing countries therefore suggested the establishment of additional guidelines on the nature of the notice of appeal in order to make sure that such notices are sufficiently clear.[783] Submissions of parties or third parties to a dispute before the Appellate Body are in the same way and for the same reasons confidential as submissions in panel proceedings. Further, Art. 18.2 of the DSU equally applies to appellate proceedings.

Although these concerns regarding sufficient clarity of the notice of appeal have also been addressed in the DSU negotiations, they have also been considered by the Appellate Body itself in the meantime. New Working Procedures for Appellate Review entered into force on 1 January 2005. The modified rules require, *inter alia*, more detail on the nature of the appeal. Appellants are requested to include a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying, and to provide an indicative list of the paragraphs of the panel report containing the alleged errors.[784]

With respect to enforcement, the WTO system often encounters difficulties in enforcing a ruling and grapples with what can be done if the parties are not willing to comply with a ruling rendered by the WTO. The major problem is that the WTO does not have a mechanism for enforcement. The "legalization" of the dispute settlement process has not been paired with a stronger enforcement arm. This creates a major impediment to

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[782]WT/DS58/AB/R, para 92.

[783]TN/DS/W/18 and TN/DS/W/18 Add 1, no VI (Cuba, Honduras, India, Jamaica, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe).

[784] See the modified Rule 20(2), as contained in WT/AB/WP/5.

the WTO's enforcement of its rulings. In response, the WTO does not seek to enforce directly compliance itself but employs softer methods such as monitoring and reporting on implementation and discussions in councils and ministerial meetings, to encourage Members to conform.

J. What is finality in the context of dispute resolution?

Historically, "finality," meaning in practice the lack of appeal on the merits of the dispute, has tended to be counted among the advantages of private dispute resolution over national court litigation. However there is no reason to assume that arbitrators are any less prone to mistakes than judges are. Further, one commentator suggested that many potential parties avoid the UNCITRAL and ICSID mechanisms "because they have no confidence that the arbitrators' decision will be as objective, predictable and correct as one would expect if the decision were made by a highly respected judge sitting without a jury."[785] As international cases presented to international dispute settlement mechanisms are increasingly complex, both technically and financially, the likelihood of error is further increased. To further complicate the job of international dispute settlement mechanisms, they often face the application of legal principles from multiple countries, and there is no guarantee the arbitrators will be sufficiently familiar with any of them.

The establishment of a substantive appeals process in the ICSID and UNCITRAL systems will not be easy and the mere concept creates several complicated questions for consideration. How wide should an international appeals mechanism range? Should it, for example, cover all maters in dispute in the original arbitration, including issues of fact? Or should it be confined to issues of law? Should it be concerned only with reviewing the decisions of the original tribunal on the issues before it? To what extent should it allow new issues to be introduced at the appeal stage?

A substantive appellate process that considered errors of fact would involve the investigation of the question whether the original tribunal had improperly attached weight to particular evidence or had indeed decided issues of fact without any evidence to

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[785] Stephen A. Hochman, "Judicial Review to Correct Arbitral Error: An Option to Consider" (1997) 13 Ohio St. J. On Disp. Resol. 103, 104.

support its conclusions. This type of review raises serious concerns surrounding the concept of the autonomy of the original tribunal.

With respect to appeals mechanism where the appellate process limits itself to consideration of errors of law that are significant, who is to determine whether the error of law is obvious or not obvious? In a domestic regime the civil courts are there and available to determine whether this filter system should operate in favor of the appellant. However, where there is no substitute for a domestic court operating as a filtering agency, there are more difficult problems. For example, is the filtering to be done by the very same body which sits for the purpose of determining a substantive appeal?

The next question for consideration is whether the members of the appellate body should be a standing court or tribunal, having a published list of members or, whether the members of the appellate body should be appointed ad hoc by an administrative machinery such as the Chairman of the Administrative Council of ICSID. This in turn raises the question as to how the appellate body should be composed by whoever is responsible for appointing it.

The advantage of the establishment of a permanent appellate body with published names is that it can develop a coherent body of jurisprudence and can thereby gradually establish consistency of approach to the kind of issues likely to arise on appeal. However, it is important to note, as discussed above, that those with a Civil Law background will likely find the concept of anything approaching a doctrine of stare decisis difficult to accept. This will be discussed further below.

In relation to ICSID and UNCITRAL dispute settlement systems the establishment of a permanent appellate body could be made to fit in with the existing procedural regime. On one hand, under ICSID one has a system of ad hoc annulment committees which may be called upon to deal with issues of fact arising before the original tribunal for the purpose, for example, of deciding whether the tribunal is properly constituted or has manifestly exceeded its powers or has departed from a fundamental rule of procedure. On the other hand one would run perhaps an unacceptable risk of jurisdictional overlap between such a committee looking at a claim of annulment, and an

appellate body considering whether the original tribunal had erred in relation to a question of law on an issue before it. For that reason, there is perhaps much to be said for combining the functions of an appellate tribunal on the questions of law with the functions of the had hoc annulment committee into a single appellate body similar to that of the WTO system.

K. The value of finality

In general, with respect to appellate proceedings in the context of international dispute settlement, former general counsel Thomas Klitgaard remarked:

> Speed and finality are virtues, but only if you win. They are not virtues if a fundamental mistake has been made. The arbitral institutions dealing with … disputes should set up a mechanism for appeal. It would be up to the parties to elect the mechanism in their agreement. If they did not so elect, they would assume the risk of an unprincipled or fundamentally erroneous decision. But at least the issue involving the possibility of review would be focused for the business persons on each side, who often become aware of the lack of an appeal only after the remedy of international arbitration is already selected.[786]

Expanding the possibilities for review and appeal in any dispute settlement system comes at a price through reduced flexibility and speed. However, this exchange of finality and speed for accuracy might be one that parties to international dispute settlement feel is necessary if it is to be an acceptable alternative to domestic adjudication. The benefits of arbitration in the international context can be significant; however, given the stakes oftentimes involved, either public or private, finality and speed may likely become secondary to neutrality, enforceability, consistency, predictability, technical expertise, and others. In particular, talking a little more time to ensure accuracy and a just decision at the end is likely a far better investment than focusing only on speed which has a higher likelihood to result in an erroneous decision.

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[786] Thomas J. Klitgaard, "The Transnational Arbitration of High-Tech Disputes," presentation given to the Seventh Annual Transnational Commercial Arbitration Workshop, Dallas, Texas, June 20, 1996. www.wirepaladin.com/articles/article9.htm.

When the value of finality is considered in light of the high stakes and factual and legal complexity of many international disputes combined with increasingly complex technical evidence, it becomes more apparent that there is potentially a significant need for substantive appellate procedures in international dispute settlement mechanisms. By establishing clause modules that will establish clearly-defined standards of review, deadlines, evidentiary procedure and limitations, and other procedural details, the parties' negotiated compromise between finality and accuracy can be implemented faithfully, allowing both sides to calculate future risks and feel confident entrusting their international disputes to international dispute settlement mechanisms.

L. Some judicial review is needed

It can be argued that an optimal legal framework for international dispute settlement would limit national court scrutiny to narrow review standards, regardless of whatever judicially administered review measures might be considered appropriate for domestic cases.[787] The best default rule for judicial review of international awards gives losers a right to challenge awards only for excess of authority and basic procedural unfairness, bias or denial of an opportunity to present one's case, but not on the merits of the case.[788]

In the eventuality that the substance of a dispute could regularly be second-guessed by judges, international dispute settlement would merely become the precursor to national litigation. It is important to note that limited review, however, does not mean no review at all. Few commercial actors would be comfortable to buy into a system with no prospect for rectifying gross procedural unfairness. In agreeing to arbitrate, business managers generally assume to risk that arbitrators may make mistakes on the substance of the dispute and these can and should be remedied by the system's appellate mechanism but this is not always the case.

However, such business managers are not likely willing to give up fundamental due process protections in submitting their case to international dispute settlement. When

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[787] *Hoeft v. MVL Group, INC.*, 343 F.3d 57 (2003) (holding that a federal court is not deprived of the power to review an award for "manifest disregard of law).

[788] *Ibid.*

one side regrets its bargain to arbitrate only after the award is rendered, national courts should maintain a hands-off approach that balances the interests of winners and losers.[789] Normally, in the context of international dispute settlement, national judicial intervention should be justified only to promote the basic integrity of the process and the arbitrators' respect for the contours of their mission.[790] It must be remembered, however, that the text of the law must be read in the context of its application and even a statue that is written to allow challenge only for defects related to procedural regularity could be interpreted to allow justification for an overzealous judge to examine a dispute's legal merits under the guise of correcting arbitrator excess of authority

M. Basic components for a substantive appeal processes

In constructing an efficient and equitable international dispute settlement substantive appeals option for the ICSID and UNCITRAL systems, three conflicting interests must be balanced. First, the procedural aspects of any appellate process must contain sufficient detail to provide systematic predictability and to minimize potential collateral disputes over the interpretation or implementation of the system's rules. Secondly, the system must be sufficiently flexible to encompass the preferences of a wide variety of potential parties and have the ability to accommodate a range of different attitudes towards the value of efficiency and finality as compared accuracy and fairness. There should be clearly defined rules for the appeals system but a degree of flexibility should still be present should the parties agree on some changes. Thirdly, the analysis during the appellate process must reach a level that is more than cursory and consider issues that reach beyond those that are procedural to those that are substantive and address the merits of the actual case. In doing this, the appellate process must not become too cumbersome so as to create unnecessary delay.

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[789] *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373, 386 (1911) (The most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear).

[790] Lord Alfred T. Denning, *The Discipline of the Law* (New York: Lexis Nexis, 1979) 74 (whenever a tribunal goes wrong in law it goes outside the jurisdiction conferred on it and its decision is void).

Expedited Procedure – The desirability of expediency and cost reduction in resolving any dispute suggests that the process should, where possible and consistent with its principle objectives, simplify and accelerate the appeals process. While it should not be the default option, if the parties choose to restrict or exclude new evidence at the appeals stage, a significantly shortened time frame may be possible relative to the time needed if more evidence is to be permitted. "Fast track" mechanisms could include time limits on initial submissions and subsequent briefs, accelerated tribunal formation or standing appeal panels, caps on the length of oral hearings, and short deadlines for the rendering of an award. Guidance as to how the procedures can be accelerated without sacrificing substantive accuracy can be gleaned from those currently employed by the WTO appeals system.

Scope and Standard of Review – At the core of any new substantive appellate mechanism will be the scope of review. By choosing the appropriate standard, parties would be able to select a narrower or broader scope in accordance with the needs of the particular issue at hand, balancing expediency against breadth or recourse. It will be essential that whatever standard of review is selected, it be clearly defined from the beginning in order to avoid time-consuming disputes over appellate jurisdiction. In addition, it should be clear that the appellate tribunal itself has the exclusive jurisdiction to determine whether the complaint submitted falls within parties' agreement as to scope. Possible standards could fall anywhere in the range between the minimal review provided by the New York Convention and a complete de novo review. Review could be limited to errors of law[791] or provide for remedies were, as an example, an award was found not to be supported by any evidence, by substantial evidence or by a preponderance of the evidence or was against the great weight of the evidence. As different standards provide different tradeoffs of speed and accuracy, and given the need for a degree of flexibility in ICSID and UNCITRAL settings, it may be most effective to allow the parties to choose among two or more alternatives to tailor the proceeding to their own needs.

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[791] A report by a committee of the National Conference of Commissioners on Uniform State Laws (UCCUSL) suggests that advantages of arbitration are less undermined by appeal concerning mistakes of law than mistakes of fact. NCCUSL Study Committee Report, Recommendation No. 2 (1995).

Sanctions – In national courts, legal ethics rules and lawyer sanctions are used to increase the pain involved in bringing non-meritorious actions. An arbitral appeals system could do the same by giving the appeals tribunal the discretion to assess penalties upon either the appealing party or his attorney where the request for review is found to have no legitimate basis. A related device is the provision of post-award interest. When any delay in the payment of an award caused by the losing party in opting for arbitral review is reflected in the final amount assessed, neither party is likely to employ delay tactics at the appeal level, and the frequency of appeals with a low probability of success will be further reduced.

Waiver of Judicial Remedies – one of the more controversial elements that might be incorporated into an international arbitral appeals system to minimize potential detrimental effects on speed and finality is a waiver of judicial remedies. Such a rule would deprive the losing party of the opportunity to oppose enforcement of the award before judicial bodies anywhere in the world, whether prior to and instead of applying to the agreed-upon tribunal, or after that body decides the outcome of an appeal.[792] Such a waiver is generally enforced under English law, and can likely be used to reasonably bar judicial recourse once a particular international dispute settlement mechanism has been initiated.[793] If such a clause is effective in a wide range of jurisdictions around the world, the result could be a dramatic increase in the efficiency and finality over the standard situation where courts currently provide the exclusive forum for challenge. A waiver of judicial recourse, however, is more likely to be effective at the location of the arbitral proceedings than at the place of enforcement due to the interest of states in safeguarding public policy when an award is closely connected to their territory or citizens.

Standing Body or Ad Hoc Tribunal – Given the concern for flexibility in international dispute settlement, it is not entirely clear that one or more standing appellate bodies (such as that used in the WTO dispute resolution facility) would be a more

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[792] Michael J. Mustill & Stewart C. Boyd, *Commercial Arbitration* (London: Butterworths Law, 1989) 579.

[793] *Ibid.*

effective solution than ad hoc panels formed from a list of qualified arbitrators established by relevant administering organizations. Both options could provide the necessary expertise in appeals arbitrator candidates. Standing ICSID or UNCITRAL appellate bodies could provide speedier resolution of challenges and more uniform interpretation and a greater degree of consistency with previous case law. Alternatively, ad hoc tribunals would reduce additional administrative costs to international institutions and consequently to the parties, and may better respond to the technical details of a particular dispute by maintaining the flexibility to include technical experts in a particular subject matter as necessary. A combination of the benefits of ad hoc and standing appellate panels could be achieved if international dispute settlement institutions maintained an extensive list of potential appellate members who could be called upon depending upon their particular technical expertise at short notice.

Appellate Remedies – The scope of remedies available to an arbitral appeals panel is as important an aspect of a review system as the review mechanism itself. Should a panel decide that an award is erroneous, there need to be a number of actions available to it to take, and the parties should agree at the outset which of these options will be available to the appellate panel, to avoid disputes over the appeal tribunal's authority and to better reflect the parties' preferences with regard to economy and accuracy. If an award is flawed but not to the degree that it is fatal, an appeal tribunal could be empowered to amend the award, or to issue a new award replacing the flawed one. Alternatively, the award could be reversed and remanded, either to the original panel or, in some rare circumstances where the original panel are not available or are found to be somewhat suspect or disqualified given the issues on appeal, a new panel could be formed with instructions on how errors should be corrected.

Cost Shifting – The proliferation of erroneous appeals can be significantly reduced by including at a contractual level the tools that courts use to reduce caseloads. The most fundamental tool for reducing non-meritorious appeals is cost shifting. This would mean that should an appeals panel affirm the arbitration award, the party initiating the arbitral appeal would be responsible for paying his opponent's reasonable legal costs and other reasonable expenses connected with the appeal. Given that cost shifting is

more common in international commercial arbitration than in American litigation, if could be argued that cost shifting provisions will do little to alter incentive to bring arbitral appeal. However, cost shifting is by no means a forgone conclusion in international arbitration.[794] Explicit provisions for a "costs follow the event" rule at the appeals stage will therefore remove all discretion and uncertainty as to the distribution of legal costs, removing the power of losing parties to extort advantageous settlement from the victor by threatening appeal.[795]

Security for Costs – If a losing party will already be drained of assets by the enforcement of the arbitral award against it, the prospect of paying both sides' appeal costs will pose little deterrent threat. Appeals panels could therefore be empowered to require a deposit of security to cover the costs incurred by the appellee during the procedure. While a default rule should likely leave the question of security for costs to the appeals panel's discretion in order to avoid shutting out parties with highly meritorious complaints, alternative language could provide for security of costs in all appeals, or in all cases where matters of fact or law are at issue, rather than appeals as to procedural defects.

N. The case of the WTO Appellate Body

The WTO Appellate Body's case law is highly authoritative and has made a significant contribution to the development of international trade law and in practice is today the only substantive appeals process for international dispute settlement. This is changing as recently the European Union and Canada announced their agreement to rely on a new permanent investment court system under the EU-Canada Comprehensive Economic and Trade Agreement (CETA),[796] replacing the prevailing ad hoc arbitration system that was initially part of the deal. The EU also included a similar provision in the text of the EU-Viet Nam free trade agreement. This change, however, only refers to investor-state

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[794] John Y. Gotanda, "Awarding Costs and Attorneys' Fees in International Commercial Arbitration" (1999) 21 Mich. J. Int'l L. 1, 2

[795] *Ibid.*

[796] See Investment provisions in the EU-Canada free trade agreement (CETA), February 2016: http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf

dispute settlement under Chapter Eight (investment)[797] of the CETA. Interestingly, rather than referring to the mechanism already established by the ICSID system, the parties have opted to develop their own mechanism which includes new substantive appeal procedures. The final text of the CETA establishes a permanent Appellate Mechanism which is similar in concept to that of the WTO Appellate Body. The inclusion of a substantive appeals mechanism is a huge departure from the traditional approach to investor-state dispute settlement because previously, as explained above with respect to the ICSID system, it was extremely difficult, if not impossible, to challenge an award on the basis of a legal or substantive error. Under the new CETA approach, legal errors can now be challenged. The fact that the new Appellate Mechanism is patterned after the WTO Appellate Body only highlights the value of the WTO appellate system and it can be reasonably expected that this new system will increase the consistency and predictability of the jurisprudence.

The WTO DSU, provided in Article 17, that "a standing Appellate Body shall be established . . ." In line with this mandate, the DSB set up the Appellate Body through its decision of 10 February 1995 on the Establishment of the Appellate Body.[798] During the Uruguay Round negotiations, the two main trading powers, the United States and the European Communities had both been exposed, in their views, to several panel reports which they felt contained serious legal errors[799] and as a safety measure against such erroneous panel reports, the negotiators provided for an appellate review mechanism. The European Communities proposed the creation of an appeals mechanism for parties who believed that panel decisions were "erroneous or incomplete."[800] The United States supported appellate review for "extraordinary cases where a panel report contains legal interpretations that are questioned formally by one of

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[797] Id.

[798] WT/DSB/1, dated 19 June 1995.

[799] P.J. Kuijper, "The New WTO Dispute Settlement System: The Impact of the European Community" (1995) 29 Journal of World Trade 6, 52.

[800] 1990 Proposal by the EC; reported by T. Steward (ed.), The GATT Uruguay Round: A negotiating History (1986-1992), Volume II (Kluwer Law and Taxation Publishers, 1993), 2767.

the parties'.[801] Canada viewed the appellate review mechanism as a way to correct errors of "fundamentally flawed decisions."[802] Bob Hudec described the WTO appellate review mechanism as a "safety valve" against "bad" panel decisions.[803]

Interestingly, the decision to establish a standing Appellate Body is held to be somewhat of an afterthought, rather than the product of a large design to create a strong international court system.[804] This concept is supported by the fact that of the 27 articles of the DSU, only one article, Article 17, specifically addresses the Appellate Body and the WTO process for appellate review and only one of the four appendices of the DSU considers the Appellate Body or its work. Compared with the significant amount of information on the panel process, the small amount of attention paid to appellate review demonstrates the limited importance given by the original WTO negotiators to any type of appellate review.

Article 17 of the DSU defines the work of the Appellate Body in very general terms to be the hearing of appeals from panel cases[805], but then goes on to narrow the scope of appellate review and the overall mandate of the WTO Appellate Body. Appeals are limited to issues of law covered in the panel report and legal interpretations the panel develops and generally findings of fact by the panel are not included in the scope of appellate review.[806] The Appellate Body is mandated to address each of the legal points

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[801]1990 Proposal by the US; reported by T. Steward (ed.), The GATT Uruguay Round: A negotiating History (1986-1992), Volume II (Kluwer Law and Taxation Publishers, 1993), 2767-2768.

[802]1990 proposal by Canada; reported by T. Steward (ed.), The GATT Uruguay Round: A negotiating History (1986-1992), Volume II (Kluwer Law and Taxation Publishers, 1993), 2768.

[803] R. Hudec, Dispute Settlement, in J. Schott (ed.), *Completing the Uruguay Round: A Results-Oriented Approach to the GATT Trade Negotiations* (New York: Institute for International Economics, 1990), 191.

[804] Peter Van den Bossche, *The WTO Appellate Body and its Rise to Prominence in the World Trading System,* (Maastricht: Maastricht Working Papers Faculty of Law, 2005).

[805] Article 17.1, 17.2, and 17.3 of the DSU.

[806] Article 17.12 of the DSU.

raised during the appellate review process[807] but it is limited only to upholding, modifying or reversing the panel's legal findings and conclusions. Access to appellate proceedings is limited only to parties to a dispute and third parties or other WTO Members do not have standing to appeal a panel report, even if they have clear interests at stake.

According to Article 17.6 of the DSU, the Appellate Body is to be composed of seven members and when compared with the ICJ, the ICC or the ITLOS, which are made up of 15, 18, and 21 judges respectively, the small size of the WTO Appellate Body is somewhat surprising.[808] Further, Article 17.2 provides that appeals are never heard by all the members of the Appellate Body, but only by three of the seven persons serving on the Appellate Body on rotation. Critics were concerned that this rotational system of decision making provided by the DSU negotiators would have resulted in the development of inconsistent WTO case law.[809] However, the Appellate Body recognized and addressed this danger in the development of its Working Procedures. Rule 4 of the Working Procedures, entitled "Collegiality," requires the division responsible for deciding an appeal "to exchange views with the other Members [of the Appellate Body] before the division finalizes the appellate report."[810] This mechanism of "exchange of views" is quite unique in dispute settlement, be it national or international, and has been of "enormous benefit to the work of the Appellate Body."[811] While the responsibility for deciding the appeal remains with the division, the exchange of views actively involves the full Appellate Body in every appeal. Interestingly, after retiring from the Appellate

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[807] *Ibid.*

[808] Article 3 of the Statute of the International Court of Justice, Article 36(1) of the Rome Statute of the International Criminal Court, and Article 2(1) of the Statute of the International Tribunal for the Law of the Sea.

[809] R. Hudec, "The New WTO Dispute Procedure: An Overview of the First Three Years" (1999) 8 Minnesota Journal of Global Trade 1, 28.

[810] Rule 4.3 of the Working Procedures for Appellate Review.

[811] C.D. Ehlermann, Some Personal Experiences as Member of the Appellate Body of the WTO, Policy Paper RSC No 02/9, The Robert Schuman Center for Advanced Studies, European University Institute, 12.

Body, several of its former Members publically made statements to the high degree of collegiality among the Members of the Appellate Body and the resulting positive effect on its case law.[812]

The working procedures of the Appellate Body have directly contributed to the prominence obtained by this appellate mechanism today. The working procedures provide for judicial-type proceedings and a court-like appeals body. The Appellate Body made it clear from the outset that it would have a "fairly high standard of practice," as compared with the "more easy-going standard of practice common to party-controlled panel proceedings."[813] Part I of the Working Procedures sets out the duties and responsibilities of the Appellate Body Members and put much focus on their independence and impartiality, as well as on the avoidance of conflicts of interest.[814] The Appellate Body adopted on a temporary basis the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes and attached these Rules in Annex II to the Working Procedures. The Rules of Conduct, as they apply to Appellate Body Members and the Appellate Body Secretariat, are more elaborated than the rules of other international courts, such as the ICJ.[815] Part I of the Working Procedures also set out the rules on the composition and operation of divisions.[816]

Part II of the Working Procedures for Appellate Review provides for specific rules on the commencement of an appeal, on the working schedule of an appeal, on the appellant's and appellee's submissions, on the rights of third parties, on the oral hearing,

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[812] C.D. Ehlermann, Some Personal Experiences as Member of the Appellate Body of the WTO, Policy Paper RSC No 02/9, The Robert Schuman Center for Advanced Studies, European University Institute, 12.

[813] R. Hudec, "The New WTO Dispute Settlement Procedure: An Overview of the First Three Years" (1999), 8 Minnesota Journal of Global Trade 1, 28.

[814] Rules 2, 14, and 15 and Rules 8 to 11 of the Working Procedures for Appellate Review.

[815] Van den Bossche, Peter, *The WTO Appellate Body and its Rise to Prominence in the World Trading System* (Maastricht: Maastricht Working Papers Faculty of Law, 2005).

[816] Rules 3, 6, 7, 12, and 13 of the Working Procedures for Appellate Review.

on the filing and circulation of documents, on the prohibition of *ex parte* communications, on multiple appeals, on the transmittal of the record to the Appellate Body, on additional memoranda, on the consequences of failure to appear and on the withdrawal of an appeal. Annex I of the Working Procedures contains a detailed time table for appeals. With the maximum timeframe of 90 days mandated by Article 17.5 the working schedule is tight, with very short time periods in which the participants in the appeal must file their written submissions and in which the division of the Appellate Body hearing the appeal must conduct the oral hearing, deliberate, exchange views, deliberate again, draft, translate and finally circulate the report. The Working Procedures for Appellate Review leave no doubt that the Appellate Body division hearing the appeal (and not the participants) is firmly in control of the appellate process, just as one would expect from a court as opposed to an arbitral body.

When in an appeal a procedural question arises that is not covered by the Working Procedure, the Appellate Body division hearing that appeal has the authority to adopt an additional procedural rule for the purposes of that appeal. The Working Procedures give this authority to the division "in the interests of fairness and orderly procedure in the conduct of an appeal." For example, the Appellate Body division in *EC-Asbestos* used this authority to adopt an Additional Procedure to address the many amicus curiae briefs submitted to the division in that appeal.[817]

The Working Procedure adopted in February 1996 have served the Appellate Body very well and have allowed it to conduct its work in a fair, efficient and genuinely judicial manner. Throughout the years the Working Procedure has been amended several times to address specific deficiencies. This was particularly the case with amendments effective as of 2002, which made it easier for third parties to participate in the oral hearing, and the amendments effective as of 2005, which elaborated on the content requirements for the notice of appeal, introduced the requirement of notice of other

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[817] Appellate Body Report, *EC – Asbestos, paras. 50-57.*

appeal to be filed by other appellants, and modified the time of the oral hearing.[818] These, along with other amendments, have further strengthened the court-like nature of the Appellate Body and the judicial-type nature of the WTO appellate review proceedings.

In the July 2015 case, *Peru – Additional Duty on Imports of Certain Agricultural Products*[819], the Appellate Body was faced with the issue as to whether new argumentation could be considered during an appeal or if such consideration was a violation of due process protections afforded to the parties. Defendant Guatemala objected that it was confronted for the first time on appeal with specific arguments and with extensive supporting materials and therefore requested the Appellate Body to exclude from the scope of the appeal the new arguments, which, according to Guatemala, would require the consideration of new facts and to address issues that are not issues of law covered in the Panel report or legal interpretations developed by the Panel.[820]

In previous jurisprudence, the Appellate Body has maintained the principle that new argumentation is not excluded from the scope of appellate review; however, its ability to consider new arguments is indeed circumscribed by Article 17.6 of the DSU.[821] In an effort to provide clarity, the Appellate Body found that it would be able to consider new arguments if: 1) they do not require it "to solicit, receive and review new facts"[822]; 2) they "involve either an 'issue of law covered in the panel report' or 'legal interpretations developed by the panel'".[823] In any event, the Appellate Body has clarified that such consideration must not compromise a party's due process rights to have a fair opportunity to defend itself adequately.[824]

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[818] Working Procedures for Appellate Review.
[819] Appellate Body Report, *Peru-Additional Duty on Imports of Certain Agricultural Products,* WT/DS457/AB/R, adopted 20 July 2015, para 5.81.
[820] Id.
[821] Appellate Body Report, *Canada – Aircraft*, para. 211.
[822] Appellate Body Report, *US – FSC*, para. 102.
[823] Id at para. 103.
[824] Appellate Body Report, *US – Gambling,* para. 270.

In the current case, the Appellate Body reasoned that while Peru did not raise the specific argumentation during the initial panel process to which Guatemala objected, Peru did raise arguments concerning the interpretation of the same specific WTO covered agreements at issue. According to the Appellate Body, Peru's arguments, although new, were framed as concerning the interpretations of the same WTO provisions as at issue before the Panel and covered in the Panel report. Therefore, Peru's new arguments on appeal could be considered as relating to "issues of law covered in the panel report" or "legal interpretations developed by the panel" allowing their consideration by the Appellate Body without any prejudice to Guatemala's due process rights. [825] With respect to the submission of new facts, the Appellate Body did clarify that in the event new argumentation on appeal requires the consideration of new facts, it would not be appropriate for the Appellate Body to address such arguments to that extent. In the current situation, the submission of new facts was not an issue because the new argumentation put forward by Peru relied entirely on facts previously submitted and considered by the Panel and explained in the Panel report.[826]

As demonstrated above, a particularly valuable component of the WTO appellate review mechanism is its case law, and in particular the case law balancing free trade and other societal values and interests and case law ensuring the fairness and effectiveness of the WTO dispute settlement system. In general, the case law of the Appellate Body carefully balances free trade with other societal values, such as public health, the environment, or consumer protection. This balance is initially set out in the numerous provisions of the WTO agreements but the Appellate Body has clarified this delicate balance and applied it in specific cases. In line with the common intentions of the WTO Members, the Appellate Body, when interpreting and applying provisions of covered agreements leaves Members significant discretion to implement measures for the protection and promotion of these societal values and interests.

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[825] Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, para. 5.86.
[826] Id. At para. 5.86

The Appellate Body has gained significant stature as a result of its case law ensuring the fairness and effectiveness of the WTO dispute settlement system. The agreement on the rules and procedures of WTO dispute settlement reached by the Uruguay Round negotiators and reflected in the DSU was a significant achievement. However, at the time of operation it was clear that the WTO dispute settlement had important gaps in the rules and procedures. The rulings of the Appellate Body on issues such as burden of proof, judicial economy, the use of experts, the submission and admission of evidence, standard of review, terms of reference, third party rights, good faith in dispute settlement proceedings, and representation by private council, have made an important contribution to the fair and effective functioning of the WTO dispute settlement system. It is important to note that the WTO Appellate Body is not without its critics and proposals to further strengthen the system and some specific examples will be further considered below.

O. Potential appellate mechanisms in the ICSID and UNCITRAL systems

Policies around the establishment of a WTO-type appellate mechanism, perhaps similar to the new CETA Appellate Tribunal, in both the ICSID and UNCTIRAL systems which follows a similar ICJ-type of judicial appointment mechanism would be an elegant solution to addressing concerns surrounding the integrity of ad hoc tribunals and the fact that both the ICSID and UNCITRAL systems do not currently offer potential users a review mechanism that considers substantive and legal issues. It must be noted that although the ICSID allows for annulment of an award based on a claim of decision-maker corruption or lack of proper notice, this is done on an ad hoc basis and does not rise to the level of the WTO Appellate Body mechanism. In the ICISD the administration of the annulment procedure is conducted by the Administrative Council of ICSID which appoints an ad hoc committee to consider the very limited grounds for annulment under Art. 52(3). As current ICSID annulment stands, the remarkable situation may arise where there is an original arbitration, then the proceedings before an ad hoc committee relating to annulment, then the annulment of part of the original award, the reference of the annulled part of the original award to a new ad hoc arbitral tribunal, followed by proceedings before that new tribunal in which findings of the original tribunal relevant

both to the surviving part of the original award and to issues before the new tribunal are not necessarily binding on the parties and can be re-opened. This eventuality, stemming from the fact that all tribunals in the ICSID system are ad hoc with little coordination is worrisome and could be addressed by the establishment of a permanent substantive appeals mechanism.

Interestingly, while the UNCITRAL Rules do provide clarification on the causes for a party to contest the enforcement of an award, tribunal corruption, impartiality or adequate notice are not included among them. In general, the UNCITRAL and ICSID systems establish a one-tiered system where awards are automatically considered final, subject to very limited grounds to contest enforcement. In contrast, proceedings in domestic courts for example are a matter of public record, the public can have access to the pleadings, judges are neutrally rostered and parties have the clear right to appeal. UNCITRAL and ICSID arbitrations lack such basic accountability mechanisms. In any legitimate process making decisions that weigh private against public interest, tribunals must be accountable for what they do and therefore the establishment of an appellate mechanism for the UNCITRAL and ICSID systems would be useful.

With respect to UNCITRAL Article 34, Application for setting aside as exclusive recourse against arbitral award, the case *Apa Insurance Co. Ltd v. Chrysanthus Barnabas Okemo*[827] and courts in numerous other jurisdictions have made clear that setting aside proceedings are not appeal proceedings in which evidence is re-evaluated and the correctness of the arbitral tribunal's decision on the merits is examined. The underlying rationale for that approach is that the arbitral tribunal decides in place of the State court and does not merely constitute a first instance.[828] In describing the nature of setting aside proceedings, the Spanish court in *Sofia v. Tintoreria Paris,* held that the "applicable review in annulment proceedings is that of an external trial … in such a way that the

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[827] High Court, Nairobi Kenya, 24 November 2005, available at www.kenyalaw.org/casesearch.

[828] Oberlandesgericht Karlsruhe, Germany, 10 Sch 01/07, 14 September 2007, available at www.dis-arb.de/de/47/datenbanken/rspr.

competent court examining the case solely decides on the formal guarantees of the proceedings and the arbitral award, but cannot review the merits of the matter."[829]

As the UNCITRAL system does not contemplate the review of an award its merits, parties are left to resort to domestic courts to address the national enforcement of UNCITRAL decisions, thereby instilling in them a type of supervisory jurisdiction. However, the disparity found in national laws with respect to a party's options or recourse against an arbitral award underlies a major obstacle in the harmonization of international arbitration legislation. With respect to domestic court's review of international arbitration cases, there emerges a pattern to the readiness of domestic courts and other national supervisory bodies to interfere with awards on the grounds of error of fact or law or on the grounds of implementation of the initial arbitration agreement, including jurisdiction and procedural fairness. In general most domestic courts treat any type of review of the merits of the case as off limits and are only willing to consider issues around basic procedure and case management. This situation then leaves parties to the UNCITRAL system without any meaningful type of substantive review mechanism.

In English Law the provisions of the 1996 Arbitration Act illustrates the tension between the review of issues of law and fact. The 1996 Act makes no distinction relevant for present purposes between domestic arbitrations and international arbitrations subject to the New York Convention which have their seat in England. The key provisions of the 1996 Act which involve the review of the merits of a case are to be found in sections 69 to 70 which provide as follows:

> 69(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.
>
> An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

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[829] Madrid Court of Appeal, Spain, 20 January 2006, case No. 19/2006; see also Court of Appeal, Amman, Jordan, 10 June 2008, No. 206/2008.

(2) An appeal shall not be brought under this section except –

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3) Leave to appeal shall be given only if the court is satisfied –

(a) that the determination of the question will substantially affect the rights of one or more of the parties;

(b) that the question is one which the tribunal was asked to determine;

(c) that, on the basis of the findings of fact in the award –

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just an proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

(7) On an appeal under this section the court may by order –

(a) confirm the award;

(b) vary the award;

(c) remit the award to the tribunal, in whole or in part, for reconsideration in light of the court's determination, or

(d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

70 (1) The following provisions apply to an application or appeal under section 67, 68 or 69(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted –

(a) any available arbitral process of appeal or review, and

(b) any available recourse under section 57 (correction of award or additional award).

(2) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

While on the surface it may appear that the English court is moving dangerously into the realm of a review of the merits of a case; however, in actually this situation demonstrates a compromise in that it is an attempt to preserve some method of the courts deploying the consideration of arbitration awards to achieve the further development of English law while at the same time establishing a protective barrier for the autonomy and independence of the arbitral tribunal in the area of consideration of the merits of the case. Thus, under English law, the appeal must be on a question of law and not fact. In the result, the only permissible reference materials end up being the award itself and it would not be possible for the purposes of the court's decision whether to grant leave to appeal to investigate the underlying evidence of the manner in which the arbitration or the hearing were conducted. Importantly, section 69(2) provides that there can only be an appeal if either all parties agree or the court gives leave and 69(3) imposes for requirements for the giving of leave. The court, before granting leave to appeal is therefore required to examine the strength and quality of the applicant's criticism of the award so as to decide

whether it is obviously wrong as a matter of law or whether the criticism raises a question of general public importance and the decision is open to serious doubt. Further under section 70, the appellant must first exhaust any available arbitral process of appeal and must apply to the court within 28 days of the date of the award. Interestingly, the reference to an arbitral process of appeal assumes the existence of a two-tier arbitration structure that already has a review mechanism. As discussed above the UNCITRAL and ICSID systems are lacking this type of appellate mechanism.

Similar to English law, most jurisdictions do not permit an appeal from an arbitrator's award on the merits of the case. In Switzerland there is no appeal on the merits of the case and disagreement as to whether the sections of the opinion containing reasoning on the merits should even be considered or reviewed. In Hong Kong the UNCITRAL Rules have been adopted almost without variation and consequently no appeals on the merits are allowed in international arbitrations, although in domestic arbitrations appeals on issues of law only are permitted. In France, appeals on the merits are also not aloud and the grounds for annulment are clearly set out in NCPC.ART.1502 including that there was no arbitration agreement or that the agreement was void or had expired or that the award was contrary to public policy. In the United States there is no ground of appeal in the merits area; however, manifest disregard for the law can form the basis of an appeal. This, however, appears to involve the deliberate refusal to apply established principles of law rather than a mere error in application of the law.

With respect to the ISCID dispute settlement mechanism, it is important to recall that the procedural regime and arbitration awards emanating from it are insulated from the supervisory jurisdiction of domestic courts all together. In fact, domestic courts are limited only to the automatic recognition of ICSID awards. In *Societe Benvenuti & Bonfait v. Gouvernment de la Republique du Congo,*[830] the lower court granted recognition of an ICSID award against the People's Republic of Congo, but qualified its decision by requiring the award creditors first to seek the court's authorization if they

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[830] Judgment of January 13, 1981, Tribunal de Grande Instance de Paris, 108 Journal Du Droit International (J. Droit Int'l) 365 (1981).

wanted to enforce the award against Congolese assets. On appeal, this qualification was removed. The Cour d'appel held that, in regard to ICSID awards, the function of the recognizing court is strictly limited to ascertaining the authenticity of the award as certified by the Secretary-General of ICSID, to the exclusion of any consideration of sovereign immunity.[831] In following this decision, as soon as an ICSID award is recognized in accordance with the simplified procedure set forth in the Convention, the award becomes valid title on which measures of execution can be taken. ICSID awards must be recognized with speed and without judicial interference.

Further, annulment under the ICSID is a limited remedy – it is not a remedy against an incorrect decision and an ICSID ad hoc annulment committee does not have the power to reverse findings of fact or law or to conduct a substantive review of the case and does not have the powers of a court of appeal in the traditional sense. Further troubling is the fact that ICSID annulment committee members, like the tribunal arbitrators whose work they are reviewing, are composed from essentially the same group of private lawyers and legal professionals and has no hierarchy over the initial ICSID tribunal.

Another issue stems from the consensual nature from which both UNCITRAL and ICSID jurisdictions derive their authority. Currently, as the respective systems stand, once the tribunal issues an award their jurisdictional mandate ends. There is no clear power for the tribunal to consider amendments to the award once that award has been issued. This could explain why in the UNCTRIAL system rights of a party to contest the enforcement and recognition of an award in a domestic court system are the focus rather than a party's recourse to the tribunal of first instance. This concern could be addressed by developing a clearly defined substantive appellate mechanism in both the UNCITRAL and ICSID systems and clarifying that once a case is submitted to either system the jurisdiction extends automatically to the appellate mechanism. Alternatively, a substantive appeals mechanism could be available to parties as a choice at the time of the drafting of the relevant clauses in the agreement to submit any disputes to international

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[831] *Ibid.*

arbitration; however, this is not as an effective of a solution because oftentimes at the time of drafting an arbitration agreement the need for an appellate mechanism is not considered in detail.

P. ICSID's Proposed Appellate Mechanism

In October 2004, ICSID's Secretariat proposed an appellate mechanism.[832] Justifications included efficiency and economy, as well as coherence and consistency in ICSID case law. The Secretariat suggested that investor-state dispute settlement would be best served by ICSID offering a single appeal mechanism as opposed to multiple treaty-based mechanisms.[833] The secretariat further explained that a formalized appeals facility would expand the scope of review of ICSID awards from any of the five grounds for annulment as set out in ICSID Convention Article 52, to also include review of the substantive correctness of an award from a broader perspective.[834] This is a significant advancement for the ICSID and would have the potential to quickly address many of the concerns highlighted above.

With respect to the design of the proposed ICSID Appeals Facility, the Secretariat recommended that the appeals panel be composed of 15 persons elected by the Administrative Council of ICSID on the nomination of the Secretary General of the Centre. The terms of the panel members would be staggered, having eight of the first 15 serve for three years, while all the others serve six-year terms. With respect to the qualifications of the members of the Appeals Panel, the Secretariat recommended that they have "to be persons of recognized authority, with demonstrated expertise in law, international investment and investment treaties."[835] Interestingly, the footnote at this section of the Discussion Paper references the suggested requirements applicable to members of the WTO Appellate Body. The Secretariat continues to recommend that

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[832] ICSID Secretariat Discussion Paper, *Possible Improvements of the Framework for ICSID Arbitration,* October 22, 2004, at 14-15.

[833] *Ibid* at 15-16.

[834] *Ibid* at Annex.

[835] *Ibid* at 3.

unless disputing parties agree otherwise, each case submitted to the appeals facility would be herd by three of the fifteen appellate panel members, another similarity to the WTO Appellate Body. The Secretariat continues to propose that under the possible Appeals Facility Rules, the appeal tribunal might uphold, modify or reverse the award concerned.

Irrespective of the fact that there was significant support to the concept of establishing an ICSID Appellate Facility, unfortunately on May 12, 2005, discussions related to the establishment of an appeals facility were indefinitely postponed for further study as it was decided that "it [would be] premature to attempt to establish such an ICSID mechanism" at this time.[836] The issue of an ICSID Appellate Facility has not been revisited to date.

Throughout the discussion paper the Secretariat did clarify that for a case to be considered by any ICSID Appeals Facility submission to the appellate process must be clearly articulated in the original agreement between the parties. Further, the recommendations of the Secretariat on procedure in an appeals facility echoed the ICSID rules on the initial adjudication of the case, reserving much discretion to the individual parties to tailor procedures and details of the management of the case to the needs of the parties. It is the contention of this paper that this is a risky mistake because any type of appellate facility should be designed to be significantly different from the court of first instance with significant independence for the purpose of catching and addressing the mistakes that get through the first round of consideration of the case. Again, the WTO Appellate Body provides an effective example here in that it is much more court-like in comparison to the relatively free-flowing mechanism of consideration by at WTO panel. While it is more justifiable for the first review of a case to be more flexible, appellate facilities do not share the same luxury because they have a larger burden as the final safety net before enforcement of an award. While it is true that the ICSID dispute settlement mechanism is based on the concept of retaining significant flexibility for the

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[836] ICSID Secretariat Discussion Paper at 4.

parties and tribunal to specifically tailor procedure to the needs of the case, this is not an appropriate model for an appellate facility, nor should an appellate facility be bound to the same constraints as an initial tribunal.

Q. Appellate mechanism in ICSID and UNCITRAL

Interestingly, and similar to the situation in the WTO, the establishment of an UNCITRAL or ICISD appellate mechanism would also be a bit of an afterthought. This is not problematic, however, because similar to the WTO, the UNCITRAL and ICSID could establish a WTO-type of appellate body, and then give it the mandate to develop its own working procedure based on the current needs which could also develop as necessary over time. According to the WTO DSU, "working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information."[837] In the context of the WTO, the adoption of the working procedures is therefore a matter for the Appellate Body itself. The only procedural prerequisite is the consultation of the Chairman of the DSB and the Director-General, but not their approval or the approval of the DSB. A potential UNCITRAL or ICSID appellate mechanism can easily follow the lead of the WTO Appellate Body and the initial mandate establishing an UNCITRAL or ICSID appellate mechanism could provide for judicial-type proceedings and a court-like appeals body. The appellate process could be mandated to have a high standard of practice, as compared with the more flexible standard of practice common to party-controlled tribunal proceedings. Further, and continuing with the WTO example, appeals could be limited to issues of law covered in the initial opinion and legal interpretations the initial tribunal develops. Findings of fact by the initial tribunal could also be excluded from the scope of UNCITRAL or ICSID appellate review.

R. Criticisms of the WTO Appellate System – nothing is perfect

Textualism is the view that judges should settle disputes by looking at the original meaning of treaty provisions and textualists argue that the original meaning of treaty

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[837] WTO DSU article 17.9.

provisions must be determined by looking closely at the text.[838] Textualists therefore focus the majority of their attention and analysis on questions of grammar, word placement, and dictionary definitions. Textualism stands in sharp contrast to broader, more holistic approaches to interpretation such as structuralism and developmentalism, which take into account the underlying purpose that animates the document.[839]

With respect to the analysis of WTO jurisprudence, there is significant agreement that the Appellate Body takes a very textualist position in its reports, characterized by a focus on the words and structure of treaty provisions. The full extent of the Appellate Body's textualist approach is evident in the *EC – Sardines* case.[840] This case involved a dispute between Peru and the European Communities (EC) over the labeling of sardines. A 1989 EC regulation provided that only fish of the species *sardina pilchardus* could be labeled and marked as "sardines." Peru exported other kinds of fish, and in particular *sardinops sagax*, which it desired to label as "sardines." Peru sued the EC in the WTO, claiming that the EC regulation violated the terms of the Technical Barriers to Trade Agreement (TBT). Peru pointed to a non-binding international standard, the Codex Alimentarius, which would allow *sardinops sagax* and other fish to be labeled as sardines. The Appellate Body agreed with Peru, holding that the EC had violated the TBT by failing to use relevant international standards as a basis for its regulations.[841]

While the substance of the dispute was very technical, involving the proper designation of several genera of fish, the consequences of the decision were significant as this was the first time the Appellate Body had held that a technical regulation adopted by a member state was invalid because it was not in conformity with an explicitly non-

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[838] Akhil Reed Amar, "The Supreme Court: 1999 Term, Forward: The Document and the Doctrine" (2000) 114 Harv. L. Rev. 26.

[839] Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Knopf, 2005).

[840] Appellate Body Report, *European Communities – Trade Description of Sardines,* WT/DS231/AB/R (Sep. 26, 2002).

[841] See Article 2.4 of the Agreement on Technical Barriers to Trade, April 15, 1994, Marrakesh Agreement.

binding international standard. With this holding, the Appellate Body was in effect giving more weight to an international standard than that international standard itself claimed to possess.

Interestingly, the Appellate Body did not acknowledge the momentous nature of this decision, and rather its analysis focused on interpretations of treaty text and dictionary definitions. One of the first questions posed by the Appellate Body was the proper definition of a technical regulation. The text of the TBT stated that a technical regulation was a "[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory." The Appellate Body interpreted this provision to mean that the document must (1) apply to an identifiable product, (2) lay down characteristics of the product and (3) make compliance with the product characteristics mandatory.[842] Upon a review of the TBT agreement, one can see that the Appellate Body's interpretation as not really an interpretation at all but merely a restatement of the text. Further, this restatement does not offer further guidance to member states about the actual meaning of the text.

Another important section of the Appellate Body's decision addressed whether the EC had used the Codex Alimentarius as a basis for its regulation. The EC claimed that it had used the standard as a basis for its regulation, arguing that "as a basis" should be interpreted according to the basic structure of the text as a whole.[843] The Appellate Body settled the matter by referring to the definition of "basis" in a variety of dictionaries. First the Appellate Body pointed out that Webster's Dictionary defines "basis" as "the principal constituent of anything, the fundamental principle of theory, as of a system of knowledge."[844] Second, the Appellate Body stated that the New Shorter Oxford English Dictionary provided further support by defining "basis" as "the main

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[842] Appellate Body Report, *European Communities – Trade Description of Sardines,* WT/DS231/AB/R (Sep. 26, 2002) at para 176.

[843] *Ibid* at para 241.

[844] *Ibid* at para 243 (quoting *Webster's New World Dictionary* 117 (1976)).

constituent" and "[a] thing on which anything is constructed and by which its constitution or operation is determined."[845] Finally, the Appellate Body stated, "from these various definitions, we would highlight the similar terms 'principal constituent,' 'fundamental principle,' 'main constituent,' and 'determining principle' – all of which lend credence to the conclusion that there must be a very strong and very close relationship between two things in order to be able to say that one is 'the basis for the other.'"[846] The Appellate Body concluded this discussion by holding that the EC had not used the Codex Alimentarius as a basis for its regulation.[847]

Based on these arguments the Appellate Body arrived at the decision that domestic technical regulations must be consistent with even non-binding international standards in order to satisfy the requirements of the WTO treaty. This is a significant shift in the binding power of international law and was arrived at through a narrow textualist reasoning resting predominantly on definitions from dictionaries. A few characteristics of the particular WTO version of textualism stand out in the *EC- Sardines* case. The Appellate Body begins with a piece of the text, interprets it by restating the text, and then uses this interpretation to make a conclusion that was the very subject of the dispute. Dictionary definitions of seemingly obvious terms are used to arrive at controversial holdings and the basic logic seems strained as the Appellate Body jumps from one self-evident statement to the next self-evident statement, arriving abruptly at a hugely consequential and controversial conclusion. This propensity for seemingly arbitrary reasoning has the potential to be troubling.

Critics of the WTO case law have highlighted the failure of the Appellate Body to recognize the array of interests that are at issue and the potential consequences for the

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[845] *Ibid* at para 244 (quoting 1 *New Shorter Oxford English Dictionary* 188 (1993)).

[846] *Ibid* at para 245.

[847] *Ibid* at para 258.

system as a whole.[848] They explain this shortcoming is based on the Appellate Body's concern for its own legitimacy and its belief that close textual interpretation provides greater authority on Appellate Body opinions.[849] Put another way, the Appellate Body is cautious about clearly explaining its real, closed door reasoning because it fears criticism that it is overstepping its limited mandate, that of resolving member state disputes.

Other common criticisms of the WTO Appellate Body include that there is no clear guidance on what standard of review the Appellate Body should apply when reviewing panel decisions, that the Appellate Body exceeds its mandate and acts too much like a tribunal of last instance or even a Constitutional Court and that the Appellate Body tends to lean towards judicial activism which puts the entire panel system at risk by undermining its decision authority and increasing incentives to appeal an unfavorable panel decision. In practice, most all panel decisions are appealed which further undermines the authority of panels. In some instances, the Appellate Body takes a custodianship approach toward panel decisions, at times implying ad hoc panels lack capacity to rule on their own. One potential solution to strengthen the capacity of panels and the whole system in general would be the establishment of a permanent panel body instead of the current system where panelists are appointed ad hoc, discharging their tasks on a part-time basis and in addition to their ordinary duties.[850] This model would arguably increase the capacity and quality of panel decisions but to date, no significant action has been taken in this regard.

The WTO Appellate Body certainly has a difficult task. In comparison with the other existing appellate review systems in international law it is unique with regard to the regular use made of it and the sophistication of its case law. The WTO Appellate Body is a standing judicial body that has an essential role in maintaining the credibility and

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[848] Henrik Horn & Joseph H. H. Weiler, "European Communities – Trade description of Sardines: Textualism and its Discontent" in *The WTO Case Law of 2001: The American Law Institute Reporters' Studies* (Cambridge: Cambridge University Press, 2005).

[849] *Ibid* at 129.

[850] This concept has been raised multiple times by the EC.

reliability of the WTO dispute settlement system, without which the WTO dispute settlement system might not have survived. While it is clear that the WTO Appellate system is not without critics or faults, it does provide a practical example to the ICSID and UNCITRAL of a successfully negotiated international appellate mechanism upon which to potentially base their own appellate facilities. Given that recent bilateral free trade agreements are resorting to developing their own substantive appellate mechanisms similar to that of the WTO Appellate Body, the time is ripe for international dispute settlement more broadly to adopt policies to include a substantive approach to appeals.

Chapter 9 Policies to consider past precedent in making future decisions

Precedent presents a particular challenge in the context of international law. As a matter of doctrine, past judicial decisions are not automatically considered to be law; however, international precedent is commonly referred to. From international investment to international criminal law, prior decisions are invoked, argued over and applied by practitioners and by tribunals all the time. An initial example can be taken from the International Court of Justice which has consistently cited its own judgments and advisory opinions over the years.

Article 38(1)(d) of the Statute of the ICJ identifies "judicial decisions" together with "the teachings of the most highly qualified publicists of the various nations" as "subsidiary means for the determination of rules of law." According to Article 59 of the ICJ Statute, decisions are binding only in the relation between the parties and only in the case in question. This interpretation was followed by the court in the *Barcelona Traction* case, where the ICJ even refused to refer to invoked arbitral decisions, noting that they could not 'give rise to generalization going beyond the special circumstances of each case.'[851] The Court has since progressed, changed its approach and in 1953 it relied for the first time on the decisions from over a century earlier on the *Alabama Claims* case, which it credited with establishing the principle from which all tribunals have

[851] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 40 at sec 63.

'competence-competence.'[852] The Court again in 1982 referred to the decision rendered in 1977 on the delimitation of maritime boundaries between France and the United Kingdom in the Irish Sea, and partially employed the method followed by the arbitral tribunal.[853] In the last several years, these references to past precedent have significantly increased, for example in the delimitation of borders in the Gulf of Fonseca,[854] between Bahrain and Qatar,[855] Malaysia and Indonesia,[856] and Cameroon and Nigeria.[857]

With regard to reference to general international law in international arbitration, numerous statutes refer to it in one way or another and there is noted desire to apply this law broadly.[858] A particular example can be found in the WTO Appellate Body's first decision where it noted that the General Agreement 'is not to be read in clinical isolation from public international law.'[859] Similarly, the European Court of Justice reiterated that the 'European Community must respect international law in the exercise of its powers.'[860] The European Court of Human Rights also reiterated that in interpreting the European Convention on Human Rights 'it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties.'[861] In practice, common principles are referred to by both judges and arbitrators in numerous references to Articles 31 and 32 of the Vienna Convention on the Law of Treaties and to

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[852] *Nottebohm Case (Preliminary Objection)* (Judgment) [1953] ICJ Rep 111, 119 (18 November 1953); *Arbitral Award of 31 July 1989* (Judgment) [1991] ICJ Rep 53, 68 at sec 46.
[853] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18, 57 at sec 66,79 at sec 111.
[854] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (Judgment) [1992] ICJ Rep 351, 591-92 at sec 391.
[855] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Merits)* (Judgment) [2001] ICJ Rep 40, 70-71 at sec 100,117.
[856] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Judgment) [2002] ICJ Rep 625, 682 at sec 135.
[857] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303, 414-15 at sec 222.
[858] For the International Tribunal on the Law of the Sea, see arts 58, 74, 83, 295 and 304 of the Montego Bay Convention; for the Appellate Body of the WTO, see art 3.2 of the Memorandum of Understanding on the rules and procedures governing dispute settlements; for ICSID arbitration, see Article 42(1) of the Washington Convention.
[859] WTO Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline* (29 April 1996) WT/DS2/AB/R.
[860] Case C-286/90 *Poulsen and Diva Navigation* (ECJ 24 November 1992).
[861] *Demir and Baykara v Turkey* (Judgment) (Case 34503/93) ECHR 12 November 2008.

decisions of the International Court of Justice conferring a customary character to the disposition of these Articles. There are also a large number of judgments and arbitration decisions that rely on precedent from the Permanent Court of International Justice or from the International Criminal Court concerning the responsibility of States.[862]

Among the most common justifications for treating precedent as an important factor in future decision making is the argument on fairness, equity or basic justice and the concept of "treating like alike."[863] A failure to treat similar cases similarly is traditionally argued to be arbitrary and consequently unjust and unfair. A legitimate legal system achieves fairness by decision making rules designed to achieve consistency across a range of decisions.

Predictability is another important reason to establish a system with strong adherence to precedent. When a decision maker is tasked to decide a particular case in the same way as the last, parties will be better able to anticipate the future.[864] The ability to reasonably predict what a decision maker will do helps potential parties to plan their strategy without significant fear of the unknown. Predictability comes at a price however, and is only achieved through reducing the ability to adapt to the future.[865] In the language of precedent, following a precedent at a particular time may produce a decision that is not optimal based on the facts of the particular case.

Efficiency is another argument in support of a system with strong precedent. Strong precedent allows less reconsideration of questions already considered than if there was not rule of precedent. If the goal is to reduce the number of individual decisions adjudicators are required to take, the efficiency argument then goes a long way to support a system of precedent.

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[862] *Case Concerning the Factory at Chorzow (Claim for Indemnity) (Merits)* (Collection of Judgments) PCIJ Rep Series A No 17, 47 (13 September 1928).

[863] A. L. Goodhart, "Precedent in English and Continental Law" (1934) 50 LAW Q. Rev. 40, 56-58.

[864] Richard Wasserstrom, *The Judicial Decision* (Stanford: Stanford University Press, 1961) 35-36.

[865] *Ibid.*

A. *What is precedent?*

What does it mean for a past event to be precedent for a current decision? And how does something done today establish a precedent for the future? Can decisions really be controlled by the past but still be responsible to the future? Interestingly, arguments based on precedent must first look backward and consider the past. The traditional view of precedent, both within and outside of the law, tends to be focused on the use of precedent from yesterday to drive the decisions of today and tomorrow. Importantly, an argument based on precedent must also look forward and take responsibility for the fact that decisions made today will set a precedent for individuals making decisions tomorrow. This is a big responsibility, particularly in the international context which is free from the established cannons of interpretation similar to those found in national settings.

At its heart, the term stare decisis can be defined in a simple way and means to stand by decided cases, to maintain former adjudication and to uphold precedents. Stare decisis operates to promote system-wide stability and continuity by ensuring the establishment of norms and their survival. Stare decisis reflects values that are fundamental to the legal process and the historical tension between change and stability within the common law. In the context of the United States legal system, such norms are viewed as fundamental and include the freedom from racial discrimination by the government, the general reach of the commerce clause, and even the legality of paper money.[866]

In the eighteenth and early nineteenth centuries, English courts began to develop "a qualified obligation to abide by past decisions."[867] At the beginning of the eighteenth century William Blackstone noted "it is an established rule to abide by former precedents,

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[866] *Ibid.*

[867] Thomas R. Lee, “Stare decisis in Historical Perspective: From the Founding Era to the Rehnquist Court” (1999) 52 Vand. L. Rev 647, 661.

where the same points come again in litigation."[868] Blackstone outlined many of the same policy concerns modern writers use to justify stare decisis. He thought litigants would need to rely on precedent, having a system of precedent would increase the credibility of the court, and precedent would increase stability because the law would not change too rapidly.[869]

At the end of the eighteenth century, the English courts and commentators firmly established the doctrine of stare decisis.[870] Courts would follow prior precedent when promulgated by a superior court, the House of Lords would follow its own prior decisions, and the Court of Appeals would usually follow the past decisions of both the specific court the case was in front of and other coordinate courts of the same level.[871] There were three limits on the doctrine: (1) the rule would not be followed if it were "plainly unreasonable" or (2) courts of equal authority developed conflicting decisions, and (3) the binding force of the decision was the actual "principle or principles necessary for the decision," not the words or reasoning used to reach the decision.[872] The American Founders expressed similar attitudes towards stare decisis and were certain it was necessary but found difficulty in what it entailed and when it was appropriate for it to be abandoned.[873]

In national legal systems, precedent constitutes a point to start for judges to develop their reasoning. Commonly, judges hold close to precedent to ensure legal certainty and in concern for the fact that their decisions might be challenged before higher level courts. It is this conservative practice and approach that leads into the stare decisis rule concept in common law jurisdictions. In international jurisdictions, the stare

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[868] Sir William Blackstone, *Commentaries on the Laws of England (1765-1769)* (Oxford: Oxford University Press, 2005) 69.

[869] *Ibid.*

[870] Robert A. Sprecher, "The Development of the Doctrine of Stare Decisis and the Extent to Which It Should be Applied" (1945) 31 A.B.A.J. 501, 502.

[871] *Ibid.*

[872] *Ibid* at 503.

[873] *Ibid.*

decisis rule has been excluded; however, tribunals have commonly referenced their previous decisions.

Any system of law requires a minimum of certainty, and any dispute settlement system must have some minimum degree of foreseeability.[874] Further, these systems assume that persons in comparable situations are treated as comparable – again the equity components play a large role here. Precedent plays an essential role for this and from the perspective of the parties to a dispute it is what ensures certainty and equality of treatment. However, a blind practice of rigorously following precedent from the past is not an appropriate answer because it freezes the law and prevents it from progressing and responding to the new demands of society. A balanced approach is necessary for both the judge and arbitrator between necessary certainty and the necessity for evolution in the law.

In principle, in civil law jurisdictions the situation is rather different and in these situations the judge fulfills a different role and he is not allowed to create law. An example is in France as Article 5 of the Civil Code forbids judges to proceed by way of arret de reglemant, therefore preventing the judge from establishing a general rule in a specific proceeding.[875]

The concept of consistent interpretation with respect to WTO law is relevant here. In the context of seeking guidance on the interpretation of national or regional law and where that law allows for different interpretations, that national and regional law should be construed as much as possible in a way that is consistent with international obligations.[876] Given the institutional backing of the WTO and its associated jurisprudence in this context, WTO law provides a strong foundation from which guidance can be found to ensure the consistent interpretation of national and regional law.

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[874] Guillaume, Gilbert, "The Use of Precedent by International Judges and Arbitrators, Journal of International Dispute Settlement" (2011) 2 Journal of International Dispute Settlement, No. 1, pp.5-23 at 5-6.

[875] *Ibid.*

[876] Thomas Cottier and Matthias Oesch, *WTO Law, Precedents and Legal Change,* Turku Law Journal 3 (2001), pp. 27, 33-4.

Because the WTO rules tend to be more detailed than relevant national provisions, they can be used to provide significant guidance on the interpretation of relevant national and regional law in a way that contributes to consistency and therefore precedent. ICSID and UNCITRAL dispute settlement systems do not share this level of legitimacy on the international context. In the context of WTO dispute settlement, the concept of consistent interpretation can assist WTO members; however, limitations are encountered where phrasing and word usage of domestic law cannot be found compatible with relevant WTO provisions or case law.[877]

B. *How is precedent applied?*

Why is it that some decisions carry precedent and others do not? This distinction can only exist if there is some way of identifying a precedent and a method to determine whether an event of the past is adequately similar to the present facts to justify essentially merging the two events into the same line of reasoning. No two situations can ever be exactly alike. For a decision to form a precedent for another decision it does not require that all the facts of the earlier and latter cases be identical; however, it becomes a value judgment for the decision maker to determine when following precedent is appropriate, but how is this done?

In order to assess what is a precedent for what, the decision maker must engage in a determination of the relevant similarities between the two events. This becomes a judgment analysis and the rules of relevance are what guide this determination of the precedential from the irrelevant. Precedent relies upon such rules and these rules themselves are contingent upon time, context and culture.[878] It is important to note here that conducting the precedent analysis requires the decision maker to consider the precedential effect in the future, or to worry that a specific future event will be analogized to the case of today. This therefore assumes that there exists some rule of relevance. However, at this point in the decision making process, rarely does the decision maker tend to expect that the same facts will occur again. The more common thought is that this

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[877] Id.

[878] Robert Gordon, "Critical Legal Histories" (1985) 36 STAN. L. Rev. 57, 125.

decision will establish a precedent for some different array of facts, one that contains some points identical with the facts currently under consideration.[879]

C. *Potential concerns in applying precedent*

In order to consider the degree of value reliance on precedent brings to a dispute settlement system it is essential to look at the consequences of adopting a system of precedent. A significant consequence to precedence is that a decision maker constrained by precedent will feel sometimes compelled to make a decision contrary to the one she would have made had there been no precedent to be followed.[880] Even without an existing precedent, the decision maker must acknowledge that future decision makers will look at their decision of today as precedent. This responsibility has the potential to limit considerably possible decisions about the case at hand.

If the future is constrained to treat what we do now as binding precedent, then our current decision must judge not only what is best for now, but also how the current decision will affect the decision of other and future cases.[881] Moreover, the decision maker of today must also consider the best option for some different but similar events to come tomorrow. The decision maker must then decide on the basis of that which is best for all possible cases in the future - today's decision makers are obliged to decide not only today's case, but tomorrow's as well.[882]

When the best solution to the case of today is the same as the best solution for tomorrow's different but similar facts, no problem arises. However, when the situation occurs where what is best for today's situation might not be best for a different situation, then the need to consider the future as well as the present will result in at least some decisions taken that are not ideal.[883] Accepting the limitations of precedent therefore

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[879] Frederick Schaucer, "Slippery Slopes" (1985) 99 Harv. L. Rev. 361.

[880] *Ibid.*

[881] Frederick Schauer, "Precedent" (1987) *39 Stan. L. Rev. 571.*

[882] *Ibid.*

[883] *Ibid.*

requires taking into consideration broad spectrums of instances that are wider than the one immediately before the decision maker. This results in the fact that in some cases decisions will be taken that are less than optimal had that case been considered alone. It therefore becomes clear that adopting a strategy of reliance on precedent is inherently risk averse, in that it requires the giving up of the possibility of the optimal result in every case in exchange for diminishing the possibility of bad results in some cases.[884] Further, if the conclusions of one case apply to a wide set of analogies, and such analogies are encouraged by the system to be made by the decision maker, then the constraints of precedent are reasonably significant. For better or worse, the original decision maker will feel a greater obligation in making a decision with such far-reaching implications; but similarly, a broad set of future decision makers will also feel the impact of the initial decision. Reasonably then, the larger the group of cases that the initial decision maker is in effect deciding, the more constraining will be the requirement to address all of those cases similarly. Taken in the reverse, if the scope of cases affected is relatively small, the decision maker needs to only consider a few cases beyond the current case and therefore the constraints of precedence will be rather small.

D. *WTO and an inconsistent approach to prima facie standard in jurisprudence*[885]

In WTO dispute settlement the strict application of a *prima facie* case places upon the complaining party the burden of proof and requires that, to satisfy the *prima facie* standard, that party must provide evidence which discharges the burden such that in the absence of evidence in rebuttal, the decision-maker must determine the case in its favour.[886]

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[884] *Ibid.*

[885] This work builds upon a previously published article: James Headen Pfitzer & Sheila Sabune, "Burden-Shifting in WTO Dispute Settlement: The Prima Facia Doctrine, *Bridges*, 12 No.2, 18 (March 2008). www.ictsd.org.

[886] Unterhalter, *supra* note 342 at 549.

Although not the traditional method of applying the *prima facie* standard and the burden of production, the Appellate Body through case law, has utilised the concept of a *prima facie* standard to set the duty on the party who must satisfy the decision-maker that it is entitled to succeed in its complaint. The Appellate Body tends not to make a clear distinction between the burden of persuasion and the burden of production, and further seems to focus mainly on the burden to meet the *prima facie* standard, a concept unique to WTO jurisprudence which diverges from traditional interpretations of the various burdens of proof. Therefore, a complaining party that is unable to present the *prima facie* case runs the risk of failure.

Conversely, a defending party that believes the complaining party has not met the *prima facie* standard and, as a result, decides to forgo presentation of a defence also risks failure. In practice, however, both parties undertake to present cases which not only meet the *prima facie* standard as the burden of proof, but which meet the ultimate standard of proof, or the burden of persuasion, for their particular claims. This tendency for parties to undertake to present cases which meet the burden of persuasion, combined with the fact that procedurally there is no opportunity for the WTO panel to transparently consider and communicate to the parties the outcome of the application of the *prima facie* standard, along with inconsistency in WTO Appellate Body case law on this subject that ultimately leads to the confusion which surrounds the burden of proof issue in WTO dispute settlement and highlights the importance of consistency.

At this point, a review of WTO jurisprudence related to the *prima facie* standard and burden shifting is necessary, particularly as no such analysis exists in UNCITRAL or ICSID jurisprudence. The WTO approach to this subject, and the inherent complexities, is important also because the fundamental principles and reasoning applies to the analysis undertaken by UNCITRAL and ICSID tribunals as well. Although the UNCITRAL and ICSID systems take approaches that are significantly different from that of the WTO, because all international dispute settlement systems are undertaking to dispense justice they must be held to an international standard to secure legitimacy. Further, the approach a particular dispute settlement mechanism takes to the dispensation of the burden of proof

directly correlates to how a party will prepare their case and to whether a party has been given adequate opportunity to be heard and present their case.

The Appellate Body's holding in *EC – Hormones*[887] serves a dual purpose: first, to clarify its intention regarding the application of the *prima facie* standard to burden shifting in all cases, and second, to clarify that a *prima facie* case must be established before a responding party is required to rebut.

According to the Appellate Body, it follows that whether the defending party is able to refute evidence presented by the claimant should have no effect on the initial determination of whether the complainant was able to satisfy the standard of proof, i.e. establishing a *prima facie* case. A failure by the defendant to adequately refute the *prima facie* case presented by the claimant will mean that the complaining party has successfully discharged its burden of proof or satisfied its burden of persuasion, but should have no effect on the initial determination of whether the complainant established a *prima facie* case in the first place. Otherwise, benefits from conducting the *prima facie* analysis seem to be of little consequence.

At this point it is important to recall that although the Appellate Body in *EC - Hormones* explains that, procedurally under the Working Procedures in DSU Appendix 3, a *prima facie* case must first be established before the responding party is required to rebut; however, because all arguments must be submitted at once, the respondent does not have time to begin preparation and presentation of rebuttal arguments and there is no time when the panel informs the parties of the outcome of the *prima facie* standard analysis. All submissions are made prior to the panel releasing its preliminary report.

The *prima facie* analysis is therefore a purely internal analysis and this distinction that a *prima facie* case must first be established before the responding party is required to rebut, adds an additional layer of confusion to the burden-shifting analysis.

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[887] Appellate Body Report, *EC – Hormones,* WT/DS26/AB/R (16 January 1998).

Parties are required to address the *prima facie* analysis as a sub-section of their submissions along with the presentation of their entire case. This fact alone directly undermines the necessity and value-added from conducting the *prima facie* analysis.

1. What evidence should be considered in determining whether the prima facie standard has been attained?

The WTO DSU was not drafted to contain an explicit standard of review. The Appellate Body has explained, however, "that the issue of failure to apply an appropriate standard of review ... resolves itself into the issue of whether or not the panel . . . made an objective assessment of the matter before it, including an objective assessment of the facts"[888] While panels must employ DSU Article 11 which addresses the function of the panel, they have not developed the jurisprudence of its legal content. This task has been left to the Appellate Body as it decides claims where panels have failed to make an objective assessment of the relevant issues, as required by Article 11.[889] There are those who consider regrettable the Appellate Body's engagement in judicial law-making and that this translates into a form of judicial activism that strays from the boundaries of its institutional mandate. Others argue gap-filling and the clarification of ambiguity to be an intrinsic requirement to the Appellate Body's interpretative role.[890]

Repeatedly, the Appellate Body has indicated that the burden of proof shifts to the other party once a *prima facie* case has been established by the complainant. The substantial investigative authority given to panels under DSU Article 13 cannot be used by a panel to rule in favour of a complaining party that has not first established a *prima facie* case of WTO inconsistency based upon specific legal claims asserted by it.[891]

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[888] Appellate Body Report, *EC Hormones,* para. 119.

[889] Palmeter and Mavroidis, *supra* note 321 at 152.

[890] Unterhalter, *supra* note 342 at 543.

[891] Marceau, *supra* note 315 at 41.

Regarding the elements necessary to meet the *prima facie* standard, the Appellate Body in *US – Gambling* explained "[t]he evidence and arguments underlying a prima facie case . . . must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision"[892] However, the Appellate Body has not maintained consistency with respect to exactly what evidence should be considered by the panel in deciding whether a *prima facie* case has indeed been presented. Because the *prima facie* burden-shifting analysis is conducted internally by the panel after all evidence is submitted, panels have been known to consider outside information submitted by experts as well as arguments presented by opposing and third parties to the dispute.

The fact that panels consider information in addition to that provided by the complaining party seems to cut against traditional notions of a *prima facie* analysis for the purposes of the burden of production and the Appellate Body's determination in *EC - Hormones* that the burden of proof may shift only once the panel has conducted an analysis to determine that the requisite *prima facie* standard has been achieved by the complaining party.

2. The WTO panel considering outside information when conducting the *prima facie* analysis

As established in DSU Article 13, "Right to Seek Information", a panel is entitled to seek outside information and guidance from experts and any other relevant source. However, as interpreted by the Appellate Body, the purpose of this mandate is only to help the panel to understand and evaluate the evidence submitted and the arguments asserted by the parties and this is not a mandate for the panel to make a case on behalf of a complaining party. Below is an analysis of the relevant WTO case law.

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[892] Appellate Body Report, *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/AB/R (7 April 2005) para. 141.

i. WTO Cases, Japan – Agriculture and Canada –Aircraft

In February 1999 the Appellate Body in *Japan – Measures Affecting Agriculture Products* cited *EC – Hormones* to establish the *prima facie* standard and burden shifting. The Appellate Body then continued to explain that it is an abuse of authority for a panel to investigate under its own initiative and then to nevertheless rule in favour of a complaining party which fails to meet the *prima facie* standard. The Appellate Body thus indirectly imposed limitations upon evidence which the panel may consider during the application of the *prima facie* standard and the burden-shifting analysis. The Appellate Body explained:

> "[P]anels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a prima facie case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses . . . but not to make the case for a complaining party.[893]

The Appellate Body continued:

> "The Panel erred, however, when it used that expert information and advice as the basis for a finding of inconsistency with Article 5.6, since the United States did not establish a prima facie case of inconsistency.[894]

In *Japan – Agriculture,* the Appellate Body seems to be following the *EC – Hormones* interpretation of the *prima facie* analysis and burden shifting with respect to requiring a panel to begin the analysis of each legal provision by examining whether the complaining party has presented evidence and sufficient legal argumentation to reach the *prima facie*

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[893] Appellate Body Report, *Japan – Measures Affecting Agricultural Products,* WT/DS76/AB/R (22 February 1999) para. 129.

[894] Appellate Body Report, *Japan – Agriculture,* para. 130.

threshold, or put another way, whether the complaining party has met its burden of production. This is consistent because outside information that is not presented by the complaining party should not be considered by the panel when applying the *prima facie* standard to the shifting of the burden of proof. This is also consistent with traditionally-accepted interpretations of a *prima facie* standard and the burden of production and makes a clear difference between the burden of production and the ultimate burden of persuasion.

In a later opinion, however, the Appellate Body directly reversed itself with respect to restraints upon a panel regarding evidence it considers during the application of the *prima facie* standard to burden shifting. In August 1999, the Appellate Body in *Canada – Measures Affecting The Export of Civilian Aircrafts* determined that a panel is free to request and consider information from parties or anyone else, and specifically the panel is under no obligation to wait until the complaining party presents a *prima facie* case before it is able to conduct its own investigation. Furthermore, the Appellate Body explained that outside information requested at the prerogative of the panel may indeed be necessary for the panel to determine whether the complaining party has presented a *prima facie* case:

> "[A] panel is vested with ample and extensive discretionary authority to determine when it needs information to resolve a dispute and what information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a prima facie basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a prima facie case or defence.[895]

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[895] Appellate Body Report, *Canada – Measures Affecting The Export of Civilian Aircraft,* WT/DS70/AB/R (2 August 1999) para. 192.

Additionally, in paragraph 194 of the *Canada – Aircraft* report, the Appellate Body declared itself consistent with its holding in *Japan – Agriculture.* However, this is not clearly apparent because the Appellate Body in *Canada – Aircraft* seems to have contradicted its statements in *Japan – Agriculture* with respect to a panel's ability to freely conduct an independent investigation during the application of the *prima facie* standard for the purposes of the burden of production. Moreover, it would seem that the Appellate Body in *Canada – Aircraft* has diverged from its initial interpretation of the *prima facie* standard as applied to burden shifting, namely that it is for the complaining party alone to carry the initial burden of proof (recall that this interpretation was advanced by the Appellate Body in *EC – Hormones* and upheld by it in *Japan – Agriculture).*

If a panel is free to seek outside information to assist it in the analysis of whether the *prima facie* standard has been met by the complaining party, the value and necessity for a panel to consider whether a party has initially met the *prima facie* standard becomes less apparent. Additionally, allowing the panel to consider outside information cuts against traditional definitions of a *prima facie* standard as related to the burden of production. The Appellate Body thus seems to be creating its own novel version of a *prima facie* standard.

3. The WTO panel considering argumentation of opposing parties when conducting the *prima facie* analysis

Under the Working Procedures of DSU Appendix 3, because the panel process requires the parties to present all submissions, rebuttals, questions and answers, as well as to conduct all oral hearings before the panel releases its interim report to the parties, it is possible for the panel to consider the arguments of opposing and third parties while applying the *prima facie* standard to the burden-shifting analysis. This further undermines the necessity for the panel to apply the *prima facie* standard. If the panel does not constrain itself to the arguments of the complaining party when applying the *prima facie* standard, the utility of considering the *prima facie* standard in the first place is greatly reduced and only serves to heighten possibilities for confusion and contradiction.

i. WTO Cases, India – Quantitative Restrictions and EC – Bed Linen

Confusion and inconsistency becomes further evident with the Appellate Body's 1999 opinion in *India – Quantitative Restrictions*. In addressing whether the US reached the *prima facie* standard, the Panel followed the Appellate Body in *Canada – Aircraft* and considered evidence provided by outside experts, in this case the International Monetary Fund (IMF). However, the panel additionally considered rebuttal arguments provided by India in response to initial claims made by the United States. In reviewing the Panel's decision, the Appellate Body explained:

> "[T]he Panel did not explicitly find that the United States had made a prima facie case before it considered the answers of the IMF and the responses of India to the arguments of the United States. As mentioned above, the Panel stated that it would consider the position of the United States in light of India".[896]

The Appellate Body continued:

> "We do not interpret the above statement as requiring a panel to conclude that a prima facie case is made before it considers the views of the IMF or any other experts that it consults. Such consideration may be useful in order to determine whether a prima facie case has been made. Moreover, we do not find it objectionable that the Panel took into account, in assuming whether the United States had made a prima facie case, the responses of India to the arguments of the United States.[897]

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[896] Appellate Body Report, *India – Quantitative Restrictions On Imports Of Agricultural, Textile And Industrial Products*, WT/DS90/AB/R (23 August 1999) para. 141.

[897] Appellate Body Report, *India – Quantitative Restrictions,* para. 142.

In addition the Appellate Body in the 2003 *EC – Bed Linen* case also held that all submitted evidence should be considered by a panel during the analysis of the *prima facie* standard and burden shifting. The Appellate Body upheld the Panel's decision and explained:

> "India asserts that the Panel should have shifted the burden to the European Communities once India had established a prima facie case. There is nothing in the Panel's reasoning, however, to suggest that the Panel premised its ultimate conclusion on whether or not India had presented a prima facie case. From our perspective, the Panel assessed and weighed all the evidence before it – which was put forward by both India and the European Communities – and, having done so, ultimately, was persuaded that the European Communities did, in fact, have information before it on all relevant economic factors listed in Article 3.4 of the Anti-Dumping Agreement.[898]

The Appellate Body in *EC – Bed Linen* seems to be advocating a more liberal approach to a panel's investigative authority. Moreover it appears to be moving away from its original concept of the *prima facie* burden-shifting doctrine, something more similar to the burden of production, as supported in *EC – Hormones,* to a more complex type of *prima facie* consideration where all evidence is considered, similar to the ultimate burden of persuasion, as advanced by it in *Canada - Aircraft*. The Appellate Body in *EC – Bed Linen* continued:

> "India has not persuaded us that the Panel in this case exceeded its discretion as the trier of facts. In our view, the Panel assessed and weighed the evidence submitted by both parties . . . It is not "an error, let alone an egregious error", for the Panel to have declined to accord to the evidence the weight that India sought to have accorded to it. We, therefore, reject India's argument that, by failing to

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[898] Appellate Body Report, *European Communities – Anti-Dumping Duties On Imports Of Cotton-Type Bed Linen From India,* WT/DS141/AB/RW (8 April 2003) para. 174.

shift the burden of proof, the Panel did not properly discharge its duty to assess objectively the facts of the case as required by Article 11 of the DSU.[899]

4. The confusion and problems created

Confusion and inconsistency is apparent in the different methods that the Appellate Body uses to define and apply the *prima facie* standard to the burden of proof-shifting analysis. In *India – Quantitative Restrictions* and *EC – Bed Linen* the Appellate Body seems to advocate that a panel conduct its own analysis considering all evidence presented simultaneously, in line with *Canada - Aircraft*, rather than conducting an analysis of the *prima facie* standard and burden shifting where a panel initially limits itself to the consideration of evidence proffered by the complainant, as was previously advanced by the Appellate Body in *EC – Hormones* and *US – Shirts and Blouses.*

However, the Appellate Body does still find value in the original analysis of the *prima facie* standard and burden shifting as is evidenced by its continued practice of basing its definition of the *prima facie* standard and burden shifting upon the *US – Shirts and Blouses* and *EC – Hormones* standards. It would therefore seem prudent for the Appellate Body to clearly define requirements under the *prima facie* standard which reconcile the above-mentioned diverging case law.

More recently, in the 2003 *Japan – Apples* and the 2006 *US – Zeroing* cases, the Appellate Body again addressed evidence considered by the panel in determining whether the *prima facie* standard had been met by the complaining party. In *Japan – Apples,* the Appellate Body cited and followed its previous holding in *India – Quantitative Restrictions,* reiterating that a panel should conduct its own analysis and consider outside information in determining whether a *prima facie* case had been presented by the complaining party. Again, this interpretation of the *prima facie* standard is inconsistent with traditional interpretations and with the holdings of the Appellate Body in *US - Shirts and Blouses* and *EC - Hormones*. The Appellate Body explains:

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[899] Appellate Body Report, *EC – Bed Linen,* para. 177.

> "In order to assess whether the United States had established a prima facie case, the Panel was entitled to take into account the views of the experts. Indeed, in *India – Quantitative Restrictions,* the Appellate Body indicated that it may be useful for a panel to consider the views of the experts it consults in order to determine whether a prima facie case has been made. Moreover, on several occasions, including disputes involving the evaluation of scientific evidence, the Appellate Body has stated that panels enjoy discretion as the trier of facts;[900] they enjoy "a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence"[901]

In *US – Zeroing,* the Appellate Body further reiterates, in line with *Japan – Apples, Canada – Aircraft, India – Quantitative Restrictions* and *EC – Bed Linen,* that a panel should conduct its own analysis considering all evidence presented by all parties before deciding whether *prima facie* has been reached:

> "[T]he panel rightly conducted its own assessment of the evidence and arguments, rather than simply accepting the assertions of either party.[902] In doing so, the Panel took into account and carefully examined the evidence and arguments presented by the European Communities and the United States.[903]

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[900]Appellate Body Report, *EC – Bed Linen (Article 21.5 India),* paras. 170, 177 and 180; Appellate Body Report, *EC – Sardines,* para. 299; Appellate Body Report, *EC – Hormones* para. 132; Appellate Body Report, *Japan – Agricultural Products II* para. 140-142; Appellate Body Report, *Korea – Dairy* paras. 137-138.

[901] Appellate Body Report, *Japan – Measures Affecting The Importation Of Apples,* WT/DS254/AB/R (26 November 2003) para. 166.

[902]Appellate Body Report, *Japan – Apples,* para. 166; and Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes,* para. 82.

[903] Appellate Body Report, *United States – Laws, Regulations And Methodology For Calculating Dumping Margins ("Zeroing"),* WT/DS294/AB/R (18 April 2006) para. 220.

The Appellate Body seems to be thus instructing a panel to bundle all evidence put forward by both parties and outside experts, and then consider whether the *prima facie* standard has been reached by the complaining party, similar to that which would be conducted during the consideration of the ultimate burden of persuasion; rather than first constraining itself to the submissions of the complaining party for the purposes of the *prima facie* standard analysis and burden of proof shifting, which would be more similar to the burden of production.

This method of evidence-bundling by the panel is actually favoured by the procedural structure of the panel process. Because all evidence is submitted by the parties before the panel releases its interim report, it stands to reason that the panel would have a natural tendency to consider all evidence presented when conducting every step of its analysis. To strictly apply to the *prima facie* standard the panel would first be required to exclude evidence not provided by the complaining party, apply the *prima facie* standard, then, regardless of the outcome from the application of the *prima facie* analysis, continue to consider all submitted evidence while weighing the merits of the case and considering the ultimate burden of persuasion. When considering the procedural aspects of the panel process, the strict application of the *prima facie* standard becomes, at best, cumbersome.

i. WTO Case, US – Gambling

Evidence-bundling by the panel is inconsistent with traditional interpretations of the *prima facie* standard as well as Appellate Body interpretations of the traditional *prima facie* standard as established by it in the *US - Shirts and Blouses* and *EC – Hormones* cases. It would be reasonable to conclude that the Appellate Body is simply moving away from the application of the *prima facie* standard; however, the 2005 *US – Gambling* case indicates that the Appellate Body intends to strictly enforce the requirement that the complaining party present a *prima facie* case. The Appellate Body explains:

> "Where the complaining party has established its prima facie case, it is then for the responding party to rebut it. A panel errs when it rules on a claim for which the complaining party has failed to make a prima facie case.[904]

The Appellate Body continues:

> ". . .at a minimum, the evidence and arguments underlying a prima facie case must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.[905]

Considering the above language from *US – Gambling*, it appears that in order for a panel to determine whether the complaining party has made a *prima facie* case, it is indeed necessary for it to constrain itself to the evidence and argumentation put forward only by the complaining party while conducting the initial analysis of the *prima facie* standard and burden shifting. In *US – Gambling,* the Appellate Body has returned to traditional interpretations of the *prima facie* standard, similar to the burden of production, as originally advanced by it in the *US - Shirts and Blouses* and *EC – Hormones* cases; however, in doing so, the Appellate Body has created inconsistency in the relevant jurisprudence which leads to substantial confusion, particularly in such a system as the WTO that places significant emphasis on precedent.

ii. WTO Case, China - IP rights

On 26 January 2009, the *China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (*China - IP Rights*) was released by the Panel. In *China - IP Rights*, the Panel considers the application of the *prima facie* standard and the complaining party's obligation to present *prima facie* evidence in sufficient amount so that particular claims may be brought.

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[904] Appellate Body Report, *US – Gambling,* para. 141.

[905] *Ibid* at para. 141.

In this case, China alleged that the United States failed to make a *prima facie* case with respect to its claim that copyright protection in China is contingent upon a review of the material's content. China explained that according to well-established Appellate Body interpretation, the complaining party must both properly assert and prove its claim and that should such proof be absent or deficient, then the responding party has no burden to progress with that particular claim. China explained that the complaining party must present and substantiate its *prima facie* case and that in the absence of evidence other than that which has been comprehensively rebutted, it cannot be held that the complaining party has met its burden.[906]

In considering this issue, the Panel in *China - IP Rights* explained that although the United States provided several exhibits, "the information in the exhibits would not necessarily have been sufficient and, even if it were, it would not be appropriate for the Panel to trawl them for evidence to which the United States did not refer to make the United States' case for it"[907] The Panel continued by citing the precedent established by the Appellate Body in the *US - Gambling* case:

> "A prima facie case must be based on 'evidence and legal argument' put forward by the complaining party in relation to each of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments"[908]

With this opinion, the Panel has continued in the same line as laid out by the Appellate Body in the *US - Gambling* case: in order for a panel to complete the determination of whether the complaining party has presented a *prima facie* case

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[906] Panel Report, *China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights ("China -IP Rights"),* WT/DSU362/R, (26 January 2009).

[907] *Ibid* at para. 7.631.

[908] Appellate Body Report, *US – Gambling,* para. 140.

necessary to take the claim forward, the panel must constrain itself to the evidence presented by the complaining party. In the traditional context, the Panel has returned to the application of the *prima facie* standard as related to the burden of production.

Further, the Panel in *China - IP Rights* seems to take an additional step in restricting evidence which a panel may consider when conducting the *prima facie* analysis in stating that it is not sufficient for the complaining party to merely submit information and exhibits which it considers relevant to its case; however, the complaining party has the further obligation to present clear argumentation as to how and why the submitted evidence and exhibits bolster their claims and contribute to their presentation of a *prima facie* case. Although this concept was referred to by the Appellate Body in the *US - Gambling* case, the Panel in *China - IP Rights* presented this additional aspect with clarity.

5. Attempts to reconcile WTO jurisprudence

In considering all available WTO jurisprudence, it continues to remain largely unclear as to how the Appellate Body envisions a panel to conduct the analysis of the *prima facie* standard and its application to burden shifting. Is a panel justified in considering outside evidence and argumentation presented by both parties while conducting the analysis of the *prima facie* standard, as advocated by the Appellate Body in *Zeroing, Apples, Quantitative Restrictions* and *Bed Linen,* effectively treating the *prima facie* analysis as the analysis of the ultimate burden of persuasion? Or is a panel required to consider only evidence proffered by the complainant, as laid out by the Appellate Body in *US - Shirts and Blouses* and *EC – Hormones* and advanced by it in *US – Gambling,* therefore applying the *prima facie* standard consistently with the burden of production? The latter case is the more traditionally-accepted approach to an application of the *prima facie* standard. Clarification is necessary.

Appellate Body member Yasuhei Taniguchi explains that "the point in time at which a prima facie case is established is not always clearly discernible and, therefore, not

normally mentioned in the panel reports"[909] Taniguchi continues to explain that the "Appellate Body has found that a panel is not required to make a specific finding, in each and every instance, that a complainant has met its burden to establish a *prima facie* case in respect of a particular claim, or that the respondent has effectively rebutted a *prima facie* case."[910] Moreover, Taniguchi explains that the Appellate Body has held that "a panel is not required to make a finding, either implicitly or explicitly, regarding whether the complainant has established a prima facie case before it examines the respondent's arguments and evidence . . . and it is clear that whether a prima face case has been made is normally determined when the proceedings are concluded, although the panel is not prevented from indicating at any time before the conclusion of the proceedings that, in the panel's view, the complainant has successfully made a prima facie case and the respondent should properly rebut"[911]

In following this line of reasoning, it would seem reasonable for a panel to conduct a non-transparent determination of whether the *prima facie* standard has been met when considering whether the complaining party has presented sufficient evidence; however, non-transparent determinations have negative effects and further contribute to diverging and inconsistent WTO jurisprudence because the panel is not required to clearly explain how it arrived at its conclusions regarding the *prima facie* standard. Hypothetically the panel may opt to adjudicate all the merits of the case first, come to a decision, and then during the drafting of the opinion go back and apply the *prima facie* standard with a predetermined outcome as a technicality. In this situation, no benefit is derived from considering the *prima facie* standard while substantial risk of confusion in the opinion is incurred. Additionally, the Appellate Body has not objected consistently when panels have overlooked the application of the *prima facie* standard altogether and instead have opted to consider all the evidence presented, or, in other words, resorted to the

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[909] Yasuhei Taniguchi, “The WTO Dispute Settlement as Seen by a Proceduralist” (2009) 42 Cornell International Law Journal 1 at 569.

[910] *Ibid.*

[911] *Ibid.*

application of a preponderance of the evidence standard.[912] A traditional preponderance of the evidence standard entails the consideration of all submitted evidence and then renders a decision based upon which of the two parties provides evidence carrying the most weight[913]

In practice, although panels regularly adopt the language of the Appellate Body, at times they seem to only superficially consider the *prima facie* standard and burden shifting as described above. McGovern explains that in actuality, panels more often rely on a "weighing up of the evidence" approach, or a preponderance of the evidence standard, as demonstrated in *Zeroing, Apples, Quantitative Restrictions* and *Bed Linen.*[914]

Additionally, some panels have even avoided employing the language of the Appellate Body completely, thus denying that the *prima facie standard* exists at all.[915] Panels seem to use the preponderance of the evidence approach to bundle all the evidence presented by all parties and then use it to establish whether the proponent has successfully presented a *prima facie* case for the purpose of shifting the burden of proof.[916] Moreover, panels then use this same evidence bundle to determine whether the proponent has discharged its obligation to satisfy the standard of proof in general, or met the ultimate burden of persuasion. As explained above, this evidence bundling by the panel is inconsistent with traditional interpretations of the *prima facie* standard as associated with the burden of production and undermines the necessity of applying the

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[912] McGovern, Edmond, *International Trade Regulation* (New York: Globefield Press, 2006) 2.23-75.

[913] Kazazi, *supra* note 228 at 24(indicates that the most common standard of proof applied in international tribunals is the preponderance of evidence standard).

[914] McGovern, *supra* note 924 at 2.23-74.

[915] *Ibid.*

[916] Cameron, James and Orava, Stephen J., "GATT/WTO Panels Between Recording and Finding Facts: Issues of Due Process, Evidence, Burden of Proof, and Standard of Review in GATT/WTO Dispute Settlement" in Weiss, Friedl (Ed) *Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts & Tribunals* (London: Cameron May, 2000) 229 -40.

prima facie standard at all. McGovern explains, "if all the evidence has been considered then it is no longer meaningful to speak of a *prima facie* case"[917]

Interestingly, given the significant reliance on precedence in WTO dispute settlement, combined with the very strong role of the Appellate Body in developing precedence, it is important to note that much of the confusion surrounding the *prima facie* standard during the preliminary analysis of burden shifting is from the Appellate Body's inability to take a clear decision on the matter and maintain consistency over time. This situation highlights the potential for an appellate entity to make a whole dispute settlement system more cumbersome.

E. *Current practice in UNCITRAL and ICSID*

As the WTO system has a strong tradition of respecting precedent which has gone a long way to solidify the legitimacy of the WTO dispute settlement mechanism and this tradition can be an example for the UNCTIRAL and ICSID systems because currently the role of precedent is not clearly articulated within their respective jurisprudence. The tribunal in the 2008 ICSID case *Railroad Development Corporation v. Republic of Guatemala,*[918] presented the ICSID position with respect to the binding nature of precedent when it clarified that "precedents (in ICSID case law) reflect the experience of recognized professionals in the field and draw their strength from their intrinsic merit and persuasive value rather than from their binding character."[919] This is a very different approach than that taken in WTO dispute settlement. Ad hoc ICSID arbitration tribunals are established for each case and apply close to 3200 bilateral investment treaties (BITs) of varying quality and texts. With respect to reference to past precedent for the ad hoc tribunals when attempting to apply the substantive rules which very significantly from BIT to BIT, the ICSID Convention and the Arbitration Rules contain no provision addressing the relationship between decisions of different ICSID tribunals or on the use

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[917] McGovern, *supra* note 924 at 2.23-52.

[918] ICISD Case No. ARB/07/23, October 15, 2008.

[919] *Ibid* at para. 32.

of case law as an interpretive argument. Further, limited to no guidance is provided with respect to the role of precedent relating to the ICSID rules themselves in procedural terms. Ad hoc ICSID arbitration tribunals of first instance seem to be left on their own.

An interesting contrast is with respect to ICSID annulment proceedings and the tides for establishing a system of precedent might be shifting towards recognition of its importance and intrinsic value. In this context, investment protection treaties vary in content and therefore do not allow for a strict precedential effect. The specific wording of each treaty's text must be considered and interpreted independently, leading to potential ambiguity and confusion. In the 2011 case *Continental v. Argentina,*[920] the only ICSID annulment decision rendered in 2011, the tribunal emphasized two aspects in the annulment process. First, while it noted the limited function of an annulment committee (assessing only the legitimacy of the award rather than its correctness), the ad hoc committee noted that it is "to be expected that the ad hoc committee will have regard to relevant previous ICSID awards and decisions, including other annulment decisions, as well as to other relevant persuasive authorities."[921] In the view of the committee, the emergence in the longer term of a jurisprudence constant in relation to annulment proceedings "may be a desirable goal."[922]

A main purpose of the ICSID system is to offer potential litigants an international dispute settlement mechanism that is more effective and predictable than the courts they would otherwise be faced within host countries. As there is no way to appeal decisions of ICSID tribunals on substantive grounds, from the perspective of investors, an arguable main priority for ICSID tribunals should be to ensure consistency and predictability; however without clear adherence to precedent and previous case law, is this aspiration even possible?

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[920] ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para 84.

[921] *Ibid.*

[922] *Ibid* at para 85.

As the esteemed scholar Professor Schreuer has pointed out:

> Reliance on past decisions is a fundamental feature of any orderly decision process. Drawing on the experience of past decisions plays an important role in securing the necessary uniformity and stability of the law. The need for a coherent case law is evident. It strengthens the predictability of decisions . . . [923]

A number of ICSID decisions do contain general statements with regard to their use of case law as interpretative arguments but there is no clear and binding position. One representative example can be found in the ICSID case *ADC v. Hungary*:[924]

> The Parties to the present case have also debated the relevance of international case law relating to expropriation. It is true that arbitral awards do not constitute binding precedent. It is also true that a number of cases are fact-driven and that the findings in those cases cannot be transposed in and of themselves to other cases.

Further, many ICSID tribunals have pointed out that the issues under each case must be determined on their own merits and that the tribunals remain free to deviate from previous case law.[925] The tribunal in ICSID case *SGS v. Philippines*, went so far as to argue that there is no good reason for allowing the first tribunal in time to resolve issues for later tribunals.[926] This is a clear statement against the importance of precedent.

Many ICSID tribunals have specifically deviated from previous ICSID case law. In his work, Professor Schreuer has identified four specific situations in which he found

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[923]C.H. Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration,* 3(2) *Transnational Dispute Settlement* (2006) I.

[924] At para. 293. See also *Camuzzi v. Argentina 2*, at para. 19, *El Paso v. Argentina,* at para. 39, *SGS v. Philippines,* at para. 97, *Feldman v. Mexico,* at para. 107, and *Pan American v. Argentina,* at para. 42.

[925] *AES v. Argentina,* at paras. 23-33, *Bayindir v. Pakistan,* at para. 76, *Nul v. Egypt,* at paras. 63-64, and *Metalpar v. Argentina,* at para. 50.

[926] At para. 97.

that "tribunals sitting in different cases have come to conflicting conclusions on identical questions."[927] Schreuer explained:

> in some cases tribunals did not follow earlier decisions but adopted different solutions. At times they simply adopted a different solution without distancing themselves from the earlier decision. At other times they referred to the earlier decision and pointed out that they were unconvinced by what another tribunal had said and that, therefore, their decision departed from the one adopted earlier . . .[928]

An important question at this point is: what is the role of precedent in ICSID? As a starting point it is important to recall that Article 53 of the Washington Convention which established the ICSID states that "the award shall be binding on the parties" and that the stare decisis rule is no more applied in ICSID than it is in other international jurisdictional instances.[929] This weakness in jurisprudence is not ideal and becomes difficult to accept when identical issues, concerning the same State, are decided differently by different ICSID ad hoc arbitration tribunals, as was the exact situation in the case regarding the *Transmission Co. v. Argentine Republic*.[930] ICSID tribunals do seem to be slowly starting to make more reference to past case law than they did in the past however.

Reference to customary international law in ICSID opinions could be another means for tribunals to contribute to predictability and uniformity of jurisprudence. ICSID tribunals are faced with the application of customary international law and general

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[927] C.H. Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration,* 3(2) *Transnational Dispute Settlement* (2006) I at 16-17. See *Aguas v. Bolivia*, at paras. 276-279, *CGE v. Argentina,* at para 22, *Mondev v. US,* at para 69.

[928] *Ibid.*

[929] *El Paso Energy International v. Argintine Republic*, ICSID Case No ARB/03/15 27 April 2006, para. 39.

[930] ICSID Case No ARB/01/8, 12 May 2005, see also *Enron v. Argentine Republic State,* ICSID Case No ARB/01/3, 22 May 2007.

principles of law where there is a reference to such rules in a relevant treaty or BIT,[931] where the treaty does not address specifically the issue in question, and where customary international law replaces a clause in a treaty, for example it develops after the treaty has been concluded.[932]

Currently, the only reference to customary international law and general principles of law under the ICSID Convention is the instruction that tribunals shall apply "such rules of international law as may be applicable" where the parties to the dispute have failed to agree on the rules to be applied.[933] Further complicating the matter is the fact that there is no generally established distinction between customary international law and general principles of law. ICSID tribunals tend to use customary international law as a separate basis and their use of such rules tends to depend heavily upon the arguments of the parties to the dispute. ICSID tribunals have tended to consider customary law in relation to a broad range of issues including: jurisdictional issues,[934] procedural issues,[935] substantive issues,[936] and issues concerning so-called "secondary rules of international law."[937]

In general, ICSID tribunals tend to base their findings with regard to the existence and content of rules of customary international law on references to case law from the ICJ, the Permanent Court of International Justice, and arbitral tribunals, references to treaties, references to documents adopted by the International Law Commission, and references to the legal doctrine. Where there is a reference to customary international law in a treaty in question, it could be reasonable to ask whether tribunals are to apply customary international law as it was at the time of conclusion of

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[931] *Mihaly v. Sri Lanka,* paras 33 and 58.

[932] *Ibid.*

[933] ICSID Article 42(1).

[934] *CSOB v. Slovakia* at para. 31; *Maffezini v. Spain* at para. 29.

[935] *Gruslin v. Malaysia* at para. 20; *Camuzzi v. Argentina 2* at para 64.

[936] *Feldman v. Mexico* (award) at paras. 115 – 116; *Tecnicas v. Mexico* at paras. 116 and 139.

[937] *Mondev v. US,* at paras. 68 and 70; *Salini v. Jordan*, at para. 177; *Impregilo v. Pakistan*, at para. 310.

the treaty or at the time of the dispute. Statements in case law seem to indicate that tribunals generally prefer customary international law at the time of the dispute. In *Tecnicas v. Mexico*, where the tribunal used customary international law to clarify the concept of indirect expropriation, it applied "customary international law, not as frozen in time, but in [its] evolution."[938] This is an important application of customary international law.

One of the challenges facing the international legal community in the handling of case law will be obtaining the correct balance between civil and common law traditions and the determination as to how case law is to be weighed and selected to drive uniformity and predictability. This challenge is significantly compounded when the impact and active role of domestic courts in UNCITRAL dispute settlement is considered. Common law cases are much more discursive than civil law cases. They often present the history of relevant case law as to thereby anchor the decision in historical legitimacy. At the UNCITRAL trial level, opinions tend to contain exhaustive statements of the facts, largely to avoid the need for any retrial if a higher court reverses the decision on a point of law.

In contrast to the common law approach, with respect to the UNCITRAL system, when considering the variety of approaches taken by national courts, be they common law or civil law jurisdictions, many cases considering UNCITRAL case law give very sparse reasoning for their decisions and often assert propositions in a conclusive rather than reasoned way.[939] In practice, the effect of this limited case law is that rather than detailed presentation in legal commentary, it tends to be merely referenced in an occasional footnote. Should more detailed presentation of tribunal legal analysis be presented in the holdings, the respective jurisprudence would be enriched and the weight of the legal culture surrounding the UNCITRAL system would be increased.[940] Currently,

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[938] At para. 116. See also *ADF v. US,* at para. 179 and *Mondev v. US,* at para. 125.

[939] Bridge, Michael G., *Issues Arising Under Articles 64, 72 and 73 of the United Nations Convention on Contracts for the International Sale of Goods* at 407.

[940] *Ibid.*

much of the case law from the UNCITRAL system cannot be discussed in any significant detail retrospectively simply because it actually says very little and is very much dependent upon the special facts of each case.

F. *The value of Consistency*

Hand-in-hand with considering the value of precedent comes the value of considering consistency. Consistency is an essential component to the legitimacy of any dispute settlement mechanism because it contributes to the predictability of outcomes and enables potential parties to better understand what to expect during the preparation of and adjudication process for their case. Consistency directly contributes to effective due process protections in that it enables parties to effectively understand the steps they need to take to be heard and effectively present their case.

Consistency can be treated separately from following precedent because in order to be consistent it is not necessary to have an established obligation that rises to the level of precedent; however, what is needed is the conscientious effort on the part of the decision maker to consider similar situations similarly. A lack of consistency throughout the jurisprudence of any dispute settlement mechanism has the potential to create significant confusion that is detrimental.

The WTO has very developed jurisprudence and a clear approach to precedent. However, as demonstrated in the case study presented below in Annex 1, despite the best intentions to provide fully developed case law to supplement the rules as articulated in the WTO DSU, if consistency is not maintained by both the panel and the Appellate Body, significant confusion results. See Annex 1 below for a case study considering the inconsistent approach in WTO jurisprudence towards the application of the *prima facie* standard. This case study is intended to exemplify potential pitfalls that exist when consistency is not proactively maintained in the case law of an international dispute settlement system. Given the significant reliance on precedence in WTO dispute settlement, combined with the very strong role of the Appellate Body in developing precedence, it is important to note that much of the confusion surrounding the *prima facie*

standard during the preliminary analysis of burden shifting demonstrates challenges faced by the Appellate Body in taking clear decisions that maintain consistency over time.

When considering that the UNCITRAL and ICSID systems, in contrast to the WTO approach, do not rely on precedent and do not have anything that functions similarly to that of the WTO Appellate Body, in this specific situation with respect to consistency, perhaps theirs is the simpler path. While the drafters of the ICSID Convention have been considering whether to develop and appellate mechanism, it will be important that they fully consider both the positive and negative aspects of such a change.

G. *Developing policy on consistent precedent*

Typically, as international dispute settlement tribunals, apart from the WTO Appellate Body, are constituted on an ad hoc basis for each individual arbitration, this lack of permanence can lead to judgments of variable quality.[941] Further complicating matters is the fact that not all international dispute settlement mechanisms require their decisions to be made public and therefore the tribunals do not have through knowledge of all decisions previously rendered by that particular mechanism. For this reason, in international arbitration precedent tends to be viewed with limited importance and as a result legal coherence and predictability sometimes suffer.

As it is essential to due process for parties to be given adequate opportunity to be heard and present their case, it is important for there to be a degree of consistency and predictability to a dispute settlement system to enable a party to adequately anticipate how to effectively present the merits of their case and supporting evidence. This is particularly highlighted in situations, such as in the UNCITRAL and ICSID, where procedures are laid out to ensure significant discretion is retained by the ad hoc tribunal and parties to the case at hand. If discretion enables procedural aspects to change for

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[941] Jan Paulsson, "The Role of Precedent in Investment Arbitration" in Katia Yannaca-Small, *Arbitration under international investment agreements* (Oxford: Oxford University Press, 2010) 710-11.

every case, then parties have nothing else to refer to during their preparations than the outcomes of previous cases and in particular the way similar issues were handled in the past.

Dispute settlement systems that maintain a high degree of tribunal discretion and flexibility, combined with an approach that does not strongly value the role of precedence, open themselves to criticism in that they do not adequately protect the due process of parties. This results from the fact that if a party is not able to predict how their case will be handled by the decision makers, there is potential for their right to due process to be violated in that they will not know how to prepare their case effectively and will therefore not be given an adequate opportunity to be heard and present their case.

While flexibility and tribunal discretion should not be eliminated entirely from the UNCITRAL and ICISD systems, and in fact it is these characteristics that oftentimes make UNCITRAL and ICSID dispute settlement attractive to parties, this discretion and flexibility should not be ad hoc or completely unbridled. It is the uncertainty that comes from ad hoc and unbridled tribunal discretion and flexibility that directly contributes to the potential for violations of due process. By developing policies that seek to institutionalize or at least take steps to increase the prominence of precedent, the UNCITRAL and ICSID systems would automatically provide guidance to future decision makers on how to exercise their discretion effectively and in a way that protects due process for the parities rather than endangering it.

The question then becomes how should policies in the international community be developed to push the UNCITRAL and ICSID towards a more established tradition of precedent and consistency? Would it be effective to simply draft a new rule that clarifies that past case law should be considered in future decision making? Perhaps this would be something for a new appellate mechanism to undertake, similar to the approach taken by the WTO. How will issues of differentiability due to the fact that cases tend to be highly tailored to their specific issues be addressed? This will not be an easy or fast process. With respect to the WTO, which already has a very established tradition of grounding

decisions firmly on precedent, the challenge will be about how to prevent inconsistencies in WTO jurisprudence from creating unintended confusion.

Chapter 10 Policy options for the protection of due process in international dispute settlement

The core purpose behind the development of policy options for the international community to consider to ensure the protection of due process in international dispute settlement when amending existing or establishing new international dispute settlement mechanisms, and this entire work more broadly, has been to analyze the motivations of parties in submitting their claims to international dispute settlement, to identify strengths and weaknesses in three specific international dispute settlement systems, and to develop practical policy options to address weaknesses identified and to eventually contribute to the systematic protection of due process and ultimately the overall legitimacy of each respective system. We must recall that in the international context there exist no clear guidelines or a single body of common law to establish clearly what is required procedurally and systemically to ensure the effective protection of due process, particularly with respect to the right of a party to be heard and to fully present their case. Interestingly, we have seen that increased detail in dispute settlement rules and guidelines do not necessarily guarantee a perfect system and that similar challenges in this regard exist across systems with varying degrees of flexibility.

While we have seen that flexibility of international dispute settlement systems and the ability to specifically tailor the procedures to the particular case at hand are underlying factors identified by potential parties as attractive when determining where to submit their case on the international stage, this flexibility must be balanced with the need to protect fundamental due process and the right for parties to be heard. We must recall that while domestic jurisdictions grapple with the interpretation of fundamental requirements for due process protection at the national level, this analysis is significantly

more complex at the international level as a single international legislative authority does not exist to provide clarity. Further, safeguards for the protection of due process found in national law derived from historical and societal influences and national public policy do not exist at the international level in a cohesive and easily digestible manner – arguably significantly weakening international dispute settlement mechanisms more broadly.

Each of the above articulated policy options to support the protection of due process in the international context, when taken together have the potential to significantly bolster the legitimacy and rigor of the respective systems and highlights the importance of ensuring the equitable protection of each party's fundamental rights. When considering more broadly the role of international dispute settlement and the increasing number of cases but also the increasing diversity of parties, from a public policy perspective, the need to ensure the protection of due process in the international environment becomes more urgent, particularly for parties lacking substantial experience litigating in this domain. This becomes more apparent when parties from developing and least-developed countries attempt to pursue claims against larger, stronger and more experienced parties, inherent imbalances of power are therefore compounded. The weaker and more inexperienced parties will be at a disadvantage as a result of the inherent complexities and uncertainties around due process protections linked to tensions between maintaining a degree of procedural flexibility and the need for parties to effectively be heard and present their case. Such an unfortunate side effect could then contribute to undermining parties' from developing and least-developed countries confidence in the whole concept of international dispute settlement. We therefore run the risk of international dispute settlement becoming an option or playground only for the rich, powerful and experienced – this is not equity.

Reference in Article 28.1(c) of the Statute of the International Court of Justice to "the general principles of law recognized by civilized nations" has contributed to the development of rich international law and the demands of due process are present in relation to any decision made by an arbitrator or international decision maker during the adjudication of international dispute settlement proceedings. Commonly, however, lawyers representing the parties to international disputes raise questions of due process in

a rather threatening way, implying that if a decision maker does not accept their proposals on procedure the result would violate due process – such lawyers do not hesitate to draw attention to the consequences of a breach of due process.

International decision makers, when faced with the harshness of potential violations of due process in this way, are forced to seek their own justification through case law from a variety of sources as there currently exists no single and universally accepted common law on international fairness and due process in international dispute settlement, be it commercial, interstate or private. While case law exists in the various relevant sectors, there is no single overarching agreement on a body of common law that brings them all together. The proposed policy options for the protection of due process in international dispute settlement is an attempt to identify cross cutting systemic issues and propose possible solutions applicable to all types of international dispute settlement in an effort to strengthen the international dispute settlement system more broadly. Strong international dispute settlement mechanisms will enable decision makers to better withstand pressures applied by overzealous attorneys. The proposed policy options for the protection of due process in international dispute settlement seek to assist with strengthening these systems.

CONCLUSION

Throughout the process of developing policy guidance for the protection of due process in the international context, this work has sought to provide the international community with practical and effective options to consider when attempting to strengthen existing mechanisms or when establishing new systems for international dispute settlement. Based upon the analysis of how the three considered dispute settlement mechanisms address the protection of due process, the development of common rules relating to discovery in an effort to ensure that all evidence is made available to the decision maker is identified as the primary existing gap to be addressed. Additional policy options developed highlight the benefits of a clearly defined substantive appeals mechanism and also the practice of looking to past precedent in order to ground future decisions.

This work seeks to encourage the international community to consider developing treaty or negotiation-based policy towards common practice related to discovery and the production of evidence. In the context of the analysis of the ICSID, UNCITRAL and WTO systems, such policy could contain aspects that empower the respective parties to a case to seek out evidence from other parties but also from external sources. In contrast to the German or civil law approach, where the adjudicator alone decides which documents to request, providing parties with the power to specifically request the production of documents would be a significant step towards ensuring that the trier of fact is fully informed before a decision is made. In contrast to the approach taken in the United States, in the international context, a degree of restraint on the scope of potential discovery would be appropriate here. In the United States, the fact that a party can request information through discovery that is not admissible in the particular case combined with the fact that the United States system allows for a party to request a broad spectrum of information, information that they are not required to describe with any degree of particularity, is too broad for an international dispute settlement setting, particularly for the WTO, UNCITRAL and ICSID systems considered here. This unnecessarily broad scope to discovery would heighten the adversarial nature in a particular mechanism to a potentially undesirable level in the international context that is overall more diplomatic in nature.

Reasonably limiting the scope of what is discoverable in the international dispute settlement context is feasible and can be as simple as clarifying in the policy articulation that the scope of information that is discoverable requires that the party requesting the information to be presented be familiar enough with that information to describe it in detail. This could be achieved through policy requiring effective substantiation by the requesting party of discovery production. This approach is based on the German system and follows the concept that a party should not be forced to provide evidence to make the case of their opposing party. In requiring substantiation, the requesting party would be faced with a burden to substantiate the reasons why they reasonably need the evidence.

Additionally, in effect the substantiation requirement forces a degree of specificity upon the requesting party because in order to substantiate that evidence is needed, that evidence must be described with a degree of specificity.

Another option to effectively limit the scope of discoverable information could be to limit discovery to the "discovery of admissible evidence." This is in sharp contrast to the United States approach where discovery is considered acceptable if it is reasonably calculated to lead to the discovery of other evidence that would be admissible and far more appropriate for the international context. This limitation to discovery policy would significantly constrain the scope of discoverable evidence in that a party would only be able to request the production of evidence that would be admissible to the international dispute settlement mechanism they are participating in and not enable parties to request production of any information, admissible or not. As established above, discovery can be a very powerful tool to ensure that the decision maker is fully informed before the decision is made; however, discovery without limitation has the potential for abuse, delay, unnecessary expense and a means to justify harassment and fishing expeditions.

The decision maker simply cannot make a decision without sufficient evidence to educate themselves and upon which to base a decision. We have seen that international dispute settlement mechanisms generally rely upon the parties to voluntarily provide all the evidence they need to justify a decision in their favour; however, this often results in gaps in the evidence base for a particular case. Ensuring therefore that all evidence necessary to make a decision is made available to the decision makers through a system employing detailed discovery mechanisms becomes a very important component in ensuring the full extent of due process protections to the parties. In effect, the decision maker must have the ability to engage in effective evidence-based decision making which requires adequate evidence upon which to make the decision. While the different legal traditions commonly found in international dispute settlement compound the complexities when seeking a middle ground to develop an approach toward discovery and the production of evidence, assurances that sufficient evidence will be supplied remains at the core of due process protection.

The development of common policy on the value of a substantive appeals process in the international context, particularly around the establishment of a WTO-type appellate mechanism, perhaps similar to the CETA Appellate Tribunal, in both the ICSID and UNCTIRAL systems would be an elegant solution to addressing concerns surrounding the integrity of ad hoc tribunals and the fact that both the ICSID and UNCITRAL systems do not currently offer potential users a review mechanism that considers substantive and legal issues. Common policy around the value of a substantive appeals process would directly contribute to the protection of due process in the international context in that parties would be provided with a mechanism of last resort to appeal to if they feel their fundamental rights have been violated.

It must be noted that although the ICSID and UNCITRAL systems do allow for annulment of an award based on a claim of procedural violation, such justifications for appeal do not include substantive components or concerns about the issued decision based upon the merits of the case. In general, the UNCITRAL and ICSID systems establish a one-tiered system where awards are automatically considered final, subject to very limited grounds to contest enforcement. In contrast, proceedings in domestic courts for example are a matter of public record, the public can have access to the pleadings, judges are neutrally rostered and parties have the clear right to appeal. UNCITRAL and ICSID arbitrations lack such basic accountability mechanisms. This is troubling because in any legitimate process making decisions that weigh private against public interest, tribunals must be accountable for what they do and therefore the establishment of a substantive appellate mechanism for the UNCITRAL and ICSID systems would be a useful addition to overall legitimacy and analytical rigor.

An option to develop a substantive appeal process in both the UNCITRAL and ICSID systems would be to adopt policy that follows the WTO approach and takes steps to establish a WTO-type of appellate body, and then gives it the mandate to develop its own working procedure based on the current needs which could also develop as necessary over time. In the context of the WTO, the adoption of the working procedures

is a matter for the Appellate Body itself and this could be effective in both the UNICTRAL and ICSID contexts. A potential UNCITRAL or ICSID appellate mechanism could easily follow the lead of the WTO Appellate Body. The initial mandate establishing an UNCITRAL or ICSID appellate mechanism could provide for judicial-type proceedings and a court-like appeals body. The appellate process could be mandated to have a high standard of practice, as compared with the more flexible standard of practice common to party-controlled tribunal proceedings. Further, and continuing with the WTO example, appeals could be limited to issues of law covered in the initial opinion and legal interpretations the initial tribunal develops. Like WTO, findings of fact by the initial tribunal could also be excluded from the scope of UNCITRAL or ICSID appellate review.

A substantive appellate mechanism institutionalized in all international dispute settlement mechanisms will create an effective safety net should the initial decision maker make mistakes. No matter how swift an international adjudication process might strive to be, no human decision maker is immune from the potential to make errors, particularly when faced with a vast array of complex and technical factual disputes. A robust international appellate mechanism that considers both issues of fact and issues of substance, similar to that of WTO, provides the system with the ability to self-correct errors before they become enforceable at the national levels by enabling a defeated party dissatisfied with an outcome to seek to set it aside on substantive grounds. An appellate mechanism, similar to that of WTO, also strengthens transparency and accountability within a particular system and provides an option to address actual or perceived conflicts of interest.

Finally, we consider policies to develop a common approach to the use of past precedent in making future decisions and the systemic value of predictability and equality in international dispute settlement by seeking consistency. Surprisingly, each of the three systems analyzed view and approach the value of precedent differently and it is important to consider all sides as well as the value in applying past case law with consistency. The WTO system has a strong tradition of respecting precedent which has gone a long way to

solidify the legitimacy of the WTO dispute settlement mechanism and this tradition can be an example for future development of the UNCTIRAL and ICSID systems because currently the role of precedent is not clearly articulated within their respective jurisprudence or policy. By developing policies that seek to institutionalize or at least take steps to increase the prominence of precedent, the UNCITRAL and ICSID systems would automatically provide guidance to future decision makers on how to exercise their discretion effectively and in a way that protects due process for the parities rather than endangering it.

A significant consequence to precedent is when a decision maker feels constrained and is compelled to make a decision based on precedent which is contrary to a decision, they would have made had there been no relevant precedent. If us in the future are forced to treat our actions of today as precedent, then current decisions must consider not only what is appropriate now, but also what will be appropriate for all further possibilities – this is an incredible responsibility. However, in systems where there is no reliance on precedent, the decision maker may find themselves alone, charting new paths at every step and without sufficient justification upon which to base their decision. International dispute settlement policy favoring some type of balanced approach would be ideal.

Further contributing is the value of consistency, as demonstrated by an analysis of WTO jurisprudence on the *prima facie* standard presented earlier. Importantly, through this case study we have seen that despite the robustness of the WTO DSU and the relevant jurisprudence, no system is perfect and even the WTO Appellate Body grapples with how to manage the precedent set out in their past decisions and how to effectively apply this precedent to new situations that occur in the future. This is further heightened when the WTO Appellate Body does not always follow the precedent they set in past opinions. Despite various approaches to precedent, dispute settlement systems maintaining a high degree of tribunal discretion and flexibility, combined with an approach that does not strongly consider precedent, open themselves to criticism in that they do not adequately protect the due process of parties. It is essential to due process for

parties to be given adequate opportunity to be heard and present their case and therefore there must exist a degree of consistency and predictability to a dispute settlement mechanism to enable to party to adequately anticipate how to effectively present the merits of their case and supporting evidence.

Over the last fifty years there has been a steady increase in the number of developing countries and parties from developing countries participating actively in the international community and in all forms of international dispute settlement. This is combined with related improvement in the overall quality of international dispute settlement that can be associated with value added from consideration of different perspectives from such diverse participation. This substantially broadened engagement has raised new challenges for all parties seeking to actively engage in international dispute settlement. As cases presented before the various international dispute settlement mechanisms become ever more complex, technical and far-reaching, adjudication of international disputes cannot be meaningful without the transparent and consistent protection of due process. This is fundamental to all forms of dispute settlement and the formalization of how exactly procedural due process protection should be ensured remains unclear and parties from developing and least-developed countries should watch with particular attention as the practices relating to due process protection in the international context are further developed and refined. This will by no means be easy or fast; however, it is important for this issue to be put on the agenda and discussed. Perhaps the consideration of the policy options for the protection of due process and their application can spark such a dialogue, thus making a valuable contribution to this process and to the overall legitimacy of international dispute settlement in general.

At this point it is important to pull back to consider the broader importance of the protection of due process and the way it relates to the rule of law from the perspective of international public policy and efforts to foster and encourage sustainable development. Today an estimated four billion people throughout the world live outside the protection of

the law.[942] Without access to effective or legitimate justice institutions to ensure their fundamental protection – be they domestic or international, these people can be easily cheated by employers, driven from their land, and intimidated by violence. These men, women, youth and children often live at or below the poverty line, and face institutional, legal and administrative barriers that limit their ability to participate in society on equal terms. Despite reduction in overall poverty, it has been recognized that challenges to today's human development are largely shaped by growing inequalities across income and other factors, which in turn are linked to marginalization of certain groups, such as women and ethnic minorities.

As established throughout this work, the protection of due process is a fundamental requirement that cuts across any dispute settlement mechanism, be it international or domestic, be it in developed or developing jurisdictions. While this work focuses on the protection of due process in the international context, it is important to recall that these same principles apply to the domestic systems and contributes to the robustness of the rule of law in general. Further, countries have varying levels of development and sophistication when it comes to domestic legal systems and often look to the international community for guidance. This is particularly true for developing and least developed countries and it is important to consider the broader context within which international dispute settlement is viewed and functions. Without these broader considerations, international dispute settlement risks isolation and the potential to become an option only for the rich and powerful, further contributing to inequality and marginalization. We must therefore all work to break down barriers and strive to achieve equitable access to robust and legitimate legal systems that protect due process at all levels. Over the past few years, the world has been given the unique opportunity to take steps to address these and other issues as the international community works towards the 2030 Agenda for Sustainable Development (SDGs). Understanding the links between the protection of due process, the rule of law and sustainable development will be essential if

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[942] UN Commission on Legal Empowerment of the poor. (2008). *Making the Law Work for Everyone*, 19.

the world is to make meaningful strides toward inequality reduction and eventual elimination.

To be successful and to meaningfully transform our world, the 2030 Agenda for Sustainable Development must enable every nation to realize its own hopes and plans and effective due process protection is an essential component. The world has learned that global targets are only effectively executed when they are locally-owned and embedded in national plans as national targets.

Today's leaders, whether from government, business, academia or civil society, must be as ambitious and practical about the implementation of the new 2030 Agenda for Sustainable Development which the world has worked so hard to develop over the past several years. They must embrace a dynamic, innovative approach if we as a unified world are to fulfill the hopes and expectations of humanity. Together we face a historic opportunity. Not only to end poverty, but also to tackle the challenges to people and planet so that we can end extreme poverty and inequality in all its forms irreversibly in the context of sustainable development. What a humbling responsibility but nonetheless a truly awesome opportunity!

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