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When Some Are More Equal Than Others: The Need for a More Substantive Conception of "Equality of the Parties" in Investment Arbitration

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Contents

Abstract: The equality of the parties is a fundamental procedural norm. The proper application of this principle has faced novel challenges in investor-State arbitration and World Trade Organisation dispute settlement, particularly in regulating the presentation of evidence and the exercise of State sovereign authority. While parties in these fora are nominally equal, there is often a vast discrepancy between their respective coercive and economic power. In light of this, the principle of equality of the parties must be given more substantive content, rather than limited to a strict notion of formal equality. Tribunals should have regard to these wider considerations as part of their inherent power and duty to safeguard the integrity of their proceedings.

I Introduction

The principle of equality of the parties is a fundamental aspect of procedural fairness. Giving each side a fair hearing supports the rule of law and the manifestation of justice, as well as aiding the tribunal to come to a substantively just outcome. Equality of the parties requires that both parties be treated equally in the proceedings, including the right to be heard and respond to the other side. Despite the apparent simplicity of this principle, its proper application to new contexts requires some reflection. This is particularly so in light of investor-State arbitration, in which the parties are essentially unequal: the claimant is a private company, whereas the respondent is a sovereign State. While States possess unique powers and privileges by virtue of their sovereign status, the resources of private companies can far outstrip those of governments. Both of these facts can lead to a potential inequality of arms. Tribunals cannot abdicate their duty to ensure equality of the parties merely because such imbalances have causes independent of the dispute settlement process itself. When a power or resource disequilibrium has a manifest impact on a party's ability to present its case, the tribunals must act to remedy the imbalance. By looking beyond the legal presumption of equality of the parties, to take into account circumstances outside of the court room, tribunals will achieve a more substantive conception of equality. In light of the purposes of the equality principle, this broader interpretation is the appropriate one. The more difficult question is how to apply the equality principle in a meaningful way without also prejudicing the interests of the other party.

In the very first issue of the *ICSID Review* this question was highlighted as a potential threat to the future of international investment arbitration.[1] There, the author described the "delicate task" of the arbitrator in reconciling the need for flexibility with the elementary requirements of justice, and the danger that exceeding sensitivity towards the needs of States would undermine investors' trust in the system.[2] This paper explores this concern, which is essentially a tension between equality and equity.

[1] Pierre Lalive "Some Threats to International Investment Arbitration" (1986) 1 ICSID Review 26 at 37; note "ICSID" refers to the International Centre for Settlement of Investment Disputes.

[2] At 37.

For the purposes of exploring the difficulties posed by applying an age-old principle to new contexts, a parallel can be made between investment arbitration and the dispute settlement system within the World Trade Organisation ('WTO'). While limited to States, the relative ability of countries to successfully bring a claim in the WTO dispute system is not equivalent, as the organisation's Members have vastly different levels of economic development. The discrepancies in economic and political power impact the smaller State's right to be heard, despite the formal equality presumed before the tribunal. However, the WTO Dispute Settlement Understanding ('DSU') attempts to take into account such external causes of procedural inequality though codifying special and differential treatment for developing country Members.

Investment arbitration and world trade law have common origins.[3] While these regimes have their points of difference, there is an increasing convergence between the two. Both investor-State arbitration and WTO dispute settlement "… address politically sensitive, public disputes driven by private economic interests".[4] The boundaries between these different aspects of international economic law are "inevitably blurred", particularly because of larger concepts which connect them, such as the appropriate limits on State sovereignty.[5] Analysis of procedural difficulties which have arisen in these two fora illustrates the shared need for the development of a broader understanding of the equality of the parties principle. A focus on the presentation of evidence and the coercive power of States demonstrates how factors outside the courtroom can undermine the fair and effective operation of proceedings.

As this paper will argue, a full understanding of this basic tenet of procedural fairness may require tribunals to eschew formal inequality in adjusting their procedure to take into account the true position of each party. This may require some procedural acknowledgement of the unique considerations of sovereigns, or the

[3] Nicholas DiMascio and Joost Pauwelyn "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?" (2008) 102 American Journal of International 48 at 51.

[4] Joost Pauwelyn "The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are From Mars, Trade Adjudicators from Venus" (2015) 109 American Journal of International Law 761 at 766–767; See also Roger P Alford "The Convergence of International Trade and Investment Arbitration" (2013) 12 Santa Clara Journal of International Law 35.

[5] Andreas F Lowenfeld *International Economic Law* (2nd ed, Oxford University Press, New York, 2008) at vi–vii.

difficulties in pleading a case with a dearth of resources or litigation experience. Justice is traditionally depicted as a blindfolded woman holding a set of scales. This image reinforces the importance of equality of treatment between the parties. However, it is unsatisfactory to turn a blind eye to essential discrepancies which exist between the parties. Such an emphasis on formal equality may not only lead to poorer substantive outcomes, but may also undermine the system's broader legitimacy. Such procedural adjustments will often be possible through a broad and purposive interpretation of the adjudicative bodies' constituent instruments. In the absence of a relevant provision, tribunals are nevertheless under a duty to safeguard the integrity of their own procedure through use of their inherent powers. This paper's primary submission is that at times it will be necessary for tribunals to "lift the blindfold" and take into account the realities of the respective positions of the parties before it. This paper does not seek a radical reform of the law. Rather, this requirement arises from a proper understanding of this fundamental principle of procedural fairness.

This paper advances this submission in five main parts. First, this paper seeks to understand the content of the equality of the parties through tracing the principle's development, with particular regard to the International Court of Justice. Part II introduces the systems of investment-arbitration and WTO dispute settlement. Part III looks in detail at unequal treatment concerns which have emerged in the presentation of evidence, and Part IV examines the unfair use of the State's coercive powers as an equality of the parties issue. Part V discusses the concept of inherent powers and the steps tribunals may take to "right the balance" when faced with such issues.

A Development of the Principle

The importance of procedural rights is often simply asserted as a matter of fact and accepted as such, thus those charged with pleading or applying them may do so without questioning their precise content or boundaries.[6] It is to this task which this paper now turns.

[6] Stephen Subrin and Richard Dykstra "Notice and the Right to Be Heard: The Significance of Old Friends" (1974) 9 Harvard Civil Liberties Law Review 449 at 451.

1 Origins

The idea of fairness appears to be an innate human quality, present in children even before they develop the capacity to speak.[7] While the exact content of "fairness" is contested, the principles of natural justice such as the right to be heard have been traced back to ancient law. For example, Sanskrit plays dating from 485 BCE espouse a judicial process where both parties were given adequate opportunities to present their cases and respond to the other side.[8] It has been claimed that equality of the parties and the right to be heard are principles of natural law,[9] and that "… even God Himself did not pass sentence upon Adam before he was called upon to make his defence."[10] The latter comment is from a series of pre-Victorian administrative decisions in the United Kingdom, stretching from at least as far back as 1615, upholding the requirements of notice and the opportunity to be heard.[11] The concept of due process more generally, which equality of the parties must form part, is said to have its origins centuries earlier, recognised in the Magna Carta of 1215.[12]

The principle of hearing both sides was also recognised by Emerich de Vattel in his 1758 treatise, *The Law of Nations*.[13] In a section titled "arbitration", he wrote:[14]

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[7] Hugh Thirlway "Chapter 13: Procedural Fairness in the International Court of Justice" in Arman Sarvarian and Filippo Fontanelli (eds) (British Institute of International and Comparative Law, London, 2015) 243 at 243, citing P Bloom "Just Babies: the Origins of Good and Evil" (Bodley Head 2013) at 67-68 and the research cited therein.

[8] VS Mani *International Adjudication: Procedural Aspects* (Martinus Nijhoff Publishers, The Hague, 1980) at 17.

[9] At 16, citing H H Marshall *Natural Justice* (Sweet & Maxwell Ltd, London, 1959) at 5; Robert Kolb *The International Court of Justice* (Hart Publishing Ltd, Oxford, 2013) at 1120.

[10] *R v Chancellor of Cambridge and Scholars of the University of Cambridge* (1723) 1 Str 557 (KB).

[11] *Bagg's Case* [1615] 11 CO Rep 93b (KB); *Capel v Child* [1832] 2 Cr & J 558; Michael Supperstone, James Goudie and Paul Walker *Judicial Review* (3rd ed, LexisNexis Butterworths, Suffolk, 2005) at [10.4.1].

[12] See David Palmeter "Chapter 13: The Need for Due Process in WTO Proceedings" in David Palmeter (ed) *The WTO as a Legal System: Essays on International Trade Law and Policy* (Cameron May Ltd, London, 2003) 199 at 199.

[13] Emmerich de Vattel *The Law of Nations Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, Joseph Chitty (ed) (Cambridge University Press, Cambridge, 1834).

[14] Emmerich de Vattel "Book II Chapter XVIII: 'Of the Mode of Terminating Disputes between Nations'" in *The Law of Nations*, above n 13, at 277.

> In order to obviate all difficulty, and cut off every pretext of which fraud might make a handle, it is necessary that the arbitration articles should precisely specify the subject in dispute, the respective and opposite pretensions of the parties, the demands of the one, and the objections of the other. These constitute the whole of what is submitted to the decision of the arbitrators …

The International Law Commission in its Draft Convention on Arbitral Procedure considered the requirement that the parties be equal in proceedings expressed a fundamental procedural norm "…essential to the proper functioning of the tribunal" and of which no State would consent to be deprived.[15] The International Law Commission cited the *Umpire* cases of the 1864 United States-Colombia Commission, where a number of awards were set aside due to a failure to comply with the "universal principle of justice that no party can be condemned before having been heard in defence."[16] In his discussion of the principle, Bin Cheng cites, among others, the comments of Commissioner Gore in the 1797 *Betsey* arbitration, who said: "That board could never be denominated impartial or just, that did not see with equal eye the party that claimed and the party that resisted."[17] The *audi alterem partem* rule was so established that the House of Lords held early in the 20th century that fairly listening to both sides was a duty "lying upon every one who decides anything".[18]

The principle is contained in the UNCITRAL Arbitration Rules adopted by the General Assembly in 1976[19] and in the revised rules of 2013.[20] The New York Convention provides that if a party was unable to present its case, the award against that party may be denied recognition.[21] A breach of a party's right to be heard can lead to an annulment of a decision in investment arbitration.[22] The International

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[15] *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session* A/CN4/92 (1955) at 55.

[16] At 56.

[17] Bin Cheng *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons Limited, London, 1953) at 290, citing 4 Intl Adj MS 179 at 185.

[18] *Board of Education v Rice and Others* [1911] 1 AC 179 (HL) at 182.

[19] *UNCITRAL Arbitration Rules* GA Res 31/98, A/Res/31/98 (1976), art 15(1); note "UNCITRAL" refers to the United Nations Commission on International Trade Law.

[20] *UNCITRAL Arbitration Rules* GA Res 68/109, A/Res/68/109 (2013), art 17(1).

[21] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 3 (opened for signature 10 June 1958, entered into force 7 June 1959), art V(1)(b).

[22] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159 (opened for signature 18 March 1965, entered into force 14 October 1966),

Covenant on Civil and Political Rights provides that all persons shall be equal before courts and tribunals.[23] This right also ensures equality of arms.[24] Finally, the right to a fair trial contained in the European Convention on Human Rights implies a reasonable opportunity for each party to present its case to the Court "under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent".[25] Thus, that the parties be treated with equality is widely recognised as a fundamental procedural rule.[26] It is also a general principle of law and serves as a source of law for both substantive and procedural rules of international law.[27]

2 Content and Function of these Principles

To fully understand their scope, it is necessary to inquire into the function of these overarching principles. It is worth noting here for clarity that the right to be heard is also referred to as the hearing rule, *audiateur et altera pars* (all parties should be heard) or *audi alteram partem* (hear the other party). The equality of the parties is also referred to equality of treatment or the equality of arms. Equality of the parties and the right of each party to be heard are two complementary and closely-related

art 50; Christoph Schreuer, Loretta Malintoppi and August Reinisch *The ICSID Convention: A Commentary* (2nd ed, Cambridge University Press, Cambridge, 2009) at 990.

[23] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 14.

[24] Human Rights Committee *General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial* CCPR/C/GC/32 (2007) at [13].

[25] *Dombo Beheer BV v The Netherlands* (1994) 18 EHRR 213 (ECHR) at [35].

[26] *Maritime International Nominees Establishment (MINE) v Guinea (Decision on Annulment)* (1989) 4 ICSID Rep 79 at [506]; *Wena Hotels Limited v Arab Republic of Egypt (Annulment Proceeding)* (2002) 41 ILM 933, 6 ICSID Rep 129 at [57]; subsequently cited in *CDC Group plc v Republic of the Seychelles (Annulment Proceedings)* (2005) 11 ICSID 237 at [49]; *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile (Annulment Proceeding)* ICSID ARB/01/7, 21 March 2007 at [49]; *Azurix Corp v Argentine Republic (Decision on the Application for Annulment of the Argentine Republic)* ICSID ARB/01/02, 1 September 2009 at [212].

[27] Chester Brown *A Common Law of International Adjudication* (Oxford University Press, New York, 2009) citing Rosenne Shabtai *The Law and Practice of the International Court 1920-2005* (vol III) (4th ed, Martinus Nijhoff Publishers, Leiden, 2006) at 1021–1023; Hugh Thirlway "Chapter 21: Procedural Law and the International Court of Justice" in Fitzmaurice Malgosia and Lowe Vaughan (eds) *Fifty Years of the International Court of Justice Essays in Honour of Sir Robert Jennings* (Cambridge University Press, New York, 1996) 389 at 389; Stefania Negri "'Equality of Arms': Guiding Light or Empty Shell?" in M Bohlander (ed) *International Criminal Justice: A Critical Appraisal of Institutions and Procedures* (Cameron May Ltd, 2007) 13 at 69–70.

principles. It can thus be difficult to demarcate between them.[28] The equality of the parties principle is translated into practice through the right of both parties to be heard.[29] When speaking of procedural fairness, one of these principles cannot exist without the other as they are two sides of the same coin.[30] The concept of equality of the parties *contains* the right to be heard, [31] but the former is a distinct principle and must have some content of its own. One way to conceptualise the distinction is to view the right to be heard as operating between each party and the tribunal, in a vertical relationship. By contrast, the equality of the parties operates horizontally, with reference to each party, to ensure the treatment is equivalent between them. For instance, the impartiality of the tribunal is a "fundamental and essential requirement"[32] implicit in the notion of equality of the parties.[33]

As the right to be heard is an essential component of the equality of the parties, it deserves examination. The right to be heard is said to be "one of the essential manifestations of procedural justice".[34] It is unquestionably a fundamental rule of procedure,[35] generally applicable to international arbitral proceedings.[36] It includes the right of each party to present its claims and defences, support its submissions with evidence, have sufficient notice of the case against it, and rebut the other party's evidence.[37] The right entitles the parties to an adequate *opportunity* to be heard. It is for the party to make use of this opportunity and to determine the contents of its submissions.[38] One function of the right to be heard is that it serves the "arrival

[28] Mani *International Adjudication*, above n 8, at 13–16.

[29] Cheng *General Principles of Law*, above n 17, at 291.

[30] Mani *International Adjudication* at 16.

[31] Not the other way around, as suggested in Andrew D Mitchell *Legal Principles in WTO Disputes* (Cambridge University Press, New York, 2008) at 148; See also Georgios Petrochilos *Procedural Law in International Arbitration* (Oxford University Press, New York, 2004) at [4.86].

[32] *Klöckner v Republic of Cameroon (Annulment Decision)* (1985) 1 ICSID Rep 95 at [95].

[33] Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session, above n 15, at 55; Cheng *General Principles of Law*, above n 17, at 290, stating that the "juridical equality between the parties was the corollary of the tribunal's impartiality".

[34] Mani *International Adjudication* at 30.

[35] *Fraport v The Philippines (Annulment Proceedings)* ICSID ARB/03/25, 23 December 2010 at [197].

[36] At [198].

[37] Mani *International Adjudication* at 30.

[38] At 39.

at truth".[39] The opportunity for each party to present its evidence lends to the accurate discovery of the facts. Potential distortion of the facts is counterbalanced through cross-examination or comments by the other side.[40] Thus a hearing increases the probability that the decision on the merits will be "correct". Moreover, as the right to be heard will aid in the "generation of the feeling that justice has been done" it legitimises the outcome of the tribunal.[41]

In a domestic context, it has been suggested that the hearing of rights of individual citizens are linked to the "dignity inherent in the democratic ideal".[42] *Audi alteram partem* is a thread which links together otherwise quite distinct domestic systems of administrative law.[43] There is a parallel between investment arbitration and administrative law.[44] Procedural impropriety, which incorporates procedural equality between the parties, is a well-established ground of judicial review in common law systems.[45] Civil law systems also recognise the right to be heard as a general principle of administrative law.[46] These adjectival rules assume some

[39] Subrin and Dykstra "Notice and the Right to Be Heard: The Significance of Old Friends", above n 6, at 452, citing *Joint Anti-Fascist Refugee Committee v McGrath* 341 US 123 (1951).

[40] At 453.

[41] At 455.

[42] At 454.

[43] Rene Seerden "Comparative Remarks" in Rene Seerden (ed) *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis* (3rd ed, Intersentia Ltd, Cambridge, 2012) 375 at 381.

[44] G Van Harten and M Loughlin "Investment Treaty Arbitration as a Species of Global Administrative Law" (2006) 17 European Journal of International Law 121 at 146; Stephan W Schill "International Investment Law and Comparative Public Law – An Introduction" in Stephan W Schill (ed) *International Investment Law and Comparative Public Law* (Oxford University Press, New York, 2010) 3 at 4; *International Thunderbird Gaming Corporation v The United Mexican States (Separate Opinion of Thomas Wälde)* NAFTA/UNCITRAL, 1 December 2005 at [13].

[45] Supperstone, Goudie and Walker, above n 11, at [10.1.1]; Paul Craig *Administrative Law* (7th ed, Sweet & Maxwell, United Kingdom, 2012) at [12–037].

[46] Giacinto della Cananea "Minimum Standards of Procedural Justice in Administrative Adjudication" in Stephan W Schill (ed) *International Investment Law and Comparative Public Law* (Oxford University Press, New York, 2010) 39 at 61–62; Francesca Bignami "Comparative Administrative Law" in Mauro Bussani and Ugo Mattei (eds) *The Cambridge Companion to Comparative Law* (Cambridge University Press, New York, 2012) 145 at 155; See generally Aubert Lefas "A Comparison of the Concept of Natural Justice in English Administrative Law with the Corresponding General Principles of Law and Rules of Procedures in French Administrative Law" (1978) 4 Queen's Law Journal 197; See also Tom Ginsburg "Comparative Administrative Procedure: Evidence from Northeast Asia" (2002) 13 Constitutional Political Economy 247 at [2.3].

connection between procedural fairness and substantive justice,[47] however natural justice considerations relate only to the decision-making *process*.[48] One must then ask whether procedural disadvantages which *manifest* in front of the tribunal, but have causes independent of the judicial process itself, fall within the court's assessment of procedural propriety. There is a question as to whether, and to what extent, tribunals should have regard to large resourcing discrepancies between the parties, which is a significant inequality but nonetheless one which exists independently of the dispute settlement system.[49]

It is generally understood that the body adjudicating the disputes is not under a duty to make the case for one of the parties, as this would undermine the impartiality of the tribunal. However, there may be a duty to explain the law in order to enable a party to make their case.[50] Courts are unlikely to find procedural impropriety where the complaining party is the cause of the alleged unfairness, for example due to mistakes on the part of its lawyers.[51] In judicial review, there have been questions over whether procedural impropriety is confined to where the decision-maker is at fault.[52] This is because "natural justice cannot be invoked to rectify every perceived unfairness".[53]

Investment arbitration has also been analogised to the ability of an individual to make direct claims before human rights tribunals.[54] In that context it has been recognised that *any* inequality will be relevant to the fairness assessment, and that it may therefore be justified to offer guidance and other differential treatment to an

[47] Supperstone, Goudie and Walker, above n 11, at [10.1.4]; Craig, above n 45, at [12–2].

[48] Supperstone, Goudie and Walker, above n 11, at [10.34.1].

[49] See Niall Meagher "Chapter 8: Representing Developing Countries in WTO Dispute Settlement Proceedings" in Petros C Mavroidis and George A Bermann (eds) *Columbia Studies in WTO Law and Policy: WTO Law and Developing Countries* (Cambridge University Press, New York, 2007) 213 at 225.

[50] Supperstone, Goudie and Walker, above n 11, at [10.40.2].

[51] Jonathan Auburn, Jonathan Moffet and Andrew Sharland *Judicial Reivew: Principles and Procedures* (Oxford University Press, Oxford, 2013) at [5.46].

[52] *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876 (HL) at 890.

[53] *R v Secretary of State for the Home Department* [1989] 2 WLR 603 (CA) at 611.

[54] Campbell McLachlan, Laurence Shore and Matthew Weinger *International Investment Arbitration: Substantive Principles* (Oxford University Press, Oxford, 2007) at [1.06] citing citing G Burdeau "Nouvelles Perspectives pour l'Arbitrage dans le Contentieux Economique interessant l'Etat" [1995] Revue de l'Arbitrage 3, 16; Karl-Heinz Bockstiegel "Enterprise v State: The New David and Goliath? The Clayton Utz Lecture" (2007) 23 Arbitration International 93 at 93.

unrepresented party.[55] A substantive conception of the equality of arms has also been called for in international criminal law.[56] These arguments expose the possible scope of the equality of the parties principle and what tribunals may do to apply it in a meaningful way. These questions can be further examined through the lens of International Court of Justice jurisprudence.

B International Court of Justice

Equality of the parties is an independent principle of judicial process of universal application, however before the International Court of Justice it in part it reflects the sovereign equality of States.[57] Sovereign equality means that "a small republic is no less a sovereign state than the most powerful kingdom."[58] An international court enables smaller States to confront larger States in a way that was not possible through diplomatic or military pressure. The Permanent Court of International Justice recognised these fundamental principles.[59] They are also recognised in the Court's Statute,[60] as well as in the Rules of Court.[61] While the equality of the parties is a procedural rule, the principle has an important constitutional scope and occupies a "superior ranking in the conceptual hierarchy of ICJ law."[62] It requires the parties be accorded the same procedural rights and for the Court to continually seek to correct all procedural inequalities.[63] In determining the practical application of the principle, its imperative requirements must be considered against the factual context

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[55] Ola Johan Settem *Applications of the "Fair Hearing" Norm in ECHR Article 6(1) to Civil Proceedings: with Special Emphasis on the Balance Between Procedural Safeguards and Efficiency* (Springer International Publishing, Switzerland, 2016) at 116–177; See also generally Roger Gamble and Noel Dias "'Equality of Arms is a Blessed Phrase': Its Meaning Under International Law" (2009) 21 Sri Lanka Journal of International Law 187.

[56] Negri "'Equality of Arms': Guiding Light or Empty Shell?", above n 27, at 71–73.

[57] Kolb *The International Court of Justice*, above n 9, at 1119–1120.

[58] Vattel *The Law of Nations*, above n 13, at [18].

[59] *Chorzów Factory Case (Germany v Poland) (Merits)* [1928] PCIJ Rep (series A) No 17 at 7; *Legal Status of Eastern Greenland Case (Denmark v Norway) (1933) (Merits)* [1933] PCIJ Rep (series A/B) No 53 at 25–26.

[60] Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945), art 35(2).

[61] Rules of Court of the International Court of Justice (adopted 14 April 1978, entered into force 1 July 1978), arts 56 and 72, specifically providing that any evidence submitted after the closure of proceedings should be communicated to the other side with the opportunity to comment on it.

[62] Kolb *The International Court of Justice*, above n 9, at 1121.

[63] At 1120.

of a particular case.[64] The Court has a margin of discretion in this regard.[65] For example, the Court may take into account the fact that there is a far greater burden on one party in terms of document production,[66] or "the urgency and other circumstances of the matter" in allowing the late submission of evidence.[67] As the "guardian and guarantor" of the proper administration of justice, the Court is under a duty to ensure procedural equality, and possesses the inherent power to do so.[68] This paper argues that the principle of equality of the parties will sometimes require the attenuation of specific procedural rules in order to ensure substantive equality between the parties. A series of cases, the most recent in 2012, illustrates the power of the Court to adjust its own procedure in response to inequality between the parties. These decisions offer insight into the content of the principle, how it has developed, and the powers of the Court to bring its proceedings in line with the principle's requirements.

Until recently,[69] the Court had the ability to review judgments of the administrative tribunals of the United Nations and International Labour Organisation. In these proceedings it was not possible for the individual complainant to directly make submissions to the Court. This gave rise to concerns about "a central aspect of the good administration of justice: the principle of equality before the Court of the organization on the one hand and the official on the other."[70] In the first decision of

[64] At 1121.

[65] At 1130–1.

[66] At 1121.

[67] As was the case in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro) (Further Requests for the Indication of Provisional Measures)* [1993] ICJ Rep at 336–337.

[68] Kolb *The International Court of Justice*, above n 9, at 1125.

[69] In 1995, the General Assembly removed the provision to apply to the Court for review of UNAT decisions, see *Review of the procedure provided for under article 11 of the statute of the Administrative Tribunal of the United Nations* GA Res 50/54, A/RES/50/54 (1995); and in 2016, the International Labour Office also proposed to promptly repeal the ability for its Governing Body to challenge a decision before the International Court of Justice. This was because the provision failed to meet "the overriding principle of equality of access to courts and tribunals", see *Twelfth Item on the Agenda: Matters Relating to the Administrative Tribunal of the ILO - Proposed Amendments to the Statute of the Tribunal* GB326/PFA/12/1 (International Labour Office Governing Body, 2016).

[70] *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agricultural Development (Advisory Opinion)* [2012] ICJ Rep 10 at [35]; Eric De Brabandere "Individuals in Advisory Proceedings Before the International Court of Justice: Equality of the Parties and the Court's Discretionary Authority" (2012) 11 The Law and Practice of International Courts and Tribunals 253.

this line of cases, the Court held its judicial character "requires that both sides directly affected by these proceedings should be in a position to submit their views and their arguments to the Court."[71] The Court made two procedural decisions to remedy the imbalance. The first was to dispense with oral hearings, a decision within its discretion.[72] The Statute of the Court does not allow individuals to appear before it,[73] and in this way the equality flowed from the provisions of the Court's own Statute.[74] The second procedural decision was to require the complaining agency to transmit to the Court any written submissions made by the employee. The Court was satisfied that this process provided the Court with adequate information and accorded with the requirements of the good administration of justice.[75] The Court attributed importance to ensuring actual equality through practical measures.[76] However it was doubted whether "such safeguards of elementary principles of judicial procedures" would be adequate in a contentious case, as opposed to the advisory opinion in which the questions arose.[77] To this end, in the 2012 case the Court made the same two procedural decisions, consistent with earlier Court practice.[78] However, requiring the International Fund for Agricultural Development to essentially aid the employee present its case was not without its difficulties. The Fund was reluctant to submit the employee's communications to the Court and failed to keep her updated with the Court's procedural requests.[79] The Court concluded that despite the difficulties in the process the parties "had adequate and in large measure equal opportunities to present their case".[80]

In 1956, the Court did not consider the exclusive right of the employing agency to apply for review to be an inequality before the Court. This was justified on the basis

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[71] *Judgments of the Administrative Tribunal of the International Labour Organisation Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization (Advisory Opinion)* [1956] ICJ Rep 77 at 86.

[72] *Application for Review of Judgement No 158 of the United Nations Administrative Tribunal (Advisory Opinion)* [1973] ICJ Rep 166 at [36].

[73] Statute of the International Court of Justice, art 66.

[74] *Judgments of the Administrative Tribunal of the ILO Upon Complaints Made Against UNESCO*, above n 71, at 86.

[75] At 86.

[76] *Application for Review of Judgement No 273 of the United Nations Administrative Tribunal (Advisory Opinion)* [1982] ICJ Rep 325 at [29].

[77] At [59].

[78] *Judgment No 2867 of the Administrative Tribunal of the ILO*, above n 70, at [12] and [45].

[79] At [46].

[80] At [47].

that it was an inequality antecedent to the examination of the question by the Court.[81] However six decades later, the Court took a broader view of the principle, holding that it "…must now be understood as including access on an equal basis to available appellate or similar remedies unless an exception can be justified on objective and reasonable grounds."[82] The Court could not see any such justification for the review mechanism which favoured the employer to the disadvantage of the official.[83] The Court further noted, with reference to the General Comments of the United Nations Human Rights Committee, the extent of the principle's development in recent decades.[84] The Court did not accept, however, that there was a parallel between the situation before it and investor-State arbitration. The Court acknowledged that while only the investor may initiate the dispute settlement process, *both* parties are able to seek revision or annulment of the award.[85]

The Court has said that the principle of the equality of the parties "… follows from the good administration of justice".[86] It has been suggested that *la bonne administration de la justice* may be its own independent principle.[87] In 2002, Belgium unsuccessfully relied on this principle in objection to both jurisdiction and admissibility.[88] The Court held that the circumstances had not affected Belgium's ability to prepare its defence nor infringed "the sound administration of justice".[89] Regardless of the breadth of this other potentially distinct principle, the equality of the parties is a significant corollary of the proper administration of justice.

Finally, it is important to note a relevant issue which is outside the scope of the present paper. The non-participation of one party to the dispute raises important questions of procedural fairness as the equality of the parties is "gravely

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[81] *Judgments of the Administrative Tribunal of the ILO Upon Complaints Made Against UNESCO*, above n 71, at 85.

[82] *Judgment No 2867 of the Administrative Tribunal of the ILO*, above n 70, at [44].

[83] At [39].

[84] At [39].

[85] At [43].

[86] At [44]; *Judgments of the Administrative Tribunal of the ILO Upon Complaints Made Against UNESCO*, above n 71, at 86.

[87] Thirlway, above n 7, at 246; Kolb *The International Court of Justice*, above n 9, at 1128.

[88] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Merits)* [2002] ICJ Rep 3 at 16.

[89] At 17.

impaired".[90] Where one party chooses not to take part in proceedings, "neither party should be placed at a disadvantage" because of that fact.[91] Although non-appearance "complicates" the procedural situation before the court, it is still "essential to guarantee as perfect equality as possible between the parties" as that is an elementary duty of the court.[92] To this end, tribunals will undertake measures to safeguard the procedural rights of the non-appearing party, such as continually inviting the non-appearing party to comment on all stages of the hearing.[93] The appearing party's procedural rights also need protection from potential unreasonable delay and "having to guess" what their opponent might have argued.[94] A party's non-appearance "imposes a special responsibility" on the tribunal.[95] In such circumstances, the consistent practice of tribunals has been to take steps to determine the non-appearing party's position through review of official statements and other materials in the public domain and involvement from independent experts.[96] This discussion of the equality of the parties in these decisions further underscores the importance of this procedural principle. A detailed analysis of the particular issues related to non-appearance is however outside the scope of this paper. The measures tribunals have taken to remedy the imbalance in such a situation are significant. This procedural latitude reinforces both the existence and scope of tribunals' inherent powers, a topic which will be returned to in the final section of this paper.

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[90] Cheng *General Principles of Law*, above n 17, at 290.

[91] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at [31]; *Arctic Sunrise Case (Netherland v Russian Federation) (Provisional Measures)* [2013] ITLOS Case No 22 at [53].

[92] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)*, above n 91, at [59] and [65].

[93] *South China Sea Arbitration (Republic of the Philippines v People's Republic of China) (Award)* [2016] PCA 2013-19 at [121].

[94] At [123]-[126].

[95] At [129].

[96] At [144] and the cases cited in footnote 40.

II New Forms of Dispute Settlement and an Age-Old Principle

A Investor-State Arbitration

One of the objectives of the investment treaty regime was to aid countries in promoting foreign investment, particular developing countries.[97] This objective was pursued through the signing of international investment treaties which set out minimum standards for the host State's treatment of foreign investors. ICSID is the most commonly used mechanism.[98] The procedural framework for investment arbitration is largely derived from commercial arbitration rules, such as the UNCITRAL Arbitration Rules.[99]

The defining feature of these treaties is the ability for foreign investors to directly invoke the obligations contained therein against the host state through international arbitration, with no requirement of intervention by the investors' home State or a contractual relationship between the foreign investor and the host State.[100] The ratification of the bilateral investment treaty by the host State provides a standing consent to arbitrate with all nationals of the other ratifying State. It is only States which are the respondent in such disputes. This kind of legal relationship has been described as hybrid and *sui generis*.[101] This asymmetry is also one of the reasons investment arbitration is subject to substantial criticism.[102] The new and special

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[97] Douglas Zachary *The International Law of Investment Claims* (Cambridge University Press, Cambridge, 2009) at 1; Ibrahim FI Shihata "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA" (1986) 1 ICSID Review 1 at 5.

[98] McLachlan, Shore and Weinger *International Investment Arbitration: Substantive Principles*, above n 54, at [3.21].

[99] Tomoko Ishikawa "Third Party Participation in Investment Treaty Arbitration" (2010) 59 International and Comparative Law Quarterly 373 at 374–5; Van Harten and Loughlin, above n 44, at 126.

[100] McLachlan, Shore and Weinger, above n 54, at [1.06].

[101] See Zachary Douglas "The Hybrid Foundations of Investment Treaty Arbitration" (2004) 74 BYIL 151.

[102] See for example "The Arbitration Game" (2014) The Economist <www.economist.com>; Pauwelyn, above n 4, at 764; Julia Hueckel "Rebalancing Legitimacy and Sovereignty in International Investment Agreements" (2012) 61 Emory Law Journal 601; Pia Eberhardt, Cecilia Olivet and Helen Burley *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are*

character of investment arbitration may consequently demand a *sui generis* application of the equality of the parties principle.

States have numerous legitimate public policy objectives to pursue beyond the promotion of investment, and indeed at times these other objectives may conflict with the former.[103] The investment arbitration system seeks to strike a difficult balance between the rights of investors to protection and the rights of States to implement their chosen policies.[104] While the private rights of the investor are important, the challenged State measure will often have ramifications beyond the parties to the dispute, which introduces a public element. This public-private dynamic is another reason why "hybrid" is a fitting description for the system.[105] However for many arbitrators with a commercial arbitration background, the fact that one party is a sovereign State may matter little.[106] The fact that current procedural rules are based in large part on commercial dispute settlement raises an important question as to the adequacy of the procedural law to accommodate the unique features of the system.[107] The need for the different application of rules between diverse subjects was something Vattel noted in the opening pages of *The Law of Nations* when he wrote, "…since the same general rule, applied to two subjects, cannot produce exactly the same decisions, when the subjects are different; and a particular rule which is perfectly just with respect to one subject, is not applicable to another subject of a quite different nature."[108] The parties to investment arbitration are "of quite a different nature", yet they are bound by the same rules. Unlike in proceedings before the International Court of Justice, the equality of the parties in investment arbitration does not reflect the sovereign equality.[109] It is thus necessary for tribunals to approach the principle as a standalone tenet of procedural law.

Fuelling an Investment Arbitration Boom (Corporate Europe Observatory and the Transnational Institute, 2012).

[103] McLachlan, Shore and Weinger *International Investment Arbitration: Substantive Principles*, above n 54, at [1.57].

[104] *CMS Gas Transmission Co v Republic of Argentina (Jurisdiction)* (2003) 7 ICSID Rep 492 at 504.

[105] Ishikawa "Third Party Participation in Investment Treaty Arbitration", above n 99, at 374.

[106] Schill "International Investment Law and Comparative Public Law", above n 44, at 11.

[107] Ishikawa , above n 99, at 377; See also *International Thunderbird Gaming Corporation v The United Mexican States (Separate Opinion of Thomas Wälde)*, above n 44, at [12].

[108] Vattel *The Law of Nations*, above n 13, at [6].

[109] See Kolb *The International Court of Justice*, above n 9, at 1119.

B World Trade Organisation Dispute Settlement

The Member Countries of the World Trade Organisation established the current system of dispute settlement in the Uruguay Round of Multilateral Trade Negotiations. Its governing rules are set out in Annex 2 of the WTO Agreement, the Dispute Settlement Understanding ("the DSU").[110] The system's objective is to provide an efficient, reliable and rules-based mechanism for the resolution of disputes between States as to the application of the WTO Agreement.[111] The DSU is mandatory and excludes States from taking unilateral action or using another forum to resolve a WTO-related dispute.[112] The WTO is also a *sui generis* regime. Its establishment in 1995 was considered as such as the organisation did not form part of the United Nations system.[113] Further, even the dispute settlement process is Member-driven, with Member States able to control the adjudicatory function of the organisation through both administration and the adoption of panel and Appellate Body reports.[114]

Under the GATT 1947 system of dispute settlement, a respondent State could block every step in the process because of the requirement of positive consensus. This system has a number of structural weaknesses, especially when it came to politically sensitive trade issues.[115] The introduction of the "negative consensus rule" in 1995 was one of the most significant changes to occur. Under the DSU, the Dispute Settlement Body automatically establishes panels, and adopts panel and Appellate Body reports, unless there is consensus among Members *not* to do so.[116] The DSU also created more detailed procedures and specific time-frames. It could be said that the Uruguay Round reforms "judicialised" the WTO dispute settlement system.

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[110] Marrakesh Agreement establishing the World Trade Organisation, 1867 UNTS (signed 15 April 1994, entered into force 1 January 1995) Annex 2 "Understanding on Rules and Procedures Governing the Settlement of Disputes" ["*DSU*"].

[111] World Trade Organisation Secretariat *A Handbook on the WTO Dispute Settlement System* (Cambridge University Press, Cambridge, 2004) at 2.

[112] Marrakesh Agreement establishing the World Trade Organisation, art 23.

[113] Mary E Footer *An Institutional and Normative Analysis of the World Trade Organization* (Martinus Nijhoff Publishers, Leiden, 2006) at 328.

[114] At 51.

[115] *A Handbook on the WTO Dispute Settlement System*, above n 111, at 14.

[116] At 15; See articles 6.1, 16.4, 17.14 and 22.6 of the DSU.

Subsequent to the consultation stage, it resembles typical court proceedings in many ways.[117] The standing Appellate Body was also established to hear appeals from Panel reports.

1 Equality of the Parties in the WTO

The principle of "equality of the parties" is not mentioned in the DSU. However, under the label of "due process", the object of the principle has been recognised and given effect. Due process has been held to be implicit in the WTO dispute settlement system.[118] It ensures procedural equality between the parties.[119] Due process demands that the other side and the tribunal are made aware at the outset of the arguments on which a party intends to rely in the proceedings.[120] Due process requires parties are afforded the adequate opportunity to respond to the submissions and evidence of other parties.[121] The protection of due process has been held to be an essential feature of a rules-based system of adjudication which guarantees that that one party is not unfairly disadvantaged in the proceedings with respect to other parties.[122] Therefore if a procedural matter has this effect, it is a due process concern to which panels need to pay special attention.[123] The Appellate Body has held that the DSU "… leaves panels 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."[124]

One example of this is where the European Communities raised procedural concerns over the joint representation of India and Paraguay by the Advisory Centre on World

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[117] Kristina MW Mitchell "Developing Country Success in WTO Disputes" (2013) 47 Journal of World Trade 77 at 87–88.

[118] *Australia – Measures Affecting the Importation of Apples from New Zealand* WT/DS367/R, 9 August 2010 (Report of the Panel) at [7.7].

[119] At [7.7].

[120] *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* WT/DS50/AB/R, 19 December 1997 (Report of the Appellate Body) at [93]-[94].

[121] *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* WT/DS321/AB/R, 16 October 2008 (Report of the Appellate Body) at [434]; *Australia – Measures Affecting Importation of Salmon* WT/DS18/AB/R, 20 October 1998 (Report of the Appellate Body) at [272].

[122] *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* WT/DS321/AB/R (Report of the Appellate Body), above n 121, at [433].

[123] Australia – Measures Affecting the Importation of Apples from New Zealand WT/DS367/R (Panel Report), above n 118, at [7 9].

[124] *EC Measures Concerning Meat and Meat Products (Hormones)* WT/DS48/AB/R, 16 January 1998 (Report of the Appellate Body) at 58, footnote 138.

Trade Law.[125] India was the complainant and Paraguay was one of the third parties to the dispute. The Panel held that it had "… the inherent authority – and, indeed, the duty – to manage the proceeding in a manner guaranteeing due process to parties involved in the proceeding ..."[126] The Panel did not consider that Paraguay had gained any litigation advantage over other third parties, because all third parties had enhanced rights under which they received all parties' submissions to the Panel and were able to participate in all Panel meetings.[127] Thus potential issues related to the equality of the parties had been mitigated, but were not discounted as possibilities in other cases.[128]

2 Special and Differential Treatment Provisions in the DSU

In addition to the special and differential treatment provided for in the substantive WTO Agreements, the DSU provides for special and differential treatment (SDT) to developing countries on a *procedural* level through, for example, "making available to developing Members additional or privileged procedures, or longer or accelerated deadlines."[129] At all stages of the dispute settlement process, involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members, and to this end Members shall exercise due restraint in both raising matters under these procedures involving a least-developed country Member.[130] At the consultation stage, if a developing country is bringing a complaint against a developed country, it may request an expedited procedure;[131] special attention should be given to the particular problems of developing country Members;[132] and time periods may be extended by agreement of the parties or, failing that, by the Chairperson of the Dispute Settlement Body (DSB).[133] Where consultations involving a least-developed country Member have not been successful, that Member may request the good offices of the Director-

[125] *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* WT/DS246/R, 1 December 2003 (Report of the Panel) at [7.3].
[126] At [7.8].
[127] At [7.17].
[128] At [7.12].
[129] *A Handbook on the WTO Dispute Settlement System*, above n 111, at 11.
[130] DSU, art 24(1).
[131] DSU, art 3(12).
[132] DSU, art 4(10).
[133] DSU, art 12(10).

General or DSB Chairperson to conduct conciliation.[134] At the panel stage, when one of the parties is a developed country, the developing country may request that the panel include at least one person from a developing country;[135] when the respondent is a developing country, the panel shall accord sufficient time for the preparation and presentation of its case;[136] and the panel's report must also explicitly indicate the form in which it has taken into account the relevant provisions on differential and more-favourable treatment from the covered agreements raised by the developing country.[137]

At the implementation stage, with respect to the challenged measures, particular attention should be paid to matters affecting the interests of developing country Members,[138] if the developing country was the complainant, the DSB shall consider what further action would be appropriate to the circumstances,[139] and shall take into account the impact of the challenged measures on the economies of developing country Members concerned.[140] Furthermore, the DSU also recognises the responsibility of the Secretariat to provide additional legal advice and assistance in respect of dispute settlement to developing country Members.[141] While disturbing formal equality, these provisions were designed to take into account the disadvantaged starting position of many developing countries. As discussed later in this paper, to date these provisions have proved to be of little utility to developing countries.[142] This paper submits that the greater use of the SDT provisions is a responsibility of WTO tribunals in ensuring equality of the parties, a principle which has been recognised as an important part of WTO dispute settlement.

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[134] DSU, art 24(2).

[135] DSU, art 8(1).

[136] DSU, art 12(10).

[137] DSU, art 12(11).

[138] DSU, art 21(2); this principle was applied in *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* WT/DS90/R, 6 April 1999 (Report of the Panel) at [7.5].

[139] DSU, art 21(7).

[140] DSU, art 21(8).

[141] DSU, art 27(2).

[142] Peter Van den Bossche and Werner Zdouc *The Law and Policy of the World Trade Organization: Texts, Cases and Materials* (3rd ed, Cambridge University Press, Cambridge, 2013) at 300.

3 Issues Facing WTO Developing Countries Members

It is often said that the dispute settlement reforms were designed to preserve "right over might".[143] Nominally, at least, every country is equal before the WTO system.[144] This should mean that the 112 developing WTO Member countries would be as likely to successfully use the dispute settlement system as the remaining 41 developed country Members. However, research suggests that developing countries are one-third less likely to file proceedings under the DSU than under the former GATT system.[145] However one study concluded that there was no consistent pattern of a smaller GDP preventing countries from winning a dispute.[146] The considerable literature on low participation of developing countries postulates three explanations for this trend: lack of expertise in trade law; insufficient human and financial resources; and unwillingness to risk political retaliation from powerful, developed countries.[147]

The legalisation of the system increased the transaction cost of using the system.[148] This "new premium on legal capacity" was particularly felt by small, developing countries.[149] These countries often do not have the capacity to represent themselves yet struggled to afford legal representation.[150] The increasing complexity of WTO agreements, coupled with the sheer volume of text, increases the need for expertise and knowledge of how the system operates, and this create problems for lesser-

[143] Julio Lacarte-Muro and Petina Gappah "Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench" (2000) 3 Journal of International Economic Law 395 at 401.

[144] Gregory Shaffer "Chapter 7: Developing Country Use of the WTO Dispute Settlement System and Why It Matters" in James C Hartigan (ed) *Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment* (Emerald Group Publishing Ltd, 2009) 167 at 168.

[145] Mitchell "Developing Country Success in WTO Disputes", above n 117, at 80.

[146] At 102.

[147] As summarised at 81.

[148] Shaffer, above n 144, at 169; Eric Reinhardt and Marc L Busch "Chapter 7: Developing Countries and GATT/WTO Dispute Settlement" in Petros C Mavroidis and George A Bermann (eds) *Columbia Studies in WTO Law and Policy: WTO Law and Developing Countries* (Cambridge University Press, New York, 2007) 195 at 197.

[149] Reinhardt and Busch, above n 148, at 198.

[150] Shaffer, above n 144, at 178.

resourced States.[151] As the large developed economies are better placed to use the resource-intensive process, the system of dispute settlement "remains far from a neutral technocratic process in its operation."[152] It is likely that developed countries have a comparative legal advantage of their developing country counterparts due to the insights gained from previously navigating the panel procedure.[153] The much-vaunted rule of law system means little to developing countries when faced with such resource asymmetries and without the capacity to enforce their rights.[154]

The complexity of trade law as a barrier to developing country participation in WTO dispute settlement was discussed in a dispute between the United States and Antigua and Barbuda. In that case, Antigua had provided over a thousand pages of United States domestic law and short summaries of those laws. The United States submitted that such generalisations were not sufficient and thus Antigua had not met the standard for making out a prima facie case.[155] It has been held that the sufficient precision of the request to establish a panel is important because "… it informs the defending party and the third parties of the legal basis of the complaint."[156] Antigua seemingly asserted that its status as a developing country should exempt it from having to make a prima facie case.[157] The United States questioned whether "… basic notions of due process would ever permit a downward or upward adjustment in the burden of proof based on a Member's level of development".[158] It further submitted that Antigua must not be permitted to "… hide behind the excuse that US law is supposedly too complex and opaque", especially where Antigua had the assistance of two outside law firms.[159] Antigua submitted that to require precise statutory analysis of very complex foreign legislation would deter developing

[151] Amin Alavi "African Countries and the WTO's Dispute Settlement Mechanism" (2007) 25 Development Policy Review 25 at 31.

[152] Shaffer "Developing Country Use of the WTO Dispute Settlement System and Why It Matters", above n 144, at 169.

[153] Mitchell "Developing Country Success in WTO Disputes", above n 117, at 90.

[154] Reinhardt and Busch "Developing Countries and GATT/WTO Dispute Settlement", above n 148, at 210; Shaffer, above n 144, at 169.

[155] *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, 10 November 2004 (Report of the Panel) at [3.123].

[156] *European Communities - Regime for the Importation, Sale and Distribution of Bananas* WT/DS27/AB/R, 9 September 1997 (Report of the Appellate Body) at [142].

[157] *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/R (Report of the Panel), above n 155, at [3.122].

[158] At [3.122].

[159] At [52].

countries from using the system as lack of resources makes it difficult for developing Members to bring a claim in the first place.[160] In many ways, Antigua articulated some of the core concerns about the increased judicialisation of WTO dispute settlement. The Panel's unresponsiveness to these concerns is a failure to apply a more substantive conception of the equality of the parties principle. This is particularly unsatisfying given the explicit instruction to take into account such considerations, as contained in the DSU special and differential treatment provisions. This issue will be returned to in the final part of this paper.

III Presentation of Evidence

The submission of evidence is a fundamental part of the adjudicative process. Procedural rulings are often central to the outcome of the proceedings.[161] An absence of evidence not only poses practical impediments to the operation of an adjudicative system; a lack of probative and reliable evidence may also undermine the validity of the outcome of a dispute.[162] The exchange of evidence is central to both procedural and substantive fairness, which "… can rarely be obtained by secret, one-sided determination of facts decisive of rights."[163] The general approach to evidence in international arbitration is a liberal one without rigid or technical rules.[164] Tribunals possess a wide discretion to rule on the admissibility of evidence, limited by considerations of good faith and procedural fairness.[165] Because the exchange of evidence is reciprocal, an uncooperative party can cause an inequality in the proceeding. The ability of a party to cause an imbalance to the proceedings poses challenges to the tribunal which it may not be able to remedy directly.

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[160] At [3.114].

[161] Rahim Moloo "Chapter 10: Evidentiary Issues Arising in an Investment Arbitration" in Chiara Giorgetti (ed) *Litigating International Investment Disputes: A Practitioner's Guide* (Brill Nijhoff, Leiden, 2014) 287 at 287.

[162] Mani *International Adjudication*, above n 8, at 187, 198.

[163] Subrin and Dykstra "Notice and the Right to Be Heard: The Significance of Old Friends", above n 6, at 454 citing *Joint Anti-Fascist Refugee Committee v McGrath* 341 US 123 (1951) at 171.

[164] *The Rompetrol Group NV v Romania (Award)* ICSID ARB/06/3, 6 May 2013 at [181]; *EDF (Services) Ltd v Romania (Procedural Order No 3)* ICSID ARB/05/13, 26 August 2008 at [47].

[165] *EDF (Services) Ltd v Romania (Procedural Order No 3)* at [47], where the Tribunal said art 34 (7) of the ICSID Arbitration Rules reflects this discretion as a tribunal is "the judge of the admissibility of any evidence adduced…" but limitations on that discretion "found confirmation" in art 9(2)(g) of the *IBA Rules*.

For example, one ICSID Tribunal faced with the situation where the Respondent wished to use expert evidence from a previous, unpublished arbitration.[166] To decide on its admissibility, the Tribunal balanced the Respondent's right to defence with "the Claimant's right to equality of arms", against "the general interest of ensuring the integrity of the procedure and in particular the finding of the truth."[167] The Tribunal held that the expert evidence came with an unsurmountable risk of being used out of context "against which Claimants would have no equal means of defence."[168] In another example, the Claimants did not present their witnesses and experts to the cross-examination hearing.[169] Without the ability to test the witnesses, the Tribunal could not proceed on the basis that the experts would have proved the conclusions alleged by the Claimant. To do so would have caused a serious procedural inequality, as would reliance on the any evidence introduced indirectly through cross-examination of the Respondent's experts.[170] The Tribunal therefore did not rely on any of that evidence, as the Claimant's non-presentation of the witnesses had "…imposed serious probative limitations on the Tribunal" that it could not overcome "…without breaching the procedural equilibrium that should exist between the parties."[171]

A duty to arbitrate in good faith can be inferred from the Vienna Convention on the Law of Treaties.[172] Tribunals are "… entitled to the cooperation of the parties"[173] in matters of evidence and "… parties do have a duty to collaborate in doing their best

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[166] *Giovanna a Beccara and others v Argentina (Procedural Order No 3 - Confidentiality Order)*, ICSID ARB/07/5, 27 January 2010 at [147].

[167] At [143].

[168] At [147].

[169] *Metalpar SA and Buen Aire SA v Argentine Republic (Award on the Merits)* ICSID ARB/03/5, 6 June 2008 at [153].

[170] At [153]-[154].

[171] At [155].

[172] Thomas W Wälde "Chapter 8: 'Equality of Arms' in Investment Arbitration: Procedural Challenges" in Katia Yannaca-Small (ed) *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press, London, 2010) 161 at 161; Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 29 April 1970, entered into force 27 January 1980), preamble and art 26.

[173] *The Rompetrol Group NV v Romania (Award)*, above n 164, at [181]; Mani *International Adjudication*, above n 8, at 198.

to submit to the adjudicatory body all the evidence in their possession."[174] However difficulties arise when parties understand this duty differently. For example, when a State submits that it may justifiably withhold evidence from the tribunal. Competing conceptions of the scope of acceptable privilege claims can lead to procedural inequalities between the parties. Underpinning these concerns is a fear of abuse of privilege to skew the documentary discovery process in one's favour. Unjustified privilege claims not only frustrate the effectiveness of the dispute settlement mechanism, but also threaten the system's broader legitimacy. This section will examine privilege claims and their effect on the equality of the parties.

A Claiming Privilege

While the existence of privilege generally is accepted, its scope and exceptions are not.[175] Issues of procedural fairness arise where the law relating to privilege differs between jurisdictions. A common example is where the scope of solicitor-client privilege differs between the domestic law of the parties. In such situations, tribunals are concerned that application of different standards will result in equality of treatment and have at times held that both parties should benefit from the broader protection.[176] Concerns for equality of treatment follow from the application of inconsistent standards between the parties, not the mere fact that one party's privilege claim is upheld while the claim of the other party is denied.[177] Procedural equality issues thus readily arise when a form of privilege is only available to one of the parties.[178] Arbitral statutes rarely expressly provide for privilege claims thus, in the absence of the adoption of guidelines such as the International Bar Association

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[174] *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* WT/DS56/R, 25 November 1997 (Report of the Panel) at [6.58].

[175] Jeffrey Waincymer *Procedure and Evidence in International Arbitration* (Kluwer Law International, The Netherlands, 2012) at [10.173].

[176] See for example *Poštová banka, a.s and Istrokapital SE v Hellenic Republic (Procedural Order No 6) (redacted)* ICSID Case No ARB/13/8, 20 July 2014 at [15]-[16]; Klaus Peter Berger "Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion" (2006) 22 Arbitration International 501 at 518; Richard M Mosk and Tom Ginsburg "Evidentiary Privileges in International Arbitration" (2001) 50 International and Comparative Law Quarterly 345 at 384.

[177] *Azurix Corp v Argentine Republic (Decision on the Application for Annulment of the Argentine Republic)*, above n 26, at [233].

[178] Berger, above n 176, at 516, describing the potential for the application of different evidentiary privileges to run counter to the parties' fundamental "right to be heard as the Magna Charta of arbitral procedure".

Rules on Evidence ('IBA Rules'), these issues fall to be determined at the tribunal's discretion.[179] The IBA Rules are non-binding, but are used widely as guidance in investment arbitrations and are considered to have high persuasive value.[180] In addition to the specific grounds for non-production, the IBA Rules provide that the tribunal shall exclude evidence for compelling reasons of "procedural economy, proportionality, fairness or equality of the parties".[181] This "catch-all provision" was designed to ensure the equality of the parties and recognises that strict adherence to the rules may be inappropriate in some situations.[182]

1 State Secret Privilege

It is not uncommon for States to refuse document production on the basis of secret privilege.[183] Arbitral tribunals have recognised the ability of States to claim State secret privilege to justify non-disclosure of evidence.[184] The exact scope of this privilege is, however, unclear.[185] This privilege is not recognised in the ICSID Convention or the UNCITRAL Rules, but is reflected in the IBA Rules.[186] To successfully claim privilege under these Rules, the tribunal must find the reasons to be "compelling". State secret privilege is an additional procedural privilege uniquely available to respondent States.[187] This creates potentially serious issues for the equality between the parties.

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[179] Waincymer *Procedure and Evidence in International Arbitration*, above n 175, at [10.17.3].

[180] As discussed in *Railroad Development Corporation v Republic of Guatemala (Decision on Provisional Measures)* ICSID ARB/07/23, 26 August 2008 at [32]; Nathan O'Malley *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa UK Limited, London, 2012) at ix.

[181] *IBA Rules on the Taking of Evidence in International Arbitration* (International Bar Association, 2010), art 9(2)(g) ["*IBA Rules*"].

[182] Christina L Beharry "Objections to Requests for Documents in International Arbitration: Emerging Practices from NAFTA Chapter 11" (2012) 27 ICSID Review 33 at 59, referring to the IBA Working Party Commentary on the revised Rules.

[183] Schreuer et al *The ICSID Convention*, above n 22, at 658.

[184] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania (Procedural Order No 2)* ICSID ARB/05/22, 24 May 2006 at 9; *Pope and Talbolt Inc v Government of Canada (Ruling on Claim of Crown Privilege)* (2000) 7 ICSID Rep 99 at [14].

[185] *United Parcel Service of America Inc v Government of Canada (Decision of the Tribunal relating to Canada's Claim of Cabinet Privilege)* UNCITRAL, 8 October 2004 at [11]; O'Malley *Rules of Evidence in International Arbitration*, above n 180, at [9.93].

[186] *IBA Rules*, above n 181, art 9(2)(f).

[187] Mosk and Ginsburg "Evidentiary Privileges in International Arbitration", above n 176, at 363.

In one ICSID arbitration, the Respondent State objected to the production of Cabinet documents on the basis of "public interest immunity", relying on provisions of the Tanzanian Constitution.[188] The Claimant submitted that such a self-censoring exclusion would be an affront to the overriding principle of equality.[189] The Tribunal accepted that the doctrine of public interest immunity had no applicable equivalent in investment arbitration and held that permitting non-disclosure on that basis would create an unacceptable imbalance between the parties.[190] However, the Tribunal concluded that it was open to Tanzania to claim State secret privilege. The Tribunal emphasised that "the fact that a document could be adverse to the position of the Respondent in this arbitration is not sufficient to qualify the document as politically sensitive."[191] This indicates the central concern of this one-sided ability to claim privilege: that States may use it to hide material prejudicial to their case, with little opportunity for the claimant to challenge the State's own classification of the evidence.

Cabinet confidentiality and deliberative process privilege are considered as two separate, subsidiary components of State secret privilege.[192] Canada has refused to produce documents on the basis that it would breach Cabinet confidence.[193] Privilege is only granted when the Tribunal can sufficiently identify the documents as deserving of protection, and not on the basis of a mere assertion by the State.[194] To simply have allowed Canada to rely on its domestic law relating to Cabinet confidence would have placed the other party in an unfairly disadvantaged position, contrary to the overriding principle of equality of treatment.[195] In a different arbitration, Canada claimed Cabinet confidence privilege in regards to 377 documents. It explained that the prohibition on disclosure of Minister's discussions was essential to the Canadian political system.[196] The Claimant accepted the Canada could claim State secret privilege where the release of information would compromise national security, but objected to a wider conception of State secret

[188] *Biwater Gauff*, above n 184, at 4.

[189] At 7.

[190] At 9.

[191] At 9.

[192] O'Malley *Rules of Evidence in International Arbitration*, above n 180, at [9.99].

[193] *Pope and Talbolt Inc*, above n 184, at [13].

[194] At [14].

[195] At [15].

[196] *United Parcel Service of America*, above n 185, at [1].

privilege.[197] The Tribunal questioned the scope of the privilege but did not attempt to define the concept's boundaries.[198] It held that deliberative processes at high levels of government fell within the privilege, as those processes cannot function completely in the open.[199] This has been confirmed in later arbitrations. To claim the privilege, the evidence does not need to be formally classified as secret, as "… the purpose of the privilege is quite evidently to prevent disclosure of documents containing information which is sensitive by its nature."[200] The protection offered under the relevant domestic law, while not directly applicable, demonstrated that the documents were covered by the deliberative process privilege which existed at international law.[201]

2 Balancing Competing Interests

States are in a different position to private companies and must take wider public interests into account when considering requests to produce evidence.[202] The broader privilege cannot simply be extended to claimants, as it is only available to States. Nor is balance achieved through the possibility of claimants engaging in "unauthorised discovery" through obtaining information about the respondent State under official information laws,[203] or using confidential diplomatic cables made public through WikiLeaks.[204] This is because it is no answer to a breach of fair process to say that both parties suffered equal disadvantage.[205] These possibilities,

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[197] At [8].

[198] At [11].

[199] At [11].

[200] *Merrill & Ring Forestry LP v Government of Canada (Decision of the Tribunal on Production of Documents)* NAFTA, 18 July 2008 at [18].

[201] At [17]-[18].

[202] Beharry "Objections to Requests for Documents in International Arbitration", above n 182, at 59.

[203] *Duke Energy International Peru Investments No 1 Ltd v Republic of Peru (Decision on Jurisdiction)* ICSID ARB/03/28 (not public) 1 February 2006, as cited in Schreuer et al *The ICSID Convention*, above n 22, at 655.

[204] Jessica O Ireton "The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of WikiLeaks Cables as Evidence" (2014) 30 ICSID Review 231 at 240, citing *OPIC Karimum Corporation v Bolivarian Republic of Venezuela (Decision on the Proposal to Disqualify Professor Philippe Sands)* ICSID ARB/10/14, 5 March 2011; *Kılıç¸ Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v Turkmenistan and (Award)* ICSID ARB/10/1, 2 July 2013.

[205] *Fraport v The Philippines (Annulment Proceedings)*, above n 35, at [202].

more likely to be useful to the claimant,[206] further illustrate how evidentiary procedure can raise issues for equality between the parties.

Tribunals must act fairly when faced with a claim of State secret privilege. Tribunals have consistently held that such a privilege can only be asserted "in respect of sufficiently identified documents together with a clear explanation about the reasons for claiming such privilege."[207] Practically, the accepted means of dealing with this issue is a document-by-document approach.[208] This is where the asserting party provides a privilege log describing the author, type of document, general subject-matter description and recipients of each document.[209] Another mechanism to facilitate this process is the use of a "Redfern Schedule" which, in a series of columns, contains: a description of the document sought by Party B, justifications for non-disclosure by Party A, objections to the privilege claim by Party B, and the tribunal's decision on each category. The claimed grounds for the privilege needs to be explained to enable the other side to comment on the matter in an informed way. This flows from the principle of equality of treatment.[210] The State must show how it has weighed the interests in confidentiality against the competing public interest in disclosure.[211] This distinguishes State secret privilege from solicitor-client privilege. The latter is an unqualified right in the sense that it is not limited by the weighing of interests. By contrast, State secret privilege will only be applied where the balance in favour of non-disclosure are compelling as compared to the other interests.[212]

The particular needs of the State must be weighed against the needs of the claimant to have access to evidence in order to make its case. It must be remembered that "…

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[206] However States have introduced such evidence, see *Kılıç¸ Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v Turkmenistan and (Award)*, above n 204.

[207] *Merrill & Ring Forestry LP v Government of Canada (Decision of the Tribunal on Production of Documents)*, above n 200, at [19]; *Biwater Gauff*, above n 184, at 9.

[208] *Merrill & Ring Forestry LP*, at [19]; citing *Canada - Measures Affecting the Export of Civilian Aircraft WT/DS70/AB/R (Report of the Appellate Body)* 2 August 1999.

[209] See for example *William Ralph Clayton et al v Government of Canada (Procedural Order No 7)* PCA 2009-04, 20 November 2009.

[210] *Merrill & Ring Forestry LP v Government of Canada (Decision of the Tribunal on Production of Documents)*, above n 200, at [21].

[211] *United Parcel Service of America*, above n 185, at [10].

[212] O'Malley *Rules of Evidence in International Arbitration*, above n 180, at [9.10]; *Vito G Gallo v Government of Canada (Procedural Order No 3)* NAFTA/UNICTRAL, 8 April 2009 at [53]; This is reflected in the language of art 9 of the *IBA Rules*, where the requirement for a tribunal to find "compelling" grounds for legal privilege applies only to commercial confidentiality and institutional or political sensitivity.

the purpose of document production is to provide investors with a reasonable opportunity to obtain relevant and material documents beyond those on public record."[213] This balance also includes regard to the tribunal's obligation to ensure equality of the parties.[214] The need to balance will become more prevalent the further one gets from the core of State secret privilege, such as military secrets, which may not require any such weighing exercise.[215] For instance, the need to protect the "vigorous deliberative process" is less relevant to documents prepared many years previously.[216] A claim of deliberative process privilege is also less likely to be upheld where the documents contain mere details of an administrative process, as opposed to a record of the deliberations on policy decisions.[217] Documents that are prepared for high-level meetings but do not record the discussions are less likely to be considered sufficiently serious, as with documents that would be released under domestic freedom of information legislation. There is no clear standard by which to determine whether or not a claim of State secret privilege is compelling. On some occasions it may be necessary for the tribunal to see the evidence before making its determination rather than relying solely on the privilege log. This raises its own issues, which will be returned to shortly.

3 Commercial Confidentiality

The IBA Rules also provide the ability to claim privilege for reasons of commercial confidentiality, which could be relied upon by both by claimants and respondent States.[218] This is particularly so in relation to business transactions with third parties.[219] Equally in WTO dispute settlement, access to commercially sensitive information may be critical to enable parties to effectively make their case.[220] The

[213] *William Ralph Clayton et al v Government of Canada (Procedural Order No 8)* PCA 2009-04, 25 November 2009 at 2.

[214] O'Malley *Rules of Evidence in International Arbitration*, above n 180, at [9.94].

[215] *United Parcel Service of America*, above n 185, at [9].

[216] At [12].

[217] *Glamis Gold v United States of America (Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege)* UNCITRAL, 17 December 2005 at [36].

[218] *IBA Rules*, above n 181, at [art 9(2)(e)].

[219] *Merrill & Ring Forestry LP v Government of Canada (Decision of the Tribunal on Production of Documents)*, above n 200, at [31].

[220] Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization*, above n 142, at 251.

DSU provides that consultations, panel proceedings and Appellate Body proceedings shall be confidential.[221] A party cannot however submit full submissions to the panel but redacted versions to the other side.[222] If a Member Country does not believe the standard confidentiality procedures will be sufficient to protect confidential information, they may request additional procedures. The requesting party must in these circumstances " … clearly explain to the Panel what kind of information it may be unable to obtain and disclose but for the adoption of Business Confidential Information procedures, in order to enable the Panel to assess the need for such BCI procedures."[223] An explanation of the insufficiency of the existing confidentiality proceedings is necessary given the burden associated with the additional procedures. If the information could not reasonably be expected to be disclosed in the absence of additional procedures, panels must accommodate a party's concerns.[224] This is because failing to do so may affect that party's due process rights.[225]

Canada, for example, has sought to justify its non-production on this basis.[226] Canada refused to submit the information despite the adoption of procedures which included storing the information in a locked room at the Geneva mission with restrictions on access and destruction of the information once the panel had used it.[227] The Appellate Body found this submission to be "less than persuasive" and inconsistent with the Panel's authority to determine its own procedures.[228] There has also been concerns that industry representatives within government delegations to the WTO would be privy to the confidential information disclosed in proceedings and thus gain an unfair competitive advantage.[229] However, Member Countries are

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[221] DSU, arts 4.6 and 17.10.

[222] *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia* WT/DS312/R, 28 October 2005 (Report of the Panel) at [7.17].

[223] *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products: Recourse to Article 215 of the DSU by New Zealand and the United States* WT/DS103/RW, 11 July 2001 (Report of the Panel) at [2.19].

[224] At [2.18].

[225] At [2.18].

[226] *Canada - Measures Affecting the Export of Civilian Aircraft* WT/DS70/AB/R (Report of the Appellate Body*)*, above n 208, at [195].

[227] *Canada – Measures Affecting the Export of Civilian Aircraft* WT/DS70/R (Report of the Panel) 14 April 1999 at [9.57[-[9.69].

[228] *Canada - Measures Affecting the Export of Civilian Aircraft* WT/DS70/AB/R (Report of the Appellate Body), above n 208, at [195]-[196].

[229] *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia* WT/DS312/R (Report of the Panel), above n 222, at [7 10].

entitled to determine the composition of their own delegations and are responsible for their compliance with the provisions of the DSU.[230] In another case, Chile refused to produce a study for reasons of confidential business information.[231] Chile submitted that it could not be compelled to make the report available and neither could its industry. The Panel noted that "… parties and their industries should not be able to withhold relevant evidence and expect panels to view it favourably."[232]

WTO have exhibited a willingness to be flexible when faced with the refusal by a party to produce evidence in their possession. For example, because of Argentina's refusal to produce certain customs documentation, the United States submitted 90 additional documents as examples, just days before the second panel hearing. Argentina requested that the evidence be disregarded as untimely.[233] In response, the Panel noted that the rules did not prohibit the submission of additional evidence and that it would be guided by due process and the need to ensure "… that all parties to a dispute are given all the opportunities to defend their position to the fullest extent possible."[234] The United States argued that the Panel should prioritise submissions of formal documentation over the oral denials advanced by Argentina, and the disallowance of its evidence would "... inhibit the truth-testing process".[235] The evidence was accepted on the condition of providing Argentina two weeks to comment on the documentation. A similar flexibility has at times been exhibited by ICSID tribunals, for example, receiving evidence which was submitted late, but leaving it unread under seal until if or when the tribunal needed to consider that particular evidence.[236]

B Review of Contested Privilege Claims by an Independent Expert

Where the legitimacy of a party's objection to the production of evidence can only be determined through a review of that evidence, tribunals may appoint an

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[230] At [7.11], citing paragraph 15 of the Panel Working Procedures.

[231] *Chile – Taxes on Alcoholic Beverages* WT/DS87/R;WT/DS110/R, 15 June 1999 (Report of the Panel) at [7.66] in footnote 390.

[232] At [7.66] in footnote 390.

[233] *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* WT/DS56/R (Report of the Panel), above n 174, at [6 55].

[234] At [6.55].

[235] At [3.50].

[236] *Eastern Sugar BV (Netherlands) v Czech Republic (Partial Award)* SCC 088/2004, 27 March 2007 at [72].

independent expert to conduct this review.[237] The expert makes a recommendation but does not make the decision for the tribunal. Without the consent of the parties, the "outsourcing" of such an important procedural function may be an improper delegation of the tribunal's responsibilities.[238] When used in inter-State arbitration, the expert has been required to review the objecting party's submissions.[239] However, it seems that parties do not have an opportunity to comment on the expert's recommendations as these are made *in camera* to the tribunal.[240] To the extent the tribunal upholds the expert's recommendation of privilege, the information concerned is not disclosed to the tribunal or the other party. Submitting evidence to the tribunal without also copying in the other side can be seen as a serious procedural irregularity. This is because the equality of the parties generally includes the right to access all evidence produced by the other party during the proceedings.[241] Removing the tribunal from the evidence review process is the better approach because it lessens the risk of unequal treatment of the parties. If a tribunal reviews a document and upholds the privilege, it is difficult for the tribunal members to then "unsee" that evidence. The requesting party would never access the evidence and would be unable to challenge the tribunal's impermissible reliance on the privileged evidence.

The ICSID Tribunal in the *Piero Foresti* arbitration used this independent review process.[242] The third-party expert concluded that some of the Claimant's redactions were appropriate, while other parts of the information needed to be disclosed to the Respondent, a finding which the Claimant respected. All other issues as to document production were resolved without the assistance of the Tribunal. However, where extremely sensitive information is involved, negotiating a compromise without the tribunal's involvement might not be possible.[243] The use of a third-party review

[237] *IBA Rules*, above n 181, art 38; Waincymer *Procedure and Evidence in International Arbitration*, above n 175, at [11.8.1].

[238] O'Malley *Rules of Evidence in International Arbitration*, above n 180, at [3.85].

[239] *Guyana v Suriname (Procedural Order No 1 Access to Documents)* UNCLOS/PCA, 18 July 2005 at [5].

[240] O'Malley *Rules of Evidence in International Arbitration*, above n 180, at [3.85].

[241] At [3.60] and [3.83]; See for example *TCW Group Inc and Dominican Energy Holdings LP v Dominican Republic (Procedural Order No 2)* UNCITRAL, 15 August 2008 at [2.2].

[242] *Piero Foresti, Laura de Carli & Others v Republic of South Africa (Award)* ICSID ARB(AF)/07/1, 4 August 2010 at [14].

[243] Which is suggested in the *IBA Rules*, above n 181, art 3(6) where parties may be invited to consult in order to resolve an objection.

process for contested privilege claims avoids the disequilibrium caused by one party's effective self-censorship or *ex parte* communication of evidence to the tribunal.

C Logistical Issues

Beyond legal questions as to the appropriate scope of privilege, there are also serious practical issues which may undermine the equality of the parties. Document production can be a resource-intensive exercise. While parties elect arbitration to avoid normal court processes and the attendant extensive document production, the lack of a contractual relationship between the parties "… militates in favour of some greater receptiveness on the part of the Tribunal for document production requests."[244]

A claimant has the advantage of taking the time to prepare its case before it formally makes it claim. This process can last several months and involves research, the gathering of relevant evidence, and development of a litigation strategy.[245] A private company in investment arbitration has the advantaging of readying itself for a substantive hearing before it even makes it claim known, whereas the respondent State may not even be aware of all the underlying facts at the time the claim is made.[246] It is at this point that the State is commonly faced with important questions, such as which government department will take responsibility for the file and which budget will cover the associated costs.[247] Many States might face logistical hurdles in completing document discovery because they lack the necessary human resources and a centralised document storage system.[248] By contrast, private companies often employ the latest systems in addition to dedicated personnel.

Further, a State may face challenges in producing documents in the possession of local authorities over which it has no control.[249] The level of control States are

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[244] *Glamis Gold v United States of America (Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege)*, above n 217, footnote 1.

[245] Giorgetti and Jeremy K Sharpe "Chapter 3: Representing a Respondent State in Investment Arbitration" in *Litigating International Investment Disputes: A Practitioner's Guide* (Brill Nijhoff, Leiden, 2014) 41 at 44.

[246] At 44.

[247] At 44.

[248] At 69.

[249] At 68.

presumed to have over government agencies or provincial government bodies is an unsettled question.[250] A State may also face logistical difficulties in obtaining documents from various officials and government departments.[251] This may even include problems obtaining documents from various government lawyers, but tribunals will not necessarily have much regard to such claims.[252] These logistical issues are not necessarily limited to developing countries. Canada was granted, despite the Claimant's objections, an extension and the ability to stagger production of documents from various government entities. This was because Canada was unable to outsource the task due to the sensitive nature of the content; the number of entities involved, and the procedural complications involved in dealing with two levels of government.[253] In this case, the Tribunal did not find that the Claimant's due process rights had been affected by the staggered production, as the Claimant was able to address any new documents in its Reply Memorial.[254]

Parties to an international arbitration are expected to obtain documents from related entities, and provide evidence of their best efforts to do so in order to substantiate any claim that certain evidence is *not* under its control.[255] In assessing whether a document is within the control of a party, tribunals should "look to the practicalities and not the strict legal definition".[256] A party may object to a disclosure request if it would impose an unreasonable burden of time or cost, but "unreasonably burdensome" is a variable standard. In deciding such matters tribunals should not be afraid to employ common sense and the most important consideration should be proportionality, presumably taking into account the importance of the evidence sought.[257] The low capability of government agencies in developing countries to produce all the necessary documentation may be taken into account when the

[250] *Mesa Power Group LLC v Government of Canada (Procedural Order No 5)* PCA Case No 2012-17, 23 August 2013 at [23].

[251] Giorgetti and Sharpe, above n 245, at 69.

[252] *OPIC Karimum Corporation v Bolivarian Republic of Venezuela (Award)* ICSID ARB/10/14, 28 May 2013 at [142].

[253] *Mesa Power Group LLC v Government of Canada (Procedural Order No 5)*, above n 250, at [21].

[254] At [25].

[255] *Tidewater Inc et al v Bolivarian Republic of Venezuela (Procedural Order No 1)* ICSID ARB/10/5, 29 March 2011 at [21]; *William Ralph Clayton et al v Government of Canada (Procedural Order No 8)*, above n 213, at 3.

[256] O'Malley *Rules of Evidence in International Arbitration*, above n 180, at [3.50], citing *CME Czech Republic BV (The Netherlands) v Czech Republic (Final Award on Damages)* (2003) 9 ICSID Rep 264 at [65].

[257] O'Malley *Rules of Evidence in International Arbitration*, above n 180, at [9.66]-[9.73].

tribunal allocates the burden of proof between the parties.[258] Tribunals have indicated a willingness to extend some leniency to developing countries when it comes to procedural matters. For example, allowing a six-month extension for the filing of a Counter-Memorial due to special political circumstances.[259] Tribunals have "sympathetically" noted the Respondent's concern that its document production burden was far greater and its need for requisite time to discharge its burden, but left it to the parties to agree on an extended deadline.[260] Tribunals have exhibited some awareness of the difficulties on respondents in complying with all-encompassing document requests, rejecting the notion that such a measure would be a "merely ministerial task for the government".[261] Tribunals may also take into account the legal culture of the party and thus their relative familiarity with the document disclosure process.[262] Tribunals generally excuse a party from having to produce evidence when that party can show that the requested evidence has been lost due to civil strife or natural disaster.[263] This idea of taking into account the actual context of the parties to ensure equity, rather than formal equality, will be returned to in the final part of this paper in considering the costs of international arbitration.

IV Exercise of State Coercive Power

A grave inequality may occur when a State uses its coercive powers to gain a litigation advantage. For example, through the intimidation of potential witnesses or a police search of the claimant's premises in order to obtain evidence. This situation blurs the line between the dual roles of the sovereign as both contracting party and controller of the apparatus of government.[264] It is of course possible for claimant companies to act fraudulently or otherwise in bad faith in the conduct of

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[258] *Amco Asia Corporation and others v Republic of Indonesia (Ad hoc Committee Decision on the Application for Annulment) (English)* (1986) 1 ICSID Rep 509 at [236].

[259] *SARL Benvenuti & Bonfant v People's Republic of the Congo (Award)* (1980) 1 ICSID Rep 335, cited in Schreuer et al *The ICSID Convention*, above n 22, at 650.

[260] *Lone Pine Resources Inc v Canada (Procedural Order On Two Disputed Issues)* NAFTA/UNICTRAL, 6 February 2015 at [26].

[261] *Railroad Development Corporation v Republic of Guatemala (Decision on Provisional Measures)*, above n 180, at [33].

[262] *Noble Energy Inc, MachalaPower Cia Ltda v Republic of Ecuador, Consejo Nacional de Electricidad (Decision on Jurisdiction)* ICSID ARB/05/12, 5 March 2008 at [31]-[32].

[263] O'Malley *Rules of Evidence in International Arbitration*, above n 180, at [9.82].

[264] Wälde "Equality of Arms in Investment Arbitration", above n 172, at 162.

arbitral proceedings.[265] The equality of the parties principle requires that evidence obtained by a claimant through trespassing and rummaging through the respondent's dumpsters to be held inadmissible.[266] However, the ability of a State to undertake such actions is of a different order than that of private parties.[267] Although the State has greater coercive powers, it also has responsibilities to govern, which includes the investigation of crime. For this reason, tribunals have shown deference to States' domestic criminal enforcement powers, even if their exercise has disadvantaged the claimants' case.[268]

In one case, the Turkish Government intercepted 2,000 communications between the Claimant and its counsel and witnesses.[269] Turkey submitted it had "an undeniable entitlement to conduct investigation into crime" and that no information had been shared with officials representing the Republic in the arbitration.[270] The Tribunal described the allegations as striking at the principles which "lie at the very heart of the ICSID arbitral process."[271] The Tribunal ordered the destruction of all arbitration-related emails within 30 days. If that information was needed for the criminal investigation, the Republic had to ensure that it would not be made available to the people involved in the defence of the arbitration.[272] The Tribunal held that a State's right to investigate crime could not be exercised without regard to its duties in an ICSID arbitration.[273]

In another case, as the arbitration began, the Respondent's security and intelligence agency conducted raids on the Claimant's offices and seized a considerable sum of evidence as well as allegedly "interrogating" staff.[274] The Tribunal found it necessary to formally record that the established duty of a party to an arbitration to act in good faith includes a duty avoid harassment of the other party.[275] The Tribunal

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[265] At 162.

[266] *Methanex Corporation v United States of America (Final Award of the Tribunal on Jurisdiction and Merits)* NAFTA/UNCITRAL, 3 August 2005 at [54]-[55].

[267] Wälde, above n 172, at 163.

[268] O'Malley *Rules of Evidence in International Arbitration*, above n 180, at [7 53].

[269] *Libananco Holdings Co Limited v Republic of Turkey (Decision on Preliminary Issues)* ICSID ARB/06/8, 23 June 2008 at [72].

[270] At [75].

[271] At [78].

[272] At 41–42, Orders 1.1.3 and 1.2 .

[273] At [79].

[274] *Caratube International Oil Company LLP v Republic of Kazakhstan (Decision Regarding Claimant's Application for Provisional Measures)* ICSID ARB/08/12, 4 December 2014 at [19].

[275] At [119]-[120].

noted that criminal investigations and other similar State measures require "special considerations" as they are "a most obvious and undisputed part of the sovereign right of a State to implement and enforce its national law on its territory".[276] Because of this, "a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a State."[277] The Tribunal had to weigh this against "the particular importance of procedural equality between the parties in an arbitration proceeding and that all parties can use and rely on the same evidence".[278] To this end, during the hearing, the Respondent agreed to preserve all the seized material and to allow the Claimants access and the ability to copy all documents on request.[279] The Tribunal held that provisional measures were not appropriate as the criminal investigation did not preclude the Claimant's procedural right to continue with the arbitration.[280]

States may use the institution of criminal proceedings against the claimant as part of a defence strategy.[281] In another case, one of the Claimants was targeted specifically because of its claim under the bilateral investment treaty. Regardless of the legitimacy of the domestic criminal proceedings, their very close link to the arbitration prevented the Claimants from accessing witnesses that could be central to their case.[282] As each disputing party owes to the other a legal duty to respect the equality of arms, it is wrong for a State to use its coercive power to spy on the

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[276] At [135]-[136].

[277] At [137].

[278] *Caratube International Oil Company LLP v Republic of Kazakhstan (Decision Regarding Claimant's Application for Provisional Measures)*, above n 274, at [100].

[279] At [101].

[280] At [139].

[281] *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia (Decision on Provisional Measures)* ICSID ARB/06/2, 26 February 2010 at [122]; See also *City Oriente Limited v Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador) (Decision on Provisional Measures) (not public)* ICSID ARB/06/21, 19 November 2007 at [64]; cited in Wälde "Equality of Arms in Investment Arbitration", above n 172, at footnote 29; See also O'Malley *Rules of Evidence in International Arbitration*, above n 180 citing *European Investor v Asian State (Procedural Order No 3)* UNICTRAL (unpublished).

[282] *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia (Decision on Provisional Measures)*, above n 281, at [163]-[164]; *Caratube International Oil Company LLP & Mr Devincci Salah Hourani v Republic of Kazakhstan (Decision on the Claimant's Request for Provisional Measures)*, above n 274, at [40], this direct link is part of a "particularly high threshold" required to order a stay or criminal proceedings.

Claimant in order to gather evidence for the arbitration. The ability for States to abuse their sovereign powers in this way illustrates that the David-Goliath relationship has not been completely replaced by a procedurally-level playing field.[283]

V Shifting the Balance

The previous sections have highlighted the challenges tribunals face in maintaining the true equality of the parties in investment arbitration and WTO dispute settlement. This final Part focuses on what tribunals can do to remedy the related procedural issues. The first section looks at the inherent powers of international tribunals generally, before discussing certain examples. These are the ability to draw adverse inferences and shift the burden of proof, and to manage the costs of the proceedings. The need for WTO tribunals to give greater weight to the special and differential treatment provisions is also discussed.

A Inherent Powers of International Courts and Tribunals

This paper advocates for tribunals to apply the fundamental principle of equality of the parties in a broader and more substantive way. If tribunals were to make procedural orders in this regard, it is necessary to first locate the authority for so doing. The basis for the tribunal to act stems from the tribunals' inherent powers but, importantly, is also found in the respective constitutive instruments. The International Court of Justice has observed these powers derive from "… the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded."[284] One example is *la compétence de la compétence*.[285] Tribunals possess the inherent

[283] Bockstiegel "Enterprise v State: The New David and Goliath?", above n 54, at 104.

[284] *Nuclear Tests Case (New Zealand v France) (Judgment)* ICJ Rep 1974 457 at 463; *Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections)* [1963] ICJ Rep at 29; See also Paola Gaeta "Inherent Powers of International Courts and Tribunals" in Lal Chand Vohrah and others (eds) *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International, The Netherlands, 2003) 353.

[285] Kenneth S Carlston *The Process of International Arbitration* (Columbia University Press, New York, 1946) citing Opinion of Commissioner Gore in the case of the *Betsey* before the Mixed Commission under Article 7 of the Jay Treaty 1794 between the United States and Great Britain, 4 Moore, Intl Adj (1931) 183, 186; *Rio Grande Irrigation and Land Co Ltd (Great Britain) v United*

power to formulate procedural rules to address the circumstances as they arise.[286] It has been suggested that inherent powers have their roots in a "multiplicity of partly overlapping sources".[287] These are: the "identity" of judicial bodies; the function of judicial bodies, implied powers, and the general principles of law.[288] The functional justification is most convincing and captures the essence of inherent powers, as articulated by the International Court of Justice. Inherent powers may be express or implied in a constitutive instrument, thus the doctrine of implied powers explains the expression of the inherent powers, but not their origin.[289] The broader non-codified power is therefore not removed by a different or narrower formulation, because the treaty is only partially *declaratory* of the tribunals' inherent powers.[290]

The equality of the parties has been said to be an unanimously agreed characteristic of a court.[291] Thus in creating courts at the international level, States were consenting to the importation of the same powers necessary for the fulfilment of the judicial function domestically, including the equality of the parties.[292] Inherent powers are derived from expressly conferred functions, and therefore are fundamentally linked with State consent. The functional justification recognises the limitation of inherent powers in that the scope of the function determines the scope of the concomitant inherent powers.[293] The question then arises whether or how States may limit international courts' inherent jurisdiction. If a court's statute

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States (1910) American and British Claims Arbitration under the Special Agreement of August 18, 1910, Report of Fred K Nielsen (1926) 336, 342; *Interpretation of the Greco-Turkish Agreement of December 1st 1926 (Advisory Opinion)* [1928] PCIJ Series B No 16 at 20.

[286] Carlston, above n 285, at 30; The need for this discretion was recognised by the Institut de Droit International in 1877 in *Projet de règlement pour la procédure arbitrale internationale 1 Annuaire de l' Institut de Droit International 126* (1877), art 15.

[287] Martins Paparinskis "Chapter 2: Inherent Powers of ICSID Tribunals: Broad and Rightly So" in Ian A Laird and Todd J Weiler (eds) *Investment Treaty Arbitration and International Law* (JurisNet LLC, New York, 2012) 11 at 12.

[288] Brown *A Common Law of International Adjudication*, above n 27, at 67.

[289] Paparinskis, above n 287, at 14.

[290] At 23–25.

[291] Hermann Mosler "Introduction: Problems and Tasks of International Judicial and Arbitral Settlement of Disputes Fifty Years after the Founding of the World Court" in *Judicial Settlement of International Disputes: An International Symposium* (SpringerVerlag and Max Planck Institute for Comparative Public Law and International Law, Berlin, 1974) at 9.

[292] Hugh Thirlway "Dilemma or Chimera? Admissibility of Illegally Obtained Evidence in International Adjudication" (1984) 78 American Journal of International Law 622 at 626.

[293] Brown *A Common Law of International Adjudication*, above n 27, at 78–79.

provides for a lesser power, "…it is self-contradictory to argue that, by creating a court, they implicitly consented to a wider power."[294] Express terms in a court's constitutive instrument can displace inherent powers.[295] Tribunals have "no authority to exercise such power in opposition to a *clear directive* in the Arbitration Rules", however what constitutes a "clear directive" has been interpreted as requiring a high degree of specificity.[296]

ICSID tribunals have interpreted their inherent powers broadly and this is the preferred approach.[297] ICSID tribunals, "as a judicial formation governed by public international law … have an inherent power to take measures to preserve the integrity of its proceedings."[298] This ability has also been described as "residual procedural powers"[299] and the "exercise of its general procedural powers" to resolve issues where the Convention and Rules are silent.[300] While invocation of these powers is not reliant on codification, their use is perhaps fortified by the "textual foothold" contained in Article 44 of the Convention.[301]

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[294] Hugh Thirlway "The Law and Procedure of the International Court of Justice 1960-1989: Part Nine" (1998) 68 BYIL 1 at 21.

[295] Brown *A Common Law of International Adjudication*, above n 27, at 80; *Nottebohm Case (Liechtenstein v Guatemala) (Preliminary Objection)* ICJ Rep 1953 111 at 119–120, where the Court recognises that while *la compétence de la compétence* was a power which came from the Court's judicial character, this was "in the absence of any agreement to the contrary".

[296] *Universal SA v Argentine Republic (Order in Response to a Petition for Transparency and Participation as Amicus Curiae)* ICSID ARB/03/19, 19 May 2005 at [6].

[297] See generally Paparinskis "Inherent Powers of ICSID Tribunals", above n 287.

[298] *Hrvatska Elektroprivreda dd v Republic of Slovenia (Order Concerning the Participation of Counsel)* ICSID ARB/05/24, 6 May 2008 at [33]; also citing *Prosecutor v Beqa Beqaj (Judgment on Contempt Allegations)* ICTY Trial Chamber I IT-03-66-T-R77, 27 May 2005 at [9]-[13]; and to ensure compliance with the parties' obligation to arbitrate fairly and in good faith, see *Libananco Holdings*, above n 269, at [78].

[299] *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt (Award)* ICSID ARB/04/13, 6 November 2008 at [261].

[300] *Noble Energy Inc, MachalaPower Cia Ltda v Republic of Ecuador, Consejo Nacional de Electricidad (Decision on Jurisdiction)*, above n 262, at [190].

[301] *Hrvatska Elektroprivreda dd v Republic of Slovenia (Order Concerning the Participation of Counsel)*, above n 298, at [33]; art 44 of the ICSID Convention states that, "[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question" and art 19 of the ICSID Arbitration Rules further provides that "[t]he Tribunal shall make the orders required for the conduct of the proceeding".

Similarly, the Appellate Body and panels of the WTO have held that they possess "certain powers that are inherent in their adjudicative function."[302] However, this claim has been subject to some doubt.[303] One reason for this is the lack of institutional independence between these adjudicative bodies and the WTO Members in the Dispute Settlement Body ('DSB'). A second reason is that panel and Appellate Body Reports are only *advisory*, as it is the Members acting through the Dispute Settlement Body that issues final orders. It is arguable that the tribunals have a functional limitation compared to other international courts and tribunals. Nonetheless, it does not necessarily follow that WTO panels cannot be concerned with guarding the authority that they do possess.[304] Although the WTO dispute settlement process has some atypical features, the tribunals conduct the proceedings independently, much like other international courts.[305] The DSU also permits panels and the Appellate Body to establish their own additional working procedures.[306] Thus there is scope for subsidiary rule-making in procedural and evidentiary matters.[307]

The equality of the parties, as a general principle of law, should inform the exercise by tribunals of their inherent powers in deciding procedural questions.[308] Tribunals must use these powers to help to rebalance the proceedings if an inequality arises.[309] This will first be examined in regard to evidentiary issues.

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[302] *Mexico – Tax Measures on Soft Drinks and Other Beverages* WT/DS308/AB/R, 6 March 2006 (Report of the Appellate Body) at [45]; *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* WT/DS246/R (Report of the Panel), above n 125, at [7.8].

[303] Friedl Weiss "Chapter 14: Inherent Powers of National and International Courts" in F Ortino and E U Petersmann (eds) *The WTO Dispute Settlement System 1995 – 2003* (Kluwer Law International, The Netherlands, 2004) 117 at 177.

[304] As suggested at 187.

[305] Andrew D Mitchell and David Heaton "The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function" (2010) 31 Michigan Journal of International Law 561 at 566–567.

[306] DSU, art 12(2).

[307] Footer *An Institutional and Normative Analysis of the WTO*, above n 113, at 325; See also for example *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* WT/DS246/R (Report of the Panel), above n 125, at [7.8]; and also *European Communities – Trade Description of Sardines* WT/DS231/AB/R, 26 September 2002 (Report of the Appellate Body) at [161]-[167], where the Appellate Body accepted an amicus curiae brief from another Member country which was not a third party to the dispute.

[308] Mitchell *Legal Principles in WTO Disputes*, above n 31, at 20–21, 66.

[309] Wälde "Equality of Arms in Investment Arbitration", above n 172, at 182.

1 Drawing Adverse Inferences

Part of the obligation of arbitrating in good faith is not withholding documents for one's own benefit.[310] ICSID tribunals have broad powers to order the production of documents.[311] As has the WTO Appellate Body.[312] The Appellate Body saw itself as bound to reject an interpretation which would render the Panel's right to seek information meaningless and enable a Member to take the information-gathering process into its own hands.[313] Despite the obligations to cooperate with the tribunal in evidentiary matters, situations inevitably eventuate where one party refuses to produce the requested documents. An uncooperative opponent in an arbitration can undermine the ability of a party to fully present its case, as the necessary evidence "… often rests exclusively in the hands of adverse parties."[314] In those circumstances, a tribunal needs a mechanism by which to right the imbalance caused by the non-disclosure. The drawing of an adverse inference can be seen as such a balancing tool.

The adverse inference is recognised as an effective sanction available to arbitrators when faced with a recalcitrant party.[315] An adverse inference enables the other party to rely on circumstantial evidence, thus shifting the standard of proof without altering the burden of proof.[316] The ICSID Arbitration Rules allow for a tribunal to take formal note of a party's failure to comply with an evidentiary order and any reasons stated for so doing.[317] The 2010 UNCITRAL Arbitration Rules allow for a

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[310] *ADF Group Inc v United States of America (Procedural Order No 3)* (2001) 6 ICSID 461 at [4].

[311] *Biwater Gauff*, above n 184, at 8; See also O'Malley *Rules of Evidence in International Arbitration*, above n 180, citing *William A Parker (United States of America) v United Mexican States* (1926) 4 RIAA at 39.

[312] *Canada - Measures Affecting the Export of Civilian Aircraft* WT/DS70/AB/R (Report of the Appellate Body), above n 208, at [187].

[313] At [188]-[189].

[314] Jeremy K Sharpe "Drawing Adverse Inferences from the Non-Production of Evidence" (2006) 22 Arbitration International 549 at 549.

[315] Durward V Sandifer *Evidence Before International Tribunals* (The Foundation Press Inc, Chicago, 1939) at 101.

[316] Michael Polkinghorne and Charles B Rosenberg "Note: The Adverse Inference in ICSID Practice" (2015) 30 ICSID Review 741 at 742.

[317] *Rules of Procedure for the Institute of Conciliation and Arbitration Proceedings* ICSID15/Rev (International Centre for Settlement of Investment Disputes, 2003), rule 34(3).

tribunal to draw its own conclusions as to a failure to produce documentary evidence without satisfactory explanation, and make the award on the evidence it does possess.[318] The IBA Rules explicitly provide that a tribunal may draw an adverse inference from an unjustified failure to produce evidence.[319] Even without a specific rule, the ability to draw adverse inferences is an inherent power of tribunals.[320] The WTO Appellate Body saw it as a basic part of the judicial function, supported by reference to the jurisprudence of the International Court of Justice.[321] When evaluating claims international tribunals have considerable flexibility and the drawing of inferences was a useful means available within their "prerogative".[322]

The drawing of an adverse inference against a party should be done with care so as not to disproportionately tip the balance in favour of their opponent. Recent ICSID jurisprudence indicates some deference to the legitimate needs of States when considering whether to draw an adverse inference against them. For example, when a Respondent put forward detailed reasons on how the disclosure of correspondence would undercut an ongoing criminal investigation, a tribunal may not find that the limited disclosure warrants an adverse inference.[323] This is because the Arbitration Rules recognise that some non-compliance may be mitigated.[324] In another arbitration, restrictions on disclosure flowing from the Respondent's domestic legislation were not found to justify an adverse inference.[325] However, the Tribunal did not consider that the circumstances warranted the drawing of any *positive* inference in the Respondent's favour.[326]

Thus, faced with a party who refused to produce evidence and who offered no compelling reasons to justify the non-production, a tribunal could draw an adverse inference against the refusing party. Such an inference would help to compensate for the disadvantage the requesting party suffered from being unable to access

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[318] *UNCITRAL Arbitration Rules* GA Res 65/22, A/Res/65/22 (2010), art 30(3).

[319] *IBA Rules*, above n 181, art 9(5).

[320] Jean-François Poudret and Sébastien Besson *Comparative Law of International Arbitration* (2nd ed, Sweet & Maxwell, London, 2007) at [650].

[321] *Canada - Measures Affecting the Export of Civilian Aircraft* WT/DS70/AB/R (Report of the Appellate Body), above n 208, at [202], footnote 128].

[322] *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* WT/DS56/R (Report of the Panel), above n 174, at [6.39]; *Canada - Measures Affecting the Export of Civilian Aircraft* WT/DS70/AB/R (Report of the Appellate Body), above n 208, at [198].

[323] *The Rompetrol Group NV v Romania (Award)*, above n 164, at [186].

[324] At [185] referring to art 34(3) of the Rules .

[325] *Apotex Holdings Inc & Apotex Inc v United States of America (Award)* ICSID ARB(AF)/12/1, 25 August 2014 at [8.72].

[326] At [8.72].

potentially relevant evidence. The possibility of an adverse inference should also encourage compliance with production orders of the tribunal. A tribunal may also draw an adverse inference against a party which refused to cooperate with an independent reviewer, and may take such behaviour into account in the determination of costs.[327]

2 Responding to Misuse of Coercive Authority

Intimidation of witnesses and other abuses of coercive power undermine the peaceful settlement of disputes, the purpose the system was designed to achieve. A broad, functional approach to a tribunal's powers to restore the equality of arms in such a situation is required to stop a party from unilaterally frustrating this purpose.[328] While the constitutive instruments of these tribunals do not expressly contemplate what actions may be taken in such situations, tribunals possess the necessary procedural powers to safeguard their proceedings by virtue of their inherent powers. Possible measures tribunals might take are outlined below.

It can be difficult to provide direct proof of State-orchestrated intimidation, especially if it is indirect or informal.[329] However, tribunals have expressed the view that the more serious the allegation, the more persuasive the evidence relied on needs to be in order to meet the burden of proof.[330] There is some reluctance to find an allegation of wrongful conduct on the basis of circumstantial inferences.[331] Nonetheless, evidentiary rules are flexible and the particular facts of the case are controlling.[332] Tribunals should take account not only of the seriousness or likelihood of the allegation, but also the intrinsic difficulty of proving it.[333] Thus one way in which a tribunal can remedy the imbalance in such circumstances is to shift the burden of proof if the claimant has made out a prima facie case of abuse of

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[327] O'Malley *Rules of Evidence in International Arbitration*, above n 180, at [388].

[328] Abba Kolo "Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal" (2010) 26 Arbitration International 43 at 85.

[329] Wälde "Equality of Arms in Investment Arbitration", above n 172, at 169.

[330] *Libananco Holdings Co Limited v Republic of Turkey (Award)* ICSID ARB/06/8, 2 September 2011 at [125]-[126] citing Separate Opinion of Judge Rosalyn Higgins in *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment)* ICJ Rep 1996 at 856.

[331] *The Rompetrol Group NV v Romania (Award)*, above n 164, at [182].

[332] At [182].

[333] Constantine Partasides "Proving Corruption in International Arbitration:A Balanced Standard for the Real World" (2010) 25 ICSID Review 47 at [53].

sovereign authority.[334] Responsibility would then fall on the State to disprove the allegation. Similarly with a claim of unlawful collection of evidence, the burden of proof in regards to the admissibility of that evidence would shift to the other party.[335] This shift in the burden in proof is justified in part by a likelihood that for whatever wrongdoing has been discovered, the full extent of the wrongdoing may remain unknown.[336]

An order from the tribunal requiring the party to stop the bad faith behaviour would be appropriate. Ordering a stay of the domestic criminal proceedings until the completion of the arbitration will not necessarily be seen as an infringement on State sovereignty, as the State is free to pursue the case following the arbitration.[337] A stay of proceedings may be particularly relevant when the State's behaviour threatens "the access to and integrity of the evidence."[338] In such situations, provisional measures are "urgent by definition"[339] and cannot be remedied through a damages award.[340] Despite this, ICSID tribunals have held that "a particularly high threshold must be overcome" before the issuance of provisional measures in regards to criminal proceedings.[341] Yet, because such intimidation can be difficult to prove, a requirement that an allegation "be buttressed by concrete instances of intimidation or harassment"[342] may leave claimants at a substantial disadvantage in presenting their case. In one case, although the timing of the police raid was "remarkable" and the inherent disruption it caused, the fact that the Claimant's witnesses had not actually "been silenced or prevented from testifying" meant that provisional

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[334] *Feldman v United Mexican States (Award)* (2002) 7 ICSID Rep 341 at [176]-[180]; citing *Asian Agricultural Products Limited v Republic of Sri Lanka (Final Award on Merits and Damages)* (1997) 4 ICSID Rep 246 at 272; and *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* WT/DS33/AB/R, 23 May 1997 (Report of the Appellate Body) at 14; See also Wälde "Equality of Arms in Investment Arbitration", above n 172, at 170; Kolo "Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration", above n 328, at 77–78; Partasides, above n 333, at [63].

[335] *Methanex Corporation v United States of America (Final Award of the Tribunal on Jurisdiction and Merits)*, above n 266, at [55].

[336] Wälde "Equality of Arms in Investment Arbitration", above n 172, at 173.

[337] *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Plurinational State of Bolivia (Decision on Provisional Measures)*, above n 281, at [165].

[338] At [141].

[339] At [153].

[340] At [157].

[341] *Caratube International Oil Company LLP v Republic of Kazakhstan (Decision Regarding Claimant's Application for Provisional Measures)*, above n 274, at [137].

[342] *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia (Procedural Order No 14)* ICSID ARB/12/14 and 12/40, 22 December 2014 at [72].

measures were not required to protect the integrity of the arbitral proceedings.[343] Waiting for such "concrete" harm to eventuate does not accord with the duty on tribunals to proactively ensure the equality of arms between the parties. That said, the Tribunal did nonetheless exhibit some procedural flexibility aimed at levelling the playing field between the parties, in requiring the Respondent to seek leave before it introduced any evidence obtained through the criminal investigation.[344]

There should have to be "sufficient evidence of necessity or urgency" in the investigation to justify the potential prejudice and distraction a simultaneous criminal proceedings may cause to a claimant.[345] However, if the investigation is to continue, the State may have to establish specific machinery to ensure the strict separation of the criminal investigation and the conduct of the arbitration.[346] Even if a stay of proceedings is ordered, or an information barrier put in place, this may be seen as merely preventing further disruption to the equality of arms. To *restore* the equilibrium, " … it needs to be complemented by other measures, in particular compensatory rather than just prospective and prohibitive ones."[347] This could be through the award of damages at the merits stage of proceedings.[348] Moreover, if one party had conducted surveillance on the other, the only way to restore full equality may be the complete reciprocal disclosure of all information obtained, which would be difficult to monitor.[349] For a particular egregious or repeated breach, the tribunal could exclude the offending party from all or part of the proceedings and issue a summary judgment.[350] In extreme cases, the tribunal could move the seat of the arbitration to a neutral venue.[351]

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[343] At [86]-[87].

[344] *Churchill Mining PLC and Planet Mining Pty Ltd* at [81]-[82]; See also Tomas Furlong "Potential risks to investors highlighted by two ICSID tribunals declining to recommend provisional protection against criminal investigations" (0 January 2015) Herbert Smith Freehills <http://hsfnotes.com>.

[345] *Lao Holdings NV v Lao People's Democratic Republic (Ruling on Motion to Amend the Provisional Measures Order)* ICSID ARB(AF)/12/6, 30 May 2014 at [73].

[346] *Libananco Holdings*, above n 269, at [79].

[347] Wälde "Equality of Arms in Investment Arbitration", above n 172, at 184.

[348] *Caratube International Oil Company LLP v Republic of Kazakhstan (Decision Regarding Claimant's Application for Provisional Measures)*, above n 274, at [141].

[349] Wälde "Equality of Arms in Investment Arbitration", above n 172, at 173.

[350] Kolo "Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration", above n 328, at 82–84; *Libananco Holdings*, above n 269, at [80], as requested by the Claimants, while described by the Tribunal as "an extreme form of relief" it was not ruled out as a possibility.

[351] Kolo, above n 328, at 79–80.

B Greater Use of the DSU SDT Provisions to Ensure Equality

Arbitral tribunals can make procedural orders to ensure the equality of the parties even in the absence of specific authorising provisions. This ability is even stronger when such procedural leniency is codified in the constitutive treaty, as in the WTO. However, the SDT provisions in the DSU have been described as declaratory and without operative content.[352] Further, panels have exhibited a "high level of self-restraint and formalism" when it comes to applying these provisions and have adopted a literal approach to their interpretation.[353] The poor drafting of the provisions has also contributed to the difficulties developing countries face in invoking them.[354] The procedural SDT clauses can and should be both more meaningfully and more frequently employed by WTO panels in order to give full effect to the concept the equality of the parties.[355]

Due process requires a developing country party raise the relevant SDT provision in order for the opposite side to submit on the point, before the panel can take it into account.[356] However, in one case, the Panel took into account a substantive SDT provision from the Anti-Dumping Agreement despite the failure of the developing country Complainants to raise it in their request for establishment of the panel.[357] The Panel felt bound to consider that provision because of the requirement for a panel to explicitly indicate how it has taken into account SDT provisions during the

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[352] Valentina Delich "Developing Countries and the WTO Dispute Settlement System" in Bernard Hoekman, Aaditya Mattoo and Philip English (eds) *Development, Trade and the WTO: A Handbook* (The International Bank for Reconstruction and Development, Washington, 2002) 62 at 71–73.

[353] Amin Alavi "On the (Non-)Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process" (2007) 41 Journal of World Trade 319 at 348; Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization*, above n 142, at 185.

[354] Alavi, above n 353, at 348; Gosego Rockfall Lekgowe "The WTO Dispute Settlement System: Why it Doesn't Work for Developing Countries?" (2012) available from www.papers.ssrn.com (accessed 23 September 2016) at 23.

[355] Mitchell *Legal Principles in WTO Disputes*, above n 31, at 259, while it may be difficult, WTO tribunals can exercise their inherent jurisdiction to resolve procedural matters with regard to the principle of SDT.

[356] Alavi, above n 353, at 321; DSU, art 12(11) .

[357] *United States – Continued Dumping and Subsidy Offset Act of 2000* WT/DS217/R WT/DS234/R, 16 September 2002 (Report of the Panel) at [7.87].

dispute settlement.[358] This is a rare example of a Panel taking a proactive approach to the SDT provisions. While reliance on a provision not specifically indicated in a panel's terms of reference might traditionally be seen as undermining equality, the ability of a panel to nonetheless take special considerations into account furthers substantive equality. The other side's right to be heard can be safeguarded through allowing it adequate time to comment on any provision raised by the tribunal.

The Executive Director of the Advisory Centre on WTO Law has said that developing country Members are reluctant to invoke procedural privileges as it may detract from the legitimacy of the outcome of the case.[359] This concern has also been expressed elsewhere.[360] Further, it has been argued that the true challenges faced by developing countries will not be remedied by procedural privileges, and that the emphasis should be on legal aid and capacity building.[361] While greater application of these provisions cannot solve all inequality issues in the WTO, they can bolster the system's legitimacy through securing a more substantive equilibrium between the parties in the DSU. Procedural orders can enable fuller participation of developing countries in the dispute settlement process. This was reflected by the Appellate Body when it held that private legal counsel could represent Members, as such representation may be a matter of particular significance to developing countries often lacking technical resources.[362] The existence of a rules-based system means little when there is not an equal ability to use the system. Substantive equality must be sought through interpretative approach which gives the SDT provisions some force, alongside capacity-building initiatives.

Giving greater effect to these provisions would not constitute impermissible judicial activism. By contrast, such an approach is justified by the accepted approach to

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[358] At [7.87] referring to DSU art 12.11.

[359] Frieder Roessler "Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System"" in F Ortino and E U Petersmann (eds) *The WTO Dispute Settlement System 1995 – 2003* (Kluwer Law International, The Hague, 2004) 87 at 89.

[360] Meagher "Representing Developing Countries in WTO Dispute Settlement Proceedings", above n 49, at 224–225; Rockfall Lekgowe, above n 354, at 12.

[361] Roessler, above n 359, at 90; Gerhard Erasmus "The Non-participation by African States in the Dispute Settlement System of the WTO: Reasons and Consequences" in Trudi Hartzenberg (ed) *WTO Dispute Settlement: An African Perspective* (Cameron May Ltd, London, 2008) 179 at 190.

[362] *European Communities - Regime for the Importation, Sale and Distribution of Bananas* WT/DS27/AB/R (Report of the Appellate Body), above n 156, at [10]-[12].

treaty interpretation.[363] The proactive application of the SDT provisions is supported by reference to the preamble of the treaty establishing the WTO, which recognises the need for "positive efforts" to ensure that developing countries secure a share in the growth in international trade.[364] Further, "both the letter and the spirit" of the articles are relevant.[365]

Another relevant customary rule of interpretation is the principle of effectiveness. This principle has been recognised by the Appellate Body on a number of occasions.[366] It has held that, "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[367] This is an obligation which follows from the fundamental rule contained in Article 31 of the Vienna Convention on the Law of Treaties.[368] In regards to the seeking of evidence, the Appellate Body has interpreted "should" as creating a legal obligation. This is because to have read it as a mere encouragement would have emptied the right contained in the article of its meaning.[369] The Appellate Body has held it is bound to reject an interpretation which would "reduce to an illusion" the rights of Members to have their disputes resolved according to the system for which they negotiated.[370] If this is so, then it is also under an obligation to give meaning to the special and differential treatment provisions in the

[363] DSU, art 3(2): There is an obligation on the DSU to clarify WTO agreements "in accordance with customary rules of interpretation of public international law".

[364] Marrakesh Agreement establishing the World Trade Organisation, above n 110; The preamble is part of the context in which treaty terms must be interpreted. Vienna Convention on the Law of Treaties, s art 31(2); As also discussed by Rockfall Lekgowe, above n 354, at 3.

[365] *European Communities - Regime for the Importation, Sale and Distribution of Bananas* WT/DS27/AB/R (Report of the Appellate Body), above n 156, at [142]; See also *United States - Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R, 12 October 1998 (Report of the Appellate Body) at 102–110, rejecting a literal interpretation to the word "seek" in favour of a broad and purposive meaning.

[366] Petros C Mavroidis and David Palmeter "Chapter 15: The WTO Legal System: Sources of Law" in David Palmeter (ed) *The WTO as a Legal System: Essays on International Trade Law and Policy* (Cameron May Ltd, London, 2003) 215 at 232.

[367] *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R, 29 April 1996 (Report of the Appellate Body) at 23; and cited in *Japan – Taxes on Alcoholic Beverages* WT/DS11/AB/R (Report of the Appellate Body), above n 367, at 12.

[368] *Japan – Taxes on Alcoholic Beverages* WT/DS11/AB/R, 4 October 1996 (Report of the Appellate Body) at 12.

[369] *Canada - Measures Affecting the Export of Civilian Aircraft* WT/DS70/AB/R (Report of the Appellate Body), above n 208, at [188].

[370] At [189].

DSU. It was on the basis of the inclusion of these provisions that States signed up to the WTO Agreement, the majority of which are developing countries.

The minimal effect of the SDT provisions illustrates that a more substantive conception of equality of treatment will not be readily secured through detailed codification. Nor have dense sets of rules in international criminal tribunals prevented the emergence of numerous procedural difficulties.[371] Yet over a century ago some called for the codification of international procedural law.[372] There is thus a "perennial tension" between allowing room for judicial discretion and the creation of detailed procedural rules.[373] To adequately respond to the myriad of circumstances that will inevitably arise in international arbitration involving States, judicial discretion will be the most effective tool. We should therefore be wary of unduly constraining it through a formalistic and narrow interpretation of tribunals' powers. Compliance with procedural rules is not an end of itself, but means towards the attainment of justice.[374] As noted by one Tribunal: "although procedural considerations are important in proceedings such as these, an excessively technical approach to such matters is not appropriate."[375] To secure true procedural fairness at times will require the modification or attenuation of the rules, as they are servants of the tribunal, not its masters.[376]

Furthermore, as an institution, the WTO has the "capacity to formulate and apply systemic values".[377] Special and differential treatment, on both a substantive and procedural level, is a value embodied in international trade law.[378] It is a "touchstone" that panels and the Appellate Body may use in deciding difficult and

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[371] Awn Shawkat Al-Khasawneh "Foreword" in Arman Sarvarian and Filippo Fontanelli (eds) *Procedural Fairness in International Courts and Tribunals* (British Institute of International and Comparative Law, London, 2015) ix at xii.

[372] William Cullen Dennis "The Necessity for an International Code of Arbitral Procedure" (1913) 7 American Journal of International Law 285 at 287.

[373] Al-Khasawneh, above n 371, at xi.

[374] At xvii.

[375] *Metalclad Corp v United Mexican States (Decision by the Tribunal on a Request of the Claimant concerning the Filing of the Respondent's Counter-Memorial and its Annexes)* ICSID ARB(AF)/97/1, 31 March 1998 at [5].

[376] At xvii citing a remark purported to have been made by Edvard Hambro.

[377] Dan Sarooshi "Investment Treaty Arbitration and theWorld Trade Organization: What Role for Systemic Values in the Resolution of International Economic Disputes?" (2014) 49 Texas International Law Journal 445 at 446.

[378] Mitchell *Legal Principles in WTO Disputes*, above n 31, at 238.

novel issues.[379] This jurisprudence could then be used in parallel systems of international economic law.[380] With the convergence of these two systems, the experience of securing such substantive equality of the parties in WTO dispute settlement could be drawn upon by tribunals in investment arbitration, to contribute to the coherent development of this general principle of law.

C Managing Costs to Ensure Equality

Financial equality between the parties is not conventionally considered as an element of the equality of the parties. The presumption is that the parties are equal before the court "irrespective of their financial ability or litigation competence".[381] Despite this presumption, in reality there may be a dramatic discrepancy in the financial resources available to each party. An example of this was the first experience of the Seychelles in an investment-arbitration. The Attorney-General, without a reliable internet connection or access to legal databases, faced CDC Group, represented by Allen & Overy.[382] Moreover, the wealthier party may undertake a strategy, entirely within their formal rights, to drain the resources of their opponent. Procedural law can be "an instrument of power".[383] Tribunals should take into account any manifest financial disequilibrium between the parties as part of their obligation to ensure equality of treatment. Tribunals should be aware of

[379] Sarooshi, above n 377, at 466; Asif H Qureshi "Interpreting World Trade Organization Agreements for the Development Objective" (2003) 37 Journal of World Trade 847 at 852–855.

[380] Frank J Garcia and others "Reforming the International Investment Regime: Lessons from International Trade Law" (2015) 18 Journal of International Economic Law 861, generally on how investment arbitration might be reformed in light of world trade law; for example B E Allen "The Use of Non-pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners" (2011) 8 Transnational Dispute Management.

[381] Wälde "Equality of Arms in Investment Arbitration", above n 172, at 174; *Prosecutor v Clément Kayishema and Obed Ruzindana (Judgment Reasons) (Appeals Chamber)* ICTR-95-1-A, 1 June 2001 at [69].

[382] *CDC Group PLC v Republic of Seychelles (Award)* (2003) 11 ICSID Rep 206; Eric Gottwald "Leveling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?" (2007) 22 American University International Law Review 237 at 261–3; Raymundo Tullio Treves "Chapter 8: Equality of Arms and Inequality of Resources" in Arman Sarvarian and Filippo Fontanelli (eds) *Procedural Fairness in International Courts and Tribunals* (British Institute of International and Comparative Law, London, 2015) 153 at 165–169.

[383] Al-Khasawneh, above n 371, at xvii.

strategies employed to exploit this inequality as a potential breach of a party's obligation to arbitrate in good faith.[384] In such a situation, tribunals should be conscious of giving each party the right to be heard in the most economical way possible. Equality of the parties is not a theoretical right and thus at times will require practical solutions. For example, this could include greater and earlier guidance from the tribunal as to the issues it sees as most relevant, in order to streamline the proceedings and thus save time and costs.[385] Tribunals can also work with the parties to encourage limits on the length and number of submissions, and discourage duplication of documents, repetition of arguments and lengthy oral hearings.[386] These initiatives must be implemented in a way that does not unduly limit the parties' right to be heard.

The costs claimed by the parties can be exorbitant.[387] There is an ability for the tribunal to set a threshold for recoverable costs in a particular dispute.[388] This discretion will have to be balanced against the parties' choice as to how best present their case. Tribunals may also assess the reasonableness of costs claimed by one party and only award a portion of those costs.[389] These tools may deter the parties from incurring unnecessary legal expenses. The improper conduct of a party may also be the determinative factor in guiding the tribunal's discretion in deciding on costs.[390] This includes failing to follow document production orders or otherwise not conducting its document production in an efficient or fair manner.[391] If a document production order produces no material evidence, the tribunal could order

[384] Wälde "Equality of Arms in Investment Arbitration", above n 172, at 174.

[385] Michael Buhler "Costs of Arbitration: Some Further Considerations" in Gerald Aksen (ed) *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing, Paris, 2005) 186 at 183; Petrochilos *Procedural Law in International Arbitration*, above n 31, at [4.48].

[386] *ICC Commission Report: Controlling Time and Costs in Arbitration* (2014) at 11–14.

[387] Karl-Heinz Böckstiegel "Practical Issues and Perspectives of Investment Arbitration Involving Russian and CIS Parties" (paper presented International Dispute Resolution Involving Russian and CIS Companies, London 2014) at 7–8; See also generally Tullio Treves "Equality of Arms and Inequality of Resources", above n 382.

[388] David Brown "What Steps Should Arbitrators Take to Limit the Cost of Arbitration?" (2014) 31 Journal of International Arbitration 499 at 502.

[389] *ICC Commission Report: Decisions on Costs in International Arbitration* (2015) at [64].

[390] At [78].

[391] At [81–82].

the other party to reimburse the other for their essentially wasted efforts.[392] Improper conduct also includes "frivolous claims and defences, excessive filings and delay in the process".[393] Adopting cost-efficient measures with a sensitivity to the practical challenges facing the lesser-resourced party would help to "right the balance" as part of a tribunal's inherent duty to ensure procedural equality. Third party funding has the potential to enable impecunious parties to better present their case, however it also raises several issues in regards to the equality of the parties which are unfortunately outside the scope of this paper.[394]

This proactive rebalancing may also take the form of a procedural leniency towards the lesser-resourced party, including granting more time for the preparation of submissions, tolerating procedural mistakes and accommodating procedural requests that it might not usually grant.[395] Equality of the parties "… should not be given a strictly mechanical meaning"; it does not mean that each party should have precisely the same number of days to prepare its submissions.[396] This tolerance would have to be balanced against the other party's entitlement to have the arbitration proceed at a normal pace.[397] Such leniency does not mean allowing parties to present a case in any way they want, thus sacrificing efficient case management.[398] However, such flexibility is central to a broader conception of procedural fairness. Fairness is a "constantly evolving concept"[399] which has to be

[392] O'Malley *Rules of Evidence in International Arbitration*, above n 180, at [7.54]; Buhler, above n 385.

[393] Kateryna Bondar "Allocation of costs in investor-State and commercial arbitration: towards a harmonized approach" (2016) 32 Arbitration International 45 at [42] and the cases cited therein.

[394] See for example Nadia Darwazeh and Adrien Leleu "Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding" (2016) 33 Journal of International Arbitration 125.

[395] Tullio Treves "Equality of Arms and Inequality of Resources", above n 382, at 165; Brown "What Steps Should Arbitrators Take to Limit the Cost of Arbitration?", above n 388, at 501–502, noting that allowances will need to be made for parties who have less familiarity with the arbitration rules.

[396] Emmanuel Gaillard and John Savage *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) at 956.

[397] *SD Myers Inc v Government of Canada (Procedural Order No 18)* [2001] NAFTA/UNCITRAL at [8].

[398] Klaus Peter Berger and J Ole Jensen "Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators" (2016) 32 Arbitration International 415 at 420–421.

[399] *R v H* [2004] 2 AC 134 (HL) at [11].

"flexibly applied according to the context".[400] What the right to be heard requires varies depending on the circumstances and "requires judgement of context rather than mere knowledge of black-letter rules."[401] While there may be concern over the bias or arbitrariness which could result from the exercise of judicial discretion, there is also reason to call into question the arbitrariness and error that would inevitably follow from a rigid applications of the same rule in all circumstances.[402] To be most effective, this enhanced proactivity on the part of tribunals should be accompanied by measures which assist parties in even getting their case to arbitration.[403] There have been calls for an equivalent to the Advisory Centre on WTO Law for investment arbitration.[404] The need to ensure adequate representation is particularly strong in investment arbitration and world trade law, as an adverse decision could impact entire populations.[405]

While the equality of the parties is a principle of a great breadth and depth, it must necessarily have limits. Natural justice rights are not intended to remedy a "general sense" of unfairness.[406] The wider purpose of procedural fairness, to safeguard the legitimacy of the adjudicative system, will not be achieved through a perceived disadvantaging the stronger party solely because of their greater resources or powers. The impartiality of the tribunal demands otherwise. The creation of the investment arbitration regime was motivated by the desire to avoid the potential bias of the host State's domestic courts, and the equality of the parties principle should

[400] *Lloyd v McMahon* [1987] AC 625 (HL) at 702; Auburn, Moffet and Sharland, above n 51, at [5.26]; Supperstone, Goudie and Walker, above n 11, at [10 1 3]; *R v Secretary of State for the Home Department, Ex Parte Santillo (No 2)* [1981] 2 WLR 362 (CA) at 374; On the need for creativity Toby Landau "The Day Before Tomorrow: Future Developments in International Arbitration" (2009) Clayton Utz <www.claytonutz.com>.

[401] BL Jones *Garner's Administrative Law* (7th ed, Butterworth & Co (Publishers) Ltd, London, 1989) at 177, 181; Carlston *The Process of International Arbitration*, above n 285, at 3–4.

[402] Cass R Sunstein "'Two Conceptions of Procedural Fairness'" (2006) 73 Social Research 619 at 620.

[403] Brown "What Steps Should Arbitrators Take to Limit the Cost of Arbitration?", above n 388, at 502, on the need for arbitrators to be proactive in case management; There are financial assistance funds for other forms of public international dispute settlement, but these also have their own issues, see Brian McGarry "Cost-Efficient in State-to-State Dispute Resolution" (presentation at Integration and International Dispute Resolution in Small States conference, London, 2016) video of proceeding available at <www.youtube.com>.

[404] See Gottwald "Leveling the Playing Field", above n 382.

[405] At 264–265.

[406] *Al-Mehdawi v Secretary of State for the Home Department*, above n 52, at 889.

not re-introduce such fears. Yet, there is risk to the system's legitimacy in ignoring such evident differences between the parties and strictly adhering to the notion of formal equality. The question of when to engage in a more proactive way to ensure the equality of the parties will involve a threshold question. The existence of this threshold is indicated in the ICSID Convention, where a party may request annulment on the grounds of a *serious* departure from a fundamental rule of procedure.[407] However, the positioning of the threshold in a given case must depend on the particular circumstances. A highly relevant consideration should be the extent to which a particular situation has undermined a party's right to be heard.

Tribunals have noted, distinct from problems of procedural equality, a species of "natural inequality as between private companies and a host State, one which arises from their respective status and roles and which cannot be reversed *en tant que tel*."[408] Nevertheless, while the causes of financial disparity lay far beyond the arbitral process itself, this substantive inequality should not be artificially severed from procedural equality. A party's lack of resources or the fact that it is the subject of a police investigation, will inevitably have a palpable impact on its ability to effectively use its procedural rights and realise the opportunity to be heard. Linking back to the definition of "equality of the parties", the lesser-resourced party can be placed at a substantial disadvantage in presenting its case. The principle of equality of the parties thus imposes a duty on the tribunal to proactively rebalance the situation between the parties.[409]

D Conclusion

This paper has highlighted a number of practical issues which can undermine the equality of the parties in international arbitration and WTO dispute settlement. One-sided evidential privileges, the potential abuse of a State's sovereign authority, and the simple but pervasive effects of resource discrepancies illustrate how the balance between the parties may be impeded despite procedural guarantees of formal equality and through no fault of the tribunal itself.

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[407] ICSID Convention, above n 22, art 52(1)(d).

[408] *EnCana Corporation v Republic of Ecuador (Partial Award on Jurisdiction)* (2004) 12 ICSID Rep 413 at [43].

[409] Tullio Treves "Equality of Arms and Inequality of Resources", above n 382, at 165; Wälde "Equality of Arms in Investment Arbitration", above n 172, at 180.

This paper's primary submission is that it cannot be the correct approach to turn a blind eye to the actual context of the parties to the dispute. There is an obligation for tribunals to proactively apply a broader conception of the equality of the parties. This duty flows from a fundamental function of all tribunals and the responsibility which comes with the possession of inherent powers. Yet, mechanisms which disturb the formal equality of parties, in order to take account of the different parties' circumstances, risk tipping the scales too far the other way. The balance to be struck is a delicate one, but nonetheless critical to investment arbitration being viewed as a legitimate form of adjudication. Striking the right balance will at times require tribunals to look behind the presumed legal equality, and to use their inherent powers to enable more flexibility in arbitral procedure where necessary.

As predicted in 1986, procedural inequality does threaten the perceived legitimacy of the dispute settlement systems of international economic law. Questions over these systems' responsiveness to the needs of developing countries and appropriate deference to State sovereignty continue to fuel criticism. While many issues arise from the application of substantive law, there is an important role for procedural principles in safeguarding the integrity of individual proceedings, and thus the perceived legitimacy of the system more widely. This is because procedural and substantive fairness are not completely divorced. Tribunals must look beyond formalistic conceptions of equality, and use their inherent powers to accommodate procedural challenges. Aristotle wrote that identical treatment of unequal persons is not equality.[410] In this way, justice will not always be blind.

VI Word Count

The word count for the main text of this paper and substantive footnotes is approximately 15,250 words.

[410] Aristotle *Nicomachean Ethics* David Ross (translator) and Lesley Brown (ed) (2nd ed, Oxford University Press, Oxford, 2009) at 85–86.

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