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# Parallel Proceedings at the WTO and Under NAFTA Chapter 19: Whither the Doctrine of Exhaustion of Local Remedies in DSU Reform?

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**PARALLEL PROCEEDINGS AT THE WTO AND UNDER  
NAFTA CHAPTER 19: WHITHER THE DOCTRINE OF  
EXHAUSTION OF LOCAL REMEDIES IN  
DSU REFORM?**

KEVIN C. KENNEDY\*

I. INTRODUCTION

Initially hailed as the “crown jewel” of the Uruguay Round and the “linchpin” of the World Trade Organization (WTO) multilateral trading system,<sup>1</sup> it is now widely acknowledged that the WTO Dispute Settlement Understanding (DSU)<sup>2</sup> needs revision. At the Doha Ministerial Conference in November 2001, trade ministers issued the following statement regarding negotiations on DSU reform:

We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter.<sup>3</sup>

Even before the 2001 Doha Ministerial Conference, a formal review of the DSU had begun in late 1997 pursuant to a 1994 Uruguay Round ministerial decision to review the DSU within four years after it entered into force.<sup>4</sup> That review, however, ultimately

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1. See, e.g., John Ragosta et al., *WTO Dispute Settlement: the System is Flawed and Must Be Fixed*, 37 INT'L LAW. 697, 697 (2003); Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 856 (1999).

2. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, Apr. 15, 1994, 33 I.L.M. 1125 [hereinafter DSU].

3. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746, 751 (2002).

4. See WTO Ministerial Conference, Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 465 (World Trade Org. ed., 1994).

“sputtered to an end on July 30, 2003, without reaching any conclusions.”<sup>5</sup>

It remains unclear whether future amendments to the DSU, if any, will consist of some modest fine-tuning or an ambitious overhaul.<sup>6</sup> There are numerous suggestions and proposals for DSU reform—most from WTO Members, others from interested observers.<sup>7</sup>

The DSU, both as drafted and as interpreted by WTO panels and the Appellate Body, has also been the subject of broad criticism when it comes to the absence of rules on judicial restraint.<sup>8</sup> Commentators have criticized the DSU's legal void as to rules governing standing to bring a complaint (other than that the complaining party must be a WTO Member<sup>9</sup>), on mootness (with *post*-complaint events not rendering a dispute moot if the panel's terms of reference have been issued<sup>10</sup>), on ripeness (with panels in effect render-

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5. William J. Davey, *Reforming WTO Dispute Settlement*, in *WTO AND EAST ASIA: NEW PERSPECTIVES* 98 (Mitsuo Matsushita & Dukgeun Ahn eds., 2004).

6. As Professor William J. Davey notes, “[e]ven after more than a year of discussions [in 2002-03], there were still disagreements being aired [among the WTO Members] over whether the aim of the negotiations should be relatively limited or not.” *Id.* at 102; *see also* *WTO Members Still Stalled on DSU Changes One Month before Deadline*, *INSIDE U.S. TRADE*, Apr. 25, 2003, at 7, 7 (noting the division among countries on the substance of proposed changes).

7. *See infra* Appendix (providing a summary of proposed DSU reforms).

8. *See, e.g.*, William J. Davey, *Has the WTO Dispute Settlement System Exceeded its Authority?*, 4 *J. INT'L ECON. L.* 79, 96 (2001) (noting that the WTO system makes more use of “issue-avoidance” techniques, such as mootness, ripeness, and the exercise of judicial economy, in order to dispose of cases where a decision seems unnecessary); Ragosta, *supra* note 1, at 730 (“In practice, WTO dispute settlement lacks basic jurisdictional limitations that restrain judicial activism.”).

9. *See, e.g.*, Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶ 133, WT/DS27/AB/R (Sept. 9, 1997) (rejecting the EC's position that there is a “general rule that in all international litigation, a complaining party must have a ‘legal interest’ in order to bring a case”); EDMOND MCGOVERN, *INTERNATIONAL TRADE REGULATION* § 2.2324 (1995) (noting that the standing concept “has found little place in WTO law”); J. Patrick Kelly, *Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint*, 22 *Nw. J. INT'L TRADE & BUS.* 353, 386 (2002) (“In the EC Bananas case the AB wisely rejected the ‘legal interest’ requirement for standing to sue articulated by the International Court of Justice and instead developed a more liberal approach that permits each member considerable discretion in deciding whether to bring an action.”); Rodrigo Bustamante, *The Need for a GATT Doctrine of Locus Standi: Why the United States Cannot Stand the European Community's Banana Import Regime*, 6 *MINN. J. GLOBAL TRADE* 533, 535 (1997) (arguing for a doctrine of standing under the DSU). *But see* Peter Lichtenbaum, *Procedural Issues in WTO Dispute Resolution*, 19 *MICH. J. INT'L L.* 1195, 1210 (1998) (“[I]n future cases, panels may have discretion to reject claims brought by Members with little or no stake in the proceedings, although the parameters of any such standing doctrine are unclear at this point.”).

10. *See, e.g.*, ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 262 (1993) (“The reason for wanting a ruling in

ing advisory opinions in cases where there is no live controversy<sup>11</sup>), and on the doctrine of *non liquet*<sup>12</sup> (where panels should decline to

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such cases is usually the concern that the same measure will be repeated in the future; ruling after the fact is one of the only ways GATT can deal with short-term GATT violations.”).

11. The doctrine of ripeness is rooted in U.S. constitutional law but finds no direct counterpart in customary international law. In the context of dispute settlement at the WTO, the ripeness doctrine has been analogized to the mandatory/discretionary distinction that has developed in GATT/WTO jurisprudence. One commentator notes:

[T]he mandatory/discretionary doctrine in GATT/WTO law is sometimes compared to the “ripeness” doctrine under the US constitutional law. The ripeness doctrine addresses the question of when judicial decisions can be rendered, providing that in order for courts to render judicial decisions, there should be a “case or controversy” in contrast to a hypothetical question. The purpose of the doctrine is to restrain courts from rendering decisions in the absence of “a genuine need” to resolve a dispute, and the underlying concern here is to avoid lawmaking by courts and to maintain a proper relationship between the judiciary and other organs of the government. Similar to the ripeness doctrine, the mandatory/discretionary doctrine in GATT/WTO law indicates that when a law is mandatory, a complaint involves the genuine need for decision, and thus, a dispute is ripe, but when a law is discretionary, a dispute is not yet ripe.

Yoshiko Naiki, *The Mandatory/Discretionary Doctrine in WTO Law: The US-Section 301 Case and Its Aftermath*, 7 J. INT’L ECON. L. 23, 26 (2004) (footnotes omitted); see also Sharif Bhuiyan, *Mandatory and Discretionary Legislation: The Continued Relevance of the Distinction Under the WTO*, 5 J. INT’L ECON. L. 571, 571–72 (2002) (noting that mandatory legislation requires the executive authority of a Member to act in a given matter, while discretionary legislation gives the executive discretion in how to act). Another scholar notes:

If cases are considered ripe simply because a measure has the potential to create a violation, is this conclusion tantamount to abandoning any ripeness requirement? No, although the WTO test is less demanding than is the ripeness test under U.S. law. Under the WTO, a measure will not be ripe for review if the Member retains discretion to promulgate or interpret the law or regulation in a manner consistent with its obligations — i.e., if the violation is not “mandatory” under any given circumstances. But as long as a measure will necessarily result in a violation under some circumstances, a Member need not wait for those circumstances to arise.

Lichtenbaum, *supra* note 9, at 1214–15. See Panel Report, *Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, ¶ 6.45, WT/DS56/R (Nov. 25, 1997) (rejecting Argentina’s argument that the case should not be considered because it only addressed a potential violation because the measures constituted mandatory measures), *aff’d* by Appellate Body Report, *Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R (Mar. 27, 1998).

12. See generally Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 258, 260 (2004). According to Steinberg:

[V]arious customary doctrines counsel abstention in dealing with a gap in the law. Some would invoke the doctrine of *non liquet* (which means “it is not clear”) if the law does not permit deciding a case one way or the other. According to that view, there are gaps in international law and it is not the place of courts to fill those gaps as they are not legislative organs; thus, in such cases courts should declare *non liquet* . . . . The doctrine of *non liquet* has never been invoked by either a WTO panel or the Appellate Body to permit or excuse a member’s behavior.

*Id.* (footnotes omitted); see also Charles Pierson, *Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom*, 33 DENV. J. INT’L L. & POL’Y 150, 172 (2004) (“A *non liquet* (‘it is not clear’) occurs when the legal norms in an area of the law are so internally contradictory or confused that we cannot articulate the law.”); Lorand Bartels, *The*

rule in cases where the law is not clear).<sup>13</sup> Interestingly, among the various reform proposals advanced by WTO Members, there is not a single mention of making rules on judicial restraint—for exam-

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*Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 INT'L & COMP. L.Q. 861, 874–76 (2004) (discussing the use of *non liquet* in WTO dispute settlement proceedings); Jiaxiang Hu, *The Role of International Law in the Development of WTO Law*, 7 J. INT'L ECON. L. 143, 145 n.5 (2004) (“Only [matters left unregulated] would permit a panel or the Appellate Body to refuse jurisdiction on the basis of a *non-liquet* (i.e., issue not accessible to legal adjudication due to the absence of law on the matter or for other reasons such as political impediment).”); Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT'L L. 1, 42 (2003) (“GATT and WTO examples of *non liquets* are the unadopted panel report in EEC *Wheat Flour Export Subsidies* and the *Coconuts* case.”). Kenya advanced a proposal to amend Article 3.2 of the DSU to add a variation of the doctrine of *non liquet* into WTO dispute settlement by including the following paragraph:

When, in the course of proceedings before a panel or the Appellate Body, a question arises on whether or not there is a conflict between provisions of any covered Agreement or between any covered Agreements, the panel or Appellate Body shall refer the matter to the General Council for a determination. In reaching the determination, the General Council may exercise the authority conferred under paragraph 2 of Art. IX of the WTO Agreement.

Communication from Kenya, Text For the African Group Proposals on Dispute Settlement Understanding Negotiations, at 1, TN/DS/W/42 (Jan. 24, 2003). A closely related doctrine to that of *non liquet* is the doctrine of *in dubio mitius*. Professor Steinberg explains:

*In dubio mitius* is a well-established canon of treaty interpretation that attaches deference to state sovereignty when a rule is ambiguous: if a term is ambiguous, then the preferred meaning is the one that is the least onerous to the party assuming an obligation, or that interferes the least with the territorial and personal supremacy of a party, or that involves the fewest general restrictions on the parties.

Steinberg, *supra*, at 258 (footnote omitted); see also James Cameron & Kevin R. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 INT'L & COMP. L.Q. 248, 258 (2001) (noting that *in dubio mitius* is “widely recognized as a supplementary means of interpretation whereby deference is accorded to the sovereignty of the States”).

13. See Joost Pauwelyn, *The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO*, 8 J. INT'L ECON. L. 329, 345 (2005) (“Effective use must be made of common judicial techniques that translate political sensitivities into legal results (such as deference, judicial minimalism, putting the burden of proving an obligation on the complainant and even declaring a *non liquet*).”). When national security grounds are raised under GATT Article XXI as a defense to a WTO complaint, it has been suggested that something analogous to the political question doctrine be invoked by a WTO panel that reflects deference to the decision of the responding WTO Member. One commentator explains:

Conceivably some matters of national security may resolve themselves by the time a WTO panel is prepared to rule on a dispute involving Article XXI. Similarly, although a panel is not likely to refuse to consider an Article XXI dispute because of a “political question” doctrine, issues involving political questions may cause a panel to extend greater deference to the decisions of respective WTO members than it otherwise might.

Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 DUKE L.J. 1277, 1295 n.82 (2003) (citing William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority? A Consideration of Deference Shown by the System to member Government Decisions and its Use of Issue-Avoidance Techniques*, 4 J. INT'L ECON. L. 79, 104–05 (2001)).

ple, mootness, ripeness, and standing—a part of the WTO dispute settlement process.<sup>14</sup>

Another rule of customary international law not currently a candidate for DSU reform is the doctrine of exhaustion of local remedies. Despite the potential reduction in the WTO caseload that application of the exhaustion doctrine could produce, the exhaustion doctrine has, for some inexplicable reason, been ignored in the discussions on DSU reform. To put the exhaustion doctrine in WTO context, of the ninety-five original DSU proceedings resulting in a panel report as of September 2005, forty-three have involved disputes arising under either the WTO Antidumping Agreement (AD Agreement)<sup>15</sup> and/or the Agreement on Subsidies and Countervailing Measures (SCM Agreement).<sup>16</sup> As explained below, both of these Agreements mandate judicial review of administrative determinations by national investigating authorities. In addition, in a number of instances, Canada, Mexico, and the United States have initiated WTO dispute settlement proceedings to challenge purported violations of the AD Agreement and/or the SCM Agreement, while they and/or their nationals have simultaneously pursued resolution of the same disputed issues under the binational dispute settlement panel mechanism established under Chapter 19 of the North American Free Trade Agreement (NAFTA).<sup>17</sup> Parallel proceedings have been brought under

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14. See, e.g., Ragosta, *supra* note 1, at 730 (noting the lack of standing, mootness, or ripeness doctrines); Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT'L L. 733, 759 (1999) (suggesting that panels might resort to abstention doctrines comparable to the political question, ripeness, and standing doctrines). See generally Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice*, 18 MICH. J. INT'L L. 399 (1997) (canvassing doctrines of judicial abstention).

15. Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, Apr. 15, 1994, 33 I.L.M. 1125 [hereinafter AD Agreement].

16. Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, Apr. 15, 1994, 33 I.L.M. 1125 [hereinafter SCM Agreement].

17. North American Free Trade Agreement, U.S.-Can.-Mex., ch. 19, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA] (providing for the establishment of binational panels). NAFTA Chapter 19 sets forth an alternative dispute settlement mechanism created by Canada, Mexico, and the United States to resolve unfair trade remedy disputes. Article 1904 replaces judicial review of AD and CVD administrative determinations by national investigating authorities with binational panel review. *Id.* art. 1904.1. The law applied by binational panels is that of the country of importation. *Id.* art. 1904.2. The disputing countries select the persons who serve on the five-member panels from a roster of panelists. *Id.* annex 1901.2 (indicating that each party shall appoint two panelists in consultation with the other involved party and that the parties shall agree on the selection of a fifth panelist). The phenomenon of parallel WTO-Chapter 19 proceedings is not

NAFTA Chapter 19 and to the WTO involving the following products: (1) Canadian exports to the United States of softwood lumber and wheat, (2) U.S. exports to Mexico of high-fructose corn syrup, and (3) Mexican exports to the United States of cement and oil-country tubular goods.<sup>18</sup>

As Table XX in Appendix XX illustrates, all or most of the same legal issues were raised in these parallel proceedings. As noted by one commentator, “[i]n the WTO context, the exhaustion issue normally arises in challenges to formal administrative proceedings (e.g. antidumping, countervailing, or safeguards proceedings), although the exhaustion issue can also arise in other situations if the challenged Member contends that domestic judicial procedures would have provided an adequate remedy.”<sup>19</sup>

Consistent with the doctrine of exhaustion of local remedies, resort to the DSU should be foreclosed until all domestic review proceedings challenging a national investigating authority’s imposition of antidumping (AD) or countervailing (CVD) duties are exhausted, subject to the well-recognized grounds that excuse exhaustion.<sup>20</sup> Given the supranational character of the NAFTA Chapter 19 dispute settlement mechanism for resolving AD and CVD disputes, the exhaustion doctrine should apply *a fortiori*, thus barring one NAFTA Party from bringing a complaint to the WTO against another NAFTA Party alleging a violation of the WTO AD or SCM Agreement until the NAFTA Chapter 19 process has run its course.

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unique to NAFTA. As shown in Table XX in Appendix XX, under the Canada-U.S. Free Trade Agreement (FTA), Canada initiated parallel proceedings under GATT 1947 involving both softwood lumber and pork from Canada, while FTA Chapter 19 binational dispute settlement panel proceedings were also pending. *See* Free Trade Agreement, U.S.-Can., Dec. 22-23, 1987 and Jan. 2, 1988, 27 I.L.M. 281, 386-95 (1988) (setting forth the provisions that govern the establishment of a binational panel under Chapter 19).

18. *See infra* Appendix. On January 19, 2006, Mexico and the United States reached a settlement “in principle” to resolve the dispute over an antidumping order the United States imposed on imports of Mexican cement in 1990. *U.S., Mexico Strike Cement Deal, As U.S. Rejects Changes to NAFTA*, INSIDE U.S. TRADE, Jan. 20, 2006, at 1, 1. A settlement of the *Cement* cases, both at the WTO and under NAFTA Chapter 19, was announced on January 19, 2006. Pursuant to the agreement proposed in January, all litigation surrounding the cement antidumping case would cease, including a WTO panel brought by the Mexican government and a Chapter 19 challenge brought by Mexican cement exporters under NAFTA. *Id.* at 16. In March 2006, Mexico and the United States signed the proposed agreement, which took effect on April 3, 2006. *Mexico Threatens to Replace HFCS Tax with New Duty After WTO Defeat*, INSIDE U.S. TRADE, Mar. 10, 2006, at 10, 10. The agreement resolved all litigation surrounding the antidumping order and took effect on April 3, 2006. *Id.*

19. Lichtenbaum, *supra* note 9, at 1220.

20. *See infra* Part II.

This Article begins with an analysis of the doctrine of exhaustion of local remedies under customary international law. It then examines the status of the exhaustion doctrine at the WTO and under NAFTA. It concludes with two recommendations: (1) amend either the DSU or the AD and SCM Agreements to mandate exhaustion of local remedies in AD and CVD disputes, and (2) amend NAFTA Chapter 19 to provide for the automatic selection of panelists in the event a disputing country fails to appoint its panelists within thirty days of a request for Chapter 19 panel review.<sup>21</sup>

## II. THE DOCTRINE OF EXHAUSTION OF LOCAL REMEDIES UNDER INTERNATIONAL LAW

The doctrine of exhaustion of local remedies is well-recognized in international law. The commentary of the Restatement (Third) Foreign Relations Law of the United States indicates that “[u]nder international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.”<sup>22</sup> A corollary is that the aggrieved national’s home state may not initiate proceedings against the offending state in an international tribunal until local remedies have been exhausted. In the words of the International Court of Justice (ICJ), “[t]he rule that local remedies must be exhausted before international proceed-

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21. Decisions of NAFTA Chapter 19 binational panels are binding on the disputing parties, subject to review by an extraordinary challenge procedure. *See* NAFTA, *supra* note 17, arts. 1904.9, 1904.13 (setting forth the limited situations in which a Party may avail itself of the extraordinary challenge procedure). There have been only three extraordinary challenges brought under NAFTA to date. All three of these challenges have been brought by the United States, and all of them have been unsuccessful. *See In re* Gray Portland Cement, Secretariat File No. ECC-2000-1904-01USA (Oct. 30, 2003) (rejecting, in the first extraordinary challenge under NAFTA, a request by the United States that an extraordinary challenge committee be convened to consider one of fourteen determinations made by a binational panel regarding an antidumping order relating to gray portland cement and clinker from Mexico); *In re* Pure Magnesium from Canada, Secretariat File No. ECC-2003-1904-01USA (Oct. 7, 2004) (rejecting the challenge brought by the United States because although the binational panel exceeded its powers by failing to apply the correct standard of review, and such action did materially affect the panel’s decision, the action by the panel did not threaten the integrity of the binational panel review process, as required under Article 1904.13 of NAFTA); *In re* Certain Softwood Lumber Products from Canada, Secretariat File No. ECC-2004-1904-01USA (Aug. 10, 2005) (rejecting arguments made by the United States that the binational panel committed errors in resolving the softwood lumber dispute).

22. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. f (1986); *see also* C.F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 11–29 (1990) (discussing the history of the law relating to the local remedies rule).



ings may be instituted is a well-established rule of customary international law.”<sup>23</sup>

Traditionally, the rule of exhaustion of local remedies has been applied in cases of diplomatic protection. Typical claims stem from a foreign investor whose investment has been expropriated by a host state without payment of adequate compensation or from a victim of a human rights violation alleging violations of the minimum standard of treatment of aliens under international law.<sup>24</sup> Failure to exhaust local remedies is thus a restriction on a nation’s ability to espouse the claims of one of its nationals before another nation or an international tribunal.<sup>25</sup>

The core rationale of the exhaustion rule is opportunity to cure—“that the host or respondent State must be given the opportunity of redressing the alleged injury.”<sup>26</sup> As articulated by the ICJ, “[b]efore resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.”<sup>27</sup> Although this exhaustion rule is primarily driven by a con-

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23. *Interhandel (Switz. v. U.S.)*, 1959 I.C.J. 6, 27 (Mar. 21); see also Matthew H. Adler, *Congressional Involvement in Expropriation Cases: A Case Study of the “Factfinding” Process*, 21 *LAW & POL’Y INT’L BUS.* 211, 214–15 (1989) (“It is a principle of international claims law that nationals of one state who claim injury at the hands of another must first exhaust their local remedies in the host state, unless they can demonstrate that the exercise would be futile.”); Anuj Desai, *Case No. A27: The Iran-United States Claims Tribunal’s First Award of Damages for a Breach of the Algiers Declarations*, 10 *AM. REV. INT’L ARB.* 229, 236 (1999) (“Customary international law is clear that, before a state can bring a claim in an international tribunal on behalf of one of its nationals, the injured party must be shown to have exhausted its local remedies in the host State.”).

24. See, e.g., A.A. CANÇADO TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW* 3, 11 (1983) (discussing application of the local remedies rule in the context of human rights protection); David J. Scheffer, *Non-Judicial State Remedies and the Jurisdiction of the International Court of Justice*, 27 *STAN. J. INT’L L.* 83, 90 (1990) (“The rule typically is invoked in espousal cases, or cases where the national’s government represents the national’s interest in a claim against another target government.”).

25. See Denise Manning-Cabrol, *The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors*, 26 *LAW & POL’Y INT’L BUS.* 1169, 1191–92 (1995) (discussing that the exhaustion of local remedies requirement is recognized as a restriction on diplomatic protection and “provides a barrier to requesting one’s government to espouse a claim”).

26. AMERASINGHE, *supra* note 22, at 97; see also *id.* at 61–62 (“The rule that local remedies must be exhausted recognizes the defendant State’s interests, by affording such State the opportunity to redress the wrong committed.”).

27. *Interhandel*, 1959 I.C.J. at 27; see also EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 817 (1915) (“[T]he home government of the complaining citizen must give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all occasion for international discussion.”).

cern for the interests of the respondent state, the rule also serves both the interests of the home state of the injured alien and also the interests of international tribunals.<sup>28</sup> First, “it relieve[s] national States of espousing claims that might be resolved at a lower level or which [are] unfounded and frivolous.”<sup>29</sup> Second, it relieves “international tribunals from being excessively burdened with litigation.”<sup>30</sup>

In *Elettronica Sicula S.p.A. (the ELSI Case)*, a chamber of the ICJ addressed whether the exhaustion doctrine applies when a state brings a proceeding against another state alleging a violation of treaty obligations owed to the former by the latter.<sup>31</sup> The *ELSI Case* involved the interpretation of a 1948 Treaty of Friendship, Commerce, and Navigation between the United States and Italy (the FCN Treaty).<sup>32</sup> The United States alleged that Italy had violated the FCN Treaty by acts and omissions that deprived two U.S. corporations of their right to manage and control an Italian corporation they owned.<sup>33</sup> Italy, invoking the exhaustion doctrine, argued that the U.S. corporations had failed to exhaust Italian domestic remedies.<sup>34</sup> The United States countered that, because its case before the ICJ sought a declaratory judgment that the FCN Treaty had been violated, the claim was not one of espousal and therefore was not subject to the exhaustion doctrine.<sup>35</sup> The United States also made the related argument that because it was seeking a declaratory judgment that Italy had violated the rights of the Government

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28. See William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 357, 362 (2000).

29. AMERASINGHE, *supra* note 22, at 67.

30. *Id.* at 69; see also TRINDADE, *supra* note 24, at 3 (“[T]he rule was adopted . . . to avoid the international organ being ‘flooded’ with irrelevant complaints.”).

31. *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15, 42 (July 20) (noting that the United States questioned whether the rule of exhaustion of local remedies could apply to a case brought under the treaty involved in the case).

32. See *id.* Article XXVI of the Treaty of Friendship, Commerce and Navigation (FCN Treaty) provides as follows:

Any dispute between the High Contracting Parties as to the interpretation or the application of this Treaty, which the High Contracting Parties shall not satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties shall agree to settlement by some other pacific means.

Treaty of Friendship, Commerce and Navigation, U.S.-Italy, art. XXVI, Feb. 2, 1948, 63 Stat. 2255.

33. *Elettronica Sicula S.p.A. (ELSI)*, 1989 I.C.J. at 19–20.

34. *Id.* at 42.

35. See *id.* (“The United States further argued that the local remedies rule would not apply in any event to the part of the United States claim which requested a declaratory judgment finding that the FCN Treaty had been violated.”).

of the United States under the FCN Treaty, thereby causing direct injury to the United States, the local remedies rule was inapplicable.<sup>36</sup> The ICJ chamber rejected these arguments, concluding that it was not possible “to find a dispute over [an] alleged violation of the FCN Treaty resulting in direct injury to the United States, that is both distinct from, and independent of, the dispute over the alleged violation in respect of Raytheon and Machlett [the aggrieved American companies].”<sup>37</sup> Finding that the claim of the United States and that of the two American companies were inextricably tied, the ICJ chamber rejected the argument that “there is a part of the Applicant’s claim which can be severed so as to render the local remedies rule inapplicable to that part.”<sup>38</sup> In short, the ICJ chamber was unreceptive to what it apparently viewed as a hypertechnical argument that a state’s rights under an FCN treaty are distinct from those of its aggrieved national.

Although there is some support for the view that each domestic and international law claim potentially at issue in a case must be first presented to local tribunals in order to fully satisfy the local remedies rule,<sup>39</sup> in the *ELSI Case*, the ICJ found that both domestic and international law claims need not be presented to local tribunals in order to satisfy the exhaustion doctrine.<sup>40</sup> Nevertheless, the exhaustion rule does require that the injured alien take all appeals and obtain a final decision from the highest court of the host State to which it has a right to resort.<sup>41</sup>

A failure to exhaust local remedies may be excused when resort to local tribunals would be “clearly sham or inadequate, or their application is unreasonably prolonged.”<sup>42</sup> It is also possible to

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36. *Id.*

37. *Id.* at 42–43.

38. *Id.* at 43.

39. *See, e.g.,* Dodge, *supra* note 28, at 362 (citing authority for the proposition that suggests that “an injured alien must bring not just its domestic law claims but also its international claims before the domestic court”).

40. *Elettronica Sicula S.p.A. (ELSI)*, 1989 I.C.J. at 47–48.

41. *See AMERASINGHE*, *supra* note 22, at 181 (“[T]he alien must proceed to the highest court in the total system . . . where the legal system of the respondent or host State has a multiple hierarchy of fora which can provide redress”); *see also* Dodge, *supra* note 28, at 362 (“[I]t is clear that the local remedies rule is not satisfied until the injured alien has completely exhausted its appeals and has obtained a final decision from the highest court of the host State to which it has a right to resort.”).

42. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. f (1986); *see also* AMERASINGHE, *supra* note 22, at 194 (“Where it is clear that the resort to an appeal or reference to another court or tribunal would not be a source of adequate redress, the alien is excused from spending his money and time.”); BORCHARD, *supra* note 27, at 821–25 (discussing the qualifications on the rule that local remedies be exhausted); Dodge, *supra* note 28, at 362 (“Failure to exhaust local remedies may be

waive the exhaustion rule by treaty.<sup>43</sup> As the ICJ chamber stated unequivocally in the *ELSI Case*, there can be “no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply.”<sup>44</sup> Whether a waiver must be stated explicitly in the treaty or whether it may be implied is not clear.<sup>45</sup> In the *ELSI Case*, the United States argued that if the United States and Italy “had . . . intended the jurisdiction conferred upon the Court to be qualified by the local remedies rule in cases of diplomatic protection, [they] would have used express words to that effect.”<sup>46</sup> In rejecting this argument, the ICJ chamber was clear that an implicit waiver of the local remedies rule was not possible, stating that it was “unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.”<sup>47</sup> On the strength of the *ELSI Case*, “it seems that simply providing for the settlement of disputes without any reference to domestic courts . . . is insufficient to waive the local remedies rule.”<sup>48</sup>

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excused only in limited circumstances.”); Louis Sohn & Robert Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT’L L. 545, 577 (1961) (indicating in a Draft Convention of the International Responsibility of States for Injuries to Aliens that the need to exhaust local remedies is excused where they are “excessively slow,” or will not provide “substantial recovery,” or have been foreclosed by an act or omission of the state). Instances where recourse to a domestic forum could be considered “obviously futile” include the following:

(1) when recourse to the forum will result in the repetition of a clear line of direct precedent adverse to the claimant; (2) when the court has no jurisdiction over the issue; (3) when the respondent State’s municipal law clearly justifies the acts complained of; (4) when the respondent State’s judicial branch lacks independence; (5) when the available remedies will not provide the relief sought by claimant; or, (6) when there is an absence of due process of law in the respondent State.

Desai, *supra* note 23, at 238.

43. See AMERASINGHE, *supra* note 22, at 251–55 (discussing the possibility that express waiver of the requirement that local remedies be exhausted may be contained in treaties and do not raise any significant issues).

44. Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 42 (July 20).

45. See, e.g., Dodge, *supra* note 28, at 363 (noting that although the requirement that local remedies be exhausted may be waived, it is unclear how explicit such a waiver must be).

46. Elettronica Sicula S.p.A. (ELSI), 1989 I.C.J. at 42.

47. *Id.*

48. Dodge, *supra* note 28, at 365. In *American International Group, Inc. v. Islamic Republic of Iran*, however, the Iran-U.S. Claims Tribunal read the Iran-U.S. Claims Settlement Declaration as waiving the local remedies rule by negative implication. See *Am. Int’l Group, Inc. v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 96, 102 (1983) (noting that the Claims Settlement Declaration “delimited the grounds for excluding claims from the Tribunal’s jurisdiction, and a general reservation for cases within the domestic jurisdiction of one the

### III. EXHAUSTION OF LOCAL REMEDIES AT THE WTO

One question that has arisen is whether the exhaustion doctrine applies in WTO dispute settlement proceedings. More specifically, does the exhaustion rule apply when an aggrieved WTO Member complains about a violation of the AD or SCM Agreement in state-to-state WTO dispute settlement? The text of the DSU, the AD Agreement, and the SCM Agreement provide no clear guidance.

#### A. *The WTO Agreements*

First, Article 3.2 of the DSU notes that the DSU serves to clarify the existing provisions of various WTO agreements in accordance with the customary rules for interpreting public international law, but with no express mention of exhaustion or any of the other rules on judicial restraint.<sup>49</sup> Article 3.7 of the DSU provides that before bringing a case, “a Member shall exercise its judgment as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”<sup>50</sup> This provision hints at restraint, but restraint on the part of a complaining WTO Member, not on the part of the WTO dispute settlement panels or the Appellate Body.

Second, Article 7.4 of the SCM Agreement apparently gives Members the unconditional right to refer a matter to the DSB for the establishment of a panel after consultations have been exhausted.<sup>51</sup> The Article makes no mention of exhaustion of local

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countries was not among those grounds”); *see also* Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 1 Iran-U.S. Cl. Trib. Rep. 9, 11 (1981) (setting forth the jurisdiction of the Iran-U.S. Claims Tribunal).

49. Article 3.2 of the DSU provides:

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

DSU, *supra* note 2, art. 3.2.

50. *Id.* art. 3.7.

51. Article 7.4 of the SCM Agreement provides as follows:

If consultations do not result in a mutually agreed solution within 60 days, any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

SCM Agreement, *supra* note 16, art. 7.4 (footnote omitted).

remedies, even though Articles 12.1 and 12.2 of the SCM Agreement do provide exporting Members full rights of participation in national administrative proceedings.<sup>52</sup> Significantly, Article 23 of the SCM Agreement provides in part that “[e]ach Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations.”<sup>53</sup> It is not a legal impossibility for a treaty to expressly mandate the establishment of domestic appellate review of administrative determinations without implicitly requiring exhaustion of that appellate process before WTO dispute settlement proceedings are brought. However, in the face of such clear language mandating the establishment of a local remedy, exhaustion of that remedy is likely required before resorting to the DSU.<sup>54</sup>

In short, neither the DSU nor any of the relevant dispute settlement provisions of the AD and SCM Agreements explicitly requires exhaustion of local remedies. Nevertheless, provisions of both the

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52. *See id.* art. 12.1 (“Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.”); *id.* art. 12.2:

Interested Members and interested parties also shall have the right, upon justification, to present information orally. Where such information is provided orally, the interested Members and interested parties subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation, due account having been given to the need to protect confidential information.

53. *Id.* art. 23.

54. In parallel provisions, Article 17.4 of the AD Agreement gives Members the right to refer a matter to the DSB for the establishment of a panel if final agency action has been taken, again with no mention of exhaustion, although Articles 6.1 and 6.2 provide exporting Members full rights of participation in national administrative proceedings. *See AD Agreement, supra* note 15, art. 17.4 (providing that if final action has been taken by the administering authorities, the matter may be referred to the DSB); *id.* art. 6.1 (“All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.”); *id.* art. 6.2 (“Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests.”). The AD Agreement defines “interested parties” as including the government of the exporting Member. *Id.* art. 6.11. Additionally, Article 13 of the AD Agreement provides that “[e]ach Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations . . . .” *Id.* art. 13.

AD and SCM Agreements suggest that exhaustion of the local remedy mandated under those Agreements is required before a request for the establishment of a WTO panel may be made to the DSB. For example, the AD and SCM Agreements each mandate the establishment of an independent body to review administrative determinations made by national investigating authorities.

Despite the silence of the WTO texts on the applicability of the exhaustion doctrine, the WTO Secretariat has offered the following black letter law summary of the exhaustion doctrine: “[U]nder the DSU there is no requirement to exhaust local remedies before instituting dispute settlement proceedings.”<sup>55</sup> While that may be true as a strictly textual matter, it is questionable whether it is an accurate statement of GATT/WTO jurisprudence.

### B. GATT/WTO Jurisprudence

The available GATT jurisprudence provides some insight into the status of the exhaustion doctrine at the WTO.<sup>56</sup> Turning first to adopted GATT panel reports, in two companion cases, *United States — Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*,<sup>57</sup> and *United States — Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon*

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55. Note by the Secretariat, *Consultation and the Settlement of Disputes Between Members*, ¶ 21, WT/WGTI/W/134 (Aug. 7, 2002).

56. Although the doctrine of stare decisis does not apply *de jure* in the WTO, the Appellate Body has ruled that adopted GATT panel reports are to be taken into account. See, e.g., Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, at 14, WT/DS8/AB/R (Oct. 4, 1996):

Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.

See also Bhala, *supra* note 1, at 936–41 (discussing the status of *de jure* stare decisis in the WTO). Additionally, unadopted GATT panel reports, while having no legal status, are also to be considered to the extent that they might provide some useful guidance. See, e.g., Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, *supra*, at 14–15 (“[W]e agree with the Panel’s conclusion . . . that *unadopted* panel reports ‘have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members.’ Likewise, we agree that ‘a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant.’”).

57. Report of the Panel, *United States — Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87 (Apr. 27, 1994), GATT B.I.S.D. (41st Supp.) at 229 (1994) [hereinafter *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*].

from Norway (collectively the *Norway Salmon Cases*),<sup>58</sup> the applicability of the doctrine of exhaustion of local remedies in the context of AD and CVD disputes was thoroughly argued by the parties but not decisively settled by the panel. A later unadopted GATT panel report in *United States — Anti-Dumping Duties on Gray Portland Cement (Cement Case)* echoed the analysis of the *Norway Salmon Cases*.<sup>59</sup>

## 1. The Norway Salmon Cases

In these two cases the United States argued that the doctrine of exhaustion of local remedies and the rule of exhaustion of administrative remedies both apply to dispute settlement proceedings under the Tokyo Round Antidumping and Subsidies Agreements (Tokyo Round Agreements).<sup>60</sup> Norway countered first that the doctrine of exhaustion of local remedies applies only to cases of diplomatic protection, as distinguished from cases involving “direct injury” to a state.<sup>61</sup> Norway argued that, in dispute settlement proceedings under the Tokyo Round Agreements, a signatory was not bringing a claim on behalf of one of its nationals,<sup>62</sup> but instead brought a claim based on the “direct injury” to a signatory in the form of nullification or impairment of benefits accruing to that signatory.<sup>63</sup>

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58. Report of the Panel, *United States — Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153 (Apr. 28, 1994), GATT B.I.S.D. (41st Supp.) at 576 (1994) [hereinafter *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*].

59. See *infra* Part. III.B.2.

60. See *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 33 (indicating the argument made by the United States that the notion of exhaustion of administrative remedies was closely akin to the notion of exhaustion of local remedies); *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 22 (noting the argument made by the United States that the policies behind the doctrine of administrative remedies were almost identical to the rationales underlying the rule of the exhaustion of local remedies). The Tokyo Round Antidumping and Subsidies agreements served as the predecessor agreements to the WTO AD and SCM Agreements.

61. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 37; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 25.

62. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 37; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 25.

63. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 37; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 25.



Norway next argued that there was no basis in the texts of the Agreements for the application of the doctrine of exhaustion of local remedies.<sup>64</sup> If the signatories had intended to include such a requirement, Norway claimed, they would have done so explicitly.<sup>65</sup> Moreover, Norway asserted that there was no GATT practice recognizing the local remedies doctrine.<sup>66</sup> The Vienna Convention on the Law of Treaties directs that subsequent practice be taken into account when interpreting the provisions of an international agreement, and subsequent GATT practice does not require the exhaustion of local remedies.<sup>67</sup> Furthermore, Norway maintained that the exhaustion doctrine was excused where local remedies were inadequate and ineffective, and “[n]o adequate remedy was available for Norway in the courts of the United States for a breach by the United States of its GATT obligations” because U.S. domestic law specifically commands that no provision of any trade agreement in conflict with any U.S. statute be given effect under U.S. law.<sup>68</sup>

Finally, moving to a policy argument, Norway contended that “strong policy considerations dictated that a local remedies doctrine not be applied to dispute settlement proceedings” under the two Tokyo Round Agreements because it would result in delays in the dispute settlement process and would, therefore, be inconsistent with the Tokyo Round Agreements’ purpose of timely resolution of disputes.<sup>69</sup> Finally, regarding exhaustion of administrative remedies, Norway submitted that “[s]ince the United States Department of Commerce and other relevant agencies did not apply GATT law on any consistent basis, it was also often futile for a

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64. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 37; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 25.

65. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 37; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 25.

66. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 37; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 25.

67. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 37; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 25.

68. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 38; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 26.

69. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 39; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 27.

contracting party to raise GATT related issues before these agencies.”<sup>70</sup>

The United States countered by arguing that Norway’s discussion of the rule of exhaustion of local remedies was immaterial because the United States had not argued that the rule applied to dispute settlement under the Tokyo Round Agreements, and that, regardless, Norway’s interpretation of the exhaustion rule was erroneous.<sup>71</sup> Moreover, relying on the ICJ’s decision in the *ELSI Case*, the United States argued that the doctrine of exhaustion of local remedies applied when a nation was primarily representing its nationals, even if some issues of sovereignty were secondarily present,<sup>72</sup> and that Norway was actually espousing the interests of its nationals in these proceedings.<sup>73</sup> The United States concluded that “Norway’s argument that it was adjudicating its own rights under the [Tokyo Round] Agreements, separate and apart from the interests of its nationals, would create an exemption to the local remedies doctrine which would effectively swallow the entire doctrine.”<sup>74</sup>

The GATT panel declined to answer the question of whether the doctrine of exhaustion of local remedies applied because the issue was not within its terms of reference.<sup>75</sup> The panel concluded:

The United States had argued that the rationale behind this concept of “exhaustion of administrative remedies” was akin to the rationale behind the public international law doctrine of exhaustion of local remedies. However, when Norway argued against application of the legal doctrine of exhaustion of local remedies in this dispute, the United States had clarified that it had not sought application of this doctrine. Consequently, the

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70. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 40; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 28.

71. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 46; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 33.

72. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 46; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 33.

73. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 47; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 34.

74. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 47; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 34.

75. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 348; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 217.

issue of application of the doctrine of exhaustion of local remedies to dispute settlement under the [Tokyo Round] Agreement[s] was not before the Panel.<sup>76</sup>

Thus, the GATT panel exercised judicial restraint by avoiding the question of whether the exhaustion doctrine applies in GATT dispute settlement proceedings.<sup>77</sup> Nevertheless, on the closely related question of exhaustion of administrative remedies, the panel explicitly stated:

The Panel did not find . . . any basis for it to refuse to consider a claim by a Party in dispute settlement under the [Tokyo Round] Agreement[s] merely because the subject matter of the claim had not been raised before the investigating authorities under domestic law. The Panel considered that, had the drafters of the Agreement[s] intended a limitation on the scope of dispute settlement of the nature advocated by the United States, they would have included a clear statement to that effect in the Agreement[s] . . . .<sup>78</sup>

The panel clearly was not persuaded by the ICJ's holding in the *ELSI Case* that such an important doctrine of customary international law could not be read out of a treaty by implication.<sup>79</sup>

## 2. The Cement Case

Another GATT dispute where the exhaustion doctrine was addressed is the 1992 unadopted GATT panel report in the *Cement Case*.<sup>80</sup> Here, in a pre-NAFTA dispute between Mexico and the United States, the United States renewed its exhaustion of administrative remedies argument. According to Mexico, the intent of the drafters of the Tokyo Round Anti-Dumping Agreement was not, as the United States suggested, to institute the principle of exhaustion against those parties that declined to participate in the admin-

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76. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 348; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 217.

77. See *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 348 (refraining from deciding whether the exhaustion rule applied); *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 217 (refraining from deciding whether the exhaustion rule applied).

78. *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 57, ¶ 349; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, *supra* note 58, ¶ 218.

79. For a more detailed discussion of the holding in the *ELSI Case*, see *infra* Part II.

80. Report of the Panel, *United States — Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico* (Sept. 7, 1992) (unadopted) [hereinafter *Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico*].

istrative proceedings.<sup>81</sup> Rather, Mexico argued that the principle of exhaustion proposed by the United States would lead to illogical and impracticable results—that unless the governments that had signed the Agreement became parties to every U.S. antidumping investigation involving their producers and made every conceivable argument to the U.S. investigating authorities, they would lose their international right to make arguments to a GATT dispute settlement panel convened under the Agreement.<sup>82</sup>

The United States countered that although the exhaustion principle did not mandate that a government of an exporting country participate in every antidumping investigation involving its exporters or raise every conceivable argument, it did nevertheless require that some interested party, whether government or private, raise any issue that might later appear in a GATT dispute before national investigating authorities first.<sup>83</sup>

As in the *Norwegian Salmon* case, the panel found that there was nothing in the Tokyo Round Anti-Dumping Agreement that explicitly required exhaustion of administrative remedies—an issue did not have to have been raised in domestic administrative proceedings for an order resolving an issue to be properly before a GATT panel.<sup>84</sup> Parroting the panel in *Norwegian Salmon*, the *Cement* panel concluded that if the drafters had intended such a fundamental restriction on the right of recourse to the Agreement's dispute settlement process, they would have made an explicit provision for it.<sup>85</sup> The *Cement* panel, however, limited its review to the facts contained in the administrative record and therefore prevented Mexico from submitting new evidence to the GATT panel that had not been before the administrative agency.<sup>86</sup>

In sum, GATT jurisprudence has not addressed the precise question of whether the doctrine of exhaustion of local remedies is part of the GATT acquis, although the *Norwegian Salmon* and *Cement* cases did reject any requirement that a complaining party first exhaust administrative remedies before bringing a GATT complaint.

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81. *Id.* ¶ 3.1.6.

82. *Id.*

83. *Id.* ¶ 3.1.9.

84. *Id.* ¶ 5.9.

85. *Id.*

86. *Id.* ¶ 5.12.

### 3. The Foreign Sales Corporation Case

Turning to WTO jurisprudence, the issue of exhaustion of local remedies has only been raised and squarely addressed in one WTO panel report. In the *United States — Foreign Sales Corporation* case (*Foreign Sales Corporation Case*),<sup>87</sup> the United States argued that text in the SCM Agreement expressly directs WTO Members to resolve certain issues raised by exemptions from direct taxes in an appropriate tax forum before resorting to WTO dispute settlement.<sup>88</sup> The panel disagreed, however, stating that the text cited by the United States did not provide “a clear and unambiguous basis for circumscribing the right to resort to WTO dispute settlement at any time.”<sup>89</sup> The panel explained:

[U]nder Article XXIII of GATT 1994, the DSU and Article 4 of the SCM Agreement, a Member has the right to resort to WTO dispute settlement at any time by making a request for consultations in a manner consistent with those provisions. This fundamental right to resort to dispute settlement is a core element of the WTO system. Accordingly, we believe that a panel should not lightly infer a restriction on this right into the WTO Agreement; rather, there should be a clear and unambiguous basis in the relevant legal instruments for concluding that such a restriction exists.<sup>90</sup>

The Appellate Body did not consider this question on appeal.<sup>91</sup>

### 4. The Section 211 Case

In another WTO dispute settlement proceeding, *United States — Section 211 of the Omnibus Appropriations Act of 1998* (*Section 211 Case*),<sup>92</sup> the European Communities brought a complaint against the United States alleging, *inter alia*, that the United States had failed to provide effective domestic remedies to protect the intellectual property rights of certain intellectual property owners as required under Article 42 of the TRIPS Agreement.<sup>93</sup> In its report,

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87. Panel Report, *United States — Tax Treatment for Foreign Sales Corporations*, WT/DS108/R (Oct. 8, 2000).

88. *Id.* ¶ 7.12; *see also* SCM Agreement, *supra* note 16, Annex I(e) n.59 (“Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms . . .”).

89. *United States — Tax Treatment for Foreign Sales Corporations*, *supra* note 87, ¶ 7.19.

90. *Id.* ¶ 7.17.

91. *See* Appellate Body Report, *United States — Tax Treatment for Foreign Sales Corporations*, WT/DS108/AB/R (Feb. 24, 2000).

92. Panel Report, *United States — Section 211 of the Omnibus Appropriations Act of 1998*, WT/DS176/R (Aug. 6, 2001).

93. *Id.* ¶ 8.92 (noting the argument made by the European Communities that portions of Section 211 violate Article 42 of the TRIPS Agreement because Section 211 denies

the WTO panel dropped the following footnote: “[T]he rule of exhaustion of local remedies is not applicable in this case, as the interpretation and application of a treaty between states is what is primarily at issue rather than the infringement of rights of individuals.”<sup>94</sup> Here, the panel was clinging tightly to the notion that WTO dispute settlement proceedings do not represent espousal claims, but instead represent interpretive disputes of treaty obligations between states,<sup>95</sup> a conclusion completely at odds with the one reached by the ICJ in the *ELSI Case*.<sup>96</sup>

While none of these GATT and WTO panel reports have addressed the specific issue of exhaustion of local remedies in the context of AD and CVD proceedings, they do point to the conclusion that the exhaustion doctrine does not apply under the DSU. The Appellate Body has not yet ruled on this issue.

Notwithstanding this body of GATT/WTO jurisprudence, at least in the context of disputes brought under the AD and SCM Agreements, a complaining WTO Member’s characterization of its case as an “interpretive dispute” or as a “state-to-state” dispute over the meaning of treaty provisions strikes me as a highly formalistic depiction and mischaracterization of the true nature of the case, which is substantively one of espousal. But for an aggrieved exporting producer’s complaint that the country of importation has violated the AD Agreement, the SCM Agreement, or both, there unquestionably would be no WTO complaint brought by that producer’s home country. The purpose of these two Agreements is

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“the availability of US courts to enforce the rights targeted by Section 211(a)(2)”). Article 42 of the TRIPS Agreement provides, in part, that “[m]embers shall make available to the right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement.” *Id.* ¶ 8.94 (quoting Article 42 of the TRIPS Agreement) (footnote omitted).

94. *Id.* ¶ 8.95 n.131.

95. See Scheffer, *supra* note 24, at 92 (“A ‘legislative’ treaty, such as the Genocide Convention or the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, typically would not require exhaustion of local remedies because the dispute normally would arise directly between two governments.” (footnotes omitted)).

96. See *supra* Part II. The WTO panel also noted that “in cases involving [the local remedies] rule it has been universally recognized that the remedies available under national law must be ‘effective’ in nature, i.e., they must open the possibility of a genuine remedy for the (private) complainant.” *United States — Section 211 of the Omnibus Appropriations Act of 1998*, *supra* note 92, ¶ 8.95 n.131. This exception to the exhaustion doctrine is certainly well recognized. The exhaustion doctrine was also raised in another WTO panel proceeding, but not addressed by the panel. See Panel Report, *Argentina — Measures Affecting the Import of Bovine Hides and the Import of Finished Leather*, ¶ 11.249, WT/DS155/R (Dec. 19, 2000) (noting the argument made by the European Communities that there is no obligation to exhaust local remedies before bringing a WTO complaint).

broadly twofold: to allow importing countries to protect domestic producers from unfair import competition, while simultaneously shielding foreign producers from overreaching by national investigating authorities charged with administering domestic unfair trade remedy laws. In other words, WTO complaints brought under the AD and SCM Agreements do not materialize full-blown from a factual vacuum; they are the direct byproduct of insistent exporting producers who have successfully lobbied for bringing a WTO complaint.<sup>97</sup>

As noted above, the ICJ chamber in the *ELSI Case* ruled that the parties to a treaty either can “agree that the [exhaustion doctrine] shall not apply to claims based on alleged [treaty violations]; or confirm that [the doctrine] shall apply.”<sup>98</sup> But the ICJ was unable to accept that such an “important principle of customary international law” could be rejected in the absence of treaty language making such an intention clear.<sup>99</sup> Thus, the failure to mention exhaustion of local remedies in the treaty’s compromissory clause did not dispense with the exhaustion requirement before filing an application with the ICJ. The ICJ’s conclusion is thus sharply at odds with the one reached by the WTO panels in the *Foreign Sales Corporation* and *Section 211* cases.

### C. Exhaustion Under NAFTA Chapter 19

Alternatively, does NAFTA require NAFTA Parties to delay the initiation of WTO dispute settlement proceedings until NAFTA Chapter 19 binational dispute settlement proceedings have been completed? NAFTA Chapter 19 is silent on this question. NAFTA Articles 2005.1 and 2005.3 provide that disputes may be settled by

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97. To suggest that the object of the WTO Agreements is to protect trade in goods, trade in services, and intellectual property *simple*, rather than to protect producers of goods, providers of services, and owners of intellectual property, also strikes me as highly formalistic. See generally Rutsel Silvestre J. Martha, *World Trade Disputes Settlement and the Exhaustion of Local Remedies Rule*, 30 J. WORLD TRADE 107, 119–23 (1996) (discussing the applicability of the new multilateral trade arrangements resulting from the Uruguay Round that contain provisions creating obligations with regard to the treatment of private parties). Numerous GATT and WTO dispute settlement reports have “recalled the importance of security and predictability in the application of tariffs bindings . . . [P]revious panels and working parties had emphasized that tariff bindings justify reasonable expectations about market access and conditions of competition.” Panel Report, *Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, ¶ 3.63, WT/DS56/R (Nov. 25, 1997), *aff’d* by Appellate Body Report, *Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R (Mar. 27, 1998). These views focus on producers and exporters.

98. *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15, 42 (July 20).

99. *Id.*

either NAFTA or the WTO at the option of the complaining party except in cases of environmental, health, and safety disputes where the responding country has an exclusive choice of forum.<sup>100</sup> Thus, the relevant dispute settlement provisions of NAFTA do not explicitly require exhaustion of either the Chapter 19 process or other local remedies before resorting to WTO dispute settlement, nor do they create an exclusive international remedy under NAFTA Chapter 19.

#### D. *Parallel Proceedings Under NAFTA Chapter 20?*

Another interesting issue is whether it would be possible for the phenomenon of parallel WTO and NAFTA Chapter 19 proceedings to bleed through to NAFTA Chapter 20 (the country-to-country dispute settlement mechanism<sup>101</sup>). This question was briefly addressed, but not answered, in 2005 by a WTO panel in *Mexico — Tax Measures on Soft Drinks and Other Beverages*.<sup>102</sup> In that case, Mexico argued that the panel should decline to exercise jurisdiction in favor of dispute settlement under NAFTA Chapter 20 and sought a preliminary ruling to that effect.<sup>103</sup> Mexico's reason for urging abstention was that there is a different interpretation between Mexico and the United States regarding the conditions provided under NAFTA for access of Mexican sugar to the U.S. market.<sup>104</sup> The United States acknowledged that this difference has resulted in a

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100. NAFTA, *supra* note 17, arts. 2005.1, 2005.3.

101. There have only been three NAFTA Chapter 20 dispute settlement cases to date. At the request of the United States, a panel was formed to examine the NAFTA compatibility of Canada's tariff-rate quotas on imports of U.S. dairy, poultry, eggs, barley, and margarine products. *See* In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products, CDA-95-2008-01, Final Report of the NAFTA Chapter 20 Panel, ¶¶ 9, 16 (Dec. 2, 1996). The panel found that NAFTA entitled Canada to impose higher duties on these U.S. agricultural imports. *Id.* ¶ 209. The second Chapter 20 panel was established in January 1997 at the request of Mexico following the ITC's serious injury determination in the Section 201 broomcorn brooms case. *See* In the Matter of the U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico, USA-97-2008-01, Final Report of the NAFTA Chapter 20 Panel, ¶¶ 9–10, 17–18 (Jan. 30, 1998) (noting the injury determinations made by the ITC). The panel ruled against the United States, finding that the ITC had failed to properly explain its decision. *Id.* ¶ 78. In the third Chapter 20 proceeding, which involved cross-border trucking services and investment from Mexico, the panel ruled against the United States in its refusal to "review and consider for approval any Mexican-owned carrier applications for authority to provide cross-border trucking services . . ." In the Matter of Cross-Border Trucking Services, USA-MEX-98-2008-01, Final Report of the NAFTA Chapter 20 Panel, ¶ 295 (Feb. 6, 2001).

102. Panel Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, ¶¶ 7.6–9, WT/DS308/R (Oct. 7, 2005) (discussing certain provisions of the DSU).

103. *Id.* ¶ 7.11.

104. *Id.* ¶ 7.12.



dispute under NAFTA that is presently in the panelist selection stage.<sup>105</sup>

Nonetheless, neither the subject matter nor the respective positions of the parties are identical in the respective disputes under NAFTA and the DSU.<sup>106</sup> In the WTO case, for example, “the complaining party is the United States, and the measures in dispute are allegedly imposed by Mexico.”<sup>107</sup> In the NAFTA case, however, the situation is the reverse: “the complaining party is Mexico, and the measures in dispute are allegedly imposed by the United States.”<sup>108</sup> Likewise, in the WTO case, the United States alleged “discriminatory treatment against its products resulting from internal taxes and other internal measures imposed by Mexico,” while in the NAFTA case, Mexico argued that “the United States is violating its market access commitments under NAFTA.”<sup>109</sup>

In response to questions from the WTO panel regarding whether it could abstain from exercising subject matter jurisdiction in deference to NAFTA Chapter 20, the United States responded in the negative.<sup>110</sup> The WTO panel also asked whether anything in NAFTA would prevent the United States from bringing the present case to the WTO dispute settlement system.<sup>111</sup> The United States again responded that “there is nothing in the NAFTA that provides that the United States may not bring the present dispute to the WTO dispute settlement system.”<sup>112</sup>

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105. *Id.*

106. *See id.* ¶ 7.14.

107. *Id.*

108. *Id.*

109. *Id.*

110. Answers of the United States to Questions of the Panel in Relation to the First Substantive Meeting with the Parties, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, at 2, WT/DS308 (Dec. 20, 2004), available at [http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file169\\_6449.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file169_6449.pdf). The United States responded as follows:

For the Panel to decline to exercise jurisdiction over this dispute would mean that the Panel would make no findings on the U.S. claims that Mexico's tax measures are inconsistent with Article III of the GATT 1994. This in turn would leave the DSB unable to make any recommendations or rulings in accordance with the rights and obligations under the DSU and the GATT 1994. Such a result is incompatible with the text of the DSU. As noted above, it would require a panel to disregard the reason for its existence and the mandate given it by the DSB . . . . An approach that would permit a panel to decline to exercise jurisdiction over a dispute would be contrary to the ordinary meaning of those provisions and fail to preserve the rights and obligations at issue in the dispute.

*Id.* at 3.

111. *Id.* at 5.

112. *Id.* at 6.

On January 18, 2004, the WTO panel issued a preliminary ruling rejecting Mexico's request that it decline to exercise jurisdiction in favor of an arbitral panel under NAFTA Chapter 20.<sup>113</sup> In arriving at this decision, "[t]he Panel concluded that, under the DSU, it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it."<sup>114</sup> More specifically, the panel would be failing to perform its duty under DSU Article 11 to:

make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and to make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.<sup>115</sup>

Moreover, in the panel's view, "[i]f a WTO panel were to decide not to exercise its jurisdiction in a particular case, it would diminish the rights of the complaining Member under the DSU and other WTO covered agreements."<sup>116</sup> For these reasons, the WTO panel rejected Mexico's request to decline jurisdiction in favor of an arbitral panel under NAFTA Chapter 20.<sup>117</sup>

The WTO panel did not address the question whether abstention would have been proper had either Mexico or the United States initiated a NAFTA Chapter 20 dispute settlement proceeding and then brought a parallel proceeding under the DSU. The crux of Mexico's argument that the United States' WTO claims be pursued first under NAFTA was that it would allow Mexico to simultaneously pursue a different, yet related, claim against the United States under NAFTA.<sup>118</sup> The WTO panel expressed fear that if Mexico's argument was entertained, then there would be "no practical limit to the factors that could legitimately be taken into account" when deciding to exercise jurisdiction,<sup>119</sup> and the decision to exercise jurisdiction would thus become political rather than legal in nature.<sup>120</sup> On the basis of the WTO panel's reading of the DSU, there is every indication that if the complaining parties

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113. Panel Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, ¶ 7.18, WT/DS308/R (Oct. 7, 2005) (indicating the decision by the Panel to reject Mexico's request that the Panel decline to exercise jurisdiction in favor of an Arbitral Panel under Chapter 20 of NAFTA).

114. *Id.*

115. *Id.* ¶ 7.8.

116. *Id.* ¶ 7.9.

117. *Id.* ¶ 7.18.

118. *Id.* ¶ 7.17.

119. *Id.*

120. *Id.*

and the issues had been the same in a NAFTA Chapter 20 dispute as they were in a parallel WTO dispute settlement proceeding, the WTO panel would not have declined to exercise jurisdiction.

#### IV. AMEND THE AD AND SCM AGREEMENTS AND NAFTA CHAPTER 19

The ICJ's decision in the *ELSI Case* that the doctrine of exhaustion of local remedies applies in state-to-state dispute settlement involving an alleged treaty violation is irreconcilable with the GATT and WTO panels' views on exhaustion. The ICJ has ruled that exhaustion is only excused if the treaty expressly provides for it, while the GATT/WTO panels have ruled that exhaustion must be expressly required.<sup>121</sup> Even though the AD and SCM Agreements both require that national investigating authorities' determinations be subject to independent review—giving rise to a strong inference that this appellate review mechanism must be exhausted before a WTO challenge may be made—the view at the WTO seems to be that exhaustion is not required.

All of the rationales for the exhaustion doctrine would be advanced by requiring exhaustion in the AD and CVD context. First, international trade friction would be reduced because cases would be eliminated from the Appellate Body's docket. Second, international tribunals would be relieved from being excessively burdened with litigation. Regarding the caseload pressures faced by the Appellate Body, James Bacchus, former chairman of the Appellate Body, made the following observations in 2004:

Although it was originally envisaged that the workload of Appellate Body Members would be light, it is now generally recognized that the workload is very demanding. The average number of days per year spent by Appellate Body Members working on appeals is 174, with a high of 231 in 2001. The bulk of that work is conducted in Geneva; the average number of days spent per year in Geneva is 117, with a high of 170 in 2001. It is anticipated that the workload will continue to be significant over the next two years at a minimum, due to the fact that more panels have been established in 2003 than ever before, and the fact that 71 percent of panel reports have been appealed since 1995.

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121. See *supra* notes 46–47, 89–90, and accompanying text. Professor Raj Bhala has explained that the myth that there is no WTO *stare decisis* might be a consequence of ICJ case law holding that there is no *stare decisis* at the ICJ. See Bhala, *supra* note 1, at 891–901. If true, it is unfortunate that the same kind of “bleedthrough” did not occur in the case of the exhaustion doctrine.

There is no reason to assume that the workload will decline significantly in the years to follow.<sup>122</sup>

Thus, conserving the overtaxed resources of the WTO Appellate Body is yet another reason for requiring that the NAFTA Chapter 19 process run its full course before Canada, Mexico, or the United States initiate a parallel WTO dispute settlement proceeding. In connection with the WTO caseload, as noted above, nearly half of all WTO panel proceedings have involved disputes arising under either the AD or SCM Agreement.<sup>123</sup> It would therefore seem advisable not only to require that the NAFTA Chapter 19 process run its full course before WTO dispute settlement proceedings are initiated, but also to require that all domestic administrative review proceedings within all WTO Member States be exhausted before WTO dispute settlement proceedings are brought under the AD and SCM Agreements.

Third, the exhaustion doctrine relieves states from having to espouse claims that might be resolved at a lower level. For example, a Chapter 19 panel decision might render a potential WTO complaint moot, thereby conserving the overtaxed resources of the Appellate Body. Such a result would have been reached, for example, in *Certain Softwood Products from Canada*, where both the NAFTA Chapter 19 panel and the WTO panel reached the same result, concluding that the U.S. International Trade Commission's threat of material injury determination was unlawful.<sup>124</sup> Similarly, in *Hard Red Spring Wheat from Canada*, a NAFTA Chapter 19 panel remanded the U.S. International Trade Commission's affirmative injury determination.<sup>125</sup> Following remand, the Commission issued a negative injury determination, thereby mooting for all practical purposes Canada's request for the establishment of a WTO panel in a parallel DSU proceeding.<sup>126</sup>

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122. Letter from the Chairman of the Appellate Body, *WTO Committee on Budget, Finance and Administration*, at 3, WT/BFA/W/109 (Mar. 18, 2004) (footnote omitted).

123. *See id.* (discussing the workload of the appellate body).

124. *Compare* In the Matter of Certain Softwood Products from Canada, USA-CDA-2002-1904-07, Final Affirmative Threat of Injury Determination, at 7 (Aug. 31, 2004) (directing the ITC, in a decision of the Panel pursuant to NAFTA, to enter a negative threat of material injury determination on remand), with Panel Report, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, ¶ 8.1, WT/DS277/R (Mar. 22, 2004) (reversing the ITC's threat of material injury determination).

125. In the Matter of Hard Red Spring Wheat from Canada, USA-CDA-2003-1904-06, Decision of the NAFTA Chapter 19 Panel, at 65 (remanding the Commission's injury determination for further review).

126. *Hard Red Spring Wheat from Canada*, USITC Pub 3806, Invs. Nos. 701-TA-430B & 731-TA-1019B (Remand), at 1, (Oct. 5, 2005), available at [http://www.usitc.gov/ext\\_relations/news\\_release/2005/wheat1.pdf](http://www.usitc.gov/ext_relations/news_release/2005/wheat1.pdf) (determining that there is no material injury to an

Absent a ruling by the Appellate Body that exhaustion is required under the AD and SCM Agreements, the DSU or the AD and SCM Agreements should be amended to explicitly state that the exhaustion doctrine applies. At the same time, NAFTA Chapter 19 should be amended to require exhaustion of the binational panel review process as a precondition to bringing any complaint to the WTO.<sup>127</sup>

NAFTA Chapter 19 also needs a shot of automaticity in the binational panelist selection process in order to remove prolonged delay as a ground for excusing exhaustion. Furthermore, to the extent that NAFTA Chapter 19 proceedings are unreasonably delayed or prolonged, one of the exceptions to the exhaustion rule should be triggered. Arguably, this was the case when the United States brought its WTO complaint against Mexico before completion of the NAFTA Chapter 19 process concerning AD duties on imports of high-fructose corn syrup.<sup>128</sup> Because it took a number of months before the Chapter 19 panel was established, the United

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industry in the United States because of imports of hard red spring wheat from Canada). *Compare* In the Matter of Oil Country Tubular Goods From Mexico, USA-MEX-2001-1904-03, Final Decision of the NAFTA Chapter 19 Panel, at 17 (Feb. 11, 2005) (“[T]he Department of Commerce’s Sunset Policy Bulletin is a reasonable and permissible construction of the statute and the [Statement of Administrative Action], and is entitled to deference from the Panel . . .”), with Appellate Body Report, *United States — Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, ¶ 220, WT/DS282/AB/R (Nov. 2, 2005) (declining to make any additional recommendation regarding the Panel’s finding that the Department of Commerce’s likelihood of dumping determination in the sunset review was inconsistent with the Antidumping Agreement).

127. In the event one of the NAFTA Parties were to initiate WTO dispute settlement proceedings before the NAFTA Chapter 19 process had been exhausted, a WTO panel would be guided by customary international law rules of treaty interpretation to resolve the conflict in favor of NAFTA. *See* DSU, *supra* note 2, art. 3.2 (noting that the dispute settlement provisions serve to clarify provisions in the agreements covered by the dispute settlement system “in accordance with customary rules of interpretation of public international law”). Article 31 of the Vienna Convention on the Law of Treaties provides that, in the event of a conflict between two treaties, the latter-in-time controls. Vienna Convention on the Law of Treaties art. 31, May 22, 1969, 1155 U.N.T.S. 331 (“Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions [should be taken into account] . . .”). Since any amendment to NAFTA Chapter 19 would postdate the WTO agreements, the former would control. Even though the United States is not a party to the Vienna Convention, the customary international law rule of *lex specialis* (the more specialized agreement prevails over the more general) and of *lex posterior* (the agreement signed later in time prevails over the earlier one) would be used to resolve the DSU-NAFTA conflict in favor of the NAFTA amendment. Moreover, NAFTA Article 103.2 drives home the point that in the event of a conflict between NAFTA and WTO Agreements, NAFTA prevails. NAFTA, *supra* note 17, art. 103.2.

128. *See* Final Decision, *Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America*, MEX-USA-98-1904-01, at 6 (Aug. 3, 2001) [hereinafter *Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup*].

States purportedly ran out of patience and brought a WTO complaint.<sup>129</sup>

Similarly, nearly four years elapsed in the *Oil Country Tubular Goods* case between the request for Chapter 19 panel review and the panel's decision.<sup>130</sup> Unlike NAFTA Chapter 20 and the DSU, NAFTA Chapter 19 has no default mechanism for appointing dispute settlement panelists if one of the disputing countries fails to select its panelists in a timely fashion.<sup>131</sup> NAFTA Chapter 19 should therefore be amended to provide that, in the event a disputing Party fails to appoint its panelists within thirty days of a request for binational panel review, the other disputing Party may select such panelists by lot from among the roster members who are citizens of the disputing Party that has failed to appoint its panelists.<sup>132</sup>

Notwithstanding the absence of an express exhaustion rule in either the DSU or NAFTA, the unique nature of NAFTA Chapter 19 dispute settlement favors application of the exhaustion doctrine as a matter of policy. Under NAFTA Chapter 19, the NAFTA coun-

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129. *NAFTA Dispute Settlement Falls Short of Promise for Quick Action*, INSIDE U.S. TRADE, Jan. 23, 2004, at 12, 13 (noting that in the case involving a challenge by the United States to a Mexican antidumping duty on high fructose corn syrup, Mexico refused to name the NAFTA panelists for almost two years). As noted by the NAFTA Chapter 19 panel in its first decision in the *High Fructose Corn Syrup* case:

This case was initiated by the United States' exporters of HFCS in February of 1998 when they filed their complaint with the Mexican Section of the NAFTA Secretariat. A series of delays in appointment of the members of the Panel resulted in the case not being heard until August of 2000, while procedural motions and challenges to the authority of the Panel have resulted in the delay of the final decision until this date. In part because of these delays, a case challenging these anti-dumping duties was brought against Mexico by the United States before the World Trade Organization. In January of 2000, the WTO Dispute Settlement Body found that Mexico had failed to establish the threat of injury to the sugar industry necessary to justify the duties. . . . The existence of the parallel proceeding before the WTO raised some novel questions for this NAFTA Panel and the decision includes a discussion of the relationship between the two proceedings, and an explanation for why the Panel adopted some of the findings of the WTO panel.

*Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup*, *supra* note 128, at 6.

130. In the *Matter of Oil Country Tubular Goods From Mexico*, *supra* note 126, at 1–2 (indicating that the decision of the Panel was issued on February 11, 2005, yet the Panel was constituted pursuant to a request filed in 2001).

131. NAFTA, *supra* note 17, annex 1901.2 (nothing in Annex 1901.2, which provides for the establishment of Chapter 19 Panels, provides for the selection of panelists in the event that one country fails to timely select panelists).

132. Compare NAFTA, *supra* note 17, art. 2011.1(d) (setting forth the default provision for selection of panelists in the event disputing parties fail to make selection in a Chapter 20 dispute proceeding), with DSU, *supra* note 2, art. 8.7 (providing that if there is no agreement on the panelists, the panel shall be formed "by appointing the panelists whom [the Director-General] considers most appropriate . . . after consulting with the parties to the dispute").

tries have created a supranational dispute settlement forum where the disputing countries are able to choose impartial adjudicators and where the NAFTA countries have full rights of participation. Concededly, that treaty-based forum applies domestic law as governing law, but not necessarily to the exclusion of international law, including the WTO AD and SCM Agreements.<sup>133</sup>

## V. CONCLUSION

The phenomenon of parallel WTO and NAFTA Chapter 19 proceedings, in which the exhaustion doctrine has not played a role, illustrates how domestic political pressure can force resort to every available international forum in order to win a trade remedy case. It simultaneously illuminates the frustration evident with the NAFTA Chapter 19 process by the parties that negotiated it, as well as the lack of firm commitment to this process. The doctrine of exhaustion has an important role to play in strengthening both the WTO and NAFTA Chapter 19 dispute settlement processes. Accordingly, the AD and SCM Agreements should be amended to make clear that exhaustion of local remedies is required before an unfair trade remedy complaint may be brought under the DSU. At the same time, NAFTA Chapter 19 should be amended to provide for the automatic selection of panelists in the event one of the dis-

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133. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”). Applying the *Charming Betsy* canon of statutory construction, the U.S. Court of Appeals for the Federal Circuit recently indicated the following with regard to interpreting U.S. unfair trade remedy laws in light of U.S. WTO obligations:

[T]he WTO issued an appellate report stating that the [Commerce Department’s] same-person methodology violates § 123 of the URAA. The WTO specifically rejected the argument that sales of assets should be treated differently from sales of stock for assessing countervailing duties. Accordingly, where neither the statute nor the legislative history supports the [Commerce Department’s] same-person methodology under domestic countervailing duty law, this court finds additional support for construing 19 U.S.C. § 1677(5)(F) as consistent with the determination of the WTO appellate panel. In so doing, this court recognizes that the *Charming Betsy* doctrine is only a guide; the WTO’s appellate report does not bind this court in construing domestic countervailing duty law. Nonetheless, this guideline supports the trial court’s judgment.

*Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1348 (Fed. Cir. 2004) (citations omitted); see also *Luigi Bormioli Corp. v. United States*, 304 F.3d 1362, 1368 (Fed. Cir. 2002) (noting that unfair trade remedy laws “must be interpreted to be consistent with [international] obligations, absent contrary indications in the statutory language or its legislative history”); *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (noting that trade remedy laws are not exempt from the *Charming Betsy* principle). *But see* *Corus Staal BV v. Dep’t of Commerce*, 395 F.3d 1343, 1348 (Fed. Cir. 2005) (noting that WTO decisions are not binding on the United States and that if U.S. statutory provisions are inconsistent with the GATT or a WTO agreement, U.S. courts must enforce U.S. statutory provisions).

puting NAFTA Parties fails to appoint its panelists in a timely manner.

Moreover, in certain cases the exhaustion doctrine effectively subsumes many of the other rules of judicial restraint. For example, unless local remedies have been exhausted, a case arguably is not ripe because, if local remedies are pursued to a successful conclusion, such local remedies may moot a WTO dispute settlement proceeding for all practical purposes. Furthermore, unless local remedies have been exhausted, a WTO Member could be deemed to lack standing to complain about an alleged violation of one of the WTO agreements. Thus, by requiring exhaustion, some of the criticisms regarding the absence of rules on judicial restraint in the DSU would simultaneously be resolved.

Unfortunately, summoning political will to address larger trade issues, such as WTO reform of farm subsidies, requires a Herculean effort, often with Sisyphean results. With such major issues taking precedence, the odds are not very good that either the relevant WTO agreements or NAFTA Chapter 19 will be amended to incorporate the doctrine of exhaustion of local remedies given their relatively lower priority among the more pressing trade issues of the day.



## APPENDIX I

## Proposals for DSU Reform:

- require that mutually agreed solutions be reported in detail so that all WTO Members are able to understand them;<sup>134</sup>
- resolve the so-called sequencing issue under DSU Articles 21.2 and 22 of whether suspension of concessions may precede a Dispute Settlement Body (DSB) determination of the WTO consistency of an implementation measure, or whether the matter must first go before a compliance panel and then, assuming a finding of WTO inconsistency, concessions may be suspended;<sup>135</sup>
- amend DSU time limits so that the overall period from the start of a proceeding to the suspension of concessions is not increased as a result of the proposed sequencing amendment to Articles 21.2 and 22;<sup>136</sup>
- expand third-party rights;<sup>137</sup>
- improve the rights of developing countries in the dispute settlement process;<sup>138</sup>
- discontinue the *ad hoc* selection of dispute settlement panelists in favor of creating a permanent panel body akin to the permanent

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134. See Report by the Chairman to the Trade Negotiations Committee, *Special Session of the Dispute Settlement Body*, at 3, TN/DS/9 (June 6, 2003).

135. See Communication from Canada, Costa Rica, Czech Republic, Ecuador, the European Communities and its member States, Hungary, Japan, Korea, New Zealand, Norway, Peru, Slovenia, Switzerland, Thailand and Venezuela, *Proposed Amendment of the Dispute Settlement Understanding*, ¶¶ 1–8, WT/MIN(99)/8 (Nov. 22, 1999), amended by WT/MIN(99)/8/Corr. 1 (Nov. 23, 1999).

136. See *id.* ¶¶ 11, 15.

137. See *id.* ¶¶ 17–19. A proposed amendment to paragraph three of Article 10 recommended that:

Each third party . . . receive a copy of all documents or information submitted to the panel, at the time of submission . . . . [A] third party may observe any of the substantive meetings of the panel with the parties, except for portions of sessions when such factual confidential information is discussed.

*Id.* ¶ 17.

138. See *id.* ¶ 9. Among the proposals is automatic selection of a panelist from a developing country, where a developing country is a party to a dispute settlement proceeding, and mandatory consideration of the particular problems of developing countries when DSU proceedings are initiated. See Report by the Chairman to the Trade Negotiations Committee, *supra* note 134, at 5. It has also been proposed, for example, that a trust fund be established to finance the hiring of defense counsel to assist developing countries that are involved in dispute settlement proceedings. See Ragosta, *supra* note 1, at 737 (noting that a number of proposals have been made to improve the participation of developing countries in the WTO dispute settlement process).

Appellate Body, which would eliminate the selection of panelists as one source of delay in the dispute settlement process;<sup>139</sup>

- make trade compensation, second in the hierarchy of WTO remedies after removal of the offending measure, a more attractive alternative to suspension of concessions (third in the hierarchy of remedies);<sup>140</sup>
- amend the DSU to specifically provide that a WTO Member does not have the ability to unilaterally modify the list of concessions or other obligations for which a DSB authorization has been granted (the so-called carousel retaliation issue);<sup>141</sup>
- create an expedited compliance panel procedure in case a WTO Member implements the recommendations and rulings of the DSB after another Member has been authorized to suspend concessions or other obligations;<sup>142</sup>
- make panel and Appellate Body proceedings more transparent by opening them to the public<sup>143</sup> and by making written submissions publicly available on a case-by-case basis;<sup>144</sup>
- give private parties the right to present their views at dispute settlement proceedings or at least to observe such proceedings;<sup>145</sup>

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139. See Contribution From the European Communities, *Contribution of the European Communities and Its Member States to the Improvement of the WTO Dispute Settlement Understanding*, at 2–3, TN/DS/W/1 (March 13, 2002) [hereinafter Contribution of the European Communities].

140. See *id.* at 4–5 (noting that trade compensation is currently not a realistic option before the application of trade sanctions).

141. See *id.* at 6.

142. See *id.*

143. See *id.* at 6–7 (“The DSU should therefore provide sufficient flexibility for parties to decide whether certain parts of the proceeding before the panel or the Appellate Body should be open to the public for attendance.”).

144. See Ragosta, *supra* note 1, at 735 (noting that numerous proposals in the area of the need for transparency have been made, including requiring parties to make their submissions public). Ragosta also notes that in a judicial environment, “secrecy must give way to transparency in order to maintain faith in the system.” *Id.*

145. See *id.* at 734 (“Private parties should not be subject to binding ‘judicial’ decisions without the opportunity to have their day in court.”); see also Joel P. Trachtman & Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44 HARV. INT’L L.J. 221, 221 (2003) (“There are a number of different ways in which private persons might participate in WTO dispute settlement procedures, such as through rights to observe . . .”). On August 2, 2005, the WTO panel, in *United States — Continued Suspension of Obligations in the EC-Hormones Dispute*, announced that its proceedings would be open to the public via closed circuit television. See Communication from the Chairman of the Panels, *United States — Continued Suspension of Obligations in the EC-Hormones Dispute, Canada — Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS320/8, WT/DS321/8 (Aug. 2, 2005). On September 12, 2005, journalists, NGO representatives, scholars, and others observed the proceedings, in the first WTO legal proceed-

- create a regularized procedure for the submission of *amicus* briefs;<sup>146</sup>
- increase the number of Appellate Body members from its current seven and make the appointment to the Appellate Body full-time;<sup>147</sup>
- require that the Appellate Body issue an interim report as is currently done by panels;<sup>148</sup> authorize the Appellate Body to remand proceedings so that panels can more fully develop and clarify disputed fact issues;<sup>149</sup>
- permit the Appellate Body to award costs to the prevailing party;<sup>150</sup>
- reduce the time for DSB adoption of panel and Appellate Body reports;<sup>151</sup>
- allow for adoption by consensus of selected portions of panel and Appellate Body reports, as opposed to the current rule of wholesale adoption or rejection;<sup>152</sup>

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ing made open to the public. See *Dispute Settlement*, FOCUS WTO NEWSL. (WTO, Geneva, Switz.), Sept. 2005, at 2, available at [http://www.wto.org/english/res\\_e/focus\\_e/focus63\\_e.pdf](http://www.wto.org/english/res_e/focus_e/focus63_e.pdf).

146. See Contribution of the European Communities, *supra* note 139, at 7 (“[I]t is necessary to define better the framework and the conditions for allowing such *amicus curiae* briefs in potentially all cases.”); see also Ragosta, *supra* note 1, at 736–37 (noting that the procedural rules regarding the submission of *amicus* briefs are in dispute). India and other developing countries have countered, however, that *amicus* submissions should be prohibited. See Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia, *Dispute Settlement Understanding Proposals: Legal Text*, at 2, TN/DS/W/47 (Feb. 11, 2003) (“The Appellate Body shall neither seek nor accept information from anyone other than the parties and third parties to a dispute.”).

147. See Contribution of the European Communities, *supra* note 139, at 8 (“[I]t would appear desirable to convert the mandate of the Appellate Body Members into a full-time appointment.”); Report by the Chairman to the Trade Negotiations Committee, *supra* note 134, at 7 (noting the possible modification of the total number of Appellate Body members).

148. See Report by the Chairman to the Trade Negotiations Committee, *supra* note 134, at 7.

149. See Contribution of the European Communities, *supra* note 139, at 8.

150. See Report by the Chairman to the Trade Negotiations Committee, *supra* note 134, at 17.

151. See William J. Davey, *The WTO: Looking for Answers*, 9 J. INT’L ECON. L. 3, 22 (2006) (“[T]he time between circulation of reports and the deadline for adoption should be halved . . .”).

152. See Textual Contribution by Chile and the United States, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement*, at 2, TN/DS/W/52 (Mar. 14, 2003).

- provide for provisional remedies, increase the size of suspension of concessions over time, and allow for payments of fines or penalties in lieu of suspension of concessions.<sup>153</sup>

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153. See Communication from Mexico, *Amendments to the Understanding on Rules and Procedures Governing the Settlement of Disputes, Proposed Text by Mexico*, at 2–3, TN/DS/W/40 (Jan. 27, 2003); see also Brendan P. McGivern, *Seeking Compliance with WTO Rulings: Theory, Practice and Alternatives*, 36 INT'L LAW. 141, 156 (2002) (suggesting that punitive retaliation may be counterproductive).

## APPENDIX II

PARALLEL UNFAIR TRADE REMEDY PROCEEDINGS BROUGHT UNDER  
NAFTA CHAPTER 19 AND THE DSU

NAFTA Chapter 19 Panels	WTO Dispute Settlement Panels
<p data-bbox="310 432 818 552">CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA, USA-CDA-2002-1904-02 (Department of Commerce Final Determination)</p> <p data-bbox="310 583 805 674">Request for panel review filed May 2002; panel decisions issued July 17, 2003; March 5, 2004; June 9, 2005</p> <p data-bbox="310 705 456 732">Core Issues:</p> <ol data-bbox="310 737 813 1041" style="list-style-type: none"> <li>1. Whether Commerce erred in employing a practice of "zeroing" when determining weighted average margins of dumping.</li> <li>2. Whether Commerce properly treated certain expenses of Abitibi, Canadian softwood lumber producer.</li> <li>3. Whether Commerce properly treated certain costs of Tembec, a Canadian softwood lumber producer.</li> </ol>	<p data-bbox="841 432 1338 552">UNITED STATES – FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA, WT/DS264/AB/R</p> <p data-bbox="841 583 1352 674">Request for the establishment of panel by Canada Dec. 9, 2002; Appellate Body Report adopted Aug. 31, 2004</p> <p data-bbox="841 705 987 732">Core Issues:</p> <ol data-bbox="841 737 1344 1255" style="list-style-type: none"> <li>1. Whether the Commerce acted inconsistently with AD Agreement in determining the existence of dumping margins on the basis of a methodology incorporating the practice of "zeroing."</li> <li>2. Whether Commerce acted inconsistently with AD Agreement in its calculation of the amount for financial expense for softwood lumber for Abitibi, a Canadian softwood lumber producer.</li> <li>3. Whether Commerce acted inconsistently with AD Agreement in its calculation of the amount for by-product revenue from the sale of wood chips as an offset in the calculation of the cost of production of Tembec, a Canadian softwood lumber producer.</li> </ol>
<p data-bbox="310 1283 818 1402">IMPORTS OF HIGH-FRUCTOSE CORN SYRUP ORIGINATING IN THE UNITED STATES OF AMERICA, MEX-USA-98-1904-01 (antidumping determination)</p> <p data-bbox="310 1434 818 1524">Request for panel review filed Feb. 1998; panel decisions issued Aug. 3, 2001; April 15, 2002</p> <p data-bbox="310 1556 451 1583">Core Issue:</p> <p data-bbox="310 1587 805 1707">Whether the Secretariat of the Economy established that imports of HFCS threatened the economic health of the Mexican sugar industry.</p>	<p data-bbox="841 1283 1321 1402">MEXICO – ANTI-DUMPING INVESTIGATION OF HIGH FRUCTOSE CORN SYRUP (HFCS) FROM THE UNITED STATES, WT/DS132/R</p> <p data-bbox="841 1434 1333 1524">Request for establishment of panel filed by the United States Oct. 1998; Panel Report adopted Feb. 24, 2000</p> <p data-bbox="841 1556 982 1583">Core Issue:</p> <p data-bbox="841 1587 1344 1799">Whether Mexico's investigating authority acted consistently with AD Agreement when, in conducting its analysis of threat of injury, it examined only those factors listed in Article 3.7 that are specific to "threat," and did not examine the injury factors listed in Article 3.4.</p>

<p>OIL COUNTRY TUBULAR GOODS FROM MEXICO, USA-MEX-2001-1904-03 (Department of Commerce Final Results of Sunset Review of Antidumping Duty Order)</p> <p>Request for panel review April 2001; panel decision issued Feb. 11, 2005</p> <p>Core Issues:</p> <ol style="list-style-type: none"> <li>1. Whether the Department's Sunset Policy Bulletin was consistent with the antidumping duty statute and legislative history.</li> <li>2. Whether the Department's interpretation and application of the term "likely" in conducting five-year sunset reviews is proper.</li> <li>3. Whether the Department's decision not to consider factors other than pre- and post-order margins and volumes in making its determination was proper.</li> <li>4. Whether the automatic initiation by the Department of the sunset review procedure was proper.</li> </ol>	<p>United States – Mexican OCTG AD Measures, WT/DS282/R</p> <p>Request for establishment of panel filed by Mexico July 2003; Panel Report circulated June 20, 2005; Appellate Body report issued Nov. 2, 2005</p> <p>Core Issues:</p> <ol style="list-style-type: none"> <li>1. Whether the Sunset Policy Bulletin establishes an irrebuttable presumption and is thus inconsistent with AD Agreement.</li> <li>2. Whether the determination of likelihood of continuation or recurrence of dumping is inconsistent with AD Agreement.</li> <li>3. Whether 19 U.S.C. §§ 1675a(a)(1) and (5), which deal with the likelihood of continuation or recurrence of injury in sunset reviews, are inconsistent with AD Agreement.</li> </ol>
<p>CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA, USA-CDA-2002-1904-03 (Department of Commerce Final Affirmative Countervailing Duty Determination)</p> <p>Request for panel review filed May 2002</p> <p>Core Issues:</p> <ol style="list-style-type: none"> <li>1. Whether Commerce's determination that Canadian provinces are providing a financial contribution in the form of the provision of a good by providing standing timber to timber harvesters through the stumpage programs is consistent with the governing statute.</li> <li>2. Whether Commerce may use a benchmark other than private prices when it has been established that private prices of the goods in question in that country are distorted because of the predominant role of the government in the market as a provider of the same or similar goods.</li> <li>3. Whether Commerce must conduct a pass-through analysis to determine whether the alleged subsidy provided to the tenure holder is passed through to the producer of the subject merchandise.</li> </ol>	<p>UNITED STATES – FINAL COUNTERVAILING DUTY DETERMINATION WITH RESPECT TO CERTAIN SOFTWOOD LUMBER FROM CANADA, WT/DS257/AB/R</p> <p>Request for establishment of panel filed by Canada Aug. 2002; Appellate Body Report adopted Feb. 2004.</p> <p>Recourse to Article 21.5 requested by Canada Dec. 2004, WT/DS257/AB/RW. Appellate Body report issued Dec. 5, 2005.</p> <p>Core Issues:</p> <ol style="list-style-type: none"> <li>1. Whether Commerce's determination that Canadian provinces are providing a financial contribution in the form of the provision of a good by providing standing timber to timber harvesters through the stumpage programs is consistent with the SCM Agreement.</li> <li>2. Whether an investigating authority may use a benchmark other than private prices in the country of provision, when it has been established that private prices of the goods in question in that country are distorted because of the predominant role of the government in the market as a provider of the same or similar goods.</li> <li>3. Whether Commerce's failure to conduct a pass-through analysis in respect of arm's length sales of logs by tenured harvesters/sawmills to unrelated sawmills is inconsistent with SCM Agreement.</li> <li>4. Whether Commerce's failure to conduct a pass-through analysis in respect of arm's length sales of lumber by tenured harvesters/sawmills to unrelated remanufacturers is inconsistent with SCM Agreement.</li> </ol>

<p>CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA, USA-CDA-2002-1904-07 (USITC Final Injury Determination)</p> <p>Request for panel review filed May 2002; panel decisions issued Sept. 5, 2003; April 19, 2004; Aug. 31, 2004</p> <p>Core Issues:</p> <ol style="list-style-type: none"> <li>1. Whether the Commission's determination that the domestic softwood lumber industry is threatened with material injury by reason of subsidized and dumped imports is supported by substantial evidence.</li> <li>2. Whether the Commission ensured that the threatened injury is "by reason of" subject imports, and that it did not attribute to subject imports threatened injury from other sources in finding that subject imports threaten to cause material injury.</li> </ol>	<p>UNITED STATES – INVESTIGATION OF THE INTERNATIONAL TRADE COMMISSION IN SOFTWOOD LUMBER FROM CANADA, WT/DS277/AB/R</p> <p>Request for the establishment of panel filed by Canada April 2003; Panel Report adopted April 26, 2004</p> <p>Core Issues:</p> <ol style="list-style-type: none"> <li>1. Whether under the totality of the factors considered and the reasoning in the ITC's determination, the finding of a likely imminent substantial increase in imports is one which could have been reached by an objective and unbiased investigating authority.</li> <li>2. Whether the ITC's determination is consistent with the obligation that injury caused by non-import factors not be attributed to the subject imports.</li> </ol>
<p>CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA, USA-CDA-2005-1904-03 (USITC Implementation of the new affirmative injury determination under Section 129(a)(4) of the Uruguay Round Agreements Act)</p> <p>Request for panel review filed May 2005.</p>	<p>UNITED STATES—Investigation of the International Trade Commission in Softwood Lumber From Canada, Recourse by Canada to Article 21.5 of the DSU, WT/DS277/RW</p> <p>Request for the establishment of a panel filed by Canada on Feb. 14, 2005. Report of the Panel issued Nov. 15, 2005.</p> <p>Panel concludes that the ITC acted consistently with the Agreement on Antidumping and the Agreement on Subsidies and Countervailing Measures when it issued an affirmative injury determination following.</p>
<p>GRAY PORTLAND CEMENT AND CLINKER FROM MEXICO (Panel reviews of 5th-11th Commerce Department administrative reviews and ITC and Commerce Department sunset reviews)</p> <p>Panel reviews completed for 5th and 7th administrative reviews. Panel proceedings still active in the 6th and the 8th-11th administrative reviews and sunset reviews. Panel proceedings suspended under three-year settlement agreement, effective April 3, 2006.</p> <p>Core Issue:</p> <ol style="list-style-type: none"> <li>1. Mexican cement producers challenge virtually every aspect of the Commerce Department's determination in the 5th through 11th administrative reviews and its sunset review. The Mexican producers challenge virtually every aspect of the ITC's sunset review.</li> </ol>	<p>UNITED STATES—CEMENT AD MEASURES, WT/DS281 (5th-11th Commerce Department administrative reviews and ITC and Commerce Department sunset reviews)</p> <p>Request for the establishment of panel filed by Mexico Aug. 2003. Panel proceedings suspended under three-year settlement agreement, effective April 3, 2006.</p> <p>Core Issue:</p> <ol style="list-style-type: none"> <li>1. Mexico challenges virtually every aspect of the Commerce Department's determination in the fifth through eleventh administrative reviews and its sunset review. Mexico challenges virtually every aspect of the ITC's sunset review.</li> </ol>

<p><b>HARD RED SPRING WHEAT FROM CANADA, USA-CDA-2003-1904-06 (USITC Final Injury Determination)</b></p> <p>Request for panel review filed Nov. 2003; panel decision issued June 7, 2005. Panel remand determination issued Dec. 12, 2005, affirming ITC's negative injury determination and terminating proceeding.</p> <p><b>Core Issues:</b></p> <ol style="list-style-type: none"> <li>1. Whether the Commission erred in finding that the volume of subject imports was significant.</li> <li>2. Whether the Commission failed to consider factors other than the subject imports as the cause of injury to domestic producers, including (a) the different level of trade at which the domestic product and the subject imports compete within the United States, (b) the impact on wheat prices of prices for HRS wheat on the Minneapolis Grain Exchange, and (c) the fact that prices for hard red winter wheat, which the Commission determined to be a separate product from HRS wheat, move in tandem with prices for HRS wheat.</li> <li>3. Whether the Commission's finding of significant price underselling and significant price suppression is allegedly unsupported by substantial evidence.</li> <li>4. Whether Commission's finding that prices declined between the 2000/01 and 2001/02 crop years, and the contribution of subject imports to that alleged price decline, is unsupported by substantial evidence.</li> </ol>	<p><b>UNITED STATES - DETERMINATION OF THE INTERNATIONAL TRADE COMMISSION IN HARD RED SPRING WHEAT FROM CANADA, WT/DS310</b></p> <p>Request for the establishment of panel filed by Canada June 2004 (panel not established as of Sept. 2005).</p> <p><b>Core Issues:</b></p> <ol style="list-style-type: none"> <li>1. Whether the United States violated the AD and SCM Agreements by failing to conduct an objective examination of both (a) the volume of the dumped and subsidized imports and the effect of those imports on prices in the domestic market for like products, and (b) the consequent impact of those imports on domestic producers of such products.</li> <li>2. Whether the United States violated the AD and SCM Agreements by failing to properly consider the effect of the dumped and subsidized imports on prices, including whether there had been a significant price undercutting by the dumped and subsidized imports and whether the effect of those imports was otherwise to depress prices to a significant degree.</li> <li>3. Whether the United States violated the AD and SCM Agreements by failing to properly examine the impact of the dumped and subsidized imports on the domestic industry concerned.</li> <li>4. Whether the United States violated the AD and SCM Agreements by (a) failing to demonstrate a causal relationship between the dumped and subsidized imports and the injury to the domestic industry, and (b) failing to examine known factors other than the dumped and subsidized imports which were injuring the domestic industry and further failing to ensure that the injuries caused by these other factors were not attributed to the dumped and subsidized imports.</li> </ol>
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## APPENDIX III

## PARALLEL UNFAIR TRADE REMEDY CASES BROUGHT UNDER CANADA-US FTA CHAPTER 19 AND AT GATT

Canada-US FTA Chapter 19 Panels	GATT Dispute Settlement Panels
<p data-bbox="310 386 797 499">FRESH, CHILLED AND FROZEN PORK FROM CANADA, USA-89-1904-06 (Department of Commerce Countervailing Duty Determination)</p> <p data-bbox="310 531 797 617">Request for panel review filed Aug. 1989; panel decisions issued Sept. 28, 1990; Mar. 8, 1991</p> <p data-bbox="310 648 818 821">Core Issues: 1. Whether subsidies provided to swine producers confer benefits on pork processors. 2. Whether the program benefits are targeted to a specific enterprise, industry, or group of enterprises or industries.</p>	<p data-bbox="841 386 1338 499">UNITED STATES - COUNTERVAILING DUTIES ON FRESH, CHILLED AND FROZEN PORK FROM CANADA, DS7/R, 38S/30</p> <p data-bbox="841 531 1338 617">Request for establishment of panel filed by Canada Dec. 1989; Panel Report adopted July 11, 1991</p> <p data-bbox="841 648 1349 961">Core Issue: 1. Whether the United States acted consistently with GATT Article VI:3 when it determined that a subsidy had been bestowed on the production of pork equal to the full amount of the subsidy granted to producers of swine based solely on the findings that the demand for swine is substantially dependent on the demand for pork and that processing of swine into pork adds only limited value.</p>
<p data-bbox="310 995 797 1108">CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA, USA-92-1904-01 (Department of Commerce Countervailing Duty Determination)</p> <p data-bbox="310 1140 818 1226">Request for panel review filed May 1992; panel decisions issued May 6, 1993; Dec. 17, 1993</p> <p data-bbox="310 1257 813 1457">Core Issues: 1. Whether the stumpage programs confer benefits on a specific group of industries. 2. Whether the stumpage programs provide timber to Canadian softwood lumber producers at preferential rates.</p>	<p data-bbox="841 995 1338 1081">UNITED STATES - MEASURES AFFECTING IMPORTS OF SOFTWOOD LUMBER FROM CANADA, SCM/162</p> <p data-bbox="841 1113 1310 1199">Request for the establishment of a panel filed by Canada Dec. 1991; Panel Report adopted Oct. 27, 1993</p> <p data-bbox="841 1230 1349 1570">Core Issues: 1. Whether stumpage programs were specific. 2. Whether stumpage programs conferred a benefit at preferential rates. 3. Whether natural resource pricing practices could be subsidies subject to countervailing duty measures. 4. Whether there was sufficient evidence of the existence of a subsidy to justify the initiation by the United States of a countervailing duty investigation.</p>

<p>CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA, USA-92-1904-01 (Department of Commerce Countervailing Duty Determination)</p> <p>Request for panel review filed May 1992; panel decisions issued May 6, 1993; Dec. 17, 1993</p> <p>Core Issues:</p> <ol style="list-style-type: none"> <li>1. Whether the stumpage programs confer benefits on a specific group of industries.</li> <li>2. Whether the stumpage programs provide timber to Canadian softwood lumber producers at preferential rates.</li> </ol>	<p>UNITED STATES - MEASURES AFFECTING IMPORTS OF SOFTWOOD LUMBER FROM CANADA, SCM/162</p> <p>Request for the establishment of a panel filed by Canada Dec. 1991; Panel Report adopted Oct. 27, 1993</p> <p>Core Issues:</p> <ol style="list-style-type: none"> <li>1. Whether stumpage programs were specific.</li> <li>2. Whether stumpage programs conferred a benefit at preferential rates.</li> <li>3. Whether natural resource pricing practices could be subsidies subject to countervailing duty measures.</li> <li>4. Whether there was sufficient evidence of the existence of a subsidy to justify the initiation by the United States of a countervailing duty investigation.</li> </ol>
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