

Beyond Multilateralism and Regionalism

~ Analysis of the Review Process of Global Trade Dispute Resolution

Blake C.Y. Wang¹

I. Introduction

In the past decade, the legal text of WTO dispute settlement body (DSB) solves many of the issues that have plagued the GATT dispute settlement system. The DSU is designed to provide a single unified dispute settlement procedure for almost all the Uruguay Round texts. At the same time, differences of opinions among member countries of Regional Economic Integration (FTA or Customs Union) regarding the extent and meaning of commitments to tariff of reciprocal treatment, non-tariff procedures and formalities, and eventually even the “fairness” of how the regional organization (agreement) works out over time for a given country are inevitable. Particular issues areas likely to cause disputes are the safeguards and trade remedy provisions. This will necessitate negotiation of effective institutional and procedural provisions for the consultation, negotiation, and resolution of potential disputes. Such a system should consider precedents for trade dispute resolution in the GATT/WTO regime and other successful economic integration agreements and should take into account, as well, the differing legal and administrative system of its member countries themselves and then, only if unavailing of resolution, referral of the matter to arbitral panels of disinterested experts in the issue areas confronted. In this regard, some have argued that instead of pursuing trade liberalization by way of multilateralism within the WTO, the members’ interests would be best served by focusing on bilateral agreements with other nations outside the WTO context. This argument stems from the misconception that regional integration and the evolution of the multilateral trading system are mutually exclusive; that is, if the regional trade agreements (RTAs) continue to widen and deepen it will mean the demise of the multilateral trading system embodied in the WTO. However, this comment argues that it is essential for RTAs to emerge within the framework of the world trading system.

This article proposes to discuss a fundamental issue: should (or could) we build a “horizontal world trade dispute mechanism”, i.e. is that any possible that we can establish a “court of international trade”? To answer this question and provides the proposal as well, this article first explains the necessary for integrating the multilateral as well as the regional trade dispute systems. Then next, it reviews various dispute resolution mechanisms around

¹ Blake C.Y. Wang is Assistant Professor of the Law School of National Taipei University (Taipei, Taiwan). The author held LL.B. (1998), National Taipei University (Taiwan); LL.M. (2003) and SJD (2006), American University (USA). To contact the author, please e-mail to chenyu02@yahoo.com. This draft article is for the presentation at 5th Global Administrative Law Seminar, Viterbo, June 12-13, 2009.

the world. In global level, the DSB under WTO is the only and unique platform for all its members bringing dispute into this system. In regional level, Asian economic integration (especially ASEAN) is still in the negotiating process, and their system design for trade dispute settlement provides a reference for many FTAs amongst developing countries. Furthermore, NAFTA chapter 19 and 20 also sets out a good model of provisional design for many FTAs. Besides, European Union is no doubt an excellent example for further integrated region, i.e. Customs Union, Single Market, and Common Market. Then it follows by discussing the legal aspects of conflicts among diversity trade dispute settlement systems. After all above analysis, this article returned back to the code concern: "Do We Need to build "Court of International Trade?" This article then compares ICJ with DSB and other Regional Systems, and provides a creative idea to establish dual judicial system for trade dispute resolution, i.e. integrate the World Trade Dispute Resolution. Finally, the last section concludes the arguments and suggestions.

II. Review Process of Global Trade Dispute Settlement Mechanism

The various techniques for peaceful settlement of international disputes can roughly divide into two types: (1) settlement by negotiation and agreement with reference to relative power of the parties; or (2) settlement by negotiation or decision with reference to norms or rules to which both parties have previously agreed.² In other words, to fully comprehend the implications of "power-based system" and "rule-based system", one must first understand that there are two fundamentally different theories about the forces accounting for the organization of human society.³ Those differing theories explain the divergence in diplomatic approaches. A natural consequence of power-based system is that a government will seek to amass for itself the greatest wealth that it believes it can feasibly administer. To effectuate the goal of accumulating goods and power, it is only natural for the government to exert the power that it already possesses. Settlement of disputes within such a system takes place under the shroud of the power disparity. In other words, relative power determines one's leverage in negotiation. However, under rule-based diplomacy, international organization, individual nation-states should construct a dispute settlement regime whereby dispute settlement is dictated by adherence to universal norms and previously agreed to rules - not the relative power positions or resources of the disputant. Rules applied consistently should be the framework for settlement.⁴

A. History of Trade Dispute Resolution: From GATT to WTO

Under the Uruguay Round agreements, GATT member states have created two powerful new trade institutions: the World Trade Organization (WTO)⁵ and a trade "super

² John H. Jackson, *The World Trading System* 85 (1989).

³ See John H. Barton, *Two Ideas of International Organization*, 82 Mich. L. Rev. 1520, 1520 (1984).

⁴ Justin Byrne, *NAFTA Dispute Resolution: Implementing True Rule-Based Diplomacy through Direct Access*, 35 Tex. Int'l L.J. 415 (2000).

⁵ GATT Secretariat, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Apr. 15, 1994, reprinted in 33 I.L.M. 1125, 1143 [hereinafter *Final Act*], art. 1; see Miquel

court” called the WTO Appellate Body.⁶ The WTO is an umbrella organization for trade policymaking, surveillance, and reporting. The Appellate Body oversees the work of all dispute resolution panels interpreting the GATT and associated multilateral trade rules.⁷ Appellate Body decisions, as well as decisions of dispute resolution panels (if parties elect not to appeal), are formally binding under international law for signatory states unless all the states (including the winner of the cases) vote “unanimously” to overrule them. As a practical matter, this rule means that WTO dispute resolution decisions will automatically come into force as a matter of international law in virtually every case.⁸ The new “judges of international trade”⁹ thus have jurisdiction to rule that governments must amend or repeal domestic laws that are inconsistent with WTO norms or risk imposition of trade sanctions.¹⁰ The creation of the WTO dispute resolution system opens a new stage in the debate regarding trade legalism.¹¹ These debates will not be merely matters of academic interest within international law circles; as global trade accelerates billions of dollars and thousands of jobs may hang on the way this discussion evolves.

B. Overview of the Procedures of WTO Dispute Settlement Mechanism (DSM)

The WTO officially came into existence on January 1, 1995. The new WTO legal system differs from its GATT predecessor in many ways. First, all dispute settlement procedures under the GATT and a variety of other trade-related agreements are brought under a single dispute resolution process overseen by an institution called the WTO Dispute Settlement Body (DSB).¹² This ends the potential for forum-shopping within the WTO that exists under current GATT rules.¹³

Montana Mora, *A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, 31 Colum. J. Transnat'l L. 103, 141-59 (1993).

⁶ The dispute resolution provisions of the Uruguay Round, including the articles governing the Appellate Body, are contained in Understanding on Rules and Procedures Governing the Settlement of Disputes, Final Act, *supra* note 1, pt. 2, Annex 2, reprinted in 33 I.L.M. at 1226-44 (1994) [hereinafter Understanding].

⁷ Understanding, 33 I.L.M. at 1226-44 (1994), art. 17(1), reprinted in 33 I.L.M. at 1236.

⁸ John H. Jackson, *Managing the Trading System: The World Trade Organization and the Post-Uruguay Round GATT Agenda*, in *Managing the World Economy* 131, 141 (Peter B. Kenen ed., 1994).

⁹ Sigvard Jarvin, *The Sources and Limits of the Arbitrator's Powers*, in *Contemporary Problems in International Arbitration* 50, 67 (Julian D.M. Lew ed., 1987).

¹⁰ Understanding, *supra* note 6, art. 22, reprinted in 33 I.L.M. at 1239-41. Under the new WTO rules, losing defendants may attempt to negotiate a settlement involving payment of compensation to winners rather than change their trade policies. *Id.* art. 22(2), reprinted in 33 I.L.M. at 1239. If no such mutual agreement can be reached, the winner may seek approval from the DSB to withdraw treaty benefits in the amount of the nullification and impairment it has suffered. The amount and shape of these trade sanctions is subject to a separate WTO dispute resolution procedure. art. 22(6)-(7), reprinted in 33 I.L.M. at 1240-41.

¹¹ John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. World Trade 93, 98 (1978).

¹² The Dispute Settlement Body has a shifting set of members consisting of representatives of signatory countries to the particular code or treaty that is the subject of the dispute. This structure of governance is necessary because different treaties overseen by the WTO have different signatories. Final Act, *supra* note 5, pt. II, Annex II, art. 2(1), reprinted in 33 I.L.M. at 1226.

¹³ See Patricia Kalla, Note, *The GATT Dispute Settlement Procedure in the 1980s: Where Do We Go from Here?*, 5 Dick. J. Int'l L. 82, 92 (1986).

Second, there are strict timetables for processing disputes¹⁴ and substantial changes in the rules governing the adoption of dispute resolution panel reports. The first stage of the panel process closely resembles the old GATT system and involves the convening of a panel, the taking of evidence, and the rendering of an opinion.¹⁵ In sharp contrast to the old GATT system, however, a WTO panel decision “shall be adopted by the Dispute Settlement Body (DSB) unless a party to the dispute formally notifies the DSB of its decision to appeal to the WTO Appellate Body or the DSB decides by consensus not to adopt the report.”¹⁶ Thus, dispute resolution decisions will be formally binding on WTO signatory states unless the winner of the case can be persuaded to vote to overrule its own victory.

Third, the WTO procedures provide for appeals from panel decisions to Appellate Body. The Appellate Body is a permanent, seven-member trade court that will oversee the work of all dispute resolution panels, regardless of the treaty or agreement that is the subject of the dispute. Judges will be appointed by the DSB to serve four-year terms,¹⁷ and the court will sit in three-judge panels.¹⁸ Each judge may be reappointed once.¹⁹ According to the Uruguay Round agreements, Appellate Body judges are to be people “of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government.”²⁰ The Appellate Body has full authority to review the legal interpretations in the panel decision.²¹ Once the Appellate Body has issued its opinion, the decision is binding unless the Dispute Settlement Body votes unanimously to overrule it.²²

The fourth major change from the old GATT processes involves what happens to a final decision after it is approved by the DSB. The WTO rules expressly stipulate that the defendant must comply with the decision within “a reasonable period of time.”²³ The WTO is empowered to engage in active surveillance of compliance measures to assure that the defendant takes the required steps to remedy its violation.²⁴ If the disputing parties disagree about what constitutes a “reasonable period of time” for compliance, they may resort to binding arbitration over this issue.²⁵ If there is further disagreement about actions taken to comply, the aggrieved state may resort to the original panel for a ruling.²⁶ Eventually, failing a resolution of the dispute by satisfactory compliance, the complaining state must negotiate with the defendant to determine what amount of “mutually acceptable compensation” would

¹⁴ The rules stipulate that cases should be disposed of within twelve months of establishing a panel if the case is appealed and within nine months if no appeal is filed. Understanding, *supra* note 6, art. 20, reprinted in 33 I.L.M. at 1237-38.

¹⁵ *Id.* arts. 12-15, reprinted in 33 I.L.M. at 1233-35.

¹⁶ *Id.* art. 16(4), reprinted in 33 I.L.M. at 1235.

¹⁷ *Id.* art. 17(2), reprinted in 33 I.L.M. at 1236. The procedures are not clear as to the actual appointment method. However, the WTO and its Dispute Settlement Body have the same membership.

¹⁸ Understanding, *supra* note 6, art. 17(1), reprinted in 33 I.L.M. at 1236.

¹⁹ *Id.* art. 17(2), reprinted in 33 I.L.M. at 1236.

²⁰ *Id.* art. 17(3), reprinted in 33 I.L.M. at 1236.

²¹ *Id.* art. 17(6), reprinted in 33 I.L.M. at 1236.

²² *Id.* art. 17(14), reprinted in 33 I.L.M. at 1237.

²³ Final Act, *supra* note 5, pt. 2, art. 21(3), reprinted in 33 I.L.M. at 1238. In general a “reasonable period of time” for compliance is not to exceed fifteen months “from the date of adoption of a panel or Appellate Body report.”

²⁴ *Id.* art. 21(6), reprinted in 33 I.L.M. at 1239.

²⁵ *Id.* art. 21(3)(c), reprinted in 33 I.L.M. at 1238.

²⁶ *Id.* art. 21(5), reprinted in 33 I.L.M. at 1238. A ruling on this issue must be issued on an expedited, 90-day calendar.

be appropriate.²⁷ If the parties cannot reach an agreement on compensation, the plaintiff may request authority from the DSB to withdraw concessions,²⁸ subject to the right of the defendant to demand arbitration regarding the appropriate level of retaliation. Once any arbitration over the appropriate sanction is complete, the plaintiff may withdraw concessions in an amount consistent with that authorized by the arbitrators and “equivalent to the level of the nullification and impairment”²⁹ suffered. There is no appeal to the Appellate Body from a panel determination regarding appropriate retaliation, and a consensus vote of the DSB would be needed to overturn such a determination. Thus, the WTO dispute resolution system provides an adjudication mechanism both to resolve the merits of the dispute and to enforce the trade sanction for noncompliance. The new system essentially provides an adjudicative system by which the WTO may place its full weight behind such retaliation.

The final innovation of the WTO legal system takes the form of a pledge by WTO members to refrain from unilateral action in the global trade arena. In a clear attempt to address concerns about the use of domestic legislative schemes of the dispute resolution procedures stipulates that states shall not make any unilateral determinations that treaty violations have occurred³⁰ or that more than a reasonable period of time has passed for compliance³¹ “except through recourse to dispute settlement in accordance with the rules and procedures of the Understanding.”³² In addition, states pledge to follow the WTO procedures regarding suspension of concessions and not to impose sanctions unless they are approved by the DSB.³³ Supplementing this mandate to use and follow the WTO dispute resolution system procedures are provisions regarding the jurisdiction of both dispute resolution panels and the Appellate Body. These provisions admonish these tribunals not to “add to or diminish the rights and obligations provided in the covered agreements.”³⁴ Just exactly who is to have final authority for determining when a state has acted inappropriately or when the Appellate Body has added to or diminished the rights and obligations of WTO member states is not specified, and consequently the outlines of future, major institutional disputes between the Appellate Body and various WTO member states over the scope of Appellate Body jurisdiction are clearly visible in these rather vague, politically charged provisions.

C. Standard of Review of WTO Dispute Settlement Mechanism

The “standard of review” issue is whether a WTO panel should make a strictly objective determination of whether a Member’s action is consistent with its WTO obligations, or whether a WTO panel should grant some deference to the factual findings and interpretations of WTO obligations made by a Member in the course of deciding to take the

²⁷ *Id.* art. 22(2), reprinted in 33 I.L.M. at 1239.

²⁸ *Id.* The DSB must approve this request unless it votes unanimously to reject it. Also, at art. 22(6), reprinted in 33 I.L.M. at 1240.

²⁹ *Id.* art. 22(4), reprinted in 33 I.L.M. at 1240.

³⁰ Understanding, *supra* note 6, art. 23(2)(a), reprinted in 33 I.L.M. at 1241.

³¹ *Id.* art. 23(2)(b), reprinted in 33 I.L.M. at 1241.

³² *Id.* art. 23(2)(a), reprinted in 33 I.L.M. at 1241.

³³ Understanding, *supra* note 6, art. 23(2), reprinted in 33 I.L.M. at 1241-42.

³⁴ *Id.* art. 19(2), reprinted in 33 I.L.M. at 1237.

challenged action.³⁵ If some deference is granted, then questions arise as to how much deference is appropriate, and whether different levels of deference are appropriate for different contexts, particularly for questions of fact versus questions of law. For this regard, there are two provisions of the WTO Agreements that are particularly relevant to the standard of review issue. The DSU contains a provision with general applicability to the standard of review to be applied in panel decisions.³⁶ Article 11 of the DSU states that:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the disputes and give them adequate opportunity to develop a mutually satisfactory solution.

The terms of Article 11 raises a question whether panels should be influenced by the challenged Member's determinations on questions of either fact or law because a panel must make an “objective assessment” as to both “the facts of the case,” i.e., factual issues, and the “applicability of and conformity with the relevant covered agreements,” i.e., legal issues. The standard of review provision in the WTO Antidumping Agreement³⁷ could support this interpretation of Article 11 by inference. Article 17.6 of the Antidumping Agreement provides that:

In examining the matter in paragraph 5 [i.e., the claim of violation]:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Under Article 17.6, panels are required to grant significant deference to national authorities' establishment of the facts, deferring to factual findings as long as the findings were unbiased and objective, and are required to defer to national authorities' legal interpretation of the Antidumping Agreement as long as that interpretation is within the range of “permissible” interpretations. Antidumping Agreement's standard of review in other contexts appears inconsistent with DSU Article 11's requirement that panels make an

³⁵ A separate “standard of review” issue arises with respect to Appellate Body review of panel decisions. See *infra* Part V.C. Also, antidumping decisions are subject to a specific standard of review. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, reprinted in H.R. Doc. No. 316, 103d Cong., 2d Sess. 807 (1994) art. 17.6 [hereinafter Antidumping Agreement].

³⁶ See Understanding, *supra* note 5, art. 11.

³⁷ See Antidumping Agreement, *supra* note 35.

“objective assessment” of the merits on both factual and legal issues.³⁸ If national decisions outside the antidumping context should receive less deference than antidumping decisions, an important question would arise as to how much deference is due.

Is the Appellate Body charged with a review of the panel’s legal conclusions, or is any deference due to the panel’s more in-depth review of the record and arguments? In the cases that have come before it, the Appellate Body has essentially applied *de novo* review, modifying panel legal reasoning with which it disagreed. An interesting question arises as to whether there is a standard of review for a panel’s factual findings. In fact, the Appellate Body’s jurisdiction is limited to issues of law and legal interpretations by the panel. However, it appears that at least to some degree, the Appellate Body could review a panel’s factual findings albeit under a quite deferential standard of review. Article 12.7 of the DSU provides that “the report of a panel shall set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations” that the panel makes.³⁹ One commentator argues that the Appellate Body should develop “some concept of a “standard of review”” and “might adopt a less intrusive, more deferential standard of review.”⁴⁰ He argues that such deference to panel decisions is warranted given the many new provisions in the WTO Agreements that need honing and refining overtime, and that interpretation “is not an exact science.” So far, the issue is a difficult one, as it requires the Appellate Body to balance the value of early, clear statements of law, against the value of permitting the gradual evolution of jurisprudence in a complex area. Ultimately, it may be appropriate for the WTO Members to consider this issue as they review the WTO dispute settlement process.

III. Diversity Regional Trade Dispute Settlement Mechanisms

In analyzing the most effective types of dispute settlement mechanisms in multilateral and regional free trade agreements, scholars advocate different approaches.⁴¹ Among these, the “negotiation-based settlement” and the “rule-based approach” are perhaps the two most commonly used methodologies.⁴² Members of free trade area agreements usually strive toward the latter approach, as it provides a more impartial, fair, consistent, and unbiased platform to efficiently resolve disputes between countries.⁴³ In treaties setting up a customs union or other relatively closely integrated regional community, the regional dispute settlement mechanism is most often exclusive. Members of the union or community are required to bring their disputes with other members to the regional forum. They are precluded from bringing them to more universal regime, such as the WTO. The only

³⁸ Pierre Pescatore, *Drafting and Analyzing Decisions on Dispute Settlement*, in Handbook of WTO/GATT Dispute Settlement 3, 24, at 38 (Pierre Pescatore et al., eds. 1997).

³⁹ Understanding, *supra* note 6, art. 17.2.

⁴⁰ One also may wonder whether the same rule of “judicial economy” applies to the Appellate Body. See Understanding, *supra* note 6, art. 17.12; see also Donald M. McRae, *The Emerging Appellate Jurisdiction in International Trade Law*, in Dispute Resolution in the WTO 98, 107 (James Cameron & Karen Campbell eds., 1988).

⁴¹ See generally Brett A. Albren, Note, *The Continued Need for a Narrowly-Tailored, Rule-Based Dispute Resolution Mechanism in Future Free Trade Agreements*, 20 Suffolk Transnat'l L. Rev. 85, 105-07 (1996).

⁴² See *id.* at 92.

⁴³ See *id.* at 105-06.

exception is MERCOSUR, where parties continue to have a choice between the MERCOSUR mechanism and, for example, that of the WTO. In contrast, the more loosely integrated free trade agreements normally leave it to the complainant to decide where to bring a particular trade dispute. The complainant can bring it either under the FTA mechanism or to the WTO. In addition, some FTAs, such as NAFTA, provide for exceptions where particular types of disputes must be settled at the regional level if the defendant desires, or in case a third party insists on bringing the same case to the regional mechanism. Crucially, most of these FTAs also include a provision precluding parties from bringing the same case a second time to another forum.⁴⁴

A. DSM of the Regional Trade Agreement and It's Linkage to the WTO

Paragraph twelve of the Understanding on Article XXIV provides:

The provisions of Articles XXII and XXIII of the GATT 1994 as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free trade areas, or interim agreements leading to the formation of a customs union or free trade area.⁴⁵

The Paragraph further provides that when a panel decides that a Regional Trade Agreement (RTA) is in violation of Article XXIV, the RTA must take corrective measures. If the RTA fails to do so, then the provisions relating to compensation and suspension of concessions become directly applicable.⁴⁶ This conclusion, however, is flawed for several reasons. First, the internal and external dynamics of RTAs allow them to handle disputes with other RTA's differently than disputes with individual states. When RTAs are in dispute they are less likely to engage in "muscleflexing" because each party has more at stake. Thus, RTAs will be more likely to accept an even stronger, rule-based DRM when dealing with other RTAs that are viewed as fairly equal. As regionalism expands, any RTA that would be willing to comply with the stringent rule-based system would be permitted to participate in the mechanism. While there could be multiple complaining parties, there could only be one defending party for each claim that is brought, thus eliminating the potential complications of the proposed TPR-DRM within the context of participation by a greater number of RTAs.

In addition, because of the strength of the rule-based mechanism proposed as well as the consequences of non-compliance in the regional system, parties would almost always comply with tribunal decisions. This regional organization in its final form will facilitate what the original founders of the GATT had dreamed of: a world market with no boundaries and no frontiers. Beyond the benefits of predictability and equity that are achieved through rule-based diplomacy - or beyond the pitfalls of discretion in enforcement and resistance to adherence that are avoided by rejecting power-based diplomacy in favor of granting direct access. Trade disputes and diplomatic disputes are more often avoided and claims are adequately represented.

⁴⁴ Joost Pauwelyn, *Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions*, 13 Minn. J. Global Trade 231, 285-286 (Summer, 2004)

⁴⁵ Understanding, *supra* note 6, art. XXIV.

⁴⁶ *Id.* See also Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 AM. J. COMP. L. 917, 947 (1992).

B. NAFTA Dispute Settlement

North American Free Trade Agreement (NAFTA) formally entered into force on January 1, 1994.⁴⁷ It was the general purpose of that agreement to establish a free trade area. The institution of a free-trade area would mean that there would be among the nations no barriers to most trade or investment like tariffs, quotas, national preferences, or domestic ownership requirements. Among the objectives listed in the second article of the agreement was the creation of an “effective procedure” for the “resolution of disputes.” The principal NAFTA disputes are limited to traditional state-to-state dispute resolution procedures. The primary goal of the NAFTA is to eventually eliminate tariff and non-tariff barriers to trade in goods and to establish reciprocity requirements regarding trade in services and investment. The agreement does not have as one of its goals the progressive harmonization of internal laws nor does it grant any institution the power to effectuate harmonization. Lack of central regional institutions with supranational authority within the NAFTA is certainly a problem when attempting to create a working conflict management or dispute resolution system between the two regimes.

1. Chapter 11

Article 1139 of the NAFTA’s Chapter 11 defines an investor of a party as “a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.”⁴⁸ Initiation by an investor of the NAFTA Chapter 11 dispute settlement procedures serves as a waiver of the “right to initiate or continue before any administrative tribunal or court under the law of any Party, or [any] other dispute settlement procedures” concerning the alleged breach. When the arbitral panel has rendered its decision and a final award has been made against the party, the disputing investor may present the decision in the national courts of the disputing party for enforcement.

2. Chapter 19

The Chapter 19 dispute resolution mechanism has been closely watched because of its innovative approach and its important place in the settlement of U.S. and Canadian trade disputes. Chapter 19 is a procedural mechanism intended to supplant the judicial review of agency determinations in the respective NAFTA countries. Therefore, any evaluation of Chapter 19 must begin with and derive from its procedural structure. According to Article 1904(3), bi-national panels apply both the law of the country whose agency made the determination under review and that country's standard of review:

“The panel shall apply the standard of review . . . and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.”⁴⁹ When an agency decision undergoes judicial review, a standard of review is set out so the reviewing court has a guide as to how much deference it is to afford the agency determination in question. Canada, the United States, and Mexico all have different standards of review for their various agencies' determinations. These different standards of review have resulted in different results at the bi-national level. A

⁴⁷ See generally *The North American Free Trade Agreement*, Dec. 17, 1992, 32 I.L.M. 605 (1993) [hereinafter NAFTA]

⁴⁸ *Id.*, ch. 11, at art. 1139, 32 I.L.M. at 639.

⁴⁹ *Id.*, NAFTA, *supra* note 25, art. 1904(3).

recent study has concluded that far more U.S. agency determinations were overturned by bi-national panels than Canadian determinations.⁵⁰

The most fundamental problem with Chapter 19 is its limited scope. Chapter 19 can only strive to assure that determinations are arrived at in accordance with the law as it currently stands. Complaints about the laws must be voiced in a different forum.⁵¹ It is apparent that much of the controversy regarding the mechanism concerns the interpretation and application of the correct standard of review. However, the shortcoming of Chapter 19 is its failure to address the underlying problem of the trade laws themselves.⁵²

3. Chapter 20

Chapter 20 of the NAFTA, the reservoir for most trade disputes, grants the privilege of initiation of dispute settlement only to the parties to the agreement: the three aforementioned countries. Failure to grant direct access to dispute resolution to affected companies and private citizen results in the unfortunate incorporation of an unnecessarily large degree of “power-based” diplomacy into a trading regime acclaimed as being “rule-oriented.” All disputes falling under the rubric of Chapter 20 are resolved between the parties to the NAFTA. Any dispute settlement procedure must begin with consultations. Next, if consultations fail to resolve the matter, is referral to the NAFTA Commission, which is the group of cabinet level representatives of member countries that has the general aim of a mutually amiable effectuation of the agreement. The Commission may create or call on experts, panels, or working groups for advice, attempt mediation, and make recommendations. Again, no one other than a party to the agreement has access to this mechanism. Finally, if the efforts of the Commission prove fruitless, a party alone can request the convening of an arbitral panel for the purpose of reaching a final decision regarding the dispute. There is no direct access for private parties that believe they have been aggrieved by violations of the treaty. They must depend on their respective governments to represent their interests by pressing claims of violations on behalf of the private parties until a resolution is reached that hopefully comports with the strictures of the agreement. If the right of direct access to the dispute settlement process was to be granted to affected individuals, it is more likely that smaller and/or politically charged disputes will be resolved according to the rules that have been established to govern the relationship between government parties and private parties.⁵³

C. European Union Trade Dispute Resolution

One of the EU's goals is the harmonization of laws as “directly affecting the establishment or functioning of the common market.”⁵⁴ The EU's accomplishments include

⁵⁰ See John M. Mercury, *Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?*, 15 Nw. J. Int'l L. & Bus. 525, 525 (1995).

⁵¹ See Michael S. Valihora, *NAFTA Chapter 19 or the WTO's Dispute Settlement Body: A Hobson's Choice for Canada?*, 30 Case W. Res. J. Int'l L. 447(1998).

⁵² See Charles M. Gastle & Jean G. Castel, *Should the North American Free Trade Agreement Dispute Settlement Mechanism in Anti-dumping and Countervailing Duty Cases be Reformed in the Light of Softwood Lumber III?*, 26 Law & Pol'y Int'l Bus. 823, 829 (1995).

⁵³ See Glen T. Schleyer, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 Fordham L. Rev. 2275, 2296 (1997).

⁵⁴ Treaty Establishing the European Economic Community (Treaty of Rome), March 25, 1957, 298 U.N.T.S. 11, art. 100.

the elimination of intra-regional tariff barriers, action directed towards removal of non-tariff barriers, removal of restrictions on movement of persons, and directives effecting harmonization of various regulations.⁵⁵ Most importantly for this comment's proposed model, the EU has pursued a common negotiating position with regard to external trade.⁵⁶

1. Forms of Action

The European Court of Justice (ECJ) was first created by the Treaty of Paris, signed on April 18, 1951 in Paris and entered into force on July 23, 1952.⁵⁷ The Treaty of Paris established the European Coal and Steel Community (ECSC).⁵⁸ On March 25, 1957, Belgium, France, Germany, Italy, Luxembourg, and The Netherlands met in Rome to sign the treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM), collectively referred to as the Treaties of Rome.⁵⁹ On April 17 of that same year, the members signed the protocols on the privileges and immunities granted to the European Communities and on the statute of the European Court of Justice.⁶⁰ The treaties called for the creation of a Council of Ministers, a Commission, an Assembly (or Parliament) and a Court of Justice.⁶¹ These treaties lead to an "unnecessary and confusing institutional structure which was remedied in part by merging the Court and the Parliament in 1957." In effect, on October 7, 1958, the ECJ finally replaced the ECSC Court.⁶² The ECJ was set up in Luxembourg, acting according to the provisions of all the treaties. Although the institutions were merged, the treaties were not.

The ECJ was maintained as an institution through the provisions of the Treaty of the European Union (Maastricht Treaty) signed February 7, 1992.⁶³ The Maastricht Treaty was subject to changes introduced by the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, signed at Amsterdam on October 2, 1997 and ratified in 1999.⁶⁴ The ECJ is responsible for ensuring that EC law is observed in the interpretation and application of the Treaties establishing the EC and in the provisions created by the competent Community institutions. Cases may be brought to the Court directly by Member States, other institutions of the EU, or on reference from the national courts of the Member States. When the cases come by reference, the ECJ articulates the rule of law for the EU on the issue. However,

⁵⁵ See Abbott, *supra* note 46, at 947.

⁵⁶ *Id.* In addition to expressly granted external powers, the EU possesses whatever external powers are necessary in order to implement an internal policy effectively. David O'keefe & Patrick M. Toney, *Legal Issues of the Maastricht Treaty* 249 (1994).

⁵⁷ Europa: The European Union On-Line, *The History of the European Union*, at http://www.europa.eu.int/abc/history/1951/1951_en.htm.

⁵⁸ Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty].

⁵⁹ Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter EURATOM Treaty].

⁶⁰ Europa, *supra* note 57, at http://www.europa.eu.int/abc/history/1957/1957_en.htm.

⁶¹ Ralph H. Folsom, *European Union Law in a Nutshell* 7 (3d ed. 1999) [hereinafter FOLSOM-EU].

⁶² Europa, *supra* note 57, at http://www.europa.eu.int/abc/history/1958/1958_en.htm.

⁶³ Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1 (1992) [hereinafter Treaty on Maastricht].

⁶⁴ Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Oct. 2 1997, O.J. (C 340) 1 (1997) [hereinafter Treaty of Amsterdam].

implementation of the ECJ's decision is left to the judges of the member countries, where the national courts apply the ECJ decision to the specific facts of the case in question.

Nevertheless, the Court is not the only judicial body empowered to apply Community law. The courts of each Member State are also Community courts because they have jurisdiction to review the administrative implementation of Community law. Furthermore, national courts must uphold provisions of the treaties, regulations, directives, and decisions that directly confer individual rights on nationals of Member States. Procedures exist to ensure the effective application of Community law. They also prevent discrepancies among the rules of interpretation in national courts from leading to different interpretations of Community law. The Treaties provide for a system of preliminary rulings that do not create a hierarchical relationship, but institutionalize fruitful cooperation between the Court of Justice and the national courts. In cases involving Community law, national courts may, and in some cases must, seek a preliminary ruling from the Court of Justice on the relevant questions concerning the interpretation and validity of the law. This system ensures that Community law is interpreted and applied uniformly throughout the Community.

2. Judicial Review

Decisions of the ECJ have binding force and are applicable in all courts of the Member States. Thus, national courts, as well as public authorities, are bound by the Court's interpretation. The Court is guided in its express powers of judicial review by its recognition of supremacy and direct effect, general principles of law, and certain fundamental rights, including basic human rights that the Court requires all Community institutions to respect. The general principles that govern judicial decision-making include proportionality, equal treatment, legal certainty, non-retroactivity, and legitimate expectations. The ECJ considers Community norms as authority in its decision-making efforts.

Supremacy and direct effect are part of the Community's legal system that influences the relationship between the law of the Community and Member States. Although the treaties that created Community law contain no express supremacy clause, the ECJ has developed the doctrine of supremacy that Community law should take precedence. National authorities must comply with the ECJ's rulings and national courts must apply Community law. Thus, when the ECJ declares a national law incompatible with Community law, all competent national authorities are automatically prohibited from applying the national law; the national courts are not to wait for appeal by a constitutionally appropriate process.

D. ASEAN and Other Regional Trade Dispute Settlement Mechanism

On January 1, 2006, the South Asian Free Trade Area (SAFTA) agreement, negotiated between the seven members of the South Asian Association for Regional Cooperation (SAARC).⁶⁵ The treaty is extremely significant as it aims to promote economic cooperation by increasing intra-regional trade between the member countries, and making the South

⁶⁵ See Agreement on South Asian Free Trade Area art. 22, Jan. 6, 2004, <http://www.saarc-sec.org/data/agenda/economic/safta/SAFTA%20AGREEMENT.pdf> [hereinafter SAFTA Agreement].

Asian region more conducive to the receipt of foreign direct investment.⁶⁶ In addition, recognizing the long-standing border dispute between the two most prominent member countries, India and Pakistan, the treaty is a major effort toward facilitating improved socio-cultural and political relations in the subcontinent through improved economic ties.⁶⁷ The ASEAN Protocol follows a more “rule-based” tradition, while the SAFTA agreement’s dispute settlement provisions require more depth and elaboration to move toward this effective rule-based system.⁶⁸ Currently, the ASEAN Ministers adopted a Protocol on Dispute Settlement Mechanism (DSM) to implement the AFTA agreements.⁶⁹ Most recently at the 10th ASEAN Summit held in 2004, the ASEAN Protocol superseded the DSM and further detailed the dispute settlement mechanism available to parties under the AFTA and other agreements.⁷⁰

Pursuant to the ASEAN Protocol, all disputes arising under the existing and future AFTA agreements are within the purview of the mechanism.⁷¹ The Senior Economic Officials Meeting (SEOM) and the ASEAN Secretariat are the primary bodies that oversee the dispute settlement process.⁷² After exhausting alternative dispute settlement methods, namely consultations, good offices, conciliation, and mediation, the parties may refer their disputes to the SEOM to set up panels as well as review, implement, and monitor the decisions regarding the breach of a party’s obligations under the agreement.⁷³ The ASEAN Protocol also provides more extensive provisions on the role and functioning of the panels, timelines for deliberation and rendering recommendations, a comprehensive appellate review process administered by the ASEAN Economic Ministers (AEM), and procedures for compensation and suspension of concessions.⁷⁴ Although the SAFTA agreement’s dispute settlement mechanism is a significant improvement over the SAPTA, it is still too ambiguous and imprecise to meet the dispute resolution needs of the seven member states.⁷⁵

The ASEAN Protocol provides jurisdictional flexibility in its dispute resolution mechanism.⁷⁶ Addressing the potential jurisdictional problems that may arise in the context of regional free trade agreements, the ASEAN Protocol clearly stipulates that prior to initiating formal measures under the ASEAN Protocol, its Member States can use any other dispute settlement forum that they consider appropriate. The provision allows parties to use

⁶⁶ See World Bank Global Economic Prospects 2005: Trade, Regionalism and Development 42 (2005), available at <http://siteresources.worldbank.org/INTGEP2005/Resources/gep2005.pdf> [hereinafter World Bank Global Economic Prospects].

⁶⁷ *Id.*, at 36-38.

⁶⁸ See Rodolfo C. Severino, Secretary-General, ASEAN, The ASEAN Way and the Rule of Law, Address at the International Law Conference on ASEAN Legal Systems and Regional Integration (Sept. 3, 2001) available at http://www.aseansec.org/newdata/asean_way.htm

⁶⁹ Protocol on Dispute Settlement Mechanism pmbL, Nov. 20, 1996, <http://www.aseansec.org/16654.htm> [hereinafter DSM].

⁷⁰ See ASEAN Protocol, art. 21 (preserving the DSM for all disputes arising before November 29, 2004); see also Prime Minister Lt-Gen Soe Win Attends 10th ASEAN Summits of Heads of State/Government of ASEAN and Japan, ROK, India and Australia-New Zealand, New Light of Myanmar (Myan.), Dec. 4, 2004, available at <http://www.ibiblio.org/obl/docs/NLM2004-12-04.pdf> (reporting the signing of the ASEAN Protocol by the Economic Ministers at the 10th ASEAN Summit).

⁷¹ See ASEAN Protocol, art. 1.

⁷² See *id.* arts. 2, 19

⁷³ See *id.* arts. 2-9.

⁷⁴ See *id.* arts. 5-9, 12-16

⁷⁵ See SAFTA Agreement, art. 20

⁷⁶ See ASEAN Protocol, art. 1(3).

either the WTO or other forums for dispute settlement, while simultaneously being able to request consultations with fellow countries or use good offices, as well as other alternative dispute settlement procedures to resolve their disputes.⁷⁷ The ASEAN Protocol has elaborate and detailed criteria for the composition of the panels, and these safeguards diminish fears of bias or inability of the individual panelists to effectively adjudicate disputes.⁷⁸ For instance, the ASEAN Protocol allows for the appointment of “non-governmental” personnel with specific experience either within the ASEAN institutional framework or within other reputable organizations, thereby adding diversity and depth to the panelists.⁷⁹ Having access to a wide array of individuals allows Member States to take advantage of the specific knowledge and expertise required for the resolution of the parties’ specific disputes.⁸⁰ Such detailed provisions ensure the neutral and effective functioning of the panels, and would be an invaluable addition to the SAFTA agreement’s text.

The ASEAN Protocol provides a detailed and satisfactory mechanism for the review of the recommendations rendered by the panels. At the outset, the ASEAN Protocol departs from the largely inadequate model of its precursor, the DSM, in which the AEM was the body that conducted the appellate review.⁸¹ Instead, the ASEAN Protocol vests the AEM with the responsibility of establishing an appellate review panel that is comprised of highly competent and experienced individuals with specific qualifications. Furthermore, the ASEAN Protocol expressly states that only the legal issues involved in the panel’s recommendation report are subject to appeal, thereby clarifying the scope of the review. Although only the disputing parties involved may appeal a finding, interested third parties also have the opportunity to present their views.

IV. Issues of Establishing “International Court of Trade (ICT)”?

The WTO-DSU, both as drafted and as interpreted by WTO panels and the Appellate Body, has been the subject of broad criticism when it comes to the absence of rules on judicial restraint.⁸² 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 Member⁸³), on mootness (with post-complaint events not rendering a dispute moot if the panel’s terms of reference have been issued⁸⁴), on ripeness (with panels in effect rendering

⁷⁷ *Id.* arts. 1(3), 3, 4

⁷⁸ Compare SAFTA Agreement, art. 10(5) (discussing the establishment of the COE from “nominees” of the Contracting States) and SAFTA Agreement, with ASEAN Protocol, art. 8(1) and ASEAN Protocol, app. II(I)(1)-(9) (detailing the qualifications, expertise, and background of the members of the panels under the ASEAN Protocol).

⁷⁹ See ASEAN Protocol, app. II(I)(1)

⁸⁰ *Id.* app. II(I)(2)

⁸¹ See Nobuo Kiriya, *Institutional Evolution in Economic Integration: A Contribution to Comparative Institutional Analysis for International Economic Organization*, 19 U. Pa. J. Int'l Econ. L. 53, 67-68 (1998).

⁸² William J. Davey, *Has the WTO Dispute Settlement System Exceeded its Authority?*, 4 J. Int'l Econ. L. 79, 96 (2001).

⁸³ See, Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, P 133, WT/DS27/AB/R (Sept. 9, 1997).

⁸⁴ See, e.g., Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* 262 (1993).

advisory opinions in cases where there is no live controversy), and on the doctrine of non liquet (where panels should decline to rule in cases where the law is not clear). Interestingly, among the various reform proposals advanced by WTO Members, there is not a single mention of making rules on judicial restraint.⁸⁵

A. Compare ICJ with DSB and other Regional Systems

The area of international trade law is the only one in which binding dispute resolution is available to most members of the international trading community - the members of the World Trade Organization. The dispute settlement procedures in the WTO Agreement are the most ambitious worldwide system for the settlement of disputes among more than 130 states ever adopted in the history of international law.⁸⁶ Although the Statute of the International Court of Justice (ICJ) provides for the acceptance of compulsory jurisdiction, less than fifty states have accepted such jurisdiction, and less than one hundred cases have been referred to the ICJ in the first fifty years of its existence.⁸⁷ Recent efforts to create an international criminal tribunal resulted in the conclusion of a treaty creating such a court, although the United States opposed the agreement.⁸⁸ There is, however, no tribunal with global jurisdiction over human rights disputes.⁸⁹ In contrast, during the first three years and eight months of the existence of the WTO's Dispute Settlement Body, members lodged nearly one hundred and fifty requests for consultations, forty of which have resulted - through consultation or adjudication - in an order directing a change in national trade law or policy.⁹⁰

B. Regional Trade Mechanism as Exhaustion of Domestic Remedies

The doctrine of exhaustion of local remedies is well-recognized in international law. The commentary of the Restatement Foreign Relations Law of the United States indicates that "under 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."⁹¹ 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), "the rule that local

⁸⁵ See Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 Eur. J. Int'l L. 733, 759 (1999).

⁸⁶ Ernst-Ulrich Petersman, *From the Hobbesian International Law of Coexistence to Modern Integration Law: The WTO Dispute Settlement System*, 1 J. Int'l Econ. L. 175, 183 (1998).

⁸⁷ See International Court of Justice, Response of the International Court of Justice to General Assembly Resolution 52/161 of December 15, 1997.

⁸⁸ See Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, Am. Soc'y Int'l L. Insight (last modified Aug. 1998).

⁸⁹ See generally A.H. Robertson & J.G. Merrills, *Human Rights in Europe* 250-315 (3d ed. 1985).

⁹⁰ See also WTO, Overview of the State-of-play of WTO Disputes (as modified Jan. 14, 1999)[hereinafter WTO Dispute Overview]; Chad Bowman, Dispute Settlement: Experts Say WTO Dispute Settlement Slow, Ill-Defined, Often Unsuccessful, Int'l Trade Daily (BNA) (Oct. 30, 1998), available in LEXIS, Bnaidd Library (citing remarks by Andrew W. Shoyer, a former United States Legal Adviser to the United States Mission to the WTO in Geneva, and discussing criticisms of the WTO dispute settlement process).

⁹¹ 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).

remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law.”⁹²

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.⁹³ 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.⁹⁴ 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. As articulated by the ICJ, “before 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.”⁹⁵ Although this exhaustion rule is primarily driven by a concern 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.⁹⁶ First, “it relieves national States of espousing claims that might be resolved at a lower level or which [are] unfounded and frivolous.” Second, it relieves “international tribunals from being excessively burdened with litigation.”

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.”⁹⁷ It is also possible to waive the exhaustion rule by treaty. As the ICJ chamber stated that “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.”⁹⁸ Whether a waiver must be stated explicitly in the treaty or whether it may be implied is not clear. 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.” It seems that simply providing for the settlement of disputes without any reference to domestic courts is insufficient to waive the local remedies rule.⁹⁹

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

⁹² *Interhandel (Switz. v. U.S.)*, 1959 I.C.J. 6, 27 (Mar. 21).

⁹³ See, A.A. Cancado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* 3, 11 (1983).

⁹⁴ 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).

⁹⁵ *Interhandel*, 1959 I.C.J. at 27; see also Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* 817 (1915).

⁹⁶ 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).

⁹⁷ Restatement (Third) of the Foreign Relations Law of the United States §713 cmt. f (1986); see also Amerasinghe, at 194. Louis Sohn & Robert Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 *Am. J. Int’l L.* 545, 577 (1961).

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

⁹⁹ See *Am. Int’l Group, Inc. v. Iran*, 4 *Iran-U.S. Cl. Trib. Rep.* 96, 102 (1983).

WTO dispute settlement? The text of the DSU, the AD Agreement, and the SCM Agreement provide no clear guidance.¹⁰⁰ The question here is whether an injured party must raise an argument in the domestic administrative or domestic judicial proceedings in order for a Member to be able to raise the argument in WTO dispute settlement - i.e., whether an injured party must exhaust its domestic remedies before its representative Member may bring an action before the WTO. This doctrine states that parties may not raise issues for the first time in judicial appeals if the parties did not raise the issue before the administrative agency. In 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. The question of "exhaustion of national remedies as a prerequisite to an international case" raises sensitive political issues, as states may feel it is inappropriate for a panel to find that a violation exists in situations where the domestic authorities never had an opportunity to consider the disputed issue or develop relevant facts. The DSU does not contain any provision addressing the question of exhaustion of domestic remedies.

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. 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." 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. 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: "Under the DSU there is no requirement to exhaust local remedies before instituting dispute settlement proceedings."¹⁰¹ While that may be true as a strictly textual matter, it is questionable whether it is an accurate statement of GATT/WTO jurisprudence. Should there be a doctrine of exhaustion in WTO proceedings? A better approach to the exhaustion issue may be to build on the existing GATT and WTO practice in this area. As in the *Argentina - Footwear* case, WTO panels should not require that the national of the complaining Member has pursued all judicial appeals in the country involved; as such a process could take many years.

V. Final Remarks

In international trade, the debate about dispute resolution mechanisms is often centered on whether they should be more legalistic and adjudicatory or more conciliatory and negotiation oriented. Unfortunately, there are few absolutes which are agreed upon.

¹⁰⁰ Kevin C. Kennedy, *Parallel Proceedings at the WTO and under NAFTA Chapter 19: Whither the Doctrine of Exhaustion of Local Remedies in DSU Reform?* 39 Geo. Wash. Int'l L. Rev. 47(2007).

¹⁰¹ Note by the Secretariat, Consultation and the Settlement of Disputes between Members, P 21, WT/WGTI/W/134 (Aug. 7, 2002).

Generally, it is agreed that a dispute resolution mechanism should produce timely and objective decisions and prevent multiple jeopardy and legislation aimed at circumventing mechanism decisions.¹⁰² However, no dispute resolution mechanism can be detached from the reality of its context. Regardless of what we believe makes a good mechanism, the best mechanism is the one that best serves the attainment of the overall goals of the agreement to which it is attached.¹⁰³ However, even though there are numerous methods of solving disputes, there has been a discernible evolution towards more binding and impartial systems.¹⁰⁴ The conventional wisdom is that WTO dispute settlement is operating correctly most of the time and in most respects. Perhaps in many ways, it is. Yet the system is built on sand in key respects. Fundamentally, one cannot hope to support a “court system” unless it operates well--providing justice--not some of the time, nor most of the time, but all of the time. In order to accomplish this, procedural protections and due process are essential, and basically lacking in the current system, both in multilateral and regional levels.

The phenomenon of parallel WTO and RTA dispute settlement 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. The doctrine of exhaustion has an important role to play in strengthening both the WTO and various RTA dispute settlement processes. Furthermore, 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 disputing 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.

To capitalize on the agreement's potential, the dispute settlement mechanism requires more detailed provisions, particularly in its scope, jurisdiction, appointment and working procedures of the bodies rendering recommendations, and in its appellate review process. The changes are already threatening to undermine the foundation of the DSB as citizens groups, environmental groups, labor unions, and other NGOs insist on the effective ability to participate in the system. The failure to make the system transparent and accessible truly threatens the integrity of the process, and the danger is heightened every time someone refers to the WTO as a “world court” for trade. If the WTO hopes to play this auspicious role, two fundamental areas of reform will be essential. First, panels need a means to provide appropriate substantive guidance in areas where clarity is lacking, or they must decide in favor of defending governments in the absence of clear obligations. Second, and equally

¹⁰² See Charles M. Gastle, *Policy Alternatives For Reform of the Free Trade Agreement of the Americas: Dispute Settlement Mechanisms*, 26 Law & Pol'y Int'l Bus. 735, 736 (1995).

¹⁰³ See Michael Reisman & Mark Wiedman, *Contextual Imperatives of Dispute Resolution Mechanisms: Some Hypotheses and their Applications in the Uruguay Round and NAFTA*, J. World Trade, June 29, 1995, at 5, 9.

¹⁰⁴ See James R. Holbein & Gary Carpentier, *Trade Agreements and Dispute Settlement Mechanisms in the Western Hemisphere*, 25 Case W. Res. J. Int'l L. 531, 531 (1993).

important, the WTO must open the DSB to permit more effective access, more effective participation, and more effective analysis and commentary on the decisions issued.

After all above analysis, this article returned back to the code concern: “Do We Need to build “Court of International Trade? Or “World Trade Court?” To answer this question is not easy, and the concerns for combining global dispute settlement mechanism (WTO) and various regional systems (NAFTA, EU, ASEAN) include the issues of sovereignty and jurisdiction, choice of forum, choice of law, reorganization and enforcement, etc. This article suggests WTO members to establish a “dual DSM regime” for trade dispute resolution: In one way, WTO DSB as the “Central Court System”, which designs for appellate and supremacy level (in some countries it's called federal court, or union court). In other way, regional trade mechanisms are treated as “District Court System”, which embodies the doctrine of exhaustion of local remedies.