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Antidumping and Countervailing Duty Dispute Settlement under the United States-Canada Free Trade Agreement: Is the Process Constitutional

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Antidumping and Countervailing Duty Dispute Settlement Under the United States-Canada Free Trade Agreement: Is the Process Constitutional?

Introduction

The most comprehensive bilateral trade agreement ever negotiated took effect in January of 1989. The United States-Canada Free Trade Agreement[1] provides for the eventual elimination of all tariffs on goods traded between the two nations, and thus creates the world's largest free trade area.[2] While the Agreement does not affect either country's ability to impose special duties (tariffs) under their unfair trade laws, it does establish a special process for the review of decisions to impose these duties.[3] The validity of this process may be vulnerable to attack under the United States Constitution.

The unfair trade laws of the United States and Canada seek to reduce the disruptive effect that transnational trade can have on domestic economies. The laws authorize special duties to deter alleged unfair trade practices. For example, "dumping" occurs when a producer of goods sells in another country at a price below fair market value, thus undercutting and injuring domestic industry. To deter dumping, the unfair trade laws authorize the collection of "antidumping duties."

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1. Free Trade Agreement, Jan. 2, 1988, United States-Canada, — U.S.T. —, — T.I.A.S. —, *reprinted in* 27 I.L.M. 281 (1988) [hereinafter Free Trade Agreement or Agreement].

2. *See infra* notes 51-53 and accompanying text for further discussion of tariff elimination. "A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories in products originating in such territories." General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. (5),(6), T.I.A.S. No. 1700, 55, U.N.T.S. 194 Art. XXIV, Sec. 8(b).

3. Free Trade Agreement, *supra* note 1, art. 1904. The dispute resolution scheme for unfair trade disputes is set forth in chapter 19 of the agreement and should be distinguished from the dispute resolution scheme established in chapter 18 to deal with more general disputes regarding the interpretation or application of the Agreement. This Note addresses only the chapter 19 panels.

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Likewise, foreign government subsidies create an unfair competitive advantage to the detriment of domestic industry. Unfair trade laws authorize the collection of "countervailing duties" to offset the advantage caused by these subsidies.[4]

The Free Trade Agreement and its enabling legislation[5] replaces judicial review of both countries' antidumping and countervailing duties with a process resembling arbitration. Binding decisions are rendered by *ad hoc* five-person panels comprised of Americans and Canadians selected from rosters of qualified candidates.[6] The process will continue until 1994 while the two countries attempt to harmonize their antidumping and countervailing duty laws.[7] Legal scholars have testified before Congress that the withdrawal of the jurisdiction of American courts to review antidumping and countervailing duties in favor of binational panel review raises constitutional questions regarding the Appointments Clause, Article III, and the Due Process Clause.[8]

This Note argues that although such challenges are not without merit, the United States Supreme Court is unlikely to find the binational panel review process unconstitutional. An analysis of important Supreme Court precedent will demonstrate that the panel review does not violate the doctrine of separation of powers, nor does it unconstitutionally deny parties due process of law.

I. Background

The United States and Canada enjoy the world's largest bilateral trade relationship,[9] with Canada receiving about 25% of all United

4. In the U.S., persons may challenge the exaction or non-exaction of these duties by U.S. government agencies in court.

5. In order to take effect, the U.S. Congress and Canadian Parliament needed to pass legislation implementing the Agreement and altering preexisting trade laws where necessary. The U.S. legislation, U.S.-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988), [hereinafter Implementation Act] amends three U.S. trade laws.

6. *See infra* notes 63-88 and accompanying text for a further discussion of the panel process.

7. Free Trade Agreement, *supra* note 1, art. 1906. The process will extend for two more years if after the initial five years the countries have not agreed to and implemented a substitute system of rules. *Id.*

8. *See United States-Canada Free Trade Agreement: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 2nd Sess. 67 (1988) [hereinafter *House Judiciary Hearings*]. *See also* Christenson and Gambrel, *Constitutionality of Binational Panel Review in Canada-U.S. Free Trade Agreement*, 23 INT'L LAW 401 (1989); Note, *The Binational Panel Mechanism for Reviewing United States-Canadian Antidumping and Countervailing Duty Determinations: A Constitutional Dilemma?*, 29 VA. J. INT'L L. 681 (1989).

9. Trade between the two countries amounted to $166 billion in 1987. Statement of Reasons as to How the United States-Canada Free Trade Agreement (FTA) Serves the Interests of U.S. Commerce, *reprinted in* UNITED STATES-CANADA FREE TRADE AGREEMENT, COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. No. 216, 100th Cong. 2d Sess. 3 [hereinafter COMMUNICATION FROM THE PRESIDENT]. The U.S. sells as much merchandise to Canada as it does to the twelve nations of the European Community combined. *Id.*

States exports,[10] and the United States receiving almost 80% of all Canadian exports.[11] The trade relationship between the two countries has a long history, and the Free Trade Agreement does not represent the first attempt at breaking down trade barriers.[12]

The United States-Canada trade relationship has endured varying levels of protectionist sentiment and varying tariff rates.[13] A relatively permanent emphasis on freer trade began with 1935 tariff reductions, and became entrenched when both Canada and the United States played key roles in the formation of the General Agreement on Tariffs and Trade ("the GATT")[14] in 1947.[15] Fifty years of trade liberalization policy and decreasing tariff rates have resulted in a strong and successful trade relationship between the two countries.[16]

In recent years the tariff barriers to trade between Canada and the United States have been relatively weak. Immediately prior to the Free Trade Agreement, seventy percent of Canadian goods entered the United States duty free, and seventy percent of United States goods entered Canada duty free.[17] The average Canadian tariff rate on United States goods was 9.9 percent, while the average United States tariff rate on imports from Canada was 3.3 percent.[18] These tariff barriers would not have been a sufficient impetus for the negotiation of the United States-Canada Free Trade agreement. Trade in goods, however,

10. Rugman, *A Canadian Perspective on U.S. Administered Protection and the Free Trade Agreement*, 40 ME. L. REV. 305 (1988).

11. *Id.*

12. The effort can be traced to the Reciprocity Treaty of 1854 which, among other things, provided for free trade in primary (as opposed to finished) products until the U.S. abrogated the agreement in 1866. Other attempts at free trade were made in 1911 and 1948. Rugman, *supra* note 10, at 306-07. *See also* J. WHALLEY, C. HAMILTON & R. HILL, CANADIAN TRADE POLICIES AND THE WORLD ECONOMY (1985); and Granatstein, *Free Trade Between Canada and the United States: The Issue That Will Not Go Away*, in THE POLITICS OF CANADA'S ECONOMIC RELATIONSHIP WITH THE UNITED STATES 13-14 (D. Stairs & G. Winham eds. 1985).

13. J. Whalley, C. Hamilton & R. Hill, *supra* note 12; Rugman, *supra* note 10, at 307.

14. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. (5),(6), T.I.A.S. No. 1700, 55 U.N.T.S. 194. For the current version binding on the U.S., see 4 BASIC INSTRUMENTS AND SELECTED DOCUMENTS 1 *et seq.* (1969). From the initial twenty-three nations, the number of GATT signatories has increased to ninety-four. Twenty-two other countries have stated that they are guided by the GATT in the conduct of their international trade policy. Working groups are studying membership for China and Bulgaria. The Soviet Union has expressed an interest in becoming a signatory and has been granted observer status.

15. Since 1947, the rounds of multinational trade negotiations held under the auspices of the GATT have been the primary forum for both the U.S. and Canada in their efforts to reduce trade restrictions. One notable exception was the 1965 bilateral negotiation of an agreement for managed trade in the automobile industry. *See* Wonnacottt, *The Auto Pact: Plus or Minus*, in FREE TRADE: THE REAL STORY 54-65 (J. Crispo ed. 1988).

16. *See supra* notes 9-11 and accompanying text.

17. Legault, *The Free Trade Negotiations: Canadian and U.S. Perspectives*, 12 CANADA-U.S. L.J. 7 (1987).

18. COMMUNICATION FROM THE PRESIDENT, *supra* note 9, at 2.

encompasses only a part of the commercial relationship between the United States and Canada. More complex parts of the relationship, including investment, trade in services, financial institutions, and non-tariff barriers such as preferential policies in government procurement practices, presented more compelling arguments for a comprehensive agreement. Rising competition from newly-developed nations and from the European Community[19] and the apparent protectionist mood of the United States Congress[20] were further incentives. In addition, Canadians felt that protectionism was dictating the administration of United States unfair trade law.[21] This section looks at the international frame-

19. Special Report on U.S.-Canada Free Trade Agreement, 2 Int'l Trade Rep. (BNA) No. 35, at 1093 (Aug. 28, 1985).

20. *Id. See also* Legault, *supra* note 17, at 9-10.

21. With almost eighty percent of its exports coming to the U.S., Canada has an enormous stake in the administration of U.S. antidumping and countervailing duty laws. Between 1980 and 1986, U.S. antidumping, countervailing duty and escape clause actions have affected about $6.5 billion worth of Canadian products. Legault, *supra* note 17, at 9-10. In recent years, U.S. companies have more aggressively instigated investigations of foreign competitors with an increasing proportion of the investigations resulting in positive preliminary determinations of "material injury" to U.S. companies. Rugman, *supra* note 10, at 312-13. The Free Trade Agreement negotiations took place during a period of rising Canadian dissatisfaction over antidumping and countervailing duties. *See id.* at 318-21; Legault, *supra* note 17, at 10. Many Canadians felt that antidumping and countervailing duties were imposed for political reasons and to "harass" Canadian exporters; *see* General Developments: Canada, 3 Int'l Trade Rep. (BNA) No. 16, at 519 (Apr. 16, 1986) (comments of Murray Smith, economist with the C. D. Howe Institute, before an April 4, 1986, free trade conference at the University of Western Ontario); *House Judiciary Hearings*, *supra* note 8, at 66 (Testimony of Jean Anderson, Chief Counsel, International Trade Administration, Dept. of Commerce); the Canadians resented the time and expense of the available procedures for fighting adverse determinations. Professor John Quinn of Osgoode Hall Law School noted the extreme expense of legal battles over antidumping and countervailing duty actions. He cited the $4 million in litigation costs for the 1985 softwood lumber case, and asked, "How many of these cases can we afford to win?" General Developments: Canada, 2 Int'l Trade Rep. (BNA) No. 47, at 1506 (Nov. 27, 1985). Canadian negotiator Alan Nymark stated: "We do not consider the current U.S. trade laws to be fair. Many U.S. companies systematically exploit the laws to protect themselves from Canadian competition . . . ." 3 Int'l Trade Rep. (BNA) No. 20, at 666 (May 14, 1986). Former premier of British Columbia William Bennett described the pre-Agreement system of remedies as "a loaded gun in the hands of any special interest group." *Id.* No. 49, at 1496 (Dec. 10, 1986). A particular sore point was a 1986 preliminary determination by the ITA reversing an earlier ruling and imposing a fifteen percent countervailing duty on Canadian softwood lumber. 51 Fed. Reg. 37, 453 (1986). Ontario Premier David Peterson cited the Commerce Department's imposition of the countervailing duty on Canadian softwood lumber as an example of a politically motivated and "Blatantly unjustified" decision. 3 Int'l Trade Rep. (BNA) No. 45, at 1370 (Nov. 12, 1986). *See also* McLachlan, et. al., The Canadian - U.S. Free Trade Agreement: A Canadian Perspective, 22(4) J. World Trade 9, 14 (Aug. 1988); 4 Int'l Trade Rep. (BNA) No. 11, at 375 (Mar. 18, 1987).

Relief from the protectionist application of U.S. unfair trade law became a very important goal for Canadians. Legault, *supra* note 17, at 10. Ontario Premier David Peterson lashed out at U.S. "neo-protectionism" in a speech before the Americas Society on Nov. 6, 1986, stating that a free trade agreement that does not protect Canada from countervailing duty harassment would not have much value. General Developments: Canada, 3 Int'l Trade Rep. (BNA) No. 45, at 1370 (Nov. 12, 1986).

work that has regulated international trade for the past forty years, and United States law that seeks to protect against some of the harsh economic consequences of freer international trade.

A. The General Agreement on Tariffs and Trade (The GATT)

The General Agreement on Tariffs and Trade ("the GATT") sets forth a common code of conduct for international trade. It provides a structure for the reduction of tariffs[22] and a non-binding mechanism for the settlement of disputes which relies on consultation, conciliation, and the threat of reciprocity.[23] The GATT also contemplates multinational trade negotiations "from time to time,"[24] and several "rounds" of multilateral negotiations have taken place since the creation of the GATT, usually taking several years each. The most recent of these, the Uruguay Round, began in 1986.

Although, generally multinational in nature, GATT rules allow signatory nations to form bilateral agreements creating free trade areas if those agreements meet several requirements: the agreements must cover substantially all trade between the two countries; the parties must fully implement the agreement within a reasonable time; agreements must contain reasonably explicit rules of origin;[25] and external tariffs of the free trade area cannot rise.[26]

B. Unfair trade laws

The GATT authorizes special tariffs to counteract certain foreign trade

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Although GATT would appear to be the appropriate vehicle for remedial action by Canadians, GATT dispute resolution procedures have proved ineffective. For a general discussion of problems with GATT dispute settlement, *see* Note, *Current Efficacy of the GATT Dispute Settlement Process*, 22 TEX INT'L L. J. 87 (1987). Not only are there built-in opportunities for delay, *see id.* at 101, but the contracting parties are not legally obligated to comply with official recommendations or rulings. *Id.* at 95-98. The Canadians therefore sought some independently operated mechanism not linked to U.S. government agencies that would both eliminate uncertainty and provide for systematical fair and rapid conflict or solution. 4 Int'l Trade Rep. (BNA) No. 11, at 369 (Mar. 18, 1987). *See also* 3 Int'l Trade Rep. (BNA) No. 11, at 346 (Mar. 12, 1986) (comments of Canadian Embassy Economic Minister Jacques Roy before the National Economists Club); *Id.* No. 37, at 1137 (Sept. 17, 1986) (the Sept. 11, 1986, comments of Donald Macdonald, chairman of the Royal Commission on the Economic Union and Development Prospects for Canada before the House Banking Subcommittee on Economic Stabilization). Chief Canadian negotiator Simon Reisman stated that some sort of concession on antidumping and countervailing duties was a prerequisite for an agreement. News Highlights: Canada, 3 Int'l Trade Rep. (BNA) No. 47, at 1415 (Nov. 26, 1986). *See also* Rugman, *supra* note 10, at 311-12.

22. Legault, *supra* note 17, at 9-10. *See also* Rugman, *supra* note 10, at 311-12.

23. Note, *Current Efficacy of the GATT Dispute Settlement Process*, 22 TEX. INT'L L.J., at 87 (1987).

24. GATT, *supra* note 14, art. XXVIII.

25. Where duties on imported items differ depending on what country they come from, "rules of origin" are required to set a standard for determining which tariff rate will apply in unclear situations, e.g. a product manufactured in one country but shipped from another or a product manufactured and shipped from a certain country but made up of component parts from another country.

26. GATT, *supra* note 14, art. XXIV, §§ 5, 8.

practices that are considered "unfair."[27] Specifically, the GATT authorizes importing countries to impose "antidumping duties" and "countervailing duties" if they can establish material injury to a domestic industry.[28] Both the United States and Canada have long had laws authorizing government agencies to impose such duties.[29]

Two different agencies administer the antidumping and countervailing duty laws of the United States: the International Trade Administration (ITA), an arm of the Department of Commerce, and the International Trade Commission (ITC), an independent government agency.[30] Private domestic firms typically initiate antidumping or countervailing duty proceedings by filing a petition with the ITA.[31]

After a party files a petition, the ITA investigates and makes a preliminary determination as to whether the imports are being sold at less than fair value (in a dumping case), or whether there is an unfair subsidy (in a countervailing duty case).[32] If such a finding is made, the ITC will investigate and make a preliminary determination as to whether there has been material injury or threat of injury to a United States industry.[33] If, based on this preliminary determination, the ITC finds no injury, it will immediately terminate the investigation at both agencies.[34] An affirmative preliminary determination by the ITC will require both agencies to make final determinations. If both agencies reach affirmative final determinations, then any goods imported after the ITA preliminary

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27. GATT, *supra* note 14, art. VI.

28. *Id.*

29. The basic antidumping provisions of U.S. law are found at 19 U.S.C.S. §§ 1673-1675, 1677-1677h (1983 & Supp. 1989). The countervailing duty provisions are found at 19 U.S.C.S. §§ 1671-1671h, 1675-1677h (1983 & Supp. 1989). Canadian countervailing duty laws are found in the Canadian Special Import Measures Act, 1 Can. Stat. ch. 25 (1984).

According to U.S. unfair trade law, the amount of an antidumping duty will equal the difference between the price charged in the exporting country and the price in the importing country. 19 U.S.C.S. § 1673 (1983 & Supp. 1989). The amount of a countervailing duty will equal the amount of the subsidy or bounty conferred. 19 U.S.C.S. § 1671 (1983 &. Supp. 1989).

For general background on antidumping and countervailing duty law, see 3 J. PATTISON, ANTIDUMPING AND COUNTERVAILING DUTIES (1984); G. BRYAN, TAXING UNFAIR INTERNATIONAL TRADE PRACTICES (1980); Re, *Litigation Before the United States Court of International Trade*, 26 N.Y.L. SCH. L. REV. 437, 450-51 (1981).

30. J. Pattison, *supra* note 29, at §§ 1.03(3), 1.04. For a general discussion of independent agencies, *see The Independence of Independent Agencies*, 1988 DUKE L.J. 215-99 (1988); *The Independent Agency After Bowsher v. Synar —Alive and Kicking*, 40 VAND. L. REV. 903 (1987).

31. 3 J. Pattison, *supra* note 29, at § 2.03. The Commerce Department may also initiate such an action. *Id.* at § 2.02.

Only "interested parties" may file petitions; interested parties are U.S. entities who fall into one of three general categories: 1) a manufacturer, producer or wholesaler of the subject merchandise; 2) a union or group of workers which is representative of an industry involved in the subject merchandise industry; 3) a trade association whose members sell the subject merchandise. *Id.* at § 2.04.

32. *Id.* at § 1.03(3).

33. *Id.*

34. *Id.* at § 3.08.

determination will be subject to antidumping or countervailing duties. The Department of Commerce issues a dumping order and instructs Customs to collect duties in the amount of the difference between the fair value and the United States price (in a dumping case) or the amount necessary to offset the subsidy (in a countervailing duty case).[35]

Judicial review of antidumping and countervailing duty determinations[36] lies in the Court of International Trade (CIT), which Congress created in 1980[37] as a successor to the Customs Court.[38] The nine judges of the CIT are appointed by the President[39] and have life tenure during good behavior.[40] The court has all the powers of a district court for preserving order and compelling the attendance of witnesses and the production of evidence.[41] The CIT has exclusive jurisdiction over suits against the United States, its agencies, or its officers arising from any law pertaining to revenue from tariffs or duties.[42] This includes authority to review final agency decisions in antidumping and countervailing duty proceedings.[43]

The 1979 Trade Agreements Act[44] grants standing in the CIT to

35. *Id.* at § 11.01. The duties collected go to the U.S. treasury.

36. Pattison notes:

> Section 516A of the Tariff Act of 1930, as amended, [codified at 19 U.S.C. § 1516a (1982)] sets forth a specialized framework of review, establishing several categories of reviewable determinations. Although determinations are subject to varying requirements regarding time for appeal, procedure for filing a complaint for formal review, and other aspects, the framework is an expansive one, specifically providing for appeal of: (1) Decisions not to initiate an antidumping or countervailing duty proceeding; (2) Decisions not to review agreements to eliminate LTFV [less than fair value] sales, eliminate or offset subsidies, cease exports, or eliminate injurious effect; (3) Decisions not to review a determination on the basis of changed circumstances; (4) Negative preliminary injury determinations by the International Trade Commission; (5) Determinations by the Department of Commerce that a case is "extraordinarily complicated;" (6) Negative preliminary LTFV sales determinations by the Department; (7) Negative subsidy determinations by the Department; (8) Final injury determinations by the Commission; (9) Final LTFV sales determinations by the Department; (10) Final subsidy determinations by the Department; (11) Determinations under administrative review of antidumping or countervailing duty orders; (12) Determinations by the Department to suspend an antidumping or countervailing duty investigation; and (13) Injury determinations by the Commission during a review of a suspended investigation.

Id. at § 12.05(1).

37. Act of Oct. 10, 1980, Pub. L. No. 96-417, Title V, § 501(2), 94 Stat. 1742 (codified at 28 U.S.C § 251 (1982)).

38. Congress established the Customs Court in 1956 pursuant to article III of the Constitution. 28 U.S.C. § 251 (1982). *See infra* sec. III.B for discussion of art. III. For a brief summary of the evolution of the Court of International Trade, *see* A. Vance, *The New Ball Park*, Eighth Annual Judicial Conference, 92 F.R.D.2d 314, 316-18 (1981).

39. 28 U.S.C. § 251 (1982).

40. *Id.* at § 252.

41. *Id.* at § 1581.

42. *Id.* at §§ 1581-82.

43. *Id.* at § 1582(b)(1).

44. Pub. L. No. 96-39, 79 Stat. 144 (codified in scattered sections in 19 U.S.C.).

any interested party who was a party to the administrative proceeding.[45] "Interested party" is defined to include foreign manufacturers, United States manufacturers, foreign governments, unions, trade associations, United States importers, and foreign exporters.[46] CIT review is normally based on the record developed by the ITA and the ITC.[47] The CIT standards of review are familiar to administrative law: arbitrary and capricious, abuse of discretion,[48] and substantial evidence.[49] When the CIT rules against the ITA or the ITC, the court remands the case to the appropriate agency for a decision consistent with the court's disposition.[50] CIT decisions are appealable first to the Court of Appeals for the Federal Circuit, and ultimately, to the United States Supreme Court.

II. The United States-Canada Free Trade Agreement: Binational Panel Review in Antidumping and Countervailing Duty Cases

The United States-Canada Free Trade Agreement is comprehensive. It will eliminate all tariffs on goods traded bilaterally within a decade.[51] It immediately eliminated tariffs on goods in competitive industries[52] and tariffs on goods in other industries will be phased out over a five or a ten-year schedule.[53] The Agreement also provides for the liberalization or harmonization of laws and regulations relating to technical standards,[54] agriculture,[55] wine and distilled spirits,[56] energy,[57] automotive

45. 19 U.S.C. § 1516a(d) (1982).
46. *Id.* at § 1677(9). J. Pattison, *supra* note 29, at § 12.04.
47. 19 U.S.C. § 1516a(2) (1982).
48. *Id.* at § 1516a(b)(1)(A).
49. *Id.* at § 1516a(b)(1)(B).
50. *Id.* at § 1516a(c)(3) (1982). As noted by Jean Anderson, General Counsel to the ITA, if the court remands a case,

> it doesn't tell Commerce or the ITC what the new determination should be or what method we should use to reach a new determination. If, for example, Commerce were to find in a countervailing duty case a 10 percent subsidy, the Court would not decide that the rate should have been 5 percent or 15 percent, or that there was no subsidy at all. Instead, the Court might rule that we should have taken certain information into account differently or that we misinterpreted the law in making a particular accounting decision.

House Judiciary Hearings, *supra* note 8, at 65-66.
51. Free Trade Agreement, *supra* note 1, art. 401.
52. *Id.* art. 401(2) & annex 401.2. Products in this category include automatic data processing equipment, telecommunications equipment, motorcycles, whiskey and rum, leather, and furs. OFFICE OF THE U.S. TRADE REPRESENTATIVE, SUMMARY OF THE U.S.-CANADA FREE TRADE AGREEMENT 12 (1988) [hereinafter SUMMARY].
53. Free Trade Agreement, *supra* note 1, art. 401(2) & annex 401.2. Tariffs in import sensitive industries including plastics, rubber, most wood products, lead, zinc, base metal articles, footwear, textiles and apparel, steel, many alcoholic beverages, consumer appliances, precision instruments, watches, and most agricultural and fish products will be phased out under the ten-year schedule. Tariffs on other products including paper, furniture, printed matter, chemicals, after-market automotive parts, precious jewelry, most machines, some musical instruments, and petroleum will be phased out over five years. SUMMARY, *supra* note 52, at 12-13.
54. Free Trade Agreement, *supra* note 1, at ch. 6.
55. *Id.* at ch. 7.
56. *Id.* at ch. 8.

products,[58] government procurement,[59] services,[60] investment,[61] and financial services.[62]

Chapter Nineteen of the Free Trade Agreement sets forth the binational dispute settlement provisions for antidumping and countervailing duty cases.[63] According to the scheme, the United States and Canada continue to apply their own antidumping and countervailing duty laws to goods imported from the other country.[64]

Article 1904, the heart of Chapter Nineteen, required both the United States and Canada to amend laws, thereby replacing judicial review of final antidumping and countervailing duty determinations with binational panel review if requested by one of the parties.[65] If neither party requests panel review, ordinary judicial review is available.[66] The Agreement's implementing legislation in the United States preserves judicial review for constitutional challenges to the process.[67]

Although technically only the United States and Canadian governments, the signatories, may invoke the panel review process, the governments agreed to invoke the process automatically at the request of anyone who would otherwise have standing to challenge the determination in court.[68]

A. Panel Membership and Composition

The panels consist of five panelists picked from a roster of fifty qualified candidates,[69] twenty-five selected by each side.[70] The United States Trade Representative draws up the roster of American candidates[71] and

57. *Id.* at ch. 9.
58. *Id.* at ch. 10.
59. *Id.* at ch. 13.
60. *Id.* at ch. 14.
61. *Id.* at ch. 16.
62. *Id.* at ch. 17.
63. Chapter eighteen of the Agreement establishes a procedure to resolve most other disputes arising under the Agreement. *See supra* note 3.
64. Free Trade Agreement, *supra* note 1, art. 1902. While each government retains the right to amend its antidumping and countervailing duty laws, the Agreement provides a process to deal with amendments not conforming to GATT or to the provisions of the Agreement: the other party may refer an amendment to a panel for a declaratory ruling as to whether the amendment conforms with GATT and the provisions of the Agreement. If the panel finds that the amendment does not conform to GATT or the provisions of the Agreement they can recommend modifications and the parties must begin consultations to work out the problems. *Id.* at art. 1903(1).
65. *Id.* at art. 1904(1)-(2), (15).
66. *Id.* at art. 1904(12)(a).
67. Implementation Act, *supra* note 5, § 401(c)(4)(B).
68. Free Trade Agreement, *supra* note 1, art. 1904(5).
69. *Id.* art. 1904 and annex 1901.2. "Candidates shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment, and general familiarity with international trade law. Candidates shall not be affiliated with either [the U.S. or Canadian governments]." *Id.* at (1). "A majority of the panelists on each panel shall be lawyers in good standing." *Id.* at (2).
70. *Id.* at annex 1901.2.
71. Implementation Act, *supra* note 5, § 405(a)(2)(A).

a board chaired by the Canadian Minister for International Trade selects the Canadian candidates.[72] In the United States, the candidate list is submitted to the Senate Finance and House Ways and Means committees for approval.[73]

When a panel is requested, each side selects two panelists[74] and if the Parties or the four appointed panelists are unable to agree on a fifth panelist, the fifth is selected by lot from the roster.[75] The candidates can not be affiliated with either government, and a majority of panel members must be lawyers.[76] The Agreement establishes a Secretariat with offices in Washington and Ottawa to facilitate the panel's work and to service all panel meetings.[77]

B. Scope and Standard of Review

In a panel proceeding, the panels look to the antidumping or countervailing duty law of the importing country and determine whether the agency correctly applied the law in reaching its determination.[78] In determining the content of the antidumping and countervailing law, the panels consider materials such as legislative history, regulations, administrative practice, and judicial precedent to the extent that a court of the importing party would rely on them. The panel bases its review upon the administrative record of the agencies that make the determination.[79] The standard of review is set forth in sections 516A(b)(1)(B) and 516A(b)(1)(A) of the Tariff Act of 1930 as amended.[80] Thus, when a panel reviews an antidumping or countervailing duty imposed by United States agencies, the scope and standard of review of the panels strongly resembles those of the CIT.

C. Panel Procedures

To institute panel review, a party simply makes a written request to the other party within thirty days after publication of a final determination from the ITA or ITC or from the Canadian Import Tribunal or the Dep-

72. Members of Panels Regulations, 123 Canada Gazette, Jan. 6, 1989, at 134. P.C. 1988-2937.

73. Implementation Act, *supra* note 5, § 405(a)(3)(A). The Senate Finance Committee recommended that panel members be subject to Senate confirmation, while the House Ways and Means Committee felt that such a move would delay creation of the panels. Under a compromise, the roster of U.S. citizens from which the panels would be drawn is subject to review by the two committees. Cong. Q., May 28, 1988, at 1446 (weekly ed.). *See also* Cong. Q., May 21, 1988, at 1363 (weekly ed.).

74. American panelists are selected by the U.S. Trade Representative. *Id.* at § 405(a)(6)(A). Canadian panel members are selected by the International Trade Minister. Canada Gazette, *supra* note 72.

75. Free Trade Agreement, *supra* note 1, annex 1901.2(3).

76. *Id.* annex 1901.2(2).

77. *Id.* at art. 1909.

78. *Id.* at art. 1904(2).

79. *Id.* at art. 1911. The U.S. agencies are the ITA and ITC. The Canadian agencies are the Canadian Import Tribunal and the Deputy Minister of National Revenue for Customs and Excise. *Id.*

80. *Id.*

uty Minister of National Revenue for Customs and Excise.[81] Parties are given an opportunity to file briefs and oral arguments.[82] The procedures are designed to result in a final decision within 315 days of the request of a panel.[83] A final decision of a panel is binding on the parties,[84] however, only with respect to the particular dispute before the panel.[85] The decisions have no precedential value with regard to the courts or other panels.[86]

Panel decisions may only be challenged in extraordinary circumstances, such as when a "[p]arty alleges that: . . . i) a member of the panel was guilty of gross misconduct, bias, or serious conflict of interest . . . ii) the panel seriously departed from a fundamental rule of procedure, or iii) the panel manifestly exceeded its powers, authority or jurisdiction."[87] In such a case, the matter is taken up by a three member extraordinary challenge committee drawn from a ten-person roster comprised of judges or former judges of a United States federal court or a Canadian court of superior jurisdiction.[88]

III. Constitutionality of the Binational Dispute Panels

The binational dispute panel process is not a radical departure from past procedures; it closely parallels traditional judicial review.[89] Yet by shifting jurisdiction from the courts to binational dispute panels and by limiting appellate review, the process significantly modifies the structure of unfair trade dispute resolution in the United States with regard to Canadian trade. It also has a definite effect on the "process" afforded individuals and companies.

The United States Constitution gives Congress the power to regulate foreign commerce[90] and gives the President the power to make treaties.[91] Combined, these constitutional grants of power create a broad base of authority for entering into international agreements.[92] The Free Trade Agreement would seem to enjoy a presumption of validity because the executive branch, by express congressional authority, negotiated it and both the Senate and House of Representatives approved

81. *Id.* at arts. 1904(4), 1911.
82. *Id.*
83. *Id.*
84. *Id.* at art. 1904(9).
85. *House Judiciary Hearings*, *supra* note 8, at 67 (Testimony of Jean Anderson, Chief Counsel, International Trade Administration, Dept. of Commerce).
86. *Id.*
87. Free Trade Agreement, *supra* note 1, art. 1904(13).
88. *Id.* at annex 1904(3).
89. *House Judiciary Hearings*, *supra* note 8, at 87 (Testimony of Rep. Sam M. Gibbons (R-Fla.)).
90. U.S. CONST. art. I, § 8, cl. 3. *See also* Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 448-51 (1979).
91. U.S. CONST. art. II, § 2, cl.2.
92. *Cf.* Dames & Moore v. Regan, 453 U.S. 654, 668 (1981) (Presidential action pursuant to congressional authorization given strongest latitude of judicial interpretation).

it.[93]

International agreements that establish binational or multinational arbitration panels to resolve international disputes have a long history in the United States; the Supreme Court has found these panels constitutional.[94] The Free Trade Agreement's panel system, however, differs from earlier arbitration panels. Unlike earlier arbitration panels which provided a mechanism for settling claims against foreign governments, these panels alter United States citizens' ability to challenge the government based on duties that the government exacts.[95] For this reason, the Court may look at the Free Trade Agreement's panels differently than it has looked at past international arbitration panels. Despite broad constitutional authority in the international arena, neither Congress, the President, nor the two combined have a completely free hand in executing international agreements. Like any domestic law, international agreements may not violate provisions of the Constitution.[96]

The panels implicate Appointments Clause issues because some members of every panel reviewing United States agency decisions will be Canadians who are chosen by the Canadian government. Article III questions arise because the panels displace the jurisdiction of article III United States courts. Finally, the panels raise Due Process issues because individuals and companies may be deprived of judicial review of decisions relating to tariffs that affect them. Ultimately, if the Supreme Court addresses these issues, it must decide whether the binational panels established under the Free Trade Agreement stray too far from the structure of government contemplated in the Constitution or deprive persons of their constitutionally protected rights of due process.

A. The Appointments Clause

The Appointments Clause[97] of the Constitution sets forth the procedure

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93. *See infra* note 135 and accompanying text.

94. ITC memorandum, *House Judiciary Hearings*, *supra* note 8, at 301, 384. In 1794, the first treaty ratified under the Constitution established binational commissions to make binding decisions in boundary disputes and with regard to claims of merchants. The selection process used for those panels nearly 200 years ago strongly resembles the process for the binational panels of the Free Trade Agreement. *Id.* at 384, 395. More recently, the U.S. and Iran, with help from Algeria, established a claims tribunal made up partly by Iranian government appointees and partly by U.S. appointees, empowered to render binding decisions in disputes between Iran and the U.S. *Id.* at 390-95. Binational panels are an accepted method of international dispute resolution, and argue for the legitimacy of the Free Trade Agreement's panels.

95. Letter from Customs and International Trade Bar Association to Hon. Hamilton Fish, U.S. House of Representatives (Dec. 4, 1987), *reprinted in House Judiciary Hearings*, *supra* note 8, at 573.

96. *See* Reid v. Covert, 354 U.S. 1, 15 (1957). *Reid* involved an executive agreement between the U.S. and Great Britain permitting U.S. military courts martial to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or by their dependents. *Reid* struck down courts martial jurisdiction over dependents as unconstitutional.

97. U.S. CONST. art. II, § 2, cl. 2.

for appointing United States government officers.[98] The clause contemplates the appointment of principal officers by the President with the Senate's advice and consent, and for the appointment of inferior officers either by the President alone, by the courts, or by the heads of departments. Under the Free Trade Agreement and its implementing legislation, in the event of a dispute, both the United States Trade Representative and the Canadian International Trade Minister are empowered to appoint some members of the dispute panel. Because the United States Trade Representative is a department head, the selection of American panel members would meet the requirements for the appointment of inferior officers as set forth in the Appointments Clause. The appointment of Canadian panel members, however, would meet none of the Clause's requirements.[99] Whether the Appointments Clause reaches members of the binational dispute panels at all is unclear because the panel members might not be officers of the United States.

Soon after negotiators settled on the panel process in an eleventh-hour session that narrowly beat a congressionally imposed deadline for completion of negotiations, the Appointments Clause question surfaced.[100] In an attempt to obviate an Appointments Clause challenge, the drafters included a fallback provision in the enabling legislation. Panel decisions are directly binding on U.S. agencies;[101] however, if a court holds this process unconstitutional, panel decisions will be routed through the President.[102] With directives to U.S. agencies coming from

98. The Appointments Clause provides in part:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

99. Free Trade Agreement, *supra* note 1, annex 1901.2(2).

100. *See* 4 Int'l Trade Rep. (BNA) No. 40, at 1247.

101. Implementation Act, *supra* note 5, tit. IV, § 401(c) (adding § 516(g)(7)(A) to the Tariff Act of 1930 (19 U.S.C. § 1516a (1982)).

102. *Id.* (adding § 516(g)(7)(B) to the Tariff Act of 1930). The fallback position was the subject of a great deal of controversy and compromise. Faced with a possible Appointments Clause defect, the Administration and Congress discussed how the implementing legislation should treat the binational panels. The U.S. Trade Representative's Office, the ITA, and the Justice Department pushed for language that would filter panel decisions requiring U.S. agency action through the President. Leaders of the relevant Congressional committees balked at this suggestion, fearing loss of independence of the ITC, an independent agency. 5 Int'l Trade Rep. (BNA) No. 21, at 742 (May 25, 1988). Senate Finance Committee Chairman Lloyd Bentsen (D-Tex), for one, was concerned that allowing the panel decisions to come through the president would add a political slant to the panel's decisions. *Id.* at 733. Senator Robert Packwood (R-Or) suggested the fallback clause as a compromise. *Id.* This compromise was agreed upon when the Senate Finance committee was considering the legislation. *Id.* The compromise was dropped later when the Finance committee met with the House Ways and Means committee. 5 Int'l Trade Rep. (BNA) No. 22, at 785 (June 1, 1988). Along with the House Judiciary Committee, the Senate Finance

the President rather than the panel, a challenge under the Appointments Clause would be averted. The Reagan Administration agreed in advance not to tamper with panel decisions if the fallback provision should become operable.[103] The Appointments Clause applies only to officers of the United States. The Agreement's enabling legislation declares that panelists are not considered employees of the United States government.[104] According to Supreme Court precedent, an inquiry into the panel members' function and duties is necessary to determine whether they are officers of the United States.

1. Applicability of Appointments Clause to the Binational Panel

In *Buckley v. Valeo*,[105] a leading case interpreting the Appointments Clause, the Supreme Court concluded that the term "Officers of the United States" means "any appointee exercising significant authority pursuant to the laws of the United States. . . ."[106] In *Buckley*, the Court held that members of the Federal Elections Commission were officers of the United States and that the method of their appointment (two of the six members were appointed by the President *pro tempore* of the Senate, two by the Speaker of the House, and two by the President) violated the Appointments Clause.[107]

Under the Free Trade Agreement, the quasi-judicial panels will interpret and apply United States antidumping and countervailing duty laws[108] and will have power under the Agreement to remand determinations of United States agencies to those agencies for further action.[109]

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committee felt that the panel process was constitutional without the fallback provision. 5 Int'l Trade Rep. (BNA) No. 24, at 877 (June 15, 1988). The issue delayed the enabling legislation from being formally introduced in Congress. *Id.* The issue was only resolved after Treasury Secretary James Baker, Chief of Staff Howard Baker, U.S. Trade Representative Clayton Yeutter, and Attorney General Edwin Meese convinced House Judiciary Chairman Peter Rodino (D-N.J.) to agree to the fallback compromise. 5 Int'l Trade Rep. (BNA) No. 27, at 972 (July 6, 1988). The House Judiciary committee noted the extremely unusual nature of the fallback provision and sought to minimize its value as a precedent. H.R. REP. No. 816, 100th Cong., 2d Sess. pt. 4, at 18 (1988).

The legislation also contains a "fast track" constitutional challenge provision to hasten any litigation that might arise. Implementation Act, *supra* note 5, tit. IV, § 401(c), (Adding § 516A(g)(4)(H) to the Tariff Act of 1930).

103. The Administration stated that "an Executive Order will provide for the President's acceptance, on behalf of the United States, in whole, of any decision of a panel or committee under the agreement." United States-Canada Free Trade Agreement, Statement of Administrative Action at 106, *reprinted in* COMMUNICATION FROM THE PRESIDENT, *supra* note 9, at 163, 268.

104. Implementation Act, *supra* note 5, § 405(b). *See* Christenson & Gambel, *supra* note 8, at 424-25 for the proposition that this declaration eliminates any Appointments Clause problem for the appointment of panelists while maintaining that there may be an Appointments Clause problem as to implementation of panel decisions and control of panelists.

105. 424 U.S. 1 (1976).

106. *Id.* at 125-26.

107. *Id.* at 129-144.

108. Free Trade Agreement, *supra* note 1, art. 1902(1).

109. *Id.* at art. 1904(8).

At first blush, panel members appear to be "exercising significant authority pursuant to the laws of the United States," thus falling within *Buckley*'s definition of an "officer." The prevailing view among those who advised Congress on the issue, however, is that although the panels will often decide controversies in accordance with United States antidumping and countervailing duty law, they will in actuality be international bodies exercising their authority pursuant to an international agreement thus rendering the Clause inapplicable.[110] In an apparent effort to bolster this view, the drafters of the Agreement provided that, for purposes of the panel's review, the United States' and Canada's antidumping and countervailing duty laws "are incorporated into th[e] Agreement."[111]

2. Separation of Powers Concerns

To reach its conclusion in *Buckley v. Valeo*, the Court analyzed the history and function of the Appointments Clause,[112] noting that in drafting the Appointments Clause the Framers intended to maintain the separation of powers between the branches,[113] minimizing the threat of tyranny that would result if the same body that made the law enforced the law.[114] The Clause is part of the system of checks and balances that is a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[115]

The Free Trade Agreement does not seriously threaten the separation of powers concept that underlies the Appointments Clause. The Court has typically used the separation of powers doctrine to strike down laws with which Congress has attempted to increase its power at the expense of the Executive.[116] Such a pattern differs from an attempt to authorize the delegation of functions outside of government.[117] The

110. *House Judiciary Hearings*, *supra* note 8, at 16, at 78-79, (testimony of Jean Anderson, ITA General Counsel); at 105, 122-24 (testimony and statement of Professor Harold Bruff, John S. Reddit Professor of Law, University of Texas at Austin); at 164-68 (statement of ABA Section on Int'l Law and Practice); at 238-39 (statement of the Congressional Research Service); at 444-45 (statement of Professor Andreas Lowenfeld, Charles L. Denison Professor of Law, New York University); at 654 (statement of Committee on International Trade, the Association of the Bar of the City of New York).

Cf. Seattle Master Builders v. Pacific N.W. Elec. Power & Conservation Planning Council, 786 F.2d 1359 (9th Cir. 1986) (Appointments Clause does not apply to a council charged with establishing an energy conservation plan pursuant to legislation passed by four states and Congress).

111. Free Trade Agreement, *supra* note 1, art. 1904(2).

112. 424 U.S. 1, at 129-32 (1976).

113. 424 U.S. at 129-132 (Discussion of the Founding Fathers' debate over the issue at the Constitutional Convention).

114. 424 U.S. at 120.

115. 424 U.S. at 122. *See also* Bowsher v. Synar, 478 U.S. 714 (1986); Commodities Future Trading Comm'n. v. Schor, 478 U.S. 568 (1986).

116. *Buckley*, 424 U.S. 1; Myers v. United States, 272 U.S. 52 (1926); Bowsher v. Synar, 478 U.S. 714 (1986).

117. *House Judiciary Hearings*, *supra* note 8, at 123 (statement of Professor Harold Bruff, University of Texas at Austin).

Free Trade Agreement does not create the dangerous situation in which Congress is both making and enforcing the law.[118] Rather, under the Agreement, Congress makes antidumping and countervailing duty laws, the ITC and ITA enforce those laws, and the binational panels review the decisions of those agencies. The Supreme Court has at times endorsed a formal view of separation of powers in an attempt to maintain sharp lines between the branches.[119] Under a formal analysis, the Court might hold the panel process in violation of separation of powers simply because it takes power away from the judiciary.[120] More recent decisions, however, indicate that the Court is more flexible in its approach to separation of powers.

The Court recently reexamined the Appointments Clause in *Morrison v. Olson*.[121] *Morrison* involved an allegation that the method of appointing independent counsels as provided by the Ethics in Government Act was unconstitutional. The Ethics in Government Act of 1978[122] gives the judiciary the power to appoint independent counsels. By a 7-1 majority, the Court held that the appointment process for independent counsels did not violate the Appointments Clause[123] and that the independent counsel provisions of the Act did not violate the doctrine of separation of powers.[124]

Chief Justice Rehnquist, writing for the Court, found that independent counsels were "inferior" rather than "principal" officers because they were subject to removal by a higher executive branch official (the Attorney General), they performed only certain, limited duties, and their office was limited in jurisdiction and tenure.[125] Because the independent counsels created by the Ethics in Government Act are inferior officers, their appointment by the courts does not violate the Appointments Clause language which states that "Congress may by Law vest the Appointment of such inferior Officers . . . in the Courts of Law." The Court noted that separation of powers concerns underlying the Appointments Clause arise only when the provisions for appointment have the potential to impair the constitutional functions assigned to one of the branches.[126] Like *Buckley*, *Morrison* endorses a functional, rather than a formal, approach to separation of powers questions. Under this functional approach, the Court will not disturb a scheme unless it " 'disrupts the proper balance between the coordinate branches [by] pre-

118. *See* Note, *supra* note 8, at 702-703; Christenson & Gambrel, *supra* note 8, at 426-27.

119. *See Bowsher*, 478 U.S. at 714; Immigration & Naturalization Serv. v. Chada, 462 U.S. 919 (1983).

120. The argument that the Agreement violates separation of powers by invalidly taking power from the judiciary implicates the question of when Congress can dispense with judicial review. *See* notes 137 to 169 and accompanying text.

121. 108 S.Ct. 2597 (1988).

122. Ethics in Government Act of 1978, 28 U.S.C.A. § 49 (West Supp. 1989).

123. Morrison v. Olson, 108 S.Ct. at 2611.

124. *Id.* at 2616-22.

125. *Id.* at 2608-09.

126. *Id.* at 2611.

vent[ing] the Executive Branch from accomplishing its constitutionally assigned functions. . . .' "[127]

Whether the binational panel members are officers of the United States is debatable. If they are, then, applying the *Morrison* criterion, the Court would likely consider the panel members inferior rather than principal officers. The roster of prospective panelists is controlled by a higher executive branch official (the United States Trade Representative).[128] The panelists perform only certain, limited duties, and their office is limited in jurisdiction and tenure. While the appointment of the American panel members passes Appointments Clause muster for inferior officers, the appointment of the Canadian members does not. If the Court backs itself into this corner, the appointment of Canadian panel members seems problematic in light of the specific appointment requirements of the Appointments Clause. The Court, however, has indicated in recent articulations of the doctrine of separations of powers that as long as there were negotiations and agreement between the executive and legislative branches, the Court will be slow to interfere.

The Court recently reinforced the functional approach to separation of powers with its decision in *Mistretta v. United States*.[129] In upholding the constitutionality of the Sentencing Reform Act,[130] which created an independent commission within the Judicial Branch to promulgate sentencing guidelines for federal offenses,[131] the Court stated that

> "[i]n adopting [a] flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny - the accumulation of excessive authority in a single branch - lies not in a hermetic division between the Branches, but in a carefully crafted system of checked and balanced power within each Branch.[132]

In *Mistretta*, the Court reaffirmed that it would uphold "statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment."[133]

Adopting an approach that Justice White had advocated in previous dissenting opinions,[134] the *Mistretta* Court deferred to the bargain struck by the Executive and Legislative branches in their attempt to deal with the sentencing problem, stating that "when this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress

127. *Id.* at 2621 (quoting Nixon v. Adm. of Gen. Serv., 433 U.S. 425, 443 (1977)).
128. Implementation Act, *supra* note 5, § 405(a).
129. Mistretta v. United States, 109 S.Ct. 647 (1989).
130. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1037 (1984).
131. *Id.* tit. II, § 217(a), 98 Stat. 1837, 2017 (codified as amended at 28 U.S.C. §§ 991-998 (Supp. V 1987)).
132. *Mistretta*, 109 S.Ct. at 659.
133. *Id.* at 660.
134. *See* Bowsher v. Synar, 478 U.S. 714, 760-777 (1986) (White, J., dissenting); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 92-118 (1982) (White, J., dissenting); Immigration & Naturalization Serv. v. Chada, 462 U.S. 919, 967-1003 (1983) (White, J., dissenting).

that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons."[135] The Court went on to note that "constitutional principles of separated powers are not violated . . . by mere anomaly or innovation."[136] As they did with the Sentencing Commission in *Mistretta*, the Court will likely uphold the binational dispute resolution panels as an innovation which was the product of extensive negotiations between Congress and the Executive aimed at solving a vexing national problem.

B. Article III Questions

Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[137] Also, article III guarantees judges lifetime tenure during good behavior and security of compensation.[138] As noted by the Supreme Court, article III "serves both to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government' and to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.' "[139] The Free Trade Agreement's binational panels are not article III tribunals; panel members are not appointed for life or given security of compensation. The question arises as to whether this presents a constitutional problem.[140] The broad language of the Constitution does not specifically address Congress' power to create non-article III tribunals in which judges are not guaranteed lifetime tenure nor guaranteed security of compensation. The Supreme Court has struggled with the issue and its jurisprudence in the area "has long abounded with confusion."[141]

Article III could be interpreted to mean that any time Congress creates an adjudicative body, it must be in the nature of an article III court in order to insure the independence of the adjudicator.[142] Historically, the Supreme Court has not followed this "article III literalism."[143] Rather, the Court has given Congress broad authority to establish legislative and administrative courts outside of article III.[144] The question

135. *Mistretta*, 109 S.Ct. at 661 (*quoting* Bowsher v. Synar, 478 U.S. at 737 (Stevens, J., concurring)).
136. *Mistretta*, 109 S.Ct. at 661.
137. U.S. Const., art. III, § 1.
138. *Id.*
139. Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (*quoting* Thomas v. Union Carbide, 473 U.S. 568, 582-83 (1984) and United States v. Will, 449 U.S. 200 (1980).
140. *See* Note, *The United States-Canada Free Trade Agreement and U.S. Constitution: Does Article III Allow Binational Panel Review of Antidumping and Countervailing Duty Determinations?*, 13 B.C. INT'L & COMP. L.REV. 237 (1990).
141. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916 (1988).
142. *Id.*
143. *Id.* at 917.
144. *Id.*

regarding the United States-Canada Free Trade Agreement is whether the disputes heard by the binational panels are of a type required by the Constitution to be heard in an article III court.

The tribunal for review of trade cases has not always been subsumed under article III. In 1929, in *Ex parte Bakelite Corp.*,[145] the Supreme Court held that judges of the Court of Customs and Patent Appeals (the precursor to the Court of Appeals for the Federal Circuit) did not enjoy article III protections.[146] In 1956, however, Congress declared the court to be an article III court,[147] which the Supreme Court later recognized in *Glidden v. Zdanok*.[148] In *Glidden*, the Court based its decision both on the functions of the Court of Customs and Patent Appeals[149] and on deference to Congress's declaration.[150] The *Glidden* Court avoided the question of whether Congress has the power to commit " 'inherently' judicial business to tribunals other than Article III courts."[151]

Three times, in recent years, the Supreme Court has addressed the question of when adjudication in an article III court is mandatory;[152] however, the issue is still muddled.[153] In its most recent decisions, the Court employed an *ad hoc* balancing test that, while flexible, makes it difficult to predict an outcome to a specific case.[154]

In *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*,[155] a sharply divided Court[156] held that federal bankruptcy judges who lacked article III status could not hear certain disputes. In drawing the line as to the limits of non-article III adjudication, the Court spoke of a protected core of article III judicial powers which include traditional suits at common law.[157] Another distinction bearing on the legislature's ability to create non-article III courts is whether the court is adjudicating "private rights" or "public rights." According to the plurality, while the article III courts are mandatory for the adjudication of private law mat-

145. Ex parte Bakelite Corp., 279 U.S. 438 (1929).
146. *Id.* at 458-59.
147. Act of July 14, 1956, Pub. L. No. 84-703, 70 Stat. 532 (codified at 28 U.S.C. § 251).
148. Glidden v. Zdanok, 370 U.S. 530 (1962).
149. *Id.* at 552, 558-61.
150. *Id.* at 542-43.
151. *Id.* at 549. The Court assumed for the sake of the decision that the business of the Court of Customs and Patent Appeals was not inherently judicial. *Id.*
152. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S 50 (1982); Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).
153. Fallon, *supra* note 141, at 917.
154. *Id.*
155. Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982).
156. Justice Brennan wrote for the plurality, joined by Justices Marshall, Blackmun, and Stevens. Justice Rehnquist, joined by Justice O'Connor, wrote a separate opinion concurring in the result. Chief Justice Burger wrote a dissenting opinion as did Justice White, with Chief Justice Burger and Justice Powell joining.
157. *Northern Pipeline*, 458 U.S. at 69-70.

ters, they are not required for adjudication of public rights, defined as claims against the government that Congress could commit entirely to executive discretion.[158] Commentators have criticized the *Northern Pipeline* Court's crude "public/private" distinction.[159]

Based on the *Northern Pipeline* decision, it is unclear whether the Court would require complaints regarding antidumping and countervailing duties to be heard by an article III court rather than a binational panel. On the one hand, some have argued that the right to sue the government for improperly imposed import duties has deep historical roots, and thus falls within the "protected core" of article III judicial powers.[160] On the other hand, the Court has characterized suits against United States agencies such as the ITC or ITA as involving public rights rather than private rights,[161] arguing against a constitutional right to an article III court.

In *Thomas v. Union Carbide Agricultural Products*,[162] a case involving a complicated statute regarding the registration of pesticides by the Environmental Protection Agency, the Court upheld a scheme that involved the resolution of claims by a federal arbitrator against attacks that it violated article III, concluding that the arbitration did not threaten the independent role of the judiciary.[163] The Court minimized, but did not dismiss, the "public rights"/"private rights" distinction, and noted that arbitration was a pragmatic solution to the problems that the statute sought to cure. The Court based its decision in part on the fact that the statute did not completely preempt article III courts, but provided for article III adjudication in limited cases. The holding in *Union Carbide* is difficult to apply to the Free Trade Agreement not only because of the differences in fact patterns and adjudicative procedures, but also because the Court failed to provide a principled test for determining when an article III court is required.

More recently, in *Commodity Futures Trading Comm'n v. Schor*,[164] the Court again did not require article III adjudication, but instead allowed the Commodity Futures Trading Commission to hear state common law counterclaims. The Court applied a three-pronged balancing test that considered (1) the extent of inroads on the "essential attributes of judicial power," (2) the nature of the rights to be adjudicated, and (3) the concerns that drove Congress to depart from article III.[165] Compared to *Thomas v. Union Carbide*, *Schor* presents a less amorphous test for determining when article III adjudication is required. However, this test still creates problems for predicting the outcome of a specific case such

158. 458 U.S. at 67-70.
159. Fallon, *supra* note 141, at 929.
160. *House Judiciary Hearings*, *supra* note 8, at 526-38 (Statement of Sidney Weiss).
161. Ex parte Bakelite Corp., 279 U.S. 438, 458-59 (1929).
162. 473 U.S. 568 (1985).
163. *Id.* at 589-93.
164. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).
165. *Id.* at 852.

as the Free Trade Agreement because it is difficult to know the weight the Court will give the factors included in the balancing scheme.

Although the tradition of article III jurisdiction over tariff cases is strong throughout our history, arguing against the constitutionality of the panel process under the first prong of the *Schor* test,[166] if the court focuses on the second two prongs, the nature of the rights to be adjudicated and the concerns that led to a departure from article III, the Court will probably find the panel process constitutional. The claims involve "public rights" rather than "private rights,"[167] and the panel process as found in the Free Trade Agreement was necessary to gain Canadian acceptance of the Agreement, which was otherwise strongly in the United States' best interest.[168] Placing the balance in these terms would likely lead the Court to validate the binational panels because two of the interests weigh in favor of validity. This conclusion is bolstered by the fact that the separation of powers concerns are minimal regarding the balance of power between the branches.[169]

C. Due Process Clause

Related to the question of whether article III requires judicial review of United States agency decisions, is the question of whether the Due Process Clause,[170] as a matter of individual rights, requires that a United States court, rather than a binational panel, review an agency determination regarding an antidumping or countervailing duty. As noted above, one purpose of the article III requirements is to safeguard litigants' right to have claims decided before an independent judiciary.[171] Depriving parties of this safeguard could conceivably be a violation of their right to due process of law. The requirements of the Due Process Clause are not fixed, but must be shaped to fit the particular

166. *House Judiciary Hearings*, *supra* note 8, at 516 (Statement of Sidney N. Weiss).
167. *Schor*, 478 U.S. at 853-54.
168. In their quest for protection from the misuse of U.S. unfair trade laws the Canadian negotiators would accept nothing less than the binational dispute panel process. As Manitoba Premier Howard Pawley stated: "Unless there is a solid trade dispute mechanise, the whole purpose of discussions is rather meaningless." 4 Int'l Trade Rep. (BNA) No. 28, at 905 (July 15, 1987). *See also* 4 Int'l Trade Rep. (BNA) No. 32, at 1016 (Aug. 12, 1987). 4 Int'l Trade Rep. (BNA) No. 36, at 1121, 1122 (Sept. 16, 1987). Free Trade Agreement negotiations broke down when Canadian negotiators walked out on Sept. 23, 1987, over the antidumping and countervailing duty dispute resolution issue. Cong. Q. (weekly ed.) Sept. 26, 1987, at 2353. 4 Int'l Trade Rep. (BNA) No. 3, at 1178 (Sept. 30, 1987). Negotiations were revived only after meetings between high level Cabinet officials of the two governments. 4 Int'l Trade Rep. (BNA) No. 38, at 1179 (Sept. 30, 1987). The Canadians originally wanted a wholesale exemption from U.S. unfair trade laws. The U.S. negotiators made it clear that such an exemption had no realistic chance of surviving Congress. 4 Int'l Trade Rep. (BNA) No. 32, at 1016 (Aug. 12, 1987). 4 Int'l Trade Rep. (BNA) No. 25, at 824, 825 (June 24, 1987). 4 Int'l Trade Rep. (BNA) No. 41, at 1329, 1330 (Oct. 28, 1987). 3 Int'l Trade Rep. (BNA) No. 46, at 1405 (Nov. 19, 1986); 4 Int'l Trade Rep. (BNA) No. 36, at 1121, 1122 (Sept. 16, 1987).
169. *See supra* notes 112-119 and accompanying text.
170. U.S. Const. amend. V.
171. *See supra* note 139 and accompanying text.

circumstances and the particular right at issue.[172] In deciding what process is due, courts consider the government interest, the private interest that is affected, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[173]

Article III courts are not the sole guarantors of due process; the central issue in a due process analysis is not the forum but the adequacy of the procedures.[174] For example, the Supreme Court has upheld the denial of access to federal courts in disputes involving the federal Medicare program.[175] The Due Process Clause, however, places some limits on the extent to which adjudication in an article III court can be restricted, though the case law does not clearly define those limits.[176]

In applying the due process test to a specific regime of adjudication, the nature of the private interest affected must be examined to determine if the interest is of a type protected by the Due Process Clause (life, liberty or property). The binational panels affect private parties' interests in correct assessments of duties, whether they be domestic producers seeking higher duties, or domestic importers and foreign exporters seeking lower duties.[177] Domestic importers and foreign exporters who have contracted to buy and sell goods arguably have a stronger property interest than domestic producers' interests in having higher tariffs imposed on their foreign competitor.[178] While the government clearly has the ability to impose duties on products,[179] "once a regime of importation has been established, . . . rights and expectations arise . . . that may well merit constitutional protection."[180] A duty on an import is tantamount to a tax on property, and taxes have always been subject to substantial constitutional safeguards.[181]

In the due process calculation mentioned above, the "risk of erroneous deprivation of a claimant's interest" requires an inquiry as to whether or not the panels will serve as an adequate check on agency error. The response to this inquiry favors the validity of the panels. In addition to the process that a party to an antidumping or countervailing

172. Mathews v. Eldridge, 424 U.S. 319, 334 (1986).

173. *Id.* at 334-35.

174. *See* Note, *supra* note 8, at 704-05.

175. Schweiker v. McClure, 456 U.S. 188, 198-200 (1982).

176. *House Judiciary Hearings*, *supra* note 8, at 477-78 (Letter of Professor David Shapiro, Harvard Law School).

177. *Id.* at 114 (Statement of Professor Harold Bruff, University of Texas).

178. *House Judiciary Hearings*, *supra* note 8, at 483 (statement of Professor David Shapiro). *See* Christenson & Gambrel, *supra* note 8, at 421-22 (for the argument that those benefitting from the FTA might be estopped from challenging the jurisdiction of the panels).

179. *See* Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 318 (1933).

180. *House Judiciary Hearings*, *supra* note 8, at 484 (statement of Professor David Shapiro). *See also id.* at 110-11 (statement of Professor Harold Bruff *citing* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)).

181. *Id.* at 517-20 (statement of Sidney N. Weiss).

duty determination is provided by the ITC or ITA, the binational panel process includes a broad range of procedural protections. The procedures are very similar to those found in the Court of International Trade. All parties that would have standing to sue in a judicial proceeding have standing under the binational panel process.[182] Litigants have the right to counsel, may file written briefs, and may argue their case orally before an impartial tribunal.[183] The scope of the panel's review is limited and the standards of review are similar to the courts whose jurisdiction the panels replace.[184] The panels issue written decisions specifying the facts and legal conclusions.[185] Extraordinary challenge procedures guard against gross misconduct of panel members.[186] On the other hand, litigants do not have their cause heard by a judge appointed for life who has salary security. The litigants are put on a fast schedule and are deprived of review by the Court of Appeals for the Federal Circuit and the Supreme Court.

The government's interest in the antidumping and countervailing dispute panels of the Free Trade Agreement flows from the necessity of including such a process in the Agreement. The Canadians were unwilling to accept the Agreement without the mechanism.[187] Thus, the governmental interest in the substitute process is an integral part of the important interest of promoting better international trade relations.[188]

In sum, the government's interest in the binational panel process is arguably quite strong and the risk that the panels will deprive parties of their interest in adequate review is low due to the many procedural protections. For these reasons the court would probably not sustain a due process challenge to the binational panels of the Free Trade Agreement.[189]

Conclusion

The United States-Canada Free Trade Agreement not only eliminates tariffs and other trade barriers between the two countries, but the Agreement also addresses Canadian concern over the administration of

182. Free Trade Agreement, *supra* note 1, art. 1904(5).
183. *Id.* at art. 1904(7).
184. *See supra* notes 78 to 88 and accompanying text.
185. Free Trade Agreement, *supra* note 1, annex 1901.2(5).
186. *Id.* at annex 1904.13.
187. Canada adamantly insisted on securing relief from perceived unfair application of U.S. trade laws. *See supra* note 168.
188. *House Judiciary Hearings*, *supra* note 8, at 115 (Statement of Prof. Harold H. Bruff, University of Texas Law School).
189. Christenson & Gambrel, *supra* note 8, analyze three aspects of due process concerns: (1) the delegation of jurisdiction to the panels by Congress, (2) the disability to challenge the no judicial review provision, and (3) provisions of the Agreement that facially meet the requirements of due process. The authors conclude that in light of the fact that the disputes involve public rights, the Agreement and its implementing legislation provide sufficient standards of review and safeguards against unfairness, including notice provisions and an extraordinary challenge procedure, to satisfy the Due Process clause. *Id.* at 419-22.

United States antidumping and countervailing duty laws. The negotiators had hoped to develop a substitute system of antidumping and countervailing duty rules in both countries but the task proved too large for the limited time frame of the Free Trade Agreement negotiations. Negotiations will continue toward the goal of harmonized rules. In the meantime, the Agreement leaves each country's respective process for determining when to impose such duties intact, while shifting review jurisdiction from the courts to a binational panel process which the Agreement establishes.

Binational panels are not new to international dispute resolution; however, unlike other international dispute resolution panels, this panel process affects citizens' ability to challenge their own government over duties imposed. This change may violate provisions of the United States Constitution. In particular, the panel process may violate the Appointments Clause, article III, and the Due Process Clause. However, constitutional challenges on these grounds would probably fail, generally because the panel process does not pose a great threat to the separation of powers doctrine that underlies the Appointments Clause and article III, nor do the binational panels radically curtail the process received by challengers of the antidumping or countervailing duties. Absent significant threats to the separation of powers or due process, it is unlikely that the Court would allow the Constitution to hinder progress in international trade.

Peter Huston