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# Chapter 19 of the NAFTA: Are Binational Panels Constitutional?

*J. Todd Applegate\**

This comment examines whether Chapter 19 binational panels of the North American Free Trade Agreement (NAFTA) are constitutional under the provisions of the U.S. Constitution. Part I examines the basic structure and process of Chapter 19 binational panels. Part II takes a closer look at the method for challenging binational review panels in U.S. courts. Part III analyzes the constitutionality of binational panels under Article II of the U.S. Constitution. Part IV discusses the constitutionality of binational panels under the guise of the due Process Clause. Part V examines the constitutionality question under the Equal Protection Clause and Part VI provides a detailed analysis of binational panels under Article III of the U.S. Constitution. Finally, Part VII explores cases challenging the constitutionality of binational panels.

## I. Introduction to the Basic Features of Chapter 19.

### A. BACKGROUND.

Under Chapter 19 of the NAFTA, each Party "reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of the other Party."<sup>1</sup> Antidumping laws were enacted to prevent exporters from discarding their products on other countries at inequitably low prices. "Dumping" results in a material injury or the possibility of such injury to an industry and high prices in the exporter's home country.<sup>2</sup> In the United States, a dumping offense entails an export to the United States "priced at less than its fair value with a resulting material injury or threat thereof to an American industry."<sup>3</sup> A

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1. North American Free Trade Agreement, drafted Aug. 12, 1992, revised Sept. 6, 1992, U.S.-Can.-Mex., 32 I.L.M. 605, art. 1902(1) (entered into force Jan. 1, 1994) [hereinafter "NAFTA"]. Article 1902(1) also states: "[a]ntidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents." *Id.*
  2. Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L L.J. 141, 144 (1994).
  3. *Id.*
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penalty tariff is imposed "to restore the export price to fair value."<sup>4</sup>

Countervailing duty laws were also enacted under the NAFTA to prevent exporters from ridding themselves of their products at inequitably low prices.<sup>5</sup> In this situation, however, the exporter's home country subsidizes the practice by providing a tax rebate or a similar aid.<sup>6</sup> A penalty tariff is imposed "to offset or countervail the government subsidy."<sup>7</sup>

The procedures for pursuing antidumping and countervailing duty actions in the United States outside of (and prior to) the NAFTA are similar.<sup>8</sup> A U.S. firm is entitled to petition the Commerce Department, alleging it was harmed or is "being harmed by a foreign competitor's dumping or subsidy."<sup>9</sup> The Commerce Department then makes a preliminary determination on the "less-than-fair-value" or subsidy issue, as the case may be.<sup>10</sup> The International Trade Commission (ITC) makes a contemporaneous preliminary determination of possible industry injury.<sup>11</sup> If both the Commerce Department and the ITC make affirmative findings, the two agencies make final determinations.<sup>12</sup> If both the Commerce Department and the ITC do not make affirmative findings, there is no final determination by either agency.<sup>13</sup> Both agencies are subject to "strict time constraints" at

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4. *Id.*; 19 U.S.C. § 1673 (1988). This statute asserts that:

If the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the commission determines that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise. *Id.*

5. Metropoulos, *supra* note 2, at 144.

6. *Id.*

7. *Id.* 19 U.S.C. § 1671(a) (1988). This statute asserts that:

If the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and in the case of merchandise imported from a Subsidies agreement country, the Commission determines that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy. *Id.*

8. Metropoulos, *supra* note 2, at 145.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

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each step of the process.<sup>14</sup> These final determinations are appealable first to the Court of International Trade,<sup>15</sup> "with a second round of appeals [available] to the Court of Appeals for the Federal Circuit."<sup>16</sup>

Mexico, with Canadian support, tried to win modifications in the U.S. antidumping and countervailing duty laws, but the United States prevented the NAFTA from reaching the substance of these laws by insisting that they remain in place.<sup>17</sup> This was not the first instance in which Canada had tried to win these modifications in U.S. law.

Canada had been dissatisfied with U.S. antidumping and countervailing duty laws prior to the enforcement of the U.S.-Canada Free Trade Agreement in 1988.<sup>18</sup> Canada was under the impression that the U.S. administering agencies were "influenced by domestic political considerations, with unfair results for Canadian firms."<sup>19</sup> Canada sought significant changes in the U.S. law or a move toward "common U.S.-Canadian laws interpreted by a common tribunal," but neither option was acceptable to the United States.<sup>20</sup>

The compromise concerning binational panel review reached in the U.S.-Canada Free Trade Agreement forms the basis for the structure of the NAFTA Chapter 19 binational panels.<sup>21</sup> As stated previously, the United States prevented the NAFTA from reaching the substance of its antidumping and countervailing duty laws.<sup>22</sup> The provisions adopted in the final draft of Chapter 19 of the NAFTA are essentially the same as those adopted in the U.S.-Canada Free Trade Agreement, and focus on new procedures for the review of antidumping and countervailing duty decisions rendered by the administrative bodies of each country.<sup>23</sup>

#### B. BINATIONAL REVIEW PANELS.

The role of the binational panel is to determine whether or not the administrative determination was "in accordance with the domestic antidumping or countervailing duty law of the Party that rendered it."<sup>24</sup> If necessary, the panel may remand the determination

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14. *Id.*

15. 19 U.S.C. § 1516a(a)(1) (1988). Section 1516a(a)(1) provides that "an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing concurrently a summons, and . . . complaint . . . contesting any factual findings or legal conclusion upon which the determination is based." *Id.*

16. Metropoulos, *supra* note 2, at 145; 28 U.S.C. § 1295(a)(5) (1988). Section 1295(a)(5) states that the United States Court of Appeals for the Federal Circuit "shall have exclusive jurisdiction . . . of an appeal from a final decision of the United States Court of International Trade." *Id.*

17. PAUL ET AL., NORTH AMERICAN FREE TRADE AGREEMENT: SUMMARY AND ANALYSIS 104 (Hamilton Loeb & Michael Owen eds., 1992).

18. Metropoulos, *supra* note 2, at 145.

19. *Id.*

20. *Id.*

21. PAUL ET AL., *supra* note 17, at 104.

22. *Id.*

23. *Id.*

24. *Id.* at 105; NAFTA, *supra* note 1, at annex 1901.2(1).

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for further proceedings consistent with the panel's decision.<sup>25</sup> The decision of the review panel is binding and nonreviewable, aside from a narrow exception labeled the "extraordinary challenge."<sup>26</sup>

Chapter 19 of the NAFTA provides for the establishment of independent binational review panels consisting of five members drawn from a seventy-five person roster developed by the Parties to the suit.<sup>27</sup> Each Party chooses two panelists, and these choices are

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25. NAFTA, *supra* note 1, at art. 1904(8). Article 1904(8) sets forth the guidelines for remanding a final determination:

The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision. Where the panel remands a final determination, the panel shall establish as brief a time as is reasonable for compliance with the remand, taking into account the complexity of the factual and legal issues involved and the nature of the panel's decision. In no event shall the time permitted for compliance with a remand exceed an amount of time equal to the maximum amount of time (counted from the date of the filing of a petition, complaint or application) permitted by statute for the competent investigating authority in question to make a final determination in an investigation. If review of the action taken by the competent investigating authority on remand is needed, such review shall be before the same panel, which shall normally issue a final decision within 90 days of the date on which such remand is submitted to it. *Id.*

26. Homer E. Moyer, Jr., *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort*, 27 INT'L LAW 707, 709 (1993).

27. NAFTA, *supra* note 1, at annex 1901.2. Annex 1901.2 describes the procedures for establishing binational panels:

1. On the date of entry into force of this Agreement, the Parties shall establish and thereafter maintain a roster of individuals to serve as panelists in disputes under this Chapter. The roster shall include judges or former judges to the fullest extent practicable. The Parties shall consult in developing the roster, which shall include at least 75 candidates. Each Party shall select at least 25 candidates, and all candidates shall be citizens of Canada, Mexico or the United States. 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 a Party, and in no event shall a candidate take instructions from a Party. The Parties shall maintain the roster, and may amend it, when necessary, after consultations.

2. A majority of the panelists on each panel shall be lawyers in good standing. Within 30 days of a request for a panel, each involved Party shall appoint two panelists, in consultation with the other involved Party. The involved Parties normally shall appoint panelists from the roster. If a panelist is not selected from the roster, the panelist shall be chosen in accordance with and be subject to the criteria of paragraph 1. Each involved Party shall have the right to exercise four peremptory challenges, to be exercised simultaneously and in confidence, disqualifying from appointment to the panel up to four candidates proposed by the other involved Party. Peremptory challenges and the selection of alternative panelists shall occur within 45 days of the request for the panel. If an involved Party fails to appoint its members to a panel within 30 days or if a panelist is struck and no alternative panelist is selected within 45 days, such panelist shall be selected by lot on the 31st or 46th day, as the case may be, from that Party's candidates on the roster.

3. Within 55 days of the request for a panel, the involved Parties shall agree on the selection of a fifth panelist. If the involved Parties are unable to agree, they shall decide by lot which of them shall select, by the 61st day, the fifth panelist from the roster, excluding candidates eliminated by peremptory challenges.

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subject to challenge by the other Party.<sup>28</sup> The Parties either agree on a fifth panelist or select the fifth panelist by lot if an agreement cannot be reached.<sup>29</sup> Although panelists are not required to be lawyers, a majority of each panel, including the chairperson, must be lawyers in good standing.<sup>30</sup> The NAFTA states that the roster should include judges or former judges "to the fullest extent practicable."<sup>31</sup>

The independent binational review panels take the place of judicial review of final administrative antidumping or countervailing duty decisions of one Party that involve goods imported from another Party.<sup>32</sup> Panel review of a final administrative antidumping or coun-

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4. On appointment of the fifth panelist, the panelists shall promptly appoint a chairman from among the lawyers on the panel by majority vote of the panelists. If there is no majority vote, the chairman shall be appointed by lot from among the lawyers on the panel.

5. Decisions of the panel shall be by majority vote and based on the votes of all members of the panel. The panel shall issue a written decision with reasons, together with any dissenting or concurring opinions of panelists.

6. Panelists shall be subject to the code of conduct established pursuant to article 1909. If an involved Party believes that a panelist is in violation of the code of conduct, the involved Parties shall consult and if they agree, the panelist shall be removed and a new panelist shall be selected in accordance with the procedures of this Annex.

7. When a panel is convened pursuant to Article 1904 each panelist shall be required to sign:

(a) an application for protective order for information supplied by the United States or its persons covering business proprietary and other privileged information;

(b) an undertaking for information supplied by Canada or its persons covering confidential, personal, business proprietary and other privileged information; or

(c) an undertaking for information supplied by Mexico or its persons covering confidential, business proprietary and other privileged information.

8. On a panelist's acceptance of the obligations and terms of an application for protective order or disclosure undertaking, the importing Party shall grant access to the information covered by such order or disclosure undertaking. Each Party shall establish appropriate sanctions for violations of protective orders or disclosure undertakings issued by or given to any Party. Each Party shall enforce such sanctions with respect to any person within its jurisdiction. Failure by a panelist to sign a protective order or disclosure undertaking shall result in disqualification of the panelist.

9. If a panelist becomes unable to fulfill panel duties or is disqualified, proceedings of the panel shall be suspended pending the selection of a substitute panelist in accordance with the procedures of this annex.

10. Subject to the code of conduct established pursuant to Article 19099, and provided that it does not interfere with the performance of the duties of such panelist, a panelist may engage in other business during the term of the panel.

11. While acting as a panelist, a panelist may not appear as counsel before another panel.

12. With the exception off violations of protective orders or disclosure undertakings, signed pursuant to paragraph 7, panelists shall be immune from suit and legal process relating to acts performed by them in their official capacity.

*Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. PAUL ET AL., *supra* note 17, at 104.

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tervailing duty determination is not automatic, however.<sup>33</sup> If panel review is not requested, domestic judicial review procedures still apply.<sup>34</sup> Even if panel review is requested, the panel must apply the same domestic substantive law that the administering agency applies, which includes "the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of [the] importing Party would rely on such materials in reviewing a final determination of the competent investigating authority."<sup>35</sup>

### C. EXTRAORDINARY CHALLENGE PROCEDURES.

Extraordinary challenge procedures are available only under the unusual circumstances of gross misconduct, bias, breach of fundamental procedures, or action that manifestly exceeds the authority panels have been given.<sup>36</sup> The Party bringing the challenge must also establish that the action materially affected the panel's decision and that the decision threatens the integrity of the binational panel review process.<sup>37</sup> The committee can review the binational review panel proceedings to determine whether: (1) grounds exist to remand the panel decision; (2) to dismiss the decision and entrust the case to a new panel; or (3) whether the decision should be affirmed.<sup>38</sup> "If the complaining Party fails to establish any of the three requirements, the committee must affirm the panel's decision."<sup>39</sup>

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33. *Id.* at 105.

34. *Id.*

35. NAFTA, *supra* note 1, at art. 1904(2). Article 1904(2) states that:

An involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on materials in reviewing a final determination of the competent investigating authority. Solely for purposes of the panel review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made a part of this Agreement.

*Id.*

36. *Id.*; NAFTA, *supra* note 1, at art. 1904(13)(a). Article 1904(13)(a) allows a Party to pursue the extraordinary challenge procedure where, within a reasonable time after the panel decision is issued, the Party alleges that:

(i) [A] member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct, (ii) the panel seriously departed from a fundamental rule of procedure, or (iii) the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article . . .

*Id.*

37. NAFTA, *supra* note 1, at art. 1904(13)(b). Article 1904(13)(b) lists a further requirement that "any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process" before a Party may seek to invoke the extraordinary challenge procedure. *Id.*

38. PAUL ET AL., *supra* note 17, at 105.

39. Ethan Boyer, *Article III, The Foreign Relations Power, and the Binational Panel System of NAFTA*, 13 INT'L TAX & BUS. LAW 101, 112 (1996).

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Extraordinary challenge committees consist of three members, one member chosen by each of the two Parties from a roster selected by the Parties and the third chosen from the roster by the Party designated by lot to so choose.<sup>40</sup> Regardless of whether the committee decides to affirm, vacate, or remand the panel's decision, the committee must issue its opinion within 90 days of the request for extraordinary challenge review.<sup>41</sup>

#### D. SPECIAL COMMITTEES.

Along with the above provisions, Chapter 19 of the NAFTA includes procedures by which a Party can "seek to ensure that another Party's domestic law does not operate to prevent the establishment, functioning, or effectiveness of the binational review panel process."<sup>42</sup> A Party alleging such a hindrance may seek consultations with the other Party, but if consultation does not resolve the dispute, the matter is committed to a special three member committee chosen from the same roster and in the same manner as the commit-

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40. *Id.* NAFTA, *supra* note 1, at annex 1904.13. Annex 1904.13 describes the extraordinary challenge procedure:

The involved Parties shall establish an extraordinary challenge committee, composed of three members, within 15 days of a request pursuant to Article 1904(13). The members shall be selected from a 15-person roster comprised of judges or former judges of a federal judicial court of the United States or a judicial court of superior jurisdiction of Canada, or a federal judicial court of Mexico. Each Party shall name five persons to this roster. Each involved Party shall select one member from this roster and the involved Parties shall decide by lot which of them shall select the third member from the roster.

2. The Parties shall establish by the date of entry into force of the Agreement rules of procedure for committees. The rules shall provide for a decision of a committee within 90 days of its establishment.

3. Committee decisions shall be binding on the Parties with respect to the particular matter between the Parties that was before the panel. After examination of the legal and factual analysis underlying the findings and conclusions of the panel's decision in order to determine whether one of the grounds set out in Article 1904(13) has been established, and on finding that one of those grounds has been established, the committee shall vacate the original panel decision or remand it to the original panel for action not inconsistent with the committee's decision; if the grounds are not established, it shall deny the challenge and, therefore, the original panel decision shall stand affirmed. If the original decision is vacated, a new panel shall be established pursuant to annex 1901.2.

*Id.*

41. NAFTA, *supra* note 1, at annex 1904.13(2).

42. PAUL ET AL., *supra* note 17, at 106.

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tee under the extraordinary review procedure.<sup>43</sup>

If the committee finds that a Party's domestic law interferes with the binational review panel process, it can order the Parties to undergo consultation in order to resolve the dispute.<sup>44</sup> But if the consultation does not result in a resolution, the complaining Party can either suspend operation of the panel process for decisions involving the other party or suspend against that Party such benefits as may be appropriate under the circumstances.<sup>45</sup> The defending or opposing Party is not left defenseless, however.<sup>46</sup> That Party may reconvene the special committee to determine if the problem has been corrected, in which case

43. *Id.* NAFTA, *supra* note 1, at annex 1905.6. Annex 1905.6 describes the special committee procedures: The Parties shall establish rules of procedure by the date of entry into force of this Agreement in accordance with the following principles:

- (a) the procedures shall assure a right to at least one hearing before the special committee as well as the opportunity to provide initial and rebuttal written submissions;
- (b) the procedures shall assure that the special committee shall prepare an initial report typically within 60 days of the appointment of the last member, and shall afford the Parties 14 days to comment on that report prior to issuing a final report 30 days after presentation of the initial report;
- (c) the special committee's hearings, deliberations and initial report, and all written submissions to, and communications with, the special committee shall be confidential;
- (d) unless the Parties to the dispute otherwise agree, the decision of the special committee shall be published 10 days after it is transmitted to the disputing Parties, along with any separate opinions of individual members and any written views that either Party may wish to be published; and
- (e) unless the Parties to the dispute otherwise agree, meetings and hearings of the special committee shall take place at the office of the Section of the Secretariat of the Party complained against.

*Id.*

44. NAFTA, *supra* note 1, at art. 1905(7). Article 1905(7) provides that "[w]here the special committee makes an affirmative finding . . . The complaining Party and the Party complained against shall begin consultations within 10 days thereafter and shall seek to achieve a mutually satisfactory solution within 60 days of the issuance of the committee's report." *Id.*
45. PAUL ET AL., *supra* note 17, at 106; NAFTA, *supra* note 1, at art. 1905(8). Article 1905(8) explains the allowed procedure when consultations do not result in a resolution:

If, within the 60-day period, the Parties are unable to reach a mutually satisfactory solution to the matter, or the Party complained against has not demonstrated to the satisfaction of the special committee that it has corrected the problem or problems with respect to which the committee has made an affirmative finding, the complaining Party may suspend:

- (a) the operation of article 1904 with respect to the Party complained against; or
- (b) the application to the Party complained against of such benefits under this Agreement as may be appropriate under the circumstances. If the complaining Party decides to take action under this paragraph, it shall do so within 30 days after the end of the 60-day consultation period.

*Id.*

46. PAUL ET AL., *supra* note 17, at 106; NAFTA, *supra* note 1, at art. 1905(10).

the remedial actions taken by the complaining Party must be terminated.<sup>47</sup>

E. REVIEW OF ANTIDUMPING & COUNTERVAILING DUTY LAW AMENDMENTS.

Chapter 19 of the NAFTA also contains two provisions regarding the amendment of antidumping and countervailing duty statutes.<sup>48</sup> The first provision states that such an amendment will apply only to goods from other Parties if the amendment specifies that it so applies.<sup>49</sup> The second provision establishes that a Party may request a binational panel to issue a declaratory opinion stating whether or not the other Party's antidumping or countervailing duty law amendment "conforms to the above standards and has the function or effect of overturning the prior decision of a bilateral review panel."<sup>50</sup>

If the panel declares that the amendment does not conform to the standards, the Parties can negotiate possible modifications for ninety days.<sup>51</sup> If no modifications are made within nine months of the termination of the consultation period, the challenging party may retaliate by amending its own law or by terminating the NAFTA.<sup>52</sup>

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47. PAUL ET AL., *supra* note 17, at 106; NAFTA, *supra* note 1, at art. 1905(10). Article 1905(10) states: On the request of the party complained against, the special committee shall reconvene to determine whether:

(a) the suspension of benefits by the complaining Party pursuant to paragraph 8(b) is manifestly excessive; or

(b) the Party complained against has corrected the problem or problems with respect to which the committee has made an affirmative finding. The special committee shall, within 45 days of the request, present a report to both Parties containing its determination. Where the special committee determines that the Party complained against has corrected the problem or problems, any suspension effected by the complaining Party or the Party complained against, or both, pursuant to paragraph 8 or 9 shall be terminated.

*Id.*

48. PAUL ET AL., *supra* note 17, at 106.

49. *Id.*

50. *Id.* at 107.

51. NAFTA, *supra* note 1, at art. 1903(3)(a). Article 1903(3)(a) states:

[In the event that the panel recommends modifications to the amending statute to remedy a non-conformity that it has identified in its opinion:] (a) the two Parties shall immediately begin consultations and shall seek to achieve a mutually satisfactory solution to the matter within 90 days of the issuance of the panel's final declaratory opinion. Such solution may include seeking corrective legislation with respect to the statute of the amending Party.

*Id.*

52. NAFTA, *supra* note 1, at art. 1903(3)(b). Article 1903(3)(b) states:

[I]f corrective legislation is not enacted within nine months from the end of the 90-day consultation period referred to in subparagraph:

(a) and no other mutually satisfactory solution has been reached, the Party that requested the panel may (i) take comparable legislative or equivalent executive action, or (ii) terminate this agreement with regard to the amending Party on 60-day written notice to that Party.

*Id.*

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## II. Method for Challenging Binational Review Panels in U.S. Courts.

### A. EXAMINATION OF THE PROCESS.

As stated earlier, the NAFTA provides for constitutional challenges to the binational panel process itself, as opposed to antidumping and countervailing duty challenges, through the extraordinary challenge procedure.<sup>53</sup> These challenges in the United States must be filed in the Court of Appeals for the District of Columbia Circuit within thirty days of the disputed panel decision.<sup>54</sup> The District of Columbia Circuit Court decision may be appealed to the United States Supreme Court within ten days after issuance.<sup>55</sup> However, despite the availability of constitutional challenges, only two cases have raised such a challenge, "and neither . . . led to a decision on the merits."<sup>56</sup>

The lack of constitutional challenges may be due in part to the limited circumstances in which these challenges are available, as discussed earlier.<sup>57</sup> But the lack of cases may also be explained by legal obstacles that perhaps "discourage parties from seeking judicial review" on constitutional grounds.<sup>58</sup> These obstacles provide little or no incentive for a party to pursue such review.<sup>59</sup>

### B. OBSTACLES TO CONSTITUTIONAL CHALLENGES OF BINATIONAL PANELS.

#### 1. Financial Disincentive.

Under U.S. law, there is "a strong financial disincentive to challenging the [binational] panel process."<sup>60</sup> The NAFTA implementing legislation "requires the Party filing a constitutional challenge to pay the opponent's litigation costs if the challenge is unsuccessful."<sup>61</sup> Even though under the above legislation the court has discretion not to

53. See *supra* notes 36-39.

54. 19 U.S.C. § 1516a(g)(4)(C) (1994). Section 1516a(g)(4)(C) provides that:

Within 30 days after the date of publication in the federal register of notice that binational panel review has been completed, an interested party who is a party to the proceeding in connection with which the matter arises may commence an action . . . by filing an action in accordance with the rules of the court.

*Id.*

55. *Id.* at § 1516a(g)(4)(H). This section states that "any final judgment of the United States Court of Appeals for the District of Columbia Circuit which is issued pursuant to an action brought under subparagraph (A) shall be reviewable by appeal directly to the Supreme Court of the United States . . . within 10 days after such order is entered." *Id.*

56. Robert P. Deyling, *Free Trade Agreements and the Federal Courts: Emerging Issues*, 27 ST. MARY'S L.J. 353, 379 (1996).

57. See *supra* notes 36-39.

58. Deyling, *supra* note 56, at 379.

59. *Id.*

60. *Id.*

61. *Id.* See 19 U.S.C. § 1516a(g)(4)(F)(ii) (1994). This statute states that if a court upholds the constitutionality of the determination in question, the court "shall" award fees and expenses, as well as any additional incurred costs, to the prevailing party, unless the court finds the position of the other party substantially justified or that special circumstances would make such an award unjust. *Id.*

award fees and expenses if the court finds the claim was substantially justified or that special circumstances make an award unjust, the potential of having to pay costs if a challenge is unsuccessful is "likely to be a strong deterrent" to pursuing such a challenge.<sup>62</sup>

## 2. *Executive and Legislative Barriers.*

The executive and legislative branches have "blunted the practical value of judicial review by assuring that the underlying panel decision will continue to be binding, at least in the case under review."<sup>63</sup> In 1989 President Reagan issued Executive Order 12,662, stating the President accepts "as a whole, all decisions of binational panels and extraordinary challenge committees."<sup>64</sup> "The President may direct the Commerce Department to take action consistent with the panel decision," and "neither the President's actions, nor the agency's action at the direction of the President, are subject to judicial review."<sup>65</sup> Prior to this Executive Order, Congress passed the aforementioned NAFTA implementing legislation, one provision of which establishes that the President may accept binational decisions, even if they are held unconstitutional.<sup>66</sup>

The executive and congressional actions described above combine to form a significant obstacle to raising a constitutional challenge to a binational panel decision in the United States.<sup>67</sup> "The only incentive for seeking judicial review would be the possible effect of a favorable judicial decision on the future of the panel process as a whole," but "the result in the underlying case would not change."<sup>68</sup> Coupled with the financial disincentive to make a constitutional challenge, it is no wonder that only two cases have challenged the constitutionality of the binational panel process.

### III. Binational Panels & Constitutionality Under Article II of the U.S. Constitution.

#### A. APPOINTMENTS CLAUSE.

Under Article II, Section 2, of the U.S. Constitution, the President, by and with the advice and consent of the Senate, shall appoint "all other Officers of the United States, whose Appointments are not herein otherwise provided for, . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President

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62. Deyling, *supra* note 56, at 380.

63. *Id.*

64. Exec. Order No. 12,662, 3 C.F.R. 624 (1989), reprinted in 19 U.S.C. § 2112 (1994).

65. Deyling, *supra* note 56, at 380.

66. 19 U.S.C. § 1516a(g)(7)(B) (1994).

67. Deyling, *supra* note 56, at 380.

68. *Id.*

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alone, to the Courts of Law, or in the Heads of Departments."<sup>69</sup> This provision of the Constitution requiring that Officers of the United States be appointed by the President and confirmed by the Senate is commonly known as the Appointments Clause.<sup>70</sup> Exactly who is an "Officer" of the United States is a question that was addressed by the U.S. Supreme Court in a 1976 case, *Buckley v. Valeo*.<sup>71</sup>

#### B. BUCKLEY V. VALEO.

The Supreme Court in *Buckley v. Valeo* interpreted the Appointments Clause to mean that individuals who exercise "significant authority pursuant to the laws of the United States" must be appointed by the President, with the confirmation by the Senate.<sup>72</sup> It is argued that the binational panel system does not comply with the Appointments Clause "[s]ince at least three members of each panel are foreign, and the American members are not appointed by the President."<sup>73</sup> Although panel members are not appointed by the President, a strong argument can be made that binational panels are constitutional under Article II of the Constitution.<sup>74</sup>

#### C. ARGUMENTS SUPPORTING THE CONSTITUTIONALITY OF BINATIONAL PANELS UNDER ARTICLE II.

Persuasive arguments exist to refute the constitutional argument that binational panels do not comply with the Appointments Clause.<sup>75</sup> The first of these arguments is that the Appointments Clause does not apply to binational panels because they act pursuant to international law, not U.S. law.<sup>76</sup> Under this argument, the panel derives its authority exclusively from the Free Trade Agreement itself rather than from the laws of the United States.<sup>77</sup>

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69. U.S. CONST. art. II, § 2, cl.2. The full text of article II, § 2, clause 2, states:

He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he 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, to the Courts of Law, or in the Heads of Departments.

*Id.*

70. Deyling, *supra* note 56, at 377.

71. 424 U.S. 1 (1976).

72. *Buckley v. Valeo*, 424 U.S. at 126. The Court in *Buckley* examined whether the Federal Election Commission (FEC) was exercising significant authority pursuant to the laws of the United States in order to decide whether FEC members could be appointed by officials other than the President. *Id.* The Court held that the FEC met the definition of exercising significant authority pursuant to the laws of the United States and required any individual determined to be an officer of the United States to be subject to the Appointments Clause. *Id.*

73. Deyling, *supra* note 56, at 378.

74. See William J. Davey, *The Appointments Clause and International Dispute Settlement Mechanisms: A False Conflict*, 49 WASH & LEE L. REV. 1315, 1316-17 (1992).

75. See *id.*

76. *Id.*; Moyer, *supra* note 26, at 712.

77. Davey, *supra* note 74, at 1316.

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Another argument for not applying the Appointments Clause to binational panels states that the panel process is in essence an international arbitration, which is outside the scope of the Appointments Clause as set forth in Article II.<sup>78</sup>

A third argument supporting the constitutionality of binational panels under Article II is that U.S. panelists qualify as inferior officers under the Appointments Clause and Canadian and Mexican panelists need not qualify because they act pursuant to their own respective laws.<sup>79</sup> Since the panelists are inferior officers, they need not be appointed by the President under Article II.<sup>80</sup>

Finally, an argument can be made that "U.S. courts traditionally defer to the President in the conduct of foreign relations."<sup>81</sup>

Based upon the above arguments, Chapter 19 binational panels withstand constitutional attack under the Article II provisions of the U.S. Constitution.<sup>82</sup> The ultimate assessment of Chapter 19 binational panels under Article II is that "the foreign affairs powers of the Executive and the Congress are implicated and that the President and Congress cooperated to achieve this result," therefore there is no constitutional problem under Article II.<sup>83</sup>

#### IV. Binational Panels & Constitutionality Under the Due Process Clause of the U.S. Constitution.

##### A. DUE PROCESS CLAUSE.

Amendment V to the U.S. Constitution states "[N]o person shall . . . be deprived of life, liberty, or property, without due process of law . . ."<sup>84</sup> "The right of access to the courts . . . is one of the fundamental rights protected by the Constitution."<sup>85</sup> Exactly how an alleged due

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78. Harold H. Bruff, *Can Buckley Clear Customs?*, 49 WASH & LEE L. REV. 1309, 1312-13 (1992); see also Moyer, *supra* note 26, at 712.

79. Davey, *supra* note 74, at 1319-20; Moyer, *supra* note 26, at 712.

80. Davey, *supra* note 74, at 1319-20.

81. Moyer, *supra* note 26, at 712; see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-21 (1936).

82. JAMES R. CANNON, JR., *RESOLVING DISPUTES UNDER NAFTA CHAPTER 19* 249 (1994).

83. *Id.*

84. U.S. CONST. amend. V. Amendment V declares in full:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

*Id.*

85. Patricia Kelmar, *Binational Panels of the Canada-United States Free Trade Agreement in Action: The Constitutional Challenge Continues*, 27 GEO. WASH. J. INT'L L. & ECON. 173, 203 (1993).

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process violation is examined was explained by the U.S. Supreme Court in 1970.<sup>86</sup>

B. GOLDBERG V. KELLY.

In the case of *Goldberg v. Kelly*, the Supreme Court stated four criteria for determining a due process violation: "(1) was the action performed under the direction and control of the government; (2) is a life, liberty, or property interest affected; (3) what process is due; and (4) has the government provided such process."<sup>87</sup>

1. *Action Performed Under Governmental Direction and Control.*

The binational panel process is "clearly action performed under the direction and control of the U.S. Government."<sup>88</sup> "[S]everal of the binational panelists are appointed by the United States Trade Representative (USTR) and therefore are acting under authority of the U.S. Government."<sup>89</sup> The U.S. Government also directly limited Article III review of antidumping and countervailing duty disputes involving the United States, Canada, and Mexico by entering into the NAFTA with these countries.<sup>90</sup> Based on the above, the binational dispute resolution process falls under the first criteria of the test set forth by the Supreme Court.

2. *Life, Liberty, or Property Interest.*

Antidumping and countervailing duty cases certainly pertain to property interests.<sup>91</sup> An antidumping duty is defined as "[t]ariff, [the] purpose of which is to prevent imports of goods for sale at a lower price than that charged in the country of origin."<sup>92</sup> "Importers have a property interest because they are subject to duties, [which are] property in the form of currency."<sup>93</sup> There is also an argument that the right to trade fairly between nations is also a property interest, in that there is an expectation of an ability to participate in a market that assures fair competition.<sup>94</sup>

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86. See *Goldberg v. Kelly*, 397 U.S. 254 (1970). *Goldberg* involved the question of whether a welfare recipient's interest in continued receipt of welfare benefits was a statutory entitlement that amounted to property within the meaning of the due process clause. *Id.* The Court held that the interest was a statutory entitlement within the meaning of the due process clause, referring to the brutal need of welfare recipients. *Id.*

87. Kelmar, *supra* note 85, at 203.

88. *Id.*

89. *Id.*

90. *Id.*

91. Kelmar, *supra* note 85, at 204.

92. BLACK'S LAW DICTIONARY 93 (6th ed. 1990).

93. Kelmar, *supra* note 85, at 204.

94. *Id.*

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The Supreme Court established a balancing test to determine when due process is required to protect a property interest in *Mathews v. Eldridge*.<sup>95</sup> This test includes examining: 1) the private interest affected; 2) the risk of erroneous deprivation of that interest through the procedures used; and 3) the government's interest.<sup>96</sup> Under this test, private interests are weighed against government interests to see if the use of binational panels is justified.<sup>97</sup>

Issues before binational panels affect "the private interest in the freedom to do business."<sup>98</sup> A duty or tariff placed on imports has a direct impact on those persons doing business in that particular field.<sup>99</sup> Regarding the second prong of the *Mathews* test, there is a risk of panel decisions containing erroneous deprivations of private interests, a risk of panel decisions containing egregious errors under U.S. law.<sup>100</sup> The government also has a significant interest in that the amount of trade between the NAFTA countries has dramatically increased since its implementation.<sup>101</sup> But the private interests of thousands of U.S. producers outweigh those of the government.<sup>102</sup>

### 3. *Due Process.*

Under *Goldberg v. Kelly*, a fair and impartial judiciary is required to meet due process.<sup>103</sup> Since binational panelists "are picked through an inherently political process," it is possible Parties before the panels are not receiving decisions from a fair and impartial body.<sup>104</sup> Also, importers and producers of products that are exported to Canada are subject to different types of due process protections, because "Congress has not limited the right to judicial review to all trading businesses but only to those trading with Canada."<sup>105</sup> Those businesses dealing with Canada are treated differently than those dealing with other countries.<sup>106</sup>

### 4. *Government Process.*

As seen above, the government has not provided the same due process protections to all U.S. companies.<sup>107</sup> Businesses are treated differently depending upon with whom they

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95. 424 U.S. 319 (1976). *Mathews* involved the termination of further disability benefits after a review of the recipient's response to a questionnaire about his condition, reports from his physician and psychiatric consultant, and his files. *Id.* The Supreme Court held that because the prior recipient was informed of the termination, was given a statement of reasons for the termination, and was offered an opportunity to submit a written response, the procedure did not violate the Due Process Clause. *Id.*

96. *Id.*

97. Kelmar, *supra* note 85, at 206.

98. *Id.*

99. *Id.*

100. *Id.* at 205.

101. *Id.* at 206.

102. *Id.*

103. 397 U.S. 254, 273-74 (1970).

104. Kelmar, *supra* note 85, at 206.

105. *Id.*

106. *Id.* at 207.

107. *Id.* at 206.

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are dealing, leading to disparate treatment and results.<sup>108</sup> Businesses do not receive the same procedure for review based solely upon with whom they are dealing.<sup>109</sup> In short, the government has not provided the required due process under Amendment V of the U.S. Constitution to those citizens engaged in business with Canada and Mexico.

## V. Binational Panels & Constitutionality Under the Equal Protection Clause of the U.S. Constitution.

### A. EQUAL PROTECTION CLAUSE.

The Equal Protection Clause is a provision in the 14th Amendment to the U.S. Constitution which states "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>110</sup> Much like under a due process analysis, domestic Parties petitioning under the antidumping or countervailing duty laws are "treated differently," depending upon whether those Parties are dealing with Canada, Mexico, or some other country.<sup>111</sup> The Supreme Court of the United States set out the criteria to be applied under an equal protection analysis in 1973.<sup>112</sup>

### B. FRONTIERO V. RICHARDSON.

The U.S. Supreme Court developed a two-part analysis to be applied in determining whether there is an equal protection infirmity in *Frontiero v. Richardson*.<sup>113</sup> The first step of analysis is inquiring whether or not the party to be examined falls within a suspect class or category, such as questions of gender or ethnic discrimination.<sup>114</sup> A second question under equal protection analysis is whether or not the distinction is arbitrary or bears no rational relationship to a legitimate government interest.<sup>115</sup>

### C. APPLICATION OF EQUAL PROTECTION ANALYSIS TO BINATIONAL PANELS.

The action of binational panels does not "raise a question" which "would fall within a suspect category."<sup>116</sup> The question is not the same as in the case of gender or ethnic discrimination, where those allegedly harmed are a suspect class or category, based upon an

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108. *Id.*

109. *Id.*

110. U.S. CONST. amend. XIV, § 1. Amendment XIV, Section 1, states:

All persons born or naturalized in the United states, and subject to the jurisdiction thereof, are citizens of the United states and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United states; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.*

111. CANNON, JR., *supra* note 82, at 252.

112. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

113. *Id.*

114. *Id.* at 686-88.

115. *Id.* at 683.

116. CANNON, JR., *supra* note 82, at 254.

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immutable characteristic determined solely at birth.<sup>117</sup> Those affected by the use of binational panels chose to conduct business that would subject them to binational panels and are thus not entitled to the heightened standard of review available to suspect classes.<sup>118</sup> Businesses are not a member of a suspect class because they do not have an immutable characteristic determined solely at birth.<sup>119</sup>

The distinction must be sustained, therefore, because equal protection analysis does not proceed to the second level of inquiry, whether or not the distinction is arbitrary or bears no rational relationship to a legitimate government interest, unless the Party falls within a suspect class or category.<sup>120</sup> Even though the binational panel process might fail under due process analysis, the distinction between binational panels and courts must be sustained because the Party subject to panel review does not fall within a suspect class or category so as to render the process in violation of the Equal Protection Clause.<sup>120</sup>

## VI. Binational Panels & Constitutionality Under Article III of the U.S. Constitution.

### A. ARTICLE III.

Article III of the U.S. Constitution raises perhaps the strongest constitutional challenge to the NAFTA Chapter 19 binational panels.<sup>122</sup> Article III vests the judicial power of the United States "in one supreme Court, and in such inferior Courts as the congress may . . . establish."<sup>123</sup> Article III also provides federal judges with life tenure during good behavior and requires that each judge's compensation will not be diminished during his or her continuance in office.<sup>124</sup> Section 2 states that the judicial power shall extend to all cases arising under the Constitution and the laws of the United States to controversies in which the United States is a

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117. *Frontiero*, 411 U.S. at 677.

118. *CANNON, JR.*, *supra* note 82, at 254.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Kelmar*, *supra* note 85, at 208.

123. U.S. CONST. art. III, § 1. The full text of Article III, § 1, states:

The 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. The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

*Id.*

124. *Id.*

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party and between a state, or the citizens thereof, and foreign states, citizens, or subjects.<sup>125</sup> Although Article III contains "relatively clear provisions," it is "one of the most complex areas of American constitutional law."<sup>126</sup> Before examining Article III's application to the constitutionality question of binational panels, a review of recent Article III case law is appropriate to gain a clearer picture of how the Article III provisions are applied.

## B. RECENT ARTICLE III CASE LAW.

### 1. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>127</sup> the U.S. Supreme Court stated two purposes underlying Article III: (1) to preserve the system of checks and balances in the constitutional structure; and (2) to protect the impartiality of the federal judiciary.<sup>128</sup> The Court went on to state there are two types of exceptions that will survive constitutional challenge under Article III: (1) so-called legislative courts, which include territorial courts, courts martial, and public rights cases; and (2) the adjunct system, where a non-Article III body is attached to the federal district court system.<sup>129</sup>

*Northern Pipeline* involved the "constitutionality of the non-Article III bankruptcy courts created by the Bankruptcy Act of 1978."<sup>130</sup> "The bankruptcy courts are not Article III courts

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125. *Id.* at § 2, cl. 1. The full text of Article III, § 2, clause 1, states:

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;-- between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

*Id.*

126. Metropoulos, *supra* note 2, at 150.

127. 458 U.S. 50 (1982).

128. *Id.* at 58.

129. *Id.* at 63.

130. Boyer, *supra* note 39, at 115. The Bankruptcy Act established an adjunct system of bankruptcy courts attached to federal district courts which had the power to review the decisions of the bankruptcy judges. *Northern Pipeline*, 458 U.S. at 53; Boyer, *supra* note 39, at 115. Bankruptcy judges are appointed by the President with the advice and consent of the Senate for a term of 14 years, and can be removed only for incompetency, misconduct, neglect of duty, or mental or physical disability. *Northern Pipeline*, 458 U.S. at 53; Boyer, *supra* note 39, at 115. The bankruptcy judges' salaries are set by federal statute and may be adjusted pursuant to federal statute. *Northern Pipeline*, 458 U.S. at 53; Boyer, *supra* note 39, at 115.

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because the judges do not have life tenure and are not protected against salary diminution."<sup>131</sup> Marathon Pipe Line Company alleged that the courts violated Article III.<sup>132</sup> A majority of the Supreme Court agreed, but no opinion achieved a sufficient number of votes.<sup>133</sup>

The plurality explained that the legislative territorial courts and courts martial "clearly could not be used to justify the bankruptcy court system."<sup>134</sup> The plurality went on to argue that the legislative courts that handle public rights cases are based on the doctrine of sovereign immunity.<sup>135</sup> "[P]ublic rights must at a minimum arise between the government and others" whereas "private rights concern . . . the liability of one individual to another."<sup>136</sup>

The plurality argued that the "bankruptcy courts had jurisdiction over a broad range of state created rights," which were "quintessentially private rights since they concerned the liability of one individual to another."<sup>137</sup> Because of this, "the bankruptcy court system could not be justified as a system of public rights legislative courts."<sup>138</sup>

As for the second type of exception, the adjunct system, the plurality noted that adjuncts may perform certain adjudicative functions "as long as the essential attributes of judicial power remain in Article III courts."<sup>139</sup> Although adjuncts can perform basic functions, "more fundamental questions of law . . . must remain in Article III courts."<sup>140</sup>

The plurality noted "that Congress created the bankruptcy court system as an adjunct to the federal district courts," but the bankruptcy courts possessed "many judicial attributes," such as: "broad civil jurisdiction over any claims related to the federal bankruptcy laws, including state law claims"; "all the ordinary powers of a district court, including the power to enforce its own decisions"; and the right to have their decisions reviewed "in federal district court using only a highly deferential standard."<sup>141</sup> Because Congress had removed so many of the essential attributes of judicial power from Article III courts,<sup>142</sup> the plurality held that Congress exceeded its "minimal power, and thus held the bankruptcy court system unconstitutional."<sup>143</sup>

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131. Boyer, *supra* note 39, at 115. Although bankruptcy judges do not have life tenure and are not protected against salary diminution, the bankruptcy courts' jurisdiction was broad. Northern Pipeline, 458 U.S. at 54. After the filing of a petition under the federal bankruptcy laws, "the [bankruptcy] courts have jurisdiction over all civil proceedings . . . arising under or related to the bankruptcy action." Boyer, *supra* note 39, at 115. "The courts could hold jury trials and issue declaratory judgments, certain habeas corpus and other writs, and any orders or judgments necessary or appropriate to carry out the provisions of the federal bankruptcy laws," but "they could not enjoin other courts or sanction criminal contempt in certain instances." *Id.* Bankruptcy court decisions could be appealed to the federal circuit courts. *Id.*

132. Northern Pipeline, 458 U.S. at 50.

133. Boyer, *supra* note 39, at 116.

134. *Id.*

135. Northern Pipeline, 458 U.S. at 67-68.

136. Boyer, *supra* note 39, at 117.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 118.

142. *Id.*

143. *Id.*

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## 2. *Thomas v. Union Carbide Agricultural Products Co.*

In *Thomas v. Union Carbide Agricultural Products Co.*,<sup>144</sup> the Court adopted a "less structured analysis of congressional delegations of judicial authority to non-Article III bodies."<sup>145</sup> *Thomas* involved "a system of negotiation and binding arbitration used to resolve disputes under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)."<sup>146</sup> Congress amended FIFRA to require negotiation and, if necessary, binding arbitration, to determine whether or not compensation paid by a follow-on registrant to a previous registrant for use of previously submitted insecticide data was adequate.<sup>147</sup> "The arbitrator's decision was subject to judicial review only for fraud, misrepresentation, or other misconduct."<sup>148</sup> Certain pesticide manufacturers who had previously submitted data to the Environmental Protection Agency challenged the arbitration system on the grounds that it violated Article III.<sup>149</sup>

The *Thomas* Court clearly stated that *Northern Pipeline* "did not define the scope and nature of Article III's requirements."<sup>150</sup> The Court "emphasized that in *Northern Pipeline* the Court only held that Congress cannot give a non-Article III court jurisdiction over traditional contract action arising under state law without consent of the litigants, and subject only to ordinary appellate review."<sup>151</sup> The Court "vowed to pay practical attention to substance when determining the application of Article III," but did not elaborate on how this would apply in practice.<sup>152</sup> The Court did not state whether it considered the FIFRA arbitration system to be an adjunct or a legislative court.<sup>153</sup> In the end, the Court hedged or "compromised its analysis in order to uphold the scheme," rendering "prediction of future outcomes difficult."<sup>154</sup>

## 3. *Commodity Futures Trading Commission v. Schor.*

In *Commodity Futures Trading Commission v. Schor*,<sup>155</sup> the Supreme Court embraced an ad hoc balancing test "for assessing congressional delegations of judicial authority to non-article III bodies."<sup>156</sup> *Schor* involved "a challenge to the authority of the Commodity Futures Trading Commission (CFTC) under the Commodity Exchange Act (CEA) to hear

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144. 473 U.S. 568 (1985).

145. Boyer, *supra* note 39, at 118.

146. *Id.* FIFRA required pesticide manufacturers to submit research data on pesticides before registration of pesticide products. *Thomas*, 473 U.S. at 571; Boyer, *supra* note 39, at 118. Under FIFRA, subsequent follow-on registrants of the same or similar insecticide could use the previously submitted data provided the first registrant was adequately compensated. *Thomas*, 473 U.S. at 572; Boyer, *supra* note 39, at 118.

147. Boyer, *supra* note 39, at 118.

148. *Id.* at 118.

149. *Thomas*, 473 U.S. at 575-76; Boyer, *supra* note 39, at 118-19.

150. Boyer, *supra* note 39, at 119.

151. *Id.*

152. *Id.*

153. Boyer, *supra* note 39, at 119.

154. *Id.* at 120.

155. 478 U.S. 833 (1986).

156. Boyer, *supra* note 39, at 123.

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state law counterclaims in broker-client reparations proceedings.<sup>157</sup> Schor challenged the constitutionality of the CFTC's jurisdiction over common law counterclaims.<sup>158</sup> "The Court announced that it would not adhere to formalistic and rigid rules which would unduly restrict Congress' ability to take needed and innovative action pursuant to its Article I powers."<sup>159</sup> The Court decided once again to ignore the distinction drawn in Northern Pipeline between legislative courts and administrative adjuncts.<sup>160</sup>

The Court found that Article III served two purposes: (1) safeguarding the impartiality of the judiciary; and (2) preserving the role of an independent judiciary in the constitutional scheme of a three-way government by keeping one branch from benefiting at the expense of another.<sup>161</sup> Applying the first purpose, the court found that Schor waived any right to an Article III forum when he chose to invoke the CFTC's procedure.<sup>162</sup>

The Court then examined several factors under the second purpose.<sup>163</sup> The Court first examined "the extent to which the essential attributes of judicial power are reserved in Article III courts."<sup>164</sup> The Court found that the CFTC did not exercise many judicial powers, and that "the CFTC reparations system left many of the essential attributes of judicial power to Article III courts."<sup>165</sup>

Next, the Court examined the "nature and importance of the right at issue."<sup>166</sup> The Court concluded that the CFTC's jurisdiction over a narrow class of claims and the fact that the federal judiciary was not divested of its jurisdiction over the particular class of claims meant that the province of the judicial branch was not encroached.<sup>167</sup> The Court then "examined the concerns that motivated Congress to delegate authority to the CFTC."<sup>168</sup> "The Court concluded that the delegation of counterclaim jurisdiction was not an attempt to undermine Article III values through control of judicial function but to promote the legitimate regulatory purposes of Congress."<sup>169</sup>

"The Court's precedents require that congressional action be examined in light of the

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157. *Id.* at 121. Congress envisioned that such proceedings would "be an inexpensive and expeditious alternative to federal courts which customers could choose to redress fraudulent activity by commodity brokers." *Id.* Along with its jurisdiction over CEA-based claims, the CFTC exercised "authority in reparations proceedings to adjudicate all counterclaims arising out of the disputed transaction or transactions." *Id.*

158. Schor, 478 U.S. at 838. The dispute arose when Schor, a customer, "used the reparations proceedings of the CFTC to charge his commodity broker with violations of the CEA." Boyer, *supra* note 39, at 121. "The broker counterclaimed [in order] to recover expenses and other debts" Schor had incurred on his commodity account. *Id.*

159. Boyer, *supra* note 39, at 121.

160. *Id.*

161. Schor, 478 U.S. at 850; Boyer, *supra* note 39, at 121-22.

162. Boyer, *supra* note 39, at 122.

163. Schor, 478 U.S. at 851.

164. Boyer, *supra* note 39, at 122.

165. *Id.*

166. *Id.*

167. Schor, 478 U.S. at 850; Boyer, *supra* note 39, at 123.

168. Boyer, *supra* note 39, at 123.

169. *Id.*

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two values that underlie Article III."<sup>170</sup> The test boils down to assessing the "benefits of using the congressional scheme . . . functionally in terms of its fairness to litigants and its effects on the structural role of an independent judiciary with the tripartite system of government" (separation of powers).<sup>171</sup>

### C. APPLICATION OF ARTICLE III ANALYSIS TO BINATIONAL PANELS.

Upon initial evaluation of binational panels on the face of Article III, it appears these panels are not consistent with Article III.<sup>172</sup> The U.S. Supreme Court, in *Reid v. Covert*, stated "no agreement with a foreign nation can confer power on the Congress, or on any other branch of government, which is free from the restraints of the Constitution."<sup>173</sup> The Supreme Court has consistently given supremacy to the Constitution over treaties.<sup>174</sup>

Binational panels violate Article III in that they do not ensure that decisions by the panels will be free from political pressures of Congress and the Executive, a stated purpose of Article III.<sup>175</sup> Binational panels do not ensure freedom from political pressures because binational panelists "do not satisfy its [Article III] requirements of salary stability and [life] tenure."<sup>176</sup> But the analysis of binational panels under Article III is not such a simple task that the analysis ends there.

"The Constitution requires that disputes before the binational panels be heard in an Article III court."<sup>177</sup> The Schor Court stated that in order to determine whether Article III review is mandated, the Court must examine "the dispute mechanism in relation to the two purposes underlying Article III": (1) separation of powers and (2) an impartial judiciary.<sup>178</sup>

#### 1. *Separation of Powers.*

Delegating power to an international panel composed of U.S., Canadian, and/or Mexican citizens threatens the balance of power between all three branches of government and particularly the power of Article III courts.<sup>179</sup> Congress and the President agreed to implement the binational panel process of the NAFTA and in so doing established "an unconstitutional dispute resolution procedure that . . . weaken[s] the power of all three branches [of government]."<sup>180</sup>

The binational panel process removes power from the federal courts by precluding review by an Article III court of international trade matters.<sup>181</sup> The separation of powers is

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170. *Id.*

171. *Id.* at 124.

172. *See Kelmar, supra* note 85, at 208 (contending that the binational dispute mechanism violates Article III).

173. 354 U.S. 1, 16 (1957).

174. *Kelmar, supra* note 85, at 185.

175. *Id.*

176. *Id.*

177. *Id.* at 190.

178. *Schor*, 478 U.S. at 850; *Kelmar, supra* note 85, at 190.

179. *Kelmar, supra* note 85, at 191.

180. *Id.*

181. *Id.*

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threatened because the power of the judiciary is diminished by the actions of Congress and the President.<sup>182</sup> The *Schor* Court considered the extent to which the essential attributes of judicial power reserved to Article III courts were being tread upon.<sup>183</sup> Although the Court determined there that the judiciary was not threatened because of the "narrow subset of issues being determined by the CFTC,"<sup>184</sup> this same rationale does not apply to binational panel decisions under Chapter 19 of the NAFTA. Binational panel decisions have a "substantial impact on U.S. trade," and are not limited to a narrow subset of issues.<sup>185</sup>

"[T]he NAFTA covers trade issues affecting approximately 360 million people and a combined economy of \$6 trillion."<sup>186</sup> Many U.S. industries "could be devastated if the power to determine antidumping or countervailing duty issues continues to shift from Article III courts to binational or multinational panels."<sup>187</sup>

Another serious separation of powers problem is the "complete lack of appellate review" of binational panel decisions by U.S. courts for any question of law or fact.<sup>188</sup> Appellate review, involving the authority to decide questions of law, "is perhaps the most crucial of the essential judicial attributes that should be left to Article III courts."<sup>189</sup> The Supreme Court in *Thomas* and in *Schor* ignored the distinction between legislative courts and administrative adjuncts and listed "the availability of review by an Article III court as a positive factor for upholding the respective congressional scheme."<sup>190</sup> Although the Court has not held that such review shall be required in every case,<sup>191</sup> the fact that the Court views the existence of some appellate review as a positive factor lends strong support to the position that the lack of such appellate review for binational panel decisions leads to a separation of powers problem.

## 2. *Impartial Judiciary.*

Article III protects the rights of litigants to an impartial judiciary by preventing the other branches from influencing the courts.<sup>192</sup> In *Schor*, the appellant waived the right to Article III adjudication because he consented to the jurisdiction of the CFTC.<sup>193</sup> But in the NAFTA binational panels, U.S. litigants have no choice but to submit to the binational panels and are allowed no opportunity to consent to non-Article III adjudication.<sup>194</sup>

The NAFTA binational panel system provides little protection against political influence from outside sources.<sup>195</sup> A panelist's re-appointment to the panel roster may be

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182. *Id.*

183. *Schor*, 478 U.S. at 851.

184. *Kelmar*, *supra* note 85, at 191.

185. *Id.* at 192.

186. *Id.*

187. *Id.*

188. *Boyer*, *supra* note 39, at 129.

189. *Id.*

190. *Id.* at 130.

191. *Id.*

192. *Schor*, 478 U.S. at 848 (1986).

193. *Id.* at 849.

194. *Boyer*, *supra* note 39, at 124.

195. *Kelmar*, *supra* note 85, at 195.



directly affected by the nature of his or her decisions,<sup>196</sup> unlike Article III judges who have a set salary and life tenure. Although some would argue that the availability of constitutional review under the extraordinary challenge procedure of Chapter 19 "protects litigants' fairness interests,"<sup>197</sup> as discussed in Part II of this comment, the availability of the challenge procedure is unlikely and, at best, ineffective.<sup>198</sup>

Although there is nothing intrinsically wrong with judges without Article III status determining U.S. law, a decision-maker appointed under the authority of the United States determining questions of federal law "without any possibility of review by an Article III judge" raises serious concerns.<sup>199</sup> There exists "a rather strong consensus" that this situation which allows for no reviewability is "of dubious constitutionality."<sup>200</sup> "Because customs duty suits have had a long history in common law and are inherently judicial, antidumping and countervailing duty disputes should be settled in Article III courts."<sup>201</sup>

## VII. Cases Challenging the Constitutionality of Binational Panels.

### A. NATIONAL COUNCIL FOR INDUS. DEFENSE, INC. V. UNITED STATES.

In *National Council for Indus. Defense, Inc. v. United States*,<sup>202</sup> the NCID and the American Engineering Association (AEA) challenged the binational panel process of Canada-United States Free Trade Agreement (FTA) as a violation of the U.S. Constitution.<sup>203</sup> The NCID is a non-profit organization which works to foster "the strengthening of those endangered American production facilities and work forces which contribute to the industrial capacity of the United States."<sup>204</sup> The AEA is a non-profit group that hopes to "enhance the status of the American engineering profession and related occupations and to support activities for the employment of Americans in the engineering profession."<sup>205</sup>

The NCID and the AEA alleged violations of Articles I, II, and III of the Constitution and the Due Process Clause, and claimed that their membership was "adversely affected" by

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196. Boyer, *supra* note 39, at 125.

197. *See id.*

198. Deyling, *supra* note 56, at 379.

199. Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845, 873 (1996).

200. *Id.*

201. Kelmar, *supra* note 85, at 208.

202. 827 F. Supp. 794 (D.D.C. 1993).

203. United States-Canada Free Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 I.L.M. 293 [hereinafter FTA]. The FTA is an agreement containing numerous provisions, including binational panels, which were adopted by the NAFTA.

204. NCID, 827 F. Supp. at 796.

205. *Id.*

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Chapter 19's unconstitutional nature.<sup>206</sup> The associations were concerned that panel members had been attorneys who represented international business interests and were "therefore antagonistic to the fair implementation of the U.S. antidumping and countervailing duty laws," not the impartial panelists that were expected to compose binational panels.<sup>207</sup>

The plaintiff associations failed to bring their action in the United States Court of Appeals for the District of Columbia Circuit, as was required in the implementing legislation of the FTA for challenging the constitutionality of the FTA binational panel process.<sup>208</sup> The plaintiffs instead brought their action in the United States District Court for the District of Columbia.<sup>209</sup> The District Court dismissed the matter for lack of subject matter jurisdiction and in so doing, "rejected plaintiffs' argument that, because they were calling for all of Chapter 19 of the FTA to be declared unconstitutional, including the portion giving jurisdiction to the Court of Appeals, they therefore had to assert jurisdiction under, *inter alia*, the Administrative Procedure Act and the federal question doctrine."<sup>210</sup>

Because of the jurisdictional defect in the plaintiffs' filing, the court did not reach the issue of the constitutionality of the binational panel process. The constitutionality question was not raised again until 1994, in the case of *Coalition for Fair Lumber Imports v. United States*.

#### B. COALITION FOR FAIR LUMBER IMPORTS V. UNITED STATES.

In *Coalition for Fair Lumber Imports v. United States*,<sup>211</sup> the plaintiffs challenged the Chapter 19 binational process arising out of lumber determinations.<sup>212</sup> Unlike the plaintiffs in *National Council for Indus. Defense, Inc. v. United States*, the "plaintiffs [here] were the petitioners in the underlying countervailing duty determination at issue in the Lumber panel proceedings."<sup>213</sup> The plaintiffs also filed in the venue specified by statute, so the standing and jurisdiction problems facing the plaintiffs in NCID were not present here.<sup>214</sup>

The plaintiff's complaint challenged the Chapter 19 binational panel process "as a denial of due process to the Coalition for Fair Lumber Imports."<sup>215</sup> The complaint also

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206. Kelmar, *supra* note 85, at 184. The plaintiffs specifically contended that Chapter 19 violates: (1) Article I by ceding judicial powers to the binational panels; (2) the Appointments Clause of Article II by vesting judicial power in panelists without the advice and consent of the Senate; (3) Article III by vesting judicial power in a tribunal other than the Supreme court or such inferior courts as the Congress may from time to time ordain and establish; and (4) the Fifth Amendment by depriving plaintiff's members and other citizens of due process and equal protection of the laws. NCID, 827 F. Supp. At 794. The plaintiffs asked the court to declare the binational panels devoid of authority to review, reverse, or modify the decisions of U.S. trade agencies and to declare the U.S. legislation that implements Chapter 19 to be null and void. *Id.*

207. Kelmar, *supra* note 85, at 184.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Coalition for Fair Lumber Imports v. United States*, No. 94-1627 (D.C. Cir., Docketed Oct. 4, 1994).

212. *Id.*

213. CANNON, JR., *supra* note 82, at 258.

214. *Id.*

215. *Id.*

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challenged the constitutionality of the Chapter 19 system and its implementing legislation on four grounds: "(1) as violative of the Appointments Clause, Article II of the Constitution; (2) as violative of the separation of powers doctrine; (3) as violative of due process under the Fifth Amendment; and (4) as violative of the equal protection rights implicit in the Fifth Amendment."<sup>216</sup>

This case, unlike *NCID*, "squarely raised" the constitutional issues presented in this comment without any procedural defects.<sup>217</sup> Alas, the court had no opportunity to rule on the matter as the case was settled before a decision on the merits could be reached,<sup>218</sup> the constitutional questions raised by this case and by scholars remain unanswered by a court of law.

### VIII. Conclusion.

The continued use of Chapter 19 binational panels raises serious constitutional issues.<sup>219</sup> Although binational panels seem to withstand constitutional challenges arising under Article II and the Equal Protection Clause of the U.S. Constitution, there are strong arguments arising from other constitutional provisions to question the validity of binational panels.<sup>220</sup>

The strongest argument that the panels are unconstitutional arises under Article III of the U.S. Constitution.<sup>221</sup> Binational panelists do not qualify under Article III because they are not life-tenured judges and because they do not have guaranteed salary protection.<sup>222</sup> Binational panels do not ensure that their decisions will be free from the political pressures of Congress and the Executive Branch.<sup>223</sup> A panelist's re-appointment to the panel roster is often contingent upon how he or she decides certain cases, an infirmity not present in the decisions of Article III judges.<sup>224</sup>

Binational panels threaten the separation of powers by diminishing the power of the judiciary by removing from it the ability to hear cases that will have a substantial impact on U.S. trade.<sup>225</sup> U.S. courts are left with no appellate review of binational panel proceedings for any question of law or fact.<sup>226</sup>

There is also a strong argument that the binational panel process is unconstitutional under the Due Process Clause of the U.S. Constitution.<sup>227</sup> The U.S. Government has not provided the same due process protections to all U.S. companies.<sup>228</sup> Businesses are treated differently depending upon with whom they are dealing, leading to disparate treatment and results.<sup>229</sup>

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216. *Id.*

217. *Id.*

218. Deyling, *supra* note 56, at n. 134.

219. *Id.* at 376.

220. *See Kelmar, supra* note 85, at 183-208.

221. *Id.* at 208.

222. Kelmar, *supra* note 85, at 185.

223. *Id.*

224. Boyer, *supra* note 39, at 125.

225. Kelmar, *supra* note 85, at 191.

226. Boyer, *supra* note 39, at 129.

227. Kelmar, *supra* note 85, at 206.

228. *Id.*

229. *Id.* at 206-07.

Although Chapter 19 of the NAFTA allows for constitutional challenges to the binational panel process in limited circumstances, many obstacles make judicial review of the panel system unlikely and, if attained, ineffective.<sup>230</sup> Only two cases thus far have challenged the constitutionality of the binational panel process.<sup>231</sup>

It has been said that if the binational process is ever successfully challenged on constitutional grounds, "then that's the end of the FTA, and the NAFTA. And the WTO isn't worth the paper it's printed on."<sup>232</sup> Even if this is true, the private interests of thousands of U.S. producers who may not receive fair hearings under the binational panel system outweigh the public interest.<sup>233</sup> The panel system violates important features of the U.S. Constitution and should be abolished or vitally reworked in order to comply with the Constitution.

As the United States contemplates entering into similar agreements with other countries, binational panels could become even more important and influential in the international trade context.<sup>234</sup> If the binational panel process is not abolished or substantially reorganized, "more U.S. companies and more U.S. goods will be subject to the decisions of panels that violate constitutional protections."<sup>235</sup>

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230. Deyling, *supra* note 56, at 379-80.

231. *Id.* at 379.

232. *Maclaren Says Canada Expects Payment of Lumber Duties Despite Legal Action*, 11 Int'l Trade Rep. (BNA) No. 37, at 1444 (Sept. 21, 1994).

233. Kelmar, *supra* note 85, at 208.

234. *Id.* at 191-92.

235. *Id.* at 208.

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## Corrigendum

In Volume 3, Number 2, the final sentence of David Lopez's *Dispute Resolution Under MERCOSUR from 1991 to 1996: Implication for the Formation of a Free Trade Area of the Americas* was printed incorrectly. Page 33 of our Volume 3, Number 2, should be replaced by the following page. The article, *Peru: How Problems in the Framework for Secured Transactions Limit Access to Credit*, should have started on page 34.

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