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ARTICLE

SAWING OFF THE THIRD BRANCH: PRECLUDING JUDICIAL REVIEW OF ANTI-DUMPING AND COUNTERVAILING DUTY ASSESSMENTS UNDER FREE TRADE AGREEMENTS

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INTRODUCTION

Free trade is currently the "glass of fashion."[1] Indeed, GATT's[2] free trade paradigm seems guaranteed a hegemonic role in global affairs for the foreseeable future. Free Tradism seeks to reduce or eliminate tariffs and other state imposed barriers to trade. To date, its most vigorous expression is to be found in bilateral and regional trade agreements which establish relatively free trading zones between and among

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1. William Shakespeare, *Hamlet*, Act III, Scene 1: "The expectancy and rose of the fair state, The glass of fashion and the mould of form."

2. The General Agreement on Tariffs and Trade (GATT) was most recently reconstituted by the new World Trade Organizations (WTO) and the Uruguay Round Agreements Act (Act) signed into law by President Clinton on Dec. 8, 1994. Pub. L. No. 103-465, 108 Stat. 4804 (1994). The Act implements more than twenty attendant agreements negotiated by the United States and its trading partners. The principal agreement consummated by the Uruguay Round negotiation replaced the pre-existing GATT organization and established a World Trade Organization (WTO). With regard to the various agreements annexed to the principal agreement, the General Agreement on Tariffs and Trade Anti-dumping Code is most relevant to the subject matter of this article. Effective January 1, 1995, the new Code supersedes the 1979 GATT Anti-dumping Code for the United States and at least 80 other nations. *See* Donald Harrison and Judith A. Ott, *Trade Regulation*, THE NATIONAL LAW JOURNAL, Apr. 3, 1995, p. 35, col. 1-4 (discussing the most salient changes the new agreement will effect in U.S. law). GATT provides a framework of agreed-upon codes of conduct for international trading relationships. Although it is a multilateral structure, it permits signatories to form bilateral free trade zones; although it contemplates reduction or elimination of trade barriers, it permits individual members to impose anti-dumping and countervailing duties upon unfairly traded imports. *See* GATT art. XXIV; art. VI.

the parties. The free trade agreement momentum is fueled, in part, by the perception that reciprocal free trading arrangements will facilitate the signatories' ability to compete in an increasingly aggressive global market.[3] In the United States, the new era of free trade was ushered in by the U.S. - Canada Free Trade Agreement of 1988 (hereinafter, FTA).[4] The FTA, in turn, has served as a prototype for the North American Free Trade Agreement (hereinafter, NAFTA).[5] While the free trade movement falls short of garnering unanimous support in the U.S.,[6] the U.S. will most likely be a party to an ever-widening sphere

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3. *See* GATT AND CONFLICT MANAGEMENT: A TRANSATLANTIC STRATEGY FOR A STRONGER REGIME (Reinhard Rode ed., Westview Press, 1990) (suggesting that competing free trade blocs simply replicate and reflect policies grounded in nationalistic protectionism). *But see* THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS (Judith H. Bello and Alan F. Holmer eds., The American Bar Association, 1994) (expressing that these bilateral and regional agreements serve as stepping stones to world trade integration and segue into a global free trade regime). *See generally* Barbara Bucholtz, *Coase and the Control of Transboundary Pollution: The Sale of Hydroelectricity under the United States - Canada Free Trade Agreement of 1988*, 18 B. C. ENVTL. AFF. L. REV. 279, 296 n.98 (1991).

4. 27 I.L.M. 281 (1988). The implementing legislation is found in the United States - Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988). The FTA was the second free trade agreement to which the U.S. was a party. Bucholtz, *supra* note 3, at 317 n.195.

5. North American Free Trade Agreement, Dec. 8 and 17, 1992, U.S.-Can.-Mex., 1993 WL 572901; *reprinted in* 32 I.L.M. 289 (1993). The implementing legislation is found in the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 (1993).

Free trade agreements are not self-executing treaties. They are entered into by the President and require Congressional approval of implementing legislation before they become law in the U.S. The implementing legislation incorporates the trade agreement under consideration and, if not disapproved by Congress, becomes federal law. The approval process is delineated in the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2902-2903 (1988). *See infra* notes 57, 71-74 and accompanying text.

6. *See, e.g.*, Pratap Chatterjee, *Heads We Win, Tails You Lose*, INTER PRESS SERVICE GLOBAL INFORMATION NETWORK, 1993 WL 2531877 (arguing that the free trade agenda is elitist and merely a rhetorical mask for big business interests); Robert Benson, *Free Trade as an Extremist Ideology: The Case of NAFTA*, 17 U. PUGET SOUND L. REV. 555 (1994), *Symposium, Trade and the Environment: The Role of Regional Trade Agreements, Special Focus: North American Free Trade Agreement*, 5 GEO INT'L ENVTL. L. REV. 515 (1993) (free tradism has become "a classic extremist ideology" which evinces a clear policy choice in favor of traditional commercial concerns at the expense of competing societal interests, such as the environment); Jeremy Brecher and Tom Costello, *The Lilliput Strategy: Taking on the Multinationals*, THE NATION, Dec. 19, 1994, at 757 (bilateral institutions created by free trade accords will undermine or even eliminate democratic control of national economies); Harvey Berkman, *As GATT Gains, Will States Wane?*, THE NATIONAL LAW JOURNAL, Nov. 14,

of free trade arrangements.[7] Similarly, it is safe to assume that the FTA will continue to serve as the prototypical legal mechanism for future trading bloc arrangements. With that in mind, it seems prudent to reassess the efficacy of this seminal legal framework and to inquire whether it is achieving its intended results or whether some revision or fine-tuning might be advisable.

Among the most notable provisions of the FTA is Chapter 19 which replaces judicial review of anti-dumping and countervailing duty (AD/CVD) assessments with binational panel review.[8] During the Congressional debates on the FTA,[9] the panel review mechanism was challenged on the grounds that it was unconstitutional, but Canada insisted that U.S. rejection of the binational panel provision would be a

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1994, at A1, col. 1 (consumer and labor interests will be sacrificed under the auspices of an all-powerful multi-national free trade bureaucracy); Michael Janofsky, *Trade Pact Casts Shadow for Garment Workers*, N.Y. TIMES, Dec. 12, 1994, at A8, col. 1; Thomas R. Donahue, *The Case Against a North American Free Trade Agreement*, 26 COLUM. J. WORLD BUS. 93 (1991) (that bilateral institutions created by free trade accords will undermine - indeed - eliminate democratic control of national economies). In summary, the detractors challenge the dominant claim of proponents that free trade will inure to the benefit of all economies by rewarding efficiency and thereby maximizing prosperity. (*See*, William P. Alford, *Introduction: The North American Free Trade Agreement and the Need for Candor*, 34 HARV. INT'L L.J. 293 (1993). While the voices in opposition to NAFTA cited above arise primarily from U.S. interest groups, it is notable and, perhaps instructive, that parallel arguments were expressed by Canadian interests in opposition to the FTA. *Id.* at 301 n.40. *See also Conference Proceedings, The Law and Economics of Environmental Regulation in the Canada/U.S. Context*, 18 CAN.-U.S. L.J. 1 (1992); Bucholtz, *supra* note 3, at 297 n.99.

7. *Infra* notes 14-18 and accompanying text.

8. Briefly, anti-dumping and countervailing duty statutes are non-tariff barriers to trade. They are devices by which national governments seek to protect their domestic industries from what they perceive to be unfair trade practices by importers or foreign governments. The statutes seek to dilute the deleterious effect of these practices on local markets by imposing compensatory duties on the subject imports. "Dumping" occurs when an importer sells its product in the domestic market at a lower price than the same product is sold in the importer's home market. The practice is considered to be unfair because it undercuts the domestic competitors' market share by selling at less than fair value. Anti-dumping regulations impose a duty to reflect the difference between the importer's price and the fair price. 19 U.S.C. § 1677(3)(C) (1988); 19 U.S.C. § 1673(2)(B) (1987). Countervailing duties seek to offset the unfair price advantage to imported goods which are the beneficiaries of subsidies granted to importers by their governments. To counteract the unfair benefit the subsidy affords the cost of producing the import, a duty is assessed in the amount of the net subsidy. 19 U.S.C. §§ 1671-77(g) (1987). *See infra* notes 30 and 33 and accompanying text. Title 19 is discussed in more detail below. *See infra*, notes 64-70 and accompanying text.

9. *See infra* note 10 and accompanying text.

deal breaker.[10] Congress was convinced to approve Chapter 19 and its panel review provision after expert witnesses assured Congressional committees that the mechanism could pass Constitutional muster[11] and that the impact of the panel mechanism on the domestic economy and legal regime would be minimal.[12] The "minimal impact" argument can

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10. The binational panel review provision was actually an "eleventh hour" fallback solution to the parties' failure to reach agreement on a unified or harmonized AD/CVD legal regime. Jean Anderson & Jonathan T. Fried, *The Canada - U.S. Free Trade Agreement in Operation*, 17 CAN.-U.S. L.J. 397, 408 (1991). Negotiators found themselves "under the gun" of imminent expiration of the "fast track" procedure and the provision was, by all accounts, hastily drafted. *See, e.g.*, Andrew Kayumi Rosa, *Old Wine, New Skins: NAFTA and the Evolution of International Trade Dispute Resolution*, 15 MICH. J. INT'L L. 255 n.19 (1993). But the binational panel provision became non-negotiable as Canada insisted that without it Canadian imports would be jeopardized by biased application of U.S. AD/CVD laws. *See* Negotiation of United States - Canada Free Trade Agreement, Hearing before the Senate Comm. on Finance, 99th Cong.; 2d Sess. 41 (1986) (statement of Ambassador Clayton Yeutter, U.S. Trade Representative); *see also*, 4 Int'l Trade Rep. (BNA) No. 28 at 905 (July 15, 1987) (statement of Manitoba Premier Howard Pawley to the effect that without bilateral panel review as a replacement for domestic judicial review, the FTA was unacceptable to Canadians). Indeed, even after ratification of the FTA and actual dispute resolution pursuant to Title 19, AD/CVD disputes continue to be a sore point in the U.S. - Canada relations. And, as will be discussed subsequently, the Softwood Lumber cases have proved particularly problematic in that regard. *See, e.g.*, Daphne Bramhan, *Canada Gets Short End of the Stick: U.S. Ruling on Softwood Ignores Free Trade Deal*, VANCOUVER SUN, May 16, 1992 at Al.; Robert Hage, *Dispute Settlement under the Canada - United States Free Trade Agreement*, 1990 CAN. Y.B. INT'L L. 361, 363.

11. On May 20, 1988, the Committee on the Judiciary, U.S. Senate, received testimony from Professor Harold Bruff (University of Texas School of Law), Professor Andreas Lowenfeld (New York University School of Law), Andrew Vance (on behalf of the Customs and International Trade Bar Association), Stewart Baker and Jeffery Bialos (representing the International Trade Administration, Department of Commerce), Ambassador Alan F. Holmer (Deputy U.S. Trade Representative), and John O. McGinnis (Office of Legal Counsel, Department of Justice). On April 28, 1988, the Committee on the Judiciary, U.S. House of Representatives, conducted hearings and received testimony from Hon. Sam Gibbons (Chair, Subcommittee on Trade of the Committee on Ways and Means), Hon. Alan Holmer, Andrew Vance, Joseph Griffin (on behalf of the American Bar Association), and Professor Harold Bruff. Prior thereto, the Committee solicited written opinions from Professor Louis Henkin (Columbia Univ. School of Law), Professor David Shapiro (Harvard University Law School), and Professor Andreas Lowenfeld. The resulting consensus was that the binational panel mechanism which precluded judicial review of private litigant challenges to AD/CVD agency determinations was constitutional. However, Professor Shapiro and Andrew Vance expressed concerns about the provision's constitutionality. Similarly, Senators Dennis De Concini and Howell T. Heflin filed dissenting views on the issue in the Committee Report. S. Rep. No. 509, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 2395 [hereinafter, Senate Comm. Hearings].

12. *Hearings before the Senate Committee on the Judiciary*, 100th Cong., 2d

be summarized as follows: 1) the binational panel review provision of Chapter 19 is merely a temporary measure to preserve the rights of private litigants while the two governments resolve their differences over a proposed harmonized dispute resolution regime; 2) in the absence of a harmonized regime, Canada was unwilling to abide by what it perceived to be a biased or arbitrary administration of U.S. unfair trade laws; however, the U.S. refused to exempt Canada from the administration of those laws; therefore Chapter 19's binational panel review became the "eleventh hour" stop-gap measure of compromise; 3) the binational panel system is not a radical departure from the existing legal regime because panel review would be bound by judicial precedent; 4) Canada shares a common legal tradition with the U.S.; and 5) U.S. AD/CVD orders against Canada typically average a mere two per year.[13] This *de minimus* argument which was so effectively presented to the Congressional committees by Reagan Administration witnesses in 1988 takes on a different cast and hue in 1995 against a background of proliferating free trade accords to which the U.S. is a party. As noted above, the FTA, including its Chapter 19 bilateral panel review mechanism, was replicated[14] in NAFTA to which the U. S., Canada, and Mexico are parties. Chile has recently been chosen to become the "Fourth Amigo" of NAFTA. The announcement was made at the conclusion of a three-day summit meeting attended by 34 leaders of Western Hemisphere nations in December, 1994.[15] The avowed purpose of the December summit was to commit participant nations to a "Free Trade Area of the Americas" by the year 2005.[16] On the other

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Sess., May 20, 1988, S. Hrg. 100-1081, Serial No. J. - 100-62 (U.S. Gov't. Printing Office). "It is also important to have some perspective on the numbers here. Of over 700 U.S. AD/CVD cases filed since 1980, only 31 involved Canada, and only 13 of those 31 led to orders. On average, that is fewer than two U.S. orders against Canada annually. And those orders cover less than $600 million of our approximately $70 billion in annual imports from Canada. United States - Canada cases are also only a small fraction, less than 6 percent, of the AD/CVD appeals before the Court of International Trade and less than 1 percent of the total cases before the Court of International Trade." *Id.* at 64 (statement of Ms. Anderson).

13. *Id. See also* Abraham Rotstein, *Trading Down*, 14 CAN. BUS. L.J. 399, 401 (1988) (explaining that the desire to be exempt from U.S. trade laws was the driving force behind Canadian support for a free trade agreement).

14. Changes in Article 19 in NAFTA were minor and are discussed below at notes 71-81 and accompanying text.

15. David E. Sanger, *Chile is Admitted as North American Free Trade Partner*, N.Y. TIMES INTERNATIONAL, Dec. 12, 1994, at A1. Formal negotiations on the terms of Chile's admission to NAFTA were initiated on Jun. 7, 1995. Calvin Simms, *Chile Fears a Delay in Trade-Bloc Entry*, N.Y. TIMES INTERNATIONAL, May 5, 1995, at C4.

16. David E. Sanger, *U.S. Envisions An Expansion of Free Trade in Hemisphere*,

side of the globe, the U.S. is a party to a multi-national effort to establish the world's largest free trading area in the Asia-Pacific region. On November 16, 1994, seventeen nations (Australia, the United States, Canada, Mexico, Japan, China, Hong Kong, Taiwan, South Korea, Indonesia, Brunei, the Philippines, Malaysia, Singapore, Thailand, Papua New Guinea, and New Zealand) committed themselves to a free trade confederation to be known as the Asia-Pacific Economic Cooperation or APEC. APEC is reported to encompass more than half of the world's economy. The parties have targeted the year 2010 for the commencement of its operation as a free trade zone.[17] The proliferation of free trade accords to which the U.S. is a signatory is clearly proceeding apace. And, in the wake of that momentum, the strength of the "minimal impact" argument[18] - whatever its merits in 1988 - is dramatically reduced.

The remaining premise advanced by the Reagan Administration in support of the binational panel review mechanism was its constitutionality. During the debate on the FTA, constitutional challenges to binational panel review posed three distinct questions: does supplanting judicial review of AD/CVD determinations with binational panel review violate the Appointments Clause, Article III, or the Due Process Clause?[19] This article revisits those questions and argues that - to para-

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N.Y. TIMES INTERNATIONAL, Dec. 8, 1994, at A7. Already in place are two smaller regional pacts in Latin America: the Mercosur (or Common Market of the South) and the Group of Three. Both of these pacts took effect on January 1, 1995. Brazil, Argentina and Uruguay, which together represent two-thirds of South American commerce and investment, are signatories to the Mercosur accord, while Mexico, Colombia and Venezuela comprise the Group of Three. The member-nations of the two blocs are currently seeking to merge and create a South American free trade bloc. James Brooke, *On Eve of Miami Summit Talks, U.S Comes Under Fire*, N.Y. TIMES INTERNATIONAL, Dec. 9, 1994, at A4.

17. Andrew Pollack, *Opening Asia's Door*, N.Y. TIMES INTERNATIONAL, Nov. 16, 1994, at A6. Six members of the group have already formed a more limited free trade bloc: the Association of Southeast Asian Nations or ASEAN. Andrew Pollack, *Asia-Pacific Countries Near Agreement on Trade*, N.Y. TIMES INTERNATIONAL, Nov. 15, 1994, at A1.

18. *See supra* notes 9-13 and accompanying text.

19. These issues were addressed by Congress during its fast-track consideration of the FTA. *See, e.g., United States - Canada Free Trade Agreement Hearing* before the Subcomm. on Courts, Civil Liberties, and the Administrator or Justice of the House Comm. on the Judiciary, 100th Cong., 2d Sess. 67 (1988) (hereinafter House Comm. Hearings); Senate Comm. Hearings, *supra* note 11. The issues were also considered in several law review articles following ratification of the FTA. *See, e.g.*, Peter Huston, *Anti-dumping and Countervailing Duty Dispute Settlement under the United States - Canada Free Trade Agreement: Is the Process Constitutional?*, 23 CORNELL INT'L L.J. 529 (1990).

phrase Justice Rehnquist[20] - they do not yield easy answers. The facility with which these questions were considered during the FTA debate is attributable more to the political appeal of the free trade paradigm and the time constraints of the fast-track procedure[21] than to the compelling logic of the arguments advanced. This article then argues that, even assuming the constitutionality of binational panel review, Chapter 19 gives away more than was necessary or prudent in order to achieve its intended goal of securing Canadian participation in a bilateral free trade accord. To concede the facial constitutionality of the provision is not to vouch for its substantive merit. The thesis of this article is that there is no serious impediment to affording binational panels Article III protection. The reasons the Article III safeguards of life tenure and undiminished salary were found essential for an independent judiciary apply equally to a binational panel system as it is utilized in ever-widening free trade zones. Indeed, the absence of Article III safeguards threatens the efficacy of free trade accords.

Part I presents a framework analysis of the nation's tariff and trade laws and their interface with GATT, the FTA and NAFTA. Part II considers the constitutional issues raised during fast track consideration of the FTA as well as the Administration's failsafe "minimal impact" argument. The focus then narrows to take a closer look at Article III case law and its applicability to binational panel review. Part III chronicles the actual operation of the binational panel review mechanism by targeting the *Softwood Lumber* case.[22] Part IV concludes with the proposal that binational panel members be granted the salary and tenure protections of Article III judges.

I. UNITED STATES TRADE LAWS AND TRADE AGREEMENTS

A. Historical Development of U.S. Tariff and AD/CVD Laws.

1. Evolution of Judicial AD/CVD Cases

The Constitution confers upon Congress the "power to lay and col-

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20. Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring). The question presented in *Northern Pipeline* was " 'whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in 28 U.S.C. § 1471 . . . of the Bankruptcy Act of 1978 violates Art. III of the Constitution.' " *Id.* at 89 (Rehnquist, J., concurring, q*uoting* the *Northern Pipeline* plurality opinion at 52). Justice Rehnquist opined that "[t]he cases dealing with the authority of Congress to create courts other than by use of its power under Art. III do not admit of easy synthesis." *Id.* at 91. *See infra* notes 158-175 and accompanying text.

21. *See infra* notes 57-58 and accompanying text.

22. *See infra* notes 204-252 and accompanying text.

lect taxes, duties, imports and excise" as well as the power "to regulate commerce with foreign nations."[23] Congress was prompt to exercise these powers: following adoption of the Constitution, its next legislative action was to pass a statute mandating the collection of duties on imports.[24] The priority of that enactment is not surprising in light of the fact that, until 1913 and the adoption of the income tax amendment,[25] tariffs provided the principal source of income for the federal government.

A fortiori, the assessment of customs duties on imports pursuant to the 1789 Act gave rise to disputes. Challenges to duty assessments were initially litigated in federal courts of general jurisdiction. In 1890, Congress established a Board of General Appraisers under the Department of the Treasury as a special tribunal with exclusive jurisdiction over cases challenging customs assessments.[26] The Board was replaced in 1926 by the United States Customs Court. The Customs Court was originally an Article I court under the Department of Justice[27] but was elevated to Article III status in 1956.[28] In 1979, Congress made significant procedural changes in customs litigation by requiring, *inter alia*, formal filing of a civil action in the U.S. Customs Court to initiate a challenge to a duty assessment. But no attempt was made to broaden the jurisdiction or remedial powers of what remained, essentially, an administrative tribunal in spite of its formal status as an Article III court.[29]

During the decade of the 1970s, significant demands were made on the customs court system as the case load of international trade suits multiplied, particularly with regard to anti-dumping and countervailing duty cases.[30] In response to the increasing case load pressure, to the

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23. U.S. CONST. Art. I, § 8, cl. 3.

24. Tariff Act of July 4, 1789, 1 Stat. 24 (1789). Customs districts were established by Act of July 31, 1789, 1 Stat. 29 (1789).

25. "The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived . . . ." U.S. CONST. amend. XVI.

26. Customs Administrative Act, ch. 407, 26 Stat. 131 (1890) (*amended by* ch. 16, 38 Stat. 181 (1913); *superseded by* ch. 411, 44 Stat. 669 (1926)). The nine members of the Board were appointed to life tenure status by the President with the advice and consent of the Senate. Appeals of the Board's decisions were taken to the federal circuit courts until 1909 when the Court of Customs Appeals was established.

27. Customs Administrative Act of 1926, ch. 411, 44 Stat. 669 (1926).

28. 28 U.S.C. § 251 (1956) (amended by 1980 Acts, Section 701 of Pub. L. No. 96-417, *as amended* Pub. L. No. 96-542, § 1, 94 Stat. 3209 (1980)).

29. Customs Court Act of 1970, Pub. L. No. 91-271, 84 Stat. 274 (1970). *See also* Ruth F. Sturm, *Customs: Past, Present and Future*, 37 FED. B. NEWS J. 151 (1990) (giving an overview of the development of the customs court system).

30. *See supra* note 8. *See also* Sturm, *supra* note 29. The Brookings Institute

evolving intricacies in customs litigation, and to certain ambiguities concerning Customs Court jurisdiction, Congress in 1979 and 1980 enacted significant changes in existing law which served to expand the jurisdiction and power of the Customs Court.[31] In 1979, the Customs Court was given the power to grant injunctive relief; in 1980, it was given authority to assess money damages and to provide complete equitable relief. The 1980 Act also changed the name of the court to the United States Court of International Trade (hereinafter, CIT).[32] The present status of the CIT is described by those changes wrought by Congress in 1979 and 1980. It is the CIT which has exclusive authority to hear appeals of AD/CVD assessments.

2. Current Administrative Process for AD/CVD Assessments under U.S. Law

The purpose of anti-dumping and countervailing duty law is to penalize imports sold substantially below actual market value[33] by impos-

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reported that, by 1980, 20% of domestically produced U.S. goods were protected by AD/CVD and other non-tariff impediments to imported goods. ROBERT B. REICH, TALES OF NEW AMERICA 57 (Time Books, 1987) (*citing* ROBERT Z. LAWRENCE, CAN AMERICA COMPETE? (Washington, D.C., Brookings Institute, 1984)). The demand for non-tariff protection by U.S. producers was created by the fact that import prices undercut domestic prices, resulting in a U.S. trade deficit as U.S. consumers flocked to the lower priced imported goods. REICH, *supra* at 57 (*citing* International Trade Commission, Annual Reports (Washington, D.C., United States Government Printing Office 1980-1985)). Reich notes that "[i]n 1979 sixty-two petitions to restrict imports were filed with the U.S International Trade Commission; by 1984 the number had more than tripled." *Id.*

Reich's point is that in the long run, the domestic malaise is due less to foreign unfair trade practices than to the ineptitude of the American private sector to reward companies for making long term investments in developing the expertise and sophisticated technological skills of the American work force. That point was made more recently in HEDRICK SMITH, RETHINKING AMERICA 196-215 (Random House, 1995).

31. The Trade Agreements Act of 1979, Pub. L. No. 96-391, 93 Stat. 144 (1979); The Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980).

32. While the 1980 Act specifically granted Article III powers to the CIT, it appears to have failed in its avowed mission to "eliminate the considerable jurisdictional confusion" and to "increase the availability of judicial review in the field of international trade in a manner which results in uniformity without sacrificing the expeditious resolution of import-related disputes." Sen. Dennis De Concini, 126 CONG. REC. 27, 063 (1980). *See also* Hon. Gregory W. Carman, *The Jurisdiction of the United States Court of International Trade: A Dilemma for Potential Litigants*, 22 STETSON L. REV. 157, n.27 and accompanying text (1992) (*quoting* Sen. De Concini and discussing the continuing ambiguity of the jurisdictional reach of the CIT).

33. Valuation standards and techniques for determining fair value and unfair practices are beyond the scope of this article. For a general discussion of these issues,

ing a duty upon them and, thereby, leveling the playing field for their domestic competitors.[34] The procedure for ascertaining unfair practice and imposing duties is set forth in Title VII of the Tariff Act of 1930[35] as amended by the Trade Agreements Act of 1979[36] and the Trade and Tariff Act of 1984.[37] Current law establishes a bifurcated system of investigation,[38] administered by the International Trade Administration of the Department of Commerce (ITA or Commerce) and the Interna-

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see Presley L. Warner, *Canada - United States Free Trade: The Case for Replacing Anti-dumping with Antitrust*, 23 LAW & POLICY INT'L BUS. 791 (1992); Donald B. Cameron and Susan M. Crawford, *An Overview of the Anti-dumping and Countervailing Duty Amendments: A New Protectionism?* 20 LAW & POLICY INT'L BUS. 471 (1989).

34. *See supra* note 8. Duties imposed for dumping are equal to the difference between the price charged in an import's home market and the price charged in the U.S. market. *See* 19 U.S.C. § 1673 (1983 & Supp. 1989). Duties imposed to countervail subsidies are calculated as the amount of the net subsidy. *See* 19 U.S.C. § 1671 (1983 & Supp. 1989).

35. To establish intent under the first anti-dumping law, a party had to prove "[s]uch act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States." Anti-dumping Duty Act of 1916, 15 U.S.C. § 72 (1982). This standard of proof was very difficult to meet.

The intent element was eliminated in the 1921 Act which replaced the 1916 Act. Anti-dumping Act of 1921, 42 Stat. 11 (1921) (codified in its amended form at 19 U.S.C. §§ 160-171 (1976)). In turn, the 1921 Act was repealed and replaced by the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979). The first countervailing duty law was enacted in 1890. Tariff Act of 1890, ch. 1244 § 237, 26 Stat. 584 (1890). Prior to 1974, the Secretary of the Treasury had discretionary authority to impose duties on imports supported by foreign subsidies. That discretionary power was subsequently eliminated by the Trade Acts of 1974 and 1979. Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1976); Trade Act of 1979, 19 U.S.C. §§ 1671-1677 (1979). Section 1671(a) requires the imposition of a duty upon a finding of the existence of a subsidy.

For a general discussion of anti-dumping and countervailing duty law, *see* 3 J. PATTISON, ANTI-DUMPING AND COUNTERVAILING DUTIES (1984); Jameson, *The Administration of the U.S. Countervailing Duty Laws with Regard to Domestic Subsidies*, 12 SYRACUSE J. INT'L L. & COM. 59 (1985); *Litigation before the United States Court of International Trade*, 26 N.Y.L. SCH. L. REV., 437, 450-451 (1981).

36. *Id.*

37. Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984). The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988), did not significantly change the existing administrative law. *See* Cameron and Crawford, *supra* note 33, at 471 (noting that the 1988 Act codifies existing Commerce Department administrative practice).

38. The first bifurcated administrative procedure was established by the 1921 Act. *Supra* note 35.

tional Trade Commission (ITC), an independent federal agency. Investigations of alleged unfair trading practices may be initiated either by Commerce or by private litigants who are qualified as interested parties.[39] Once a proceeding has been initiated, the ITA investigates and makes a preliminary determination of unfair price or unfair subsidy. Upon a finding of an unfair practice (dumping or subsidy), the case is considered by the ITC which makes a determination as to whether the unfair practice has or will materially injure the U.S. industry. If that finding is affirmative, Commerce directs Customs to collect the appropriate duty on the import at issue.[40] Challenges to duties imposed are reviewed by the CIT which, as noted above, has exclusive jurisdiction of AD/CVD appeals.[41] Based upon traditional standards of review of administrative agency actions,[42] the CIT may affirm or remand to either the ITA or the ITC for further proceedings. Decisions of the CIT may be appealed to the Court of Appeals for the Federal Circuit and then to the U.S. Supreme Court.[43]

B. A Comparison of U.S. and Canadian AD/CVD Law

The Canadian anti-dumping law predates its U.S. counterpart by a decade.[44] The Canadian law, first enacted in 1904 as Section Six of the Customs Tariff Act, was enacted in response to allegations of dumping by U.S. imports.[45] The law was revised in 1968 to bring it into conformity with GATT's Anti-dumping Code.[46] The law was changed again in 1984 when the Special Import Measures Act (SIMA)

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39. Interested parties are defined under the Act as 1) U.S. manufacturers, producers, or wholesalers of the product at issue; 2) a union or equivalent representative group from labor in the industry producing the product at issue; or 3) a trade association of vendors of the product at issue. 28 U.S.C. § 2631 (1995).

40. 19 U.S.C. § 1677(a)(20)(A) (1995). For a more complete discussion of the process, *see* Huston, *supra* note 19. *See also Nam H. Paik, American Lamb Company v. United States: Application of the Reasonable Indication Standard*, 9 NW. J. INT'L L. & BUS. 191 (1988).

41. *See supra* note 32 and accompanying text.

42. The applicable standards are "arbitrary and capricious," "abuse of discretion," and "against the weight of evidence." 5 U.S.C. § 706 (1995).

43. 28 U.S.C. § 1295(a)(5) (1995).

44. An Act to Amend the Customs Tariff, ch. 11, § 19, 1904 S.C. (1897).

45. *See generally* Mark Gillis, *The United States - Canada Free Trade Agreement and Its Effect on Anti-dumping/Countervailing Duty Law: Does the Interim Measure Beat the Long Term Solution?*, 15 SUFFOLK TRANSNATIONAL L.J. 700 n.44 (1992).

46. The 1979 Act accomplished that task under U.S law. *See supra* note 35.

replaced the 1968 Act.[47]

SIMA established an administrative procedure which is similar to the U.S process. Both countries provide for a bifurcated investigative regime as required by GATT.[48] In Canada, unfair practice investigations and determinations are made by the Deputy Minister of National Revenue for Customs and Excise,[49] the counterpart of the ITA in the U.S. Following an affirmative finding, the case is reviewed by the Canadian International Trade Tribunal for a "material injury" determination[50] (the role assumed by the ITC in the United States).

The Federal Court of Appeal,[51] like its U.S. counterpart the CIT, has exclusive jurisdiction over challenges to these determinations. Ultimate appeals may be taken to the Supreme Court of Canada.[52]

Similarities in federal tariff regimes and the common bond of an English legal ancestry have done little to eliminate discord between the two countries on AD/CVD issues.[53] Indeed, the dispute over Canadian softwood lumber industry imports to the United States, discussed in some detail below, and Canadian perceptions that agency enforcement of U.S. AD/CVD laws are egregiously biased and combined to produce a major impetus for ratification of the FTA.[54]

C. *The U.S. - Canada Free Trade Agreement of 1988* (FTA)

1. Ratification and Implementation Process — U.S.

The Trade Act of 1974 authorized the President "to harmonize, reduce or eliminate barriers" which are deemed to place an undue burden on our trade with other nations.[55] The 1984 Trade and Tariff Act

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47. Special Import Measure Act, ch.25, 1984 S.C. 739 (1984), as amended by Customs Act, ch. 1, 1986 S.C. 1 (1986).

48. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 31 U.S.T. 4919, 26 Supp. B.I.S.D. 171 (1979). This 1979 Code was superseded by the new GATT Anti-dumping Code. *See supra* note 2.

49. SIMA §§ 38-41.

50. *Id.*

51. Federal Court Act, R.S.C., § 28 at F-7 (Can. 1985) (prior to 1990 amendment).

52. *Id.* at § 31. For a more complete discussion of the two countries' AD/CVD laws, *see* Warner, *supra* note 33.

53. *See* MacDonald, *An Overview of the Prospects for Sectoral Integration: The View from Canada*, 10 CAN.—S. L.J. 3 (1985) (discussing their disputatious trade history).

54. *See supra* note 10 and accompanying text. GATT, alone, proved an inadequate vehicle for reducing trade barriers. *See* Gillis, *supra* note 45.

55. Trade Act of 1974 § 102(a), 19 U.S.C. § 2112(a) (1982).

granted the President express authority to enter into free trade agreements,[56] which Congress must consider on a "fast track" basis.[57] Fast track analysis essentially gives Congress 60 legislative days to accept or reject "as is" the President's proposed legislation for implementing a free trade agreement. Amendments to the legislative proposal are not in order.[58] The benefits afforded the Executive by the fast-track process are obvious: the negotiated terms are firm. Congressional opprobrium can only take the form of outright rejection of the entire implementing legislation of the accord. The integrity of the negotiation process is preserved.[59] Conversely, Congressional deliberation in approving the U.S.-Canada Free-Trade Agreement Implementation Act of 1988 must be assessed in the context of these fast track constraints of time and amendment.[60]

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56. Trade and Tariff Act of 1984 § 401, 19 U.S.C. § 2112(b)(a) (1995). But note that these Trade Agreements do not become effective unless implementing bills are enacted by both Houses of Congress. 19 U.S.C. § 2903(a)(1) (1995).

57. 19 U.S.C. § 2112(c), (e), § 2191 (1995). The "fast track" provides an expedited procedure for consideration of trade agreements whereby 1) the foreign nation must request negotiation for a trade agreement; 2) the President must give Congress 90 days notice of his intent to enter an agreement before becoming a signatory to it; 3) the President must submit a proposed draft of an implementation bill along with statements as to the purpose of the agreement and how it will change existing U.S. law; and 4) Congress has sixty (60) legislative days to accept or reject the implementing bill without amendment. A simple majority vote of each House is required for approval. For a more detailed description of the "fast track" procedure, *see* Alan Holmer and Judith Bello, *U.S. Trade and Policy Series No. 20: The Fast Track Debate: A Prescription for Pragmatism*, 26 INT'L. LAW. 183 (1992).

58. Pursuant to Section 102 of the Trade and Tariff Act, on September 26, 1985, Prime Minister Mulroney requested that Canada and the U.S. enter into negotiations for the purpose of concluding a free trade accord. On Dec. 10, 1985, President Reagan notified Congress of his intent to entertain the request for negotiations. On October 3, 1987, President Reagan gave Congress notice that he intended to enter into a free trade agreement with Canada. On January 2, 1988, President Reagan and Prime Minister Mulroney signed the FTA; whereupon the President submitted the proposed implementing bill, along with the requisite supporting documents, to Congress for consideration. The bill was approved and the FTA took effect on January 1, 1989. *See U.S.-Canada Free Trade Agreement: Hearings Before the Senate Jud. Comm.*, 100th Cong., 2d Sess. 76-87 (1988).

59. A primary concern of Congress was the constitutionality of the bilateral review panels established by Chapter 19 of the FTA. Pursuant to the "fast track" process, Congress had no power to amend Chapter 19. The content of Congressional hearings on the issue is cited above. *See supra* note 11 and accompanying text.

60. *See infra* notes 104-116 and accompanying text.

2. Provisions of the FTA

a. General Coverage

The express objectives of the FTA are identified in Article 102 as "(a) eliminate barriers to trade in goods and services . . . ; (b) facilitate conditions of fair competition; (c) significantly liberal[ize] conditions for investment; (d) establish effective procedure[s] to administer the Agreement and resolve disputes; and (e) lay the foundation for further bilateral and multi-lateral cooperation."[61] Thus, the FTA was designed as an ambitious and comprehensive plan to advance free trade. It provides for a phased-in process for the elimination of all tariffs over a 10-year period.[62] In addition, the FTA provides for the harmonization of technical standards in the two countries' laws and regulations with regard to a number of industries including automotive, energy, investment, financial services, wine and liquor, and agriculture.[63]

The FTA established two dispute resolution processes: Chapter 18 covers disputes with regard to interpretation of the FTA and Chapter 19, the problematic and innovative chapter which is the focus of this article, provides for bilateral review panels in lieu of judicial review of AD/CVD assessment challenges.

b. Chapter 19: Binational Panel Review

Article 1904 of the FTA establishes the structure for binational panel review. Each nation will retain its own AD/CVD laws and administrative procedure whereby AD/CVD duties are assessed. Challenges to those assessments will be reviewed, not by each nation's designated appellate court (the CIT in the U.S. and the Federal Court of Appeal in Canada, with ultimate appeal, in each instance, to the nation's Supreme Court),[64] but by a five-member panel of experts.[65] Re-

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61. *U.S.-Canada Free Trade Agreement: Hearings Before the Senate Jud. Comm.*, 100th Cong., 2d Sess. 76-87 (1988).

62. FTA, art. 401. Tariffs on certain products (leather, furs, motorcycles, rum, whiskey, telecommunications equipment, and automatic data processing equipment) were eliminated at the outset. Tariffs on other products (after-market automotive parts, petroleum, paper, printed materials, machinery, chemicals, furniture, and certain musical instruments) were scheduled for a five year elimination. Goods giving rise to contentious trade issues (wood, lead, zinc, rubber, plastics, textiles, apparel, footwear, alcohol, appliances, watches, precision instruments, fish, and agricultural products) were scheduled for a 10-year tariff phase-out.

63. FTA, chs. 6-17.

64. *See supra* notes 49-52 and accompanying text.

65. Each nation will select two members from a pre-existing roster of fifty candi-

quests for panel review may come from either government, *sui sponte*, or on behalf of any requesting party who would have had standing to compel judicial review.[66] Administration experts who testified before Congressional committees emphasized that the panel is bound by the administrative record in its review of the case and must apply the AD/CVD law of the assessing country. Jean Anderson, speaking on behalf of the Reagan Administration, put it this way:

> In a U.S. case, the panel will apply U.S. AD/CVD law which has been incorporated into the FTA for this purpose, including the statute, the legislative history, regulations, administrative practice, and U.S. judicial precedent. The panel would apply the same standard of judicial review as the CIT would apply. The panel cannot substitute its judgment for the agencies, [*sic*] either. It can affirm the decision, or can conclude that the agency made a mistake, and in the latter case, Commerce [ITA] or the ITC would make a new determination just as they do on remand from the CIT. . . . [T]he panel decisions are binding only with respect to the particular matter before the panel. Consequently, neither a later panel nor a United States court reviewing a non-Canadian case would be obliged to follow the panel's decision . . . .[67]

Decisions of the panel may be appealed to an "extraordinary challenge" committee only on the grounds that 1) a panelist violated specified rules of conduct; 2) the panel significantly deviated from a funda-

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dates which is composed of 25 candidates selected by the executive branches of the Canadian and U.S. governments. (The U.S. Trade Representative selects 25 candidates with the approval of the Senate Finance and the House Ways and Means Committee; a selection board appointed by the Minister of Trade selects 25 candidates on behalf of Canada.) The two governments jointly select the fifth member of the panel or, in the absence of agreement, the four panelists select the fifth. If the panelists cannot agree, the fifth member is chosen by lot. FTA Annex 1901.2; S. Hrg. 100-1081, *supra* note 58, at 72-73 (testimony of Jean Anderson).

66. FTA, Art. 1904(5). If no Party requests panel review, judicial review of a AD/CVD assessment remains available in the domestic court which has jurisdiction to hear such matters.

67. *See* Testimony of Jean Anderson, *supra* note 65, at 64-65. The standard of review for issues raised by a U.S. assessment is a determination as to whether the agency finding is supported by "substantial evidence on the record," is "arbitrary, capricious [or] an abuse of discretion;" or "otherwise not in accordance with law." 19 U.S.C. § 15161(b)(1). The provision that panel review was merely a substitute for judicial review was reinforced by section 102 of the Agreement which provides that the Agreement must be consistent with U.S. law to be given effect.

mental rule of procedure; or 3) the panel manifestly exceeded its powers, authority, or jurisdiction. As to each ground, the appellant must also show that the panel's action "materially affected the panel's decision and threatens the integrity of the panel review process."[68] The three members of the Extraordinary Challenge Committee are selected from a roster of present and past members of each nation's judiciary.[69] Finally, Chapter 19 does not preclude judicial review of constitutional challenges to the implementing legislation or constitutional issues raised in AD/CVD assessment appeals.[70] Since the effective date of the FTA in 1989, binational panels have been convened on a regular basis to hear and resolve assessment disputes. In addition, Chapter 19 served as the prototype for NAFTA's AD/CVD dispute resolution mechanism.

D. The North American Free Trade Agreement

1. Negotiations and Ratification of NAFTA

Trilateral negotiations leading to NAFTA commenced on June 12, 1991.[71] Although the fast track process for implementing trade agreements was to terminate by June 1, 1991, the law provided for a two-year extension of the process.[72] On May 23, 1991, President Bush received the extension for purposes of negotiating both NAFTA and the Uruguay Round Agreements (which culminated in the WTO) under the fast track process.[73] The United States, Canada, and Mexico concluded NAFTA negotiations on September 15, 1992.[74] On December

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68. *Id.* at 73.

69. *Id.*

70. *Id.* Ultimately the parties envisioned that a harmonized system would replace the binational panel review provision. Article 1906 provides that the parties will have five years from the effective date of the FTA to develop a unified AD/CVD assessment system; the five-year term can be extended to seven years; if no agreement has been reached by the end of the seven-year term, either party may terminate the FTA by giving the other party six months notice. 27 I.L.M. 293, 390 (1988).

71. Daniel S. Sullivan, *Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy*, 81 GEO. L.J. 2369, n.167 (1993).

72. 19 U.S.C. § 2903(b)(1); Section 1102, Omnibus Trade and Competitiveness Act of 1988 (Pub. L. No. 100-418).

73. Public Citizen v. USTR, 970 F.2d 916, 917 n.2 (D.C. Cir. 1992) (*citing Report to the Congress on the Extension of Fast Track Procedures*, Mar. 1, 1991, and noting that, pursuant to 19 U.S.C. § 2903(b)(1)(B), the extension came into effect because neither house voted to disapprove the extension). *See* 137 CONG. REC. H3588-89 (daily ed. May 23, 1991).

74. North American Free Trade Agreement, Sept. 15, 1992 (Gov't Printing Off. Doc. 1992-330-817/70635).

17, 1992, President Bush, Prime Minister Mulroney, and President Salinas executed the Agreement.[75] Bill Clinton became President before Congress acted on the Agreement. Following his inauguration in January, 1993, President Clinton became the somewhat ambivalent NAFTA torchbearer to run the gauntlet of Congressional "fast track" debates.[76] The debate over NAFTA, unlike the FTA debate, was vigorous and contentious. Broadly speaking, critics voiced concerns about the environment,[77] human rights issues,[78] and the economic impact of NAFTA on the U.S. labor force.[79] Congress, through its committees,

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75. Judith Bello and Alan F. Holmer, *U.S. Trade Law and Policy Series No. 23: Reflections on the NAFTA as a Turning Point in American Foreign Policy*, 28 INT'L LAW. 425, 428 (1994).

76. *Id.* at 428, 430.

77. *See* Benson, *supra* note 6 (discussing the major issues raised in opposition to NAFTA); ROBERT A. PASTOR, INTEGRATION WITH MEXICO: OPERATIONS FOR U.S. POLICY (New York 1993) (discussing positions in support of NAFTA); H.R. Rep. No. 103-361 (I), 100th Cong., 1st Sess. (1993) *reprinted in* 1993 U.S.C.C.A.N. 2552 (Congressional consideration of the issues). The position of the Bush Administration is summarized by Rep. Robert T. Matsui in a *Symposium on Free Trade and Democratic Values: NAFTA's Effect on Human Rights*, 27 U.C. DAVIS L. REV. 791 (1994). For specific discussions on environmental repercussions of NAFTA, *see* Carl F. Schwenker, *Protecting the Environment and U.S. Competitiveness in the Era of Free Trade: A Proposal*, 71 TEX. L. REV. 1355 (1993); *Symposium, Trade and the Environment: The Role of Regional Trade Agreements, Special Focus: North American Free Trade Agreement*, 5 GEO. INT'L ENVTL. L. REV. 515 (1993).

Not only was NAFTA challenged on grounds that it would negatively impact U.S. environmental laws and standards, the fast track process of NAFTA itself was challenged on the grounds that it was a proposal for legislation or a major Federal action which could significantly affect the quality of the human environment and, therefore, mandated compliance with NEPA and its Environmental Impact Statement requirement. *See Public Citizen*, 970 F.2d 916.

78. Differences between the U.S. legal system and that of Mexico took two forms: 1) that Mexico was not a liberal democracy; that it was authoritarian and undemocratically ruled under a one-party system; and 2) that its legal traditions were markedly different from those of the U.S. and Canada where legal traditions emphasize democratic ideals and standards of individual liberties. Senator Daniel Patrick Moynihan stated during "fast track" debate that "[w]e are for the first time being asked to consider a free-trade agreement with a country that is not free . . . . We simply cannot pretend that Mexico is a democracy with an independent judiciary." Sullivan, *supra* note 71, n.180 (*quoting* Senator Moynihan). 137 LONG. REC. S6628, S6629 (daily ed. May 24, 1991).

79. For a discussion of labor issues, *see* Thomas Howard, *Free Trade Between the United States and Mexico: Minimizing the Adverse Effects on American Workers*, 18 WM. MITCHELL L. REV. 507 (1992); *United States-Mexico Free Trade Agreement: Hearings Before the Comm. on Finance U.S. Senate*, 102d Cong., 1st Sess. 31 (1991) (statement of Thomas R. Donahue, Secretary Treasurer, AFL-CIO); Peter Morici, *Grasping the Benefits of NAFTA*, 92 CURRENT HISTORY 49 (1993); William B. Rich-

addressed itself to these large social policy issues in the 1993 NAFTA debate, rather than to the narrower, legalistic focus of the 1988 FTA debate. The focus of the 1988 debate was the constitutionality of supplanting judicial review with binational panel review of AD/CVD assessments.[80] Nevertheless, there is a notable connection between one of the major issues identified in the NAFTA debate and the *de minimus* argument advanced by the Reagan Administration in support of the FTA's binational panel review provision.

The 1988 argument described the panel system as comprised of governments with a common legal tradition whose member-panelists would simply apply the domestic law and follow the domestic legal precedents of the Parties' pre-existing AD/CVD process. The argument added that, in any case, instances of U.S.-Canadian AD/CVD disputes are rare.[81] The addition of Mexico, with a significantly different legal tradition, can only serve to diminish the strength of that argument.

2. Anti-dumping/Countervailing Duty Dispute Resolution Under NAFTA

NAFTA, in most respects, replicates the FTA. As with most Chapters of NAFTA, the AD/CVD dispute resolution provisions made few changes in FTA's Chapter 19 model.

Chapter 19 of NAFTA permits the parties to retain their own AD/CVD regimes.[82] Disputes over assessments made pursuant to a Party's domestic AD/CVD law may be appealed to a binational panel which replaces domestic judicial review, but must apply the law of the domestic government.[83] In all these respects, Chapter 19 of NAFTA mirrors Chapter 19 of the FTA.

Only three provisions diverge from the FTA model. Under the FTA, the parties must devise a harmonized system within seven years from the effective date of the Agreement or the Agreement may be

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ardson, *Congressional Approval of NAFTA*, 15 LOY L.A. INT'L & COMP. L.J. 115 (1992); Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937 (1994). For a discussion of the side agreements on non-trade issues appended to NAFTA as a result of these debates, *see* Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POLICY INT'L BUS. 391 (1993).

80. *See supra* note 77.

81. *See supra* note 13 and accompanying text.

82. NAFTA, *supra* note 5, at art. 1904.

83. *Id.* at art. 1904(3).

terminated by either Party upon six months notice.[84] Under NAFTA, Parties are required to consult with each other regarding AD/CVD issues annually.[85] A second difference is the inclusion of a safeguard mechanism in NAFTA[86] whereby a Party has standing to assert that another Party's domestic law interferes with NAFTA's panel review process. The charging Party is entitled to consultations and, ultimately, to the investigation and determination by a special committee.[87] If the special committee[88] finds in favor of the charging Party, the Parties have 60 days to resolve the dispute. If no resolution is reached, the charging Party may suspend operations of Article 1904 panels with respect to the other Party.[89] There is no comparable safeguard mechanism for protecting the operation of the binational panel review system in the FTA. The third change in NAFTA's version concerns provisions on the make-up and the standard and scope of review for Extraordinary Challenge Committees (ECCs). Under NAFTA, grounds for ECC review explicitly include failure of a binational panel to apply the appropriate standard of review under domestic law. Failure to apply the correct standard would be considered an action manifestly exceeding the panel's powers, authority, or jurisdiction.[90]

The scope of review provision has also been modified. Under NAFTA, ECCs are directed to revisit and examine the legal and factual reasoning which underpins a panel's decision; to look beyond the question of whether the panel simply applied the correct standard of review. In enlarging the scope of review, NAFTA also expanded the time in which an ECC can consider a challenge.[91] Finally, there is a provision in NAFTA that does not appear in its FTA counterpart:

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84. *See supra* note 70. Discussion on the interface of the two harmonization provisions is minimal. *See Canada Set to Negotiate Anti-dumping Changes in Trilateral Free Trade Talks, Official Says*, 8 INT'L TRADE REP. (BNA) 441 (Mar. 20, 1991). In any case the issue appears to be moot because NAFTA suspends FTA pursuant to Section 107 of the NAFTA Implementation Act.

85. NAFTA, *supra* note 5, at art. 1904.

86. *Id.* at art. 1905.

87. *Id.* at art. 1905.1-.2. Interference with the panel review process is deemed to occur whenever a domestic law prevents the convening of a panel, interferes with its deliberations, or prevents implementation of its determinations.

88. Special committee members are selected according to the process used to form an Extraordinary Challenge Committee and according to procedures set forth in Annex 1904.13. *Id.* at art. 1905.4-.5.

89. *Id.* at art. 1905(9).

90. *Id.* at art. 1904 13(a)(iii). The House Report on its NAFTA deliberations strongly suggests that the federal regulation "Certain Softwood Lumber Products" 951 Fed. Reg. 37453 (1986) inspired this provision.

91. NAFTA, *supra* note 5, at annex 1904.13.

NAFTA requires that the Parties select judges and former judges for the panel roster "to the fullest extent practicable."[92] These changes wrought in the FTA prototype by its successor, NAFTA, have the appearance of granting the dispute resolution panels and committees more of the characteristics of the judiciary in the common law tradition. Simultaneously, and somewhat anomalously, the evolutionary process is taking place under the auspices of an Agreement which extends membership to a Party with a very different legal tradition, one which is not grounded in common law precepts and perspectives.

3. The Daunting Task of Applying the Domestic (Importing) Country's Law

Binational panel members are charged with the responsibility of deciding whether, in a particular case, an AD/CVD assessment by the domestic or importing government "was in accordance with the antidumping or countervailing duty law of the importing Party."[93] Panel deliberations are proscribed by the standards of review and general legal principles that a reviewing court in the domestic (importing) country would apply to the case.[94] As discussed above,[95] this aspect of panel review was an important part of the Reagan Administration's *de minimus* argument: FTA's Chapter 19 would not affect U.S. AD/CVD law because its panels would merely apply U.S. AD/CVD law. The argument bears haunting similarities to legal formalism's simplistic view of the judicial process and suffers from similar superficialities: "finding" and "applying" the law inescapably involves more than the ministerial functions those terms seem to suggest. The function is inevitably reduced to the problem of interpretation. The problem is endemic to the judicial function. It is exacerbated in the FTA/NAFTA setting by the fact that panelists are drawn from different legal traditions. For example, under the FTA there has been a recurring problem regarding Canadian and American perceptions of the proper standard of review. As discussed earlier, the U.S. standard of review is "arbitrary and capricious," "abuse of discretion," "unsupported by substantial evidence on the record," or "otherwise not in accordance with the law."[96] By contrast, the Canadian standard of review is much more liberal and more

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92. *Id.* at Annex 1901.2. Both NAFTA and the FTA require the selection of judges and former judges for the ECC roster. *Id.* at annex 1904.13.

93. NAFTA, *supra* note 5, at art. 1904.

94. NAFTA, *supra* note 5, at art. 1904(3).

95. *See supra* note 67 and accompanying text.

96. *Id.*

deferential to the agency.[97]

The standard of review under Mexican law[98] is stricter than its Canadian counterpart. The issue of differing standards of review presents more than an academic conundrum: it has already resulted in a highly contentious review of a U.S. AD/CVD assessment against Canadian importers.[99] To date, these disputes have arisen under the FTA between countries that share a common law tradition. There will be many opportunities for disputes over interpretation of domestic law under NAFTA between countries who do not have the benefit of a shared legal tradition. The inclusion of Mexico[100] in NAFTA is problematic for "applying" the law of the importing country. The addition of Chile will be even more complex. The inclusion of other Western Hemisphere countries could increase the difficulties dramatically.[101] To paraphrase one commentator, "where legal traditions . . . are so markedly different . . . [the] legal training and law practice [of panelists in their own respective countries] . . . is more likely to hinder rather than aid . . . [panelists] in understanding their neighbor's legal system."[102] The danger is that these differences in legal perceptions could undermine confidence in the credibility and legitimacy of the legal process.[103] In hindsight, the *de minimus* argument on which the Reagan Administration relied is not compelling. The final argument advanced in sup-

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97. American Farm Bureau Federation v. Canadian Import Tribunal, 2 S.C.R. 1324 (1990).

98. Article 238 of the Código Fiscal de la Federación.

99. James F. Smith, *Confronting Differences in the United States and Mexican Legal Systems*, 1 U.S.-MEX. L.J. 85 (1993) (discussing the dispute between the ITC and the panel over the U.S. standard of review in Fresh, Chilled or Frozen Pork); 13 INT'L TRADE REP. (daily ed. BNA) 1291 (USA - 89-1904-11, Jan. 22, 1991).

> [T]here is a better chance of reversal under a stricter standard of review, the application of stricter standards to the United States and Mexico could result in more cases being appealed from those countries than from Canada. This imbalance could lead to perceptions of unfairness and thereby undermine the legitimacy of the system [citations omitted].

David Huntington, *Settling Disputed under the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 407, at n.186-7 (discussing another fallout from the differences in national standards of review).

100. *See* Smith, *supra* note 99 (discussing the Mexican legal tradition in detail).

101. In the event both a Western Hemisphere Free Trade Zone and an Asia-Pacific Free Trade Zone become realities, the polyphony of differing legal traditions could become a cacophony. *See supra* notes 16-18 and accompanying text.

102. Smith, *supra* note 99, at 85.

103. *See* Sullivan, *supra* note 71, at n.186 which states "[t]he author viewed firsthand an example of how a seeming lack of shared norms results in skepticism about the legitimacy of a legal process."

port of the panel review system is its constitutionality.

II. Constitutional Issues Raised by the Binational Review Panel Provision of the FTA

A. Fast Track Analysis by Congress.

During the debate on the FTA in 1988, Congress considered the constitutionality of the proposed binational panel review system as a replacement for traditional domestic judicial review.[104] By contrast, NAFTA debates focused on larger social issues. The panel review system was considered the "centerpiece" of the FTA[105] and its inclusion was pivotal to the Agreement reached by President Reagan and Prime Minister Mulroney.[106] Further, the House Committee on the Judiciary concluded that the panel review system would benefit the United States in the following four respects: (1) Although the panels would simply "apply" the same standards and general legal principles of review as a court would, the panels were mandated to issue a final determination within 315 days,[107] thus affording the parties economic advantages.[108] (2) The Committee viewed these panels as a temporary vehicle for permitting the free trade accord to be operational while the parties familiarize themselves with each others' legal regimes. The ultimate goal is to achieve a harmonized legal regime within five to seven years.[109] (3) Panel review reached cases otherwise not subject to judicial review under Canadian law.[110] (4) Private parties could reduce the expense of attorney fees, in certain cases, by obtaining the assistance of government legal staff.[111]

Both houses of Congress gave attention to the constitutional issues raised by Chapter 19's panel review regime, soliciting testimony and statements from various academic experts, practitioners, and trade and

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104. *See supra* notes 77-80 and accompanying text.

105. *Report of the Committee on the Judiciary*, H.R. Rep. No. 816, 100th Cong., 2d Sess., Rept. 100-816 Part 4 (1988).

106. *Supra* note 10 and accompanying text.

107. FTA, *supra* note 4, at art. 1911.

108. Report of the Committee, *supra* note 105 (*citing* Horlick, Oliver and Steger, Dispute Resolution Mechanisms in the Canada - United States Free Trade Agreement: The Global Impact at n.6 (J. Schott, M. Smith ed. 1988)). William K. Ince, Michele C. Sherman, *Binational Panel Reviews under Article 19 of the U.S. Canada Free Trade Agreement: A Novel Approach*, 37 Fed. Bus. News & J. 136, n.20 (1990) (reporting that CIT review takes, on average, almost two years).

109. *Id.* at note 7.

110. *Id.* at note 8.

111. *Id.* at note 9.

administration representatives.[112] Following hearings and deliberations Congress concluded that binational panel review, as a substitute for judicial review of AD/CVD assessments, was constitutional.[113]

Most of the witnesses called to testify before Congressional Committees found the Chapter passed constitutional muster.[114] The issues discussed before the Committees concerned constitutional implications arising from the Appointments Clause, Article III, Due Process, and general Separation of Powers considerations. As was the case with expert opinion submitted prior to passage of the FTA, commentaries published subsequently have generally held it is likely the Supreme Court would hold Chapter 19 constitutional.[115] While these commentaries have substantial merit, the possibility of the Supreme Court striking down Chapter 19 on grounds of unconstitutionality should not be dismissed out of hand. The Supreme Court will claim jurisdiction over a dispute if it finds the issues to be judicial.[116] In addition, the increasing

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112. A list of experts called by the Committee on the Judiciary of the House of Representatives is found in the Committee's Report, *supra* note 77; a list of experts called by the Senate Committee on the Judiciary is found in that Committee's Report, *supra* note 11.

113. Senators Howell T. Heflin and Dennis De Concini felt constrained to issue separate statements for the record, voicing their concerns about Chapter 19's constitutionality. Specifically, they challenged the argument, developed *infra,* that binational panels will be operating pursuant to international law, and, thereby, escaping Article III protection. They asserted that, in fact, AD/CVD assessment issues arise from domestic law and fall, therefore, arguably within the "protected core" of Article III jurisdiction. "The individuals who have shared their concerns with the Judiciary Committee regarding the Panel proposal have noted that matters subject to suit at common law or in equity or admiralty which unquestionably include import duty cases are at the 'protected core' of Article III Judicial powers." S. Rep. No. 100-509, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 2464 (1988) (citations omitted).

114. Notable dissents to the consensus were recorded by Professor David Shapiro of Harvard Law School in his letter to Congressman Robert Kastenmeier found in S. Rep. No. 501, 100th Cong., 2d Sess. 31 (1988) *reprinted in* 1988 U.S.C.C.A.N. 2395 (1988). A detailed opposition to the proposed Chapter 19 panels was submitted by the Customs & International Trade Bar Association, *reprinted in* 134 Cong. Rec. S8650, S8650 (daily ed. June 25, 1988).

115. *See e.g.,* Huston, *supra* note 19, at 529; Thomas W. Bark, *The Binational Panel Mechanism for Reviewing United States - Canadian Anti-dumping and Countervailing Duty Determinations: A Constitutional Dilemma?* 29 VA. J. INT'L L. 681 (1989); Gilad Y. Ohana, *The Constitutionality of Chapter Nineteen of the United States - Canada Free Trade Agreement: Article III and the Minimum Scope of Judicial Review,* 89 COLUM. L. REV. 897 (1989).

116. Most notably, in 1995, the Supreme Court struck down a statute which provided an extension of the statute of limitations for suits alleging fraud in the sale of securities brought pursuant to § 10(b) of the Securities Exchange Act of 1934 and pending at the time. Plaut v. Spendthrift Farms, 115 S. Ct. 1446 (1995). Prior to

number and complexity of cases handled by review panels of the Chapter 19 model in which the U.S. is a signatory only serves to weaken pro-constitutionality arguments since the arguments are premised on the notion that the review panel will have small dockets and will apply the law of the importing country. Given this background, the constitutionality issues will be revisited.

B. The Constitutionality of Chapter 19 Binational Review Panel System

1. The Presumption of Constitutionality

Many commentators begin the analysis by offering a presumption in favor of Chapter 19's constitutionality.[117] The presumption is grounded in the synergism found in the President's treaty-making power[118] and Congressional power to regulate commerce.[119] The combination of the Article I power to regulate commerce with foreign nations (*i.e.* assessing import duties) and the Article II power over foreign affairs (*i.e.* entering into free trade agreements) is particularly compelling. These powers are being exercised pursuant to the express Congressional directive to the President[120] to enter into an Agreement,

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Plaut, the Supreme Court in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 (1991), held that "[l]itigation instituted pursuant to § 10(b) and rule 10(b)(5) . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." On the same day *Lampf* was decided the Court ruled in James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991), that new law enunciated by the Court would apply not only prospectively but also retroactively to cases pending. Pursuant to the joint effect of these three cases, many petitioner's cases were dismissed as time-barred. As a prophylactic measure, Congress enacted § 27A of the Securities Exchange Act extending the limitation period to preserve pending cases that would have been considered timely filed under the law prior to *Lampf*. It was this extension, § 27A, that the Court found in *Plaut* to be an unconstitutional contravention of the Separation of Powers doctrine in that it compelled federal courts to reopen cases for which a final judgment had been rendered. *Plaut* at 1456. Though the facts at issue in *Plaut* bear little resemblance to the Chapter 19 conundrum, *Plaut* remains instructive for its strenuous defense of judicial power in the face of what it perceived as an encroachment by the legislative branch into its constitutional domain.

117. *See, e.g., supra* note 11, Statement of Harold H. Bruff; John S. Redditt Professor of Law, University of Texas, before the Senate Committee of the Judiciary, S. Hrg. 100-1081, Huston, *supra*, note 19.

118. U.S. CONST. art. II, § 2, cl. 2.

119. U.S. CONST. art. I, § 8, cl. 3.

120. Trade Act of 1974 and 1984 Trade and Tariff Act which gave the President authority to enter into free trade agreements. *See supra* notes 55-60 and accompanying text.

which is then ratified by Congress through implementing legislation.[121] *Dames & Moore v. Regan* presented the Supreme Court with a case where both powers were exercised in tandem, and the Court held that the presumption is strong "and the burden of persuasion would rest heavily upon any who might attack it."[122] The *Dames & Moore* case involved executive agreements which transferred claims by private litigants against Iran pending in U.S. federal courts to an international tribunal. These executive agreements were designed to resolve the Iranian hostage crisis. The Court upheld the transfer to an international tribunal not only on the grounds of the presumption accorded pooled powers of the executive and legislative branches exercised in foreign affairs, but also because of the international character of the adjudication. The Court noted that the use of international agreements to address private claims against foreign governments dates at least back to the case of the "Wilmington Packet" in 1799.[123] The linchpin of the case, then, would appear to be the international character of the adjudication. Most commentators have asserted that the FTA is an international law and that the Chapter 19 panels are internationally cast.[124] Some, however, have questioned the use of precedents like the Foreign Claims Settlement Commission (at issue in *Dames & Moore)* and the binational Boundary Commission (as in the Jay Treaty) asserting that they are not analogous to the Chapter 19 panel system.[125] These critics assert:

> We are not aware of any precedent where the United States has statutorily agreed to force its citizens or those entitled to the protection of its laws to go to a binational panel to construe United States laws and Federal agencies actions with the ultimate determination of those rights or obligations under United States statutes in that binational panel.[126]

Thus, while there is a presumption in support of the validity of the Chapter 19 panel review system, resting on the synergistic effect of the Article I and Article II powers which brought it into being, the pre-

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121. *See supra* note 4.

122. Dames & Moore v. Regan, 453 U.S. 654 (1981).

123. Dames & Moore v. Regan, 453 U.S. 654, 679 n.8 and accompanying text (1981).

124. BARK, *supra* note 115, at n.55.

125. Customs and International Trade Bar Association Supplemental Statement (hereinafter "Customs Bar Statement"). S. Hrg. 100-1018, *supra* note 11, at 182-183.

126. *Id.* at 183 (citations omitted).

sumption is not immune from the charge that it is domestic law rather than international law which is being reviewed (and reviewed by domestic law standards). Therefore, it can be argued that the Chapter 19 panels are not truly international in character and the situation is distinguished from *Dames & Moore*.

Beyond that point, all commentators agree that even assuming a purely international composition of the system, it is not immune from constitutional constraints. Two Supreme Court cases considering the scope of the treaty powers make that stricture clear. In *Geofroy v. Riggs*[127] the Supreme Court declared

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize *what the Constitution forbids, or a change in the character of the government* . . . .[128]

In *Reid v. Covert*,[129] the Court, relying on the *Riggs* precedent, found that an executive agreement between the U.S. and Britain was an unconstitutional violation of the Sixth Amendment in so far as it granted U.S. military courts martial jurisdiction over military dependents abroad. The court stated in a plurality decision "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 . . . they cannot be nullified by the Executive or by the Executive and the Senate combined."[130] Thus, even an international procedure to which the United States is a party must abide by the Constitution. The debate over the FTA identified three issues of Constitutional dimension.

2. Appointments Clause

One objection raised in opposition to the panel system was the selection of its members. When a Party challenges an AD/CVD assessment under the FTA, a panel is convened. Each Party selects two

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127. Customs Bar Statement, *supra* note 11, at 167-168 (*quoting* Geofroy v. Riggs, 133 U.S. 258, (1890)).

128. *Riggs*, at 267 (emphasis added).

129. Reid v. Covert, 354 U.S. 1 (1957).

130. *Id.* at 16-17.

members of a five member panel; the fifth member is chosen by agreement of the Parties, by the four panelists, or by lot.[131] The U.S. Trade Representative is authorized to select panel members for the U.S. after consulting with Congress.[132]

The Appointments Clause[133] requires that senior officers of the government be appointed by the Executive, with the advice and consent of the Senate; while inferior officers can be appointed alternatively by the President, by the Courts, or by agency heads.[134] Assuming that panelists would be considered inferior officers, there is no constitutional impediment to the appointment of the U.S. panelists by the U.S. Trade Representative. However, the Canadian panelists, if subjected to Appointments Clause analysis, could not pass Constitutional muster. The issue then becomes the parameters of the Appointments Clause.

In *United States v. Germaine*,[135] the Supreme Court declared that Officers of the federal government were divided into two classes: senior officers, nominated by the President and confirmed by the Senate; and junior officers who required no confirmation process. "All persons who can be said to hold an office under the government . . . were intended to be included within one or the other of these modes of appointment . . ."[136]

That construction of the Appointments Clause was adopted in *Buckley v. Valeo*[137] where the Supreme Court held the Federal Election Campaign Act unconstitutional in so far as it empowered the President pro tempore of the Senate and the Speaker of the House to appoint four members of the Federal Election Commission who were Officers of the United States "exercising significant authority pursuant to the laws of the United States."[138]

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131. *See supra* note 65 and accompanying text.

132. *See supra* note 65 and accompanying text.

133. U.S. CONST. art. II, § 2, cl. 2.

134. *Id.* The Provision states, in part, that 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 . . . 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.

Id. (emphasis added).

135. United States v. Germaine, 99 U.S. 508 (1879).

136. *Id.* at 509-510.

137. Buckley v. Valeo, 424 U.S. 1 (1976).

138. *Id.* at 125-126.

In *Morrison v. Olson*,[139] the Court held that independent counsel, appointed by the Special Division under the provisions of the Ethics and Government Act, was an "inferior" officer of the United States, whose appointment did not require Senate confirmation.[140] In so ruling, the Court noted that "the line between 'inferior' and 'principal' officers is one that is far from clear." The fact that, *inter alia*, the office of independent counsel was 'temporary' in the sense that an independent counsel is appointed essentially to accomplish a single task, was persuasive.[141] Similarly, panelists appointed from the roster by the U.S. Trade Representative serve on one specific review panel and there can be little doubt that they could qualify as "inferior" officers.[142]

The Canadian appointees remain problematic. Proponents of the panel review system proposed two solutions. First, they argued that the panels operated under international legal auspices; therefore panelists could not be considered Officers of the United States "exercising significant authority pursuant to the laws of the United States."[143] The drafters of the FTA sought to avoid the obvious point that the panelists would be reviewing U.S. AD/CVD law with the provision that, for purposes of panel review, domestic AD/CVD laws "are incorporated into th[e] Agreement."[144] As noted above in the discussion of the presumption of constitutionality, the linchpin of proponents' position on several constitutional issues rests on the characterization of the FTA, and its dispute resolution provision, as international law.[145] The second device proponents used to deflect constitutional challenges premised on the Appointments Clause was to provide in the Implementation Act that, in the event Chapter 19 was held unconstitutional on this issue, the President was authorized to adopt panel decisions as his own.[146] In spite of these facially corrective measures, the FTA's Chapter 19 and its progeny in NAFTA remain vulnerable to an Appointment Clause challenge.

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139. Morrison v. Olson, 487 U.S. 654 (1988).

140. *Id.* at 670.

141. *Id* at 671-2.

142. HUSTON, *supra* note 19, at 543 nn.110-111 and accompanying text.

143. HUSTON, *supra* note 19, at 543 nn.110-111 and accompanying text.

144. *Id.*

145. *See supra* notes 123-127 and accompanying text.

146. HUSTON, *supra* note 19, at n.102. This provision, dubbed the "fallback mechanism," was challenged in Coalition for Fair Lumber Imports v. United States, No. 94-1627 (D.C. Cir. 1994) and is discussed *supra* note 250 and accompanying text.

3. Due Process

The debate over Chapter 19's binational panel review raised two questions that implicate due process concerns. First, what forum is required by due process; second, what procedures does it mandate? The forum question of whether or in what circumstances due process requires judicial review will be taken up in the sub-section below dealing with Article II issues. The question of what procedures are necessary to satisfy due process is the focus of this subsection.

In his testimony before the Senate Committee, Professor Bruff stated that courts have found "in at least some circumstances Congress is free completely to exclude private parties from participating in tariff determinations."[147] But he hastened to add that the statement must be qualified by due process considerations "even where Congress is free to withhold statutory entitlements to particular government benefits, if it does confer entitlement, due process requires procedure appropriate to the context."[148] Conceding that whether AD/CVD laws can be deemed to confer entitlements "is a tricky questions of substantive law,"[149] Professor Bruff assumed that they did for purposes of his analysis. Adopting Professor Bruff's assumption, the analytical framework has been provided by case law.

In *Mathews v. Eldridge*,[150] the Supreme Court held that the Due Process Clause of the Fifth Amendment did not require that a recipient of Social Security disability benefits be granted an opportunity for an evidentiary hearing prior to termination of the benefits. In so doing, the Court distinguished its earlier decision in *Goldberg v. Kelly*[151] where the Court required a pre-termination hearing for welfare benefits. This pragmatic and contextual approach to due process analysis[152] is re-

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147. *See United States-Canada Free-Trade Agreement: Hearing Before the Senate Comm. on the Judiciary on the Constitutionality of Establishing a Binational Review Panel to Resolve Disputes in Anti-Dumping and Countervailing Duty Cases*, 100th Cong., 2d Sess. 101, 104 (1988) (Testimony of Prof. Harold M. Bruff stating "no one has a legal right to the maintenance of an existing rate or duty" (*quoting* Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 318 (1933) (Cardozo, J.)).

148. *Id.* at 105, citing Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985); Board of Regents v. Roth, 408 U.S. 564 (1972).

149. *Id.* The duty is paid to the government, not to the domestic manufacturer; thus the domestic party receives only an indirect benefit. The issue is whether this indirect benefit amounts to an entitlement for due process purposes.

150. Matthews v. Eldridge, 424 U.S. 319, 334 (1976).

151. Goldberg v. Kelly, 397 U.S. 254 (1970).

152. The Court quoted precedent for the proposition that due process " 'is not a technical conception.' " *Matthews*, 424 U.S. at 335 (*quoting* Cafeteria Workers v. Mc-

duced to a three-factor balancing test by the *Mathews* Court. The test requires, first, consideration of the private interest affected by official action; second, "the risk of an erroneous deprivation of such interest through the procedures" and the ameliorating value of "additional procedural safeguards;" and third, the nature and importance of the Government's interest and the impact additional safeguards might have on that interest.[153] The "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' "[154] This requirement is given definition by the nexus between the relative importance of the private interest and the government interest and the safeguards of the procedure provided. In *Schweiker v. McClure*,[155] the Court gave additional definition to the procedural requirements by emphasizing the importance of the expertise and qualification of the decision-makers.

Applying the *Mathews* and *Schweiker* template to Chapter 19, most commentators have found, as did Professor Bruff, that the procedural safeguards provided by it are sufficient for due process purposes: the interests of private litigants in accurate assessments and the government's interest in effecting a free trade zone with Canada as a part of its trade policy are adequately protected by the process provided in Articles 1901-1911 of the FTA.[156]

Assuming that the procedures are constitutionally firm, is the forum adequate for due process purposes? Under certain circumstances, courts have held that due process rights are not adequately protected unless an Article III court makes the ultimate decision in the case.[157]

Elroy, 367 U.S. 886, 895 (1961)). It " 'is flexible and calls for such procedural protections as the particular demands.' " *Id.* at 334 (*quoting* Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). And "whether the administrative procedures provided . . . are constitutionally sufficent requires analysis of the governmental and private interests that are affected." *Id.* at 334 (*quoting* Arnett v. Kennedy, 416 U.S. 134, 167-168 (1974) (Powell, J., concurring in part)).

153. *Id.* at 335.

154. *Id.* at 333 (*quoting* Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). *See also* Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985) ("due process is a flexible concept").

155. Schweiker v. McClure, 456 U.S. 188 (1982).

156. BRUFF, *supra* note 147, at 107-111.

157. *See, e.g.*, United States v. Raddatz, 447 U.S. 667 (1980) (use of a magistrate to hear live testimony and submit proposed findings of fact and conclusions of law in criminal matter did not violate due process since Article III judge was the ultimate decision-maker); Crowell v. Crowell, 285 U.S. 22 (1931) (delegating authority to deputy commissioner of United States Employees' Compensation Commission to hear compensation claims does not violate due process since commissioner's judgment may be appealed to a federal district court).

4. Article III Concerns

Article III provides that "the judicial power of the United States shall be vested in one [S]upreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[158] While it is clear that Congress has broad power to determine the jurisdictional reach of the federal judiciary, it is equally clear that this power is not unlimited. The apparently intractable problem is to craft an adequate test for delineating the extent of this type of legislative power. Three cases are considered pre-eminent guides through this murky area of law.

In *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*,[159] the Supreme Court struck down a provision in the Bankruptcy Reform Act which authorized bankruptcy judges to hear all civil proceedings related to bankruptcy litigation. These proceedings would include not only claims brought under federal law, but also traditional state law claims including, for example, claims alleging fraudulent conveyances or to recover accounts. A plurality found the delegation violated Article III since bankruptcy judges to do not enjoy Article III status but the issues they would hear under this act were entitled to Article III adjudication.[160] In his dissent, Justice White suggested that "the plurality opinion is not the first unsuccessful attempt to articulate a principled ground by which to distinguish Article I [legislative courts] from Article III courts."[161] Nevertheless, the plurality opinion can be said to stand for the following propositions: (1) Article III judges are protected by life tenure and non-reducible salary provisions in order to insure their independence from political forces emanating from the other two branches;[162] (2) bankruptcy judges are not Article III judges and do not enjoy such protection; and (3) the Bankruptcy Reform Act impermissably delegates essential attributes of judicial power to bankruptcy judges by permitting them to hear and determine a broad array of civil claims.[163]

Only three narrow exceptions have been carved from the general rule that the judicial power of the federal government is vested in Article III courts.[164] In each of these exceptions, the Article I courts have

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158. U.S. CONST., art. III, § 1.

159. Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982).

160. *Id.* at 81, 86.

161. *Id.* at 105.

162. *Id.* at 58.

163. *Id.* at 60.

164. *Id.* at 64.

been considered "consistent with, rather than threatening to, the constitutional mandate of separation of powers."[165] The exceptions include "non-Article III territorial courts,"[166] which have jurisdiction in areas which do not have a state government (e.g. the District of Columbia) and Congress has plenary powers. Second, military court-martial courts have been historically accepted as Article I courts.[167] Finally, Article I courts may adjudicate "public rights" issues.

The concept of "public rights" was first introduced in *Murray's Lessee*[168] and remains somewhat amorphous. In *Murray's Lessee*, summary proceedings by Article I courts to enforce a debt owed to the federal government by customs agents were deemed permissible because they involved issues of "public rights,"[169] but the Court did not define the term. Similarly, the plurality in *Northern Pipeline* refrained from attempting to define "public rights," but it declared that, at a minimum, it must involve a dispute between the federal government and others.[170] The opinion added that the presence of the federal government as a litigant was a necessary but not sufficient characteristic of "public rights."[171] It found that the matters at issue in *Northern Pipeline* did not fall within the category of "public rights" issues. In so holding, the Court rejected the argument that because a discharge in bankruptcy is a right conferred by federal statute, it is a "public right" amenable to Article I adjudication. Therefore, the case presented no violation of Article III. The Court agreed that bankruptcy discharge was indeed a "public right" similar to other rights created by Congress, such as licenses and entitlements. However, it found that the proceedings in bankruptcy with which the Article I judges would be concerned

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165. *Id.* The plurality recognizes the case of Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856) as seminal on this issue. In *Murray's Lessee*, the court said "we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Id.* at 284.

166. *Northern Pipeline*, 458 U.S. at 64. This exception was recognized in *Palmore v. United States*, 411 U.S. 389, 397 (1973) (Art. I courts have jurisdiction in the District of Columbia).

167. *Northern Pipeline*, 458 U.S. at 66.

168. *See, supra*, note 164.

> [T]here are matters, involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. *Murray's Lessee*, 59 U.S. at 284.

169. *Murray's Lessee*, 59 U.S. at 284.

170. *Northern Pipeline*, 458 U.S. at 70.

171. *Id.*

essentially involved traditional private law issues.[172] The plurality was not persuaded by the argument that bankruptcy is such a specialized area of the law that it requires particular expertise which Article I courts might provide.[173]

Applying the reasoning of the plurality in *Northern Pipeline* to Chapter 19 review panels, the pivotal issue is whether AD/CVD determinations involve "public rights" or "private rights." Clearly, the federal government is a party to the proceedings. And it could be argued that AD/CVD issues are arguably distinguishable from the kinds of cases listed in *Northern Pipeline* which involve traditional state law adjudication between private parties while disputes in AD/CVD cases arise from a "public right." On the other hand, since 1956,[174] the United States has treated AD/CVD issues as Article III issues by conferring Article III status on the CIT. It could thus be argued that, as a matter of precedent and practice, AD/CVD dispute resolution has been considered an exercise of judicial power entitled to judicial review.[175]

The second case in the Article III trilogy is Thomas v. Union Carbide Agricultural Products Co.,[176] where the Court upheld a provision in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) mandating arbitration to determine the compensation owed one manufacturer by another for the use of data disclosed as a part of the registration process. The Court found that where, as in that situation, registration was voluntary, the parties consented to arbitration. Further, limited judicial review of arbitration decisions was available under the legislative scheme; therefore, Article III was not violated.[177] Finally, the legislative scheme at issue arguably confers "public rights." Applying the *Thomas* analysis to Chapter 19 also yields ambivalent results. While *Thomas* lends support for the concept that Article I arbitration is an acceptable practical approach to dispute resolution arising out of government programs, the situation in *Thomas* is distinguishable from the panel review setting in two respects: importers cannot be said to

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172. *Id.* at 72.

173. *Id.*

174. In 1956 the U.S. Customs Court was designated an Article III court.

175. *See supra* note 125, at 170-171. The Customs and International Trade Bar argued that Congress evinced a clear recognition of AD/CVD issues as Article III issues in the legislative history of the Act of July 14, 1956 (Congressional Committee report stating "Customs Court handles cases which very properly come within the judicial power of the United States as set forth in Article III. . .). The Bar statement adds that this approach was given Supreme Court imprimatur in Gliddon Co. v. Zdanok, 370 U.S. 530 (1962).

176. Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985).

177. *Id.* at 589-93.

submit to panel review voluntarily as a result of their trading activity; and, unlike FIFRA, the FTA does not provide for even limited judicial review of panel determinations.[178]

The third case in the relevant trilogy is *Commodity Futures Trading Commission v. Schor*,[179] in which the Court upheld the authority of the Commission to adjudicate state common law counterclaims. In *Schor*, the Court applied a test for weighing the nature of the rights that are at issue against the Congressional purpose in establishing an Article I tribunal and the extent to which "essential attributes of judicial power" were jeopardized or implicated by the scheme.[180] Again, applying *Schor* to Chapter 19 leads to no clear resolution. Since it is unclear whether the rights at issue are "public" or "private," the first element of the test as applied to Chapter 19 remains indeterminate. The panel review regime was the compromise provision made to reach accord on the FTA;[181] therefore the governmental interest in establishing an Article I tribunal is strong. The second element argues in favor of the provision's constitutionality. Regarding the third factor, Professor Bruff stated that while the provision would be clearly unconstitutional in the domestic setting, its international character trumps other considerations under the *Schor* test.[182] Again, this argument in favor of the provision's constitutionality relies heavily on the characterization conferred on the AD/CVD laws which are expressly incorporated into it. But the *Northern Pipeline - Thomas - Schor* trilogy does not resolve the issue of whether Chapter 19 escapes an Article III challenge either because it concerns only public rights or because it concerns international rather than domestic law. In summary, the binational panel review scheme is vulnerable to an Article III challenge but the outcome is shrouded in the ambivalence of doctrine.

5. Complete Preclusion of Judicial Review: Constitutional Issues

A much less daunting task is presented by the issue in extreme: at what point or under what circumstances, if any, is judicial review of panel decisions mandated by the Constitution? During the debate on the FTA, witnesses who spoke to the issue uniformly counseled against complete preclusion of judicial review.[183] Courts do not favor preclusion

178. BRUFF, *supra* note 147, at 113-114.
179. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).
180. *Id.* at 852.
181. *See supra* note 10 and accompanying text.
182. *See* BRUFF, *supra* note 147, at 115.
183. *See, e.g.*, BRUFF *supra* note 147, at 111.

and will not find it by implication.[184] Indeed, even when faced with a statute that appears to preclude judicial review expressly, the Supreme Court has construed the "no-review clause" to permit judicial review of constitutional issues raised pursuant to it. So, for example, in *Johnson v. Robison*[185] a conscientious objector challenged the constitutionality of the Veterans' Readjustment Benefits Act ("Act") on the grounds that it conferred educational benefits in a manner that violated the First, Fifth and Fourteenth Amendments.[186] The Court interpreted the "no-review clause"[187] of the Act to permit constitutional challenges to the Act on the dual grounds that a "constitutional challenge is not to any . . . decision of the Administrator, [such challenge being expressly barred by the "no-review" clause] but rather to a decision of Congress" [in this case, the educational benefit scheme of the Act];[188] and the principle that " '[a]judication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.'"[189] To read the "no-review clause" as a bar to review of constitutional challenges would "raise serious questions concerning the constitutionality" of the no-review provision.[190]

Similarly, in *Webster v. Doe*,[191] the Supreme Court interpreted a provision of the National Security Act which gave discretionary power to an agency head as not precluding judicial review of a constitutional challenge.[192] The Court opined "[w]e do not think § 102(c) may be

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184. *See, e.g.*, United States v. Erika, Inc., 456 U.S. 201 (1982) (Court of Claims had no power to hear determination relating to benefits under Medicare); Heckler v. Chaney, 470 U.S. 821, 827 (1985) (Administrative Procedure Act, 5 U.S.C.A. §§ 701-706, established a general statutory right to judicial review in the absence of statute specifically precluding it); Leedom v. Kyne, 358 U.S. 184, 190 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action . . . .").

185. Johnson v. Robison, 415 U.S. 361 (1974).

186. *Id.* at 364.

187. The "no-review clause," section 211(a) of the Act, states in part "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision." *Id.* at 367.

188. *Id.*

189. *Id.* at 368 (quoting Public Utils. Comm'n v. United States, 355 U.S. 534, 539 (1958)).

190. Johnson v. Robinson, 415 U.S. at 366. It should be noted that the rights at issue in *Johnson* were "public" in nature.

191. Webster v. Doe, 486 U.S. 592 (1988).

192. Section 102(c) of the Act provides in part "the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of

read to exclude review of constitutional claims."[193] In the face of the relative clarity of precedent on this issue, the drafters of the FTA took the better part of valor and included a provision for judicial review of constitutional issues raised by the Agreement.[194]

6. Separation of Powers

Closely related to Article III and preclusion issues is the doctrine of separation of powers, although the focus of the former is the constitutional rights of private parties while the subject of the latter is the relative powers of the three governmental branches under the Constitution. Several arguments have been advanced in support of the proposition that Chapter 19's binational panel review scheme does not violate the doctrine. An essential component of these views includes the characterization of the panel system as "international." Again, no analysis has conclusively shown the system to be international and, therefore, *clearly* within the jurisdictional reach of the executive and legislative branches.[195] The membership of panels and ECCs is binational but the nature of the law panelists and committee members review, and the standard of review to be applied by them, are clearly domestic. Furthermore, in the United States, domestic AD/CVD law has a venerable history of being considered reviewable by the judiciary.[196]

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the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States." *Id.* at 594 (quoting 50 U.S.C. § 403(c)). The Court crafted the issue this way: "whether, and to what extent, the termination decisions of the Director under § 102(c) are judicially reviewable." *Id.*

193. *Id.* at 603.

194. United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, § 401(c), 102 Stat. 1851, 1879 (codified at 19 U.S.C. § 1516a(g)(4)(B)).

195. . For example, Professor Bruff's analysis rests heavily on what he believes to be the international character of FTA adjudication:

> Indeed, what is essential in crafting international agreements is the power to make arbitral bodies truly international in composition. Hence, they are creatures of the foreign policy powers to be found in Articles I and II . . . [a]ttempts by Congress to aggrandize itself at the expense of [another branch] . . . present fundamentally different problems from attempts to authorize or require the delegation outside the government of some functions that could be performed by the executive.

BRUFF, *supra* note 147, at 116-7.

196. *See* Customs Bar Statement, *supra* note 125, at 169-72:

> Given the historical fact of customs duty suits in law or equity in England and pre-constitutional United States, the clear expression of Congress in its 1956 recognition of the CIT's predecessor as an Article III court and the holdings of the majority of the Supreme Court on the constitutional require-

Other arguments advanced in support of the notion that the FTA poses no separation of powers problem are less persuasive. One view holds that there can be no real insult to the tripartite balance where, as a practical matter, the number of cases to be heard by the panels (in relation to the number of cases which will continue to be heard by the CIT) is small.[197] As discussed above, the strength of that agreement diminishes in inverse proportion to the increasing number of free trade accords to which the United States is bound. Finally, the argument has been advanced that the Court employs the Separation of Powers doctrine to eviscerate Congressional attempts to encroach upon powers properly assigned to the Executive, not the Judicial Branch.[198] While historically this has most often been the case, a notable exception occurred in 1995. In *Plaut v. Spendthrift Farms*,[199] the Supreme Court found a Congressional enactment to be an unconstitutional encroachment on the powers of the Judicial Branch in contravention of Separation of Powers precepts. The view that constitutional challenges premised upon the doctrine traditionally involve legislative aggrandizement at the expense of the Executive, not the Judiciary, predates *Plaut*. The Supreme Court has most recently proved itself perfectly capable of defending its own constitutional turf under Separation of Powers analysis.

The Doctrine of Separation of Powers is, of course, considered to be a fundamental tenet of American constitutional government. The headwaters from which the Doctrine flow are found not only in the U.S Constitution but also in the Federalist Papers.[200] The doctrine avoids an arid purism and permits flexibility in protecting the integrity of each

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ment for Article III court review, there can be no doubt that the binational panel . . . a non-judicial, non-United States body violates the tri-partiate [sic] nature of our Governmental system and denies to the importer citizen the protection afforded by an impartial and independent judiciary.

Id. at 171-72.

197. A related argument is that the panel system was designed as a temporary measure of seven years' duration to give the parties time to develop a harmonized body of AD/CVD law. *See* Bark, *supra* note 115, at n.113-14 and accompanying text. That argument has not stood the test of time; as the seven-year deadline approaches there appears to be no impetus for devising a unified system and, as discussed above, NAFTA institutes the panel system with no deadline for enacting a harmonized body of law to replace it.

198. *See* Huston, *supra* note 19, at 543 n.116.

199. Plaut v. Spendthrift Farms, 115 S.Ct. 1446 (1995).

200. *See, e.g.,* Mistretta v. United States, 488 U.S. 361, 380 (1989); Morrison v. Olson, 487 U.S. 654, 685-96 (1988); Bowsher v. Synar, 478 U.S. 714, 725 (1986); Nixon v. Administrator of General Services, 433 U.S. 425, 442 (1977); Buckley v. Valeo, 424 U.S. 1, 119 (1976).

Branch of the government while allowing a pragmatic overlap of powers in order to maintain "a nation capable of governing itself effectively."[201] But the Court has identified two markers by which to distinguish impermissible encroachments upon Judicial power from realistic interdependence of the branches:

> first, that the Judicial Branch neither be assigned nor allowed "tasks that are more properly accomplished by [other] branches . . . and, second, that no provision of law 'impermissibly threatens the *institutional integrity* of the Judicial Branch.' "[202]

The balance between the independence of the judiciary and the effectiveness of government is struck at the fulcrum of that Branch's "institutional integrity." Absent the three narrow exceptions identified above - territorial courts, court martials, and courts considering "public rights" issues - judicial functions vest solely in the Third Branch.

The importance of preserving the integrity of the judiciary has been said to rest in its independence from political pressure. That independence is assured in large part by the two Article III provisions of life tenure and undiminished salary. It was Alexander Hamilton's observation that

> [S]o long as the judiciary remains truly distinct from both the legislative and the executive . . . liberty can have nothing to fear from the Judiciary alone, but would have everything to fear from its union with either of the other departments . . . [and] permanency in office . . . may therefore be justly regarded as an indispensable ingredient . . . . [to maintaining the independence of] permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will . . . . [Article III also] has provided that the judges of the United States shall . . . receive for the services . . . a compensation, which "shall not be diminished during their continuance in office."[203]

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201. *Buckley*, 424 U.S. at 121.

202. *Mistretta*, 488 U.S. at 383 (quoting *Morrison*; Commodity Futures Trading Comm'n. v. Schor, 478 U.S. 833, 851 (1986)) (citation omitted) (emphasis added).

203. The Federalist Nos. 78, 79, at 466, 472-73 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Compensation Clause of Article III was most recently employed to invalidate statutes which reduced cost-of-living salary increases to federal

Thus, a discussion of the separation of powers implications of the FTA binational panel review regime would seem incomplete without a recognition of a principal reason for maintaining the integrity of the judicial function under the tripartite system of the Constitution: the judiciary is afforded some measure of freedom from the corrupting influence of political pressure to which the other two branches are vulnerable by the tenure and salary provisions of Article III. The importance those provisions might have in evaluating Chapter 19 emerges in the protracted and highly disputed AD/CVD case involving imports of softwood lumber from Canada to the United States.

III. THE SOFTWOOD LUMBER DISPUTE — A CAUTIONARY TALE

A. Introduction

While binational panels have now had the opportunity to review a number of AD/CVD assessment cases under the auspices of the FTA, the Softwood Lumber dispute seems an apt illustration of how the panel system operates. It serves to illuminate the panel system's effectiveness as a replacement for judicial review for a variety of reasons. First, the dispute, or lack thereof, spans a decade; it pre-dates the FTA.[204] Second, the Softwood Lumber dispute has made full use of the adjudicative procedures provided by the FTA for challenges to AD/CVD assessments: from panel review through ECC review to a constitutional challenge. Following ratification of the FTA, Canadian complainants requested binational panel review of AD/CVD assessments made by the U.S. Department of Commerce.[205] The issue came before the panel three times and on two occasions the case was remanded to Commerce.[206] The United States government sought review of the latest panel decision convening an ECC pursuant to section 1904.13 and Annex 1904.13 FTA.[207] Following a decision by the Committee dismissing the request for extraordinary challenge and affirming the decision and order of the review panel, a U.S. trade association filed suit in

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judges. *See also* United States v. Will, 449 U.S. 200 (1980).

204. Certain Softwood Lumber Products from Canada, 48 Fed. Reg. 24,159 (1983) (Lumber I). "Softwood Lumber" is defined as certain type of coniferous wood under subheadings 4407.10.00 - 4409.10.90 of the Harmonized Tariff Schedule of the United States.

205. Certain Softwood Lumber Products from Canada, 58 Fed. Reg. 44,653 (1993) (Panel Review I).

206. *See infra* notes 218-23 and accompanying text.

207. In the Matter of Certain Softwood Lumber Products from Canada ECC - 94-1904-01-USA, 1994 WL 405928 (NAFTA Binat. Panel Aug. 3, 1994).

the U.S. Court of Appeals, D.C. Circuit, challenging the constitutionality of Chapter 19 of the FTA and its implementing legislation.[208] Thus, the case lends perspective to the entire adjudicatory process crafted by the FTA. Third, what emerges from the case as it moves through the process is the very real problem of maintaining the panel system's appearance of legitimacy and integrity upon which its very success as a bilateral dispute resolution mechanism will rest. Absent the kinds of protection granted to Article III courts which serve to maintain the perception and the reality of their independence from political influence, decisions rendered by binational panels under extant and future free trade accords will be vulnerable to charges of self-interest and political pressure.

B. Lumber I through Lumber III and Beyond.

1. Lumber I

The first in a series of Softwood Lumber cases, which culminated in the 1995 constitutional challenge to Chapter 19, was initiated in 1982 by a petition from a U.S trade association[209] asking the Department of Commerce to assess a countervailing duty against softwood imports from Canada.[210] The Coalition alleged that fees collected from private parties under "stumpage programs"[211] amounted to an impermissible subsidy because the rates were "artificially low." Commerce declined to assess a duty in Lumber I finding no subsidy existed under U.S. law. That decision rested on three grounds: 1) the stumpage program did not confer rights on a "specific enterprise or industry, or group of enterprises or industries" as required by 19 U.S.C. § 1677(5)(B)(ii); 2) nor were the rights conferred "specific" as required by Commerce's specificity test; and 3) the stumpage rights were not conferred at "preferential" rates as defined by the Tariff Act of 1930.[212]

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208. Coalition for Fair Lumber Imports v. United States, No. 94-1627 (D.C. Cir., 1994). The case was dismissed and settled out of court. *See infra* note 250 and accompanying text.

209. U.S. Coalition for Fair Canadian Lumber Imports (Coalition).

210. Lumber I, *supra* note 204.

211. Most public forests in Canada (Crown forests) are owned and administered by provincial governments. "Stumpage programs" permit private parties to harvest timber from Crown forests for a fee. *See* Panel Review I, *supra* note 205.

212. Lumber I, *supra* note 204, at 24,167. Commerce found that the private parties participating in the programs totaled 27 companies representing three groups of industries. *See supra* note 207.

2. Lumber II

A new Coalition initiated a second challenge to the stumpage program in 1986.[213] The new petition asserted that evidence of preferential treatment had surfaced and that the law had materially changed since Lumber I.[214] Commerce reversed its earlier finding and, in its preliminary determination,[215] concluded that the stumpage programs amounted to a subsidy of the Softwood Lumber products exported to the U.S. by Canadian producers. In Lumber II, Commerce found the programs to be specific and preferential.[216]

3. Memorandum of Understanding

The preliminary determination in Lumber II was followed by a Memorandum of Understanding (MOU) executed by the United States and Canada on December 30, 1986. Under its terms the Coalition withdrew its petition and Commerce terminated its investigations, nullifying its preliminary determination in exchange for Canada's agreement to assess a 15% charge on Softwood Lumber exports to the U.S.[217] In 1991, Canada studied the stumpage programs in the timber-producing provinces of Alberta, British Columbia, Ontario, and Quebec. The study found that the stumpage programs produced a net revenue over production costs to the provinces, and Canada concluded that evidence of subsidy could no longer be found and served notice on the United States that it would exercise its right to terminate the MOU. Accordingly, the MOU was terminated on October 4, 1991.

4. Lumber III

On October 31, 1991, shortly after the effective termination date

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213. 51 FED. REG. 37,453 (1986) (Lumber II).

214. *Softwood Lumber from Canada*, 16 ITRD 1170, 1171 (1993) (citing 51 Fed. Reg. 21,205, 21,207 (1986)).

215. *Id.* at 1171 (citing 51 FED. REG. 37,453 (1986)).

216. *Id.* (citing 51 Fed. Reg. 37,453, 37,456-57 (1986)). In making the determination of preferentiality, Commerce utilized the Crown's cost of producing the timber as the measure of preference. Finding a differential between the cost of production and the stumpage fees, Commerce concluded that there was a benefit flowing from the stumpage programs amounting to 14.5% *ad valorem*. *See* 16 ITRD 1171 (citing 51 FED. REG. 37,453, 37,458).

217. *Certain Softwood Lumber Products from Canada*, 52 Fed. Reg. 315, amended, *Certain Softwood Lumber Products from Canada*, 52 FED. REG. 2,751 (1987). The 1987 Amendment to the MOU eliminated the charge against one province and exempted three other provinces.

of the MOU, Commerce self-initiated a countervailing duty investigation against Canadian imports of Softwood Lumber[218] on the basis that Canada's withdrawal from the MOU (the effective cause of the termination of Commerce's investigation and preliminary determination) served to reactivate the 1986 investigation.[219] As a part of the self-initiated investigation into the stumpage programs, Commerce also invited submission of evidence that Canadian federal and provincial log export regulations constituted countervailable subsidies.[220] The self-initiation and the additional log export issue were vigorously challenged by Canadian interests.[221] However, on March 5, 1992, Commerce issued a preliminary finding that not only did the stumpage programs in Alberta, British Columbia, Ontario, and Quebec confer a countervailable subsidy in the average amount of 6.25%, but also the log export restrictions in British Columbia conferred an average subsidy of 8.23%.[222] In the Final Determination, Commerce found an average subsidy of 2.91% was produced by the "stumpage programs"[223] and a subsidy of 4.65% was conferred by British Columbia's log export regulations.

5. Panel Review I

The Canadian federal government and several provincial governments then petitioned for Chapter 19 panel review of Commerce's Lumber III final determination.[224] Canadian parties challenged both grounds underlying Commerce's Final Determination of the stumpage program issue: specificity and preferentiality.[225] As to the specificity issue, the Panel found that Commerce was required to consider all relevant evidence relating to the four factors enunciated in the agency's Proposed Regulations.[226] The panel also concluded that Commerce

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218. *See* 56 FED. REG. 56,055 (1991).

219. Article 2.1 of The GATT Subsidies Code (Agreement on Interpretation and Application of Articles VI, XVI and XXIII on the General Agreement on Tariff and Trade) requires "special circumstances" to justify a "self-initiated" investigation. *See* 16 ITRD 1172 (citing 56 Fed. Reg. 56,055, 56,056-57 (1991)).

220. 56 FED. REG. 56,055, 56,057.

221. *See* 16 ITRD 1173 (citing correspondence of Robert C. Cassidy, Jr., to the Honorable Robert A. Mosbacher, Sr.).

222. *Certain Softwood Lumber Products from Canada*, 57 FED. REG. 8,800, 8,810, 8,816 (1992).

223. *Certain Softwood Lumber Products from Canada*, 14 ITRD 2166 (1992) (citing 57 FED. REG. 22,570, 22,604).

224. *Softwood Lumber from Canada*, 16 ITRD 1170 (1993).

225. *Id.* at 1181.

226. The four factors are: (1) extent to which government acts to limit the pro-

could not base its determination only on one factor (the number of participant industries in the stumpage programs). Commerce must also consider the "inherent characteristics" of the natural resources in assessing the importance of a small number of industry participants, especially if the government did nothing to limit the number of actual users. Additionally, the Panel felt Commerce should document the evidentiary basis for its findings on the factors considered.[227] Accordingly, the Panel remanded the case to Commerce for additional evaluation.[228] On the preferentiality issue, the Panel remanded to Commerce for consideration of whether the provincial stumpage programs distorted the competitive markets.[229] The Panel remanded the specificity issue[230] for a clarification of the agency's interpretation of the legal standard for a finding of subsidy and a showing that Commerce's determination met the standard by substantial evidence on the record.[231] The remand Order also called for certain recalculations.[232]

6. Panel Review II and III

On remand, Commerce analyzed the specificity issue under the four factors identified in the Proposed Regulations and essentially reiterated the previous holdings articulated in its Final Determination. In Panel Review II a majority of the Panel found that Commerce's holding was unsupported by substantial evidence on the record and otherwise not in accordance with the law. Commerce had failed to establish that either the stumpage program or the log export restrictions resulted in a market distortion. On remand, Commerce reaffirmed its previous decision but in accordance with the Panel's instructions, it found no countervailable subsidies. That ruling was affirmed by the Panel on February 23, 1994 (Panel Review III).[233] As a result, the U.S. Government petitioned for an extraordinary challenge.

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gram; (2) the number of businesses or groups that actually use a program; (3) whether dominant users or whether certain groups receive the most benefits; and (4) extent to which government exercises discretion in choosing who receives benefits under the program. *Id.* at 1184.

227. *Id.* at 1184-89.

228. *Id.* at 1189.

229. *Id.* at 1197.

230. *Softwood Lumber from Canada*, 16 ITRD 1170, 1203 (1993).

231. *Id.* at 1221.

232. *Id.* The court directed Commerce to recalculate the factors it considered in finding that the Canadian subsidies resulted in market distortion. *Id.*

233. *Id.* at 1236.

7. Extraordinary Challenge Committee (ECC)[234]

The ECC, convened pursuant to U.S. petition, was comprised of two Canadians and one American. The Committee decision split on national lines, as had the Panel Review III decision which preceded it. A majority of the ECC affirmed the panel opinion.[235] The United States had charged the Panel with exceeding its authority by failing to apply the appropriate standard of review and by substituting its own judgment for that of the agency. The U.S. contended that these errors materially affected the panel's decision and threatened the integrity of the panel review process.[236] The United States also alleged that there was a material breach of the rules of conduct identified in Article 1910 of the FTA on the part of both Canadian panelists and "serious conflict of interest" on the part of one Canadian panelist.[237] Annex 1901.2 of the FTA requires, *inter alia*, that panelists should not take instructions from or be affiliated with, or considered to be affiliated with, either country.[238] The Code of Conduct mandates ongoing disclosure of all interests or relationships of a panelist that might "affect the . . . [panelist's] independence and impartiality or that might reasonably create the appearance of bias."[239] A majority of the Committee (which is to say, two of the three members) found that "no allegation was raised against . . .[the two panelists by the U.S.] . . . until after the panel had twice decided the issue against the position of the United States although there was ample opportunity to do so."[240] The charges included alleged conflicts of interest and alleged failures to disclose conflicts of interests by the two panelists and the law firms with which they were associated. Justice Hart concluded that because panelists are required

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234. For an overview of Section 1904.13 delineating the contours of extraordinary challenges, *see supra* notes 68-70 and accompanying text. This was only the third time the ECC provision had been used. In 1991 the U.S. requested an ECC in a CVD case involving pork imports from Canada. *Extraordinary Challenge Committee Upholds Panel in Pork Case, Duties will be Imposed*, 8 ITRD 933 (1991). In 1993 the U.S. filed an ECC challenge in a CVD live-swine case involving Canada. *Extraordinary Challenge filed by U.S. in Countervailing Duty Swine Dispute*, 10 ITR 181 (1993).

235. *Supra* note 208, at 10.

236. *Id. See also* notes 68-70 and accompanying text.

237. Article 1904(13) includes, as a ground for an extraordinary challenge "(a)(i) a member of the panel was guilty of . . . a serious conflict of interest, or otherwise materially violated the rules of conduct, . . . and . . . (b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatened the integrity of the binational panel review process . . . ." FTA, *supra* note 4.

238. FTA, *supra* note 4.

239. FTA, *supra* note 4, at Article 1910.

240. *Supra* note 208, at 24 (opinion of Justice Gordon L.S. Hart).

to be conversant with the highly technical nature of the cases it is inevitable that they, and perhaps other members of their law firms, will practice in the field of international trade law either in the private sector, in a governmental capacity, or both. He felt that the two panelists had made "reasonable efforts to make sure that there was no work being conducted by their firms that would in any way interfere with their impartiality in the matter before the panel . . .[and] there was no intentional refusal to reveal any matter that would justify the opposite party in removing either panelist."[241] The Honorable Herbert B. Morgan agreed, adding that while both panelists were somewhat remiss in failing to comply strictly with the disclosure code, the disclosures that had been made were entirely consistent with undisclosed information. Therefore, he found no breach of either Article 1904.12(a)(I) or (a)(II).

The dissent of the Honorable Malcolm Wilkey (retired United States Circuit Judge) took issue with the majority's findings and conclusions. He first addressed the appropriate standard of review for Chapter 19 panels and ECCs and, in so doing, relied heavily upon the legislative history of the FTA and of NAFTA. He concluded that the majority failed to observe the statutory mandate to replicate the work of U.S. appellate courts reviewing agency action, to act as a substitute adjudicatory body that would apply U.S. law in a manner consistent with U.S. appellate courts.[242]

> If this substitute appellate system had not been intended to achieve similar results in applying U.S. law, the United States would never have agreed to it. The United States never contemplated that United States law would be changed by a binational body. If the substitute appellate system does not achieve similar results in applying U.S. law, it may not be long continued.[243]

Specifically, Judge Wilkey in his dissent charged that a majority of the Panel directed Commerce to make a certain determination and to ap-

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241. *Id.* at 28. The charges concerned alleged failures to disclose representation of the Canadian federal and provincial governments and certain Canadian lumber companies by the law firms of the two panelists on matters unrelated to the Softwood Lumber case at issue. One panelist was also charged with a serious conflict of interest because a company, of which he was president, was under contract with the Canadian government to present a seminar on Canadian merger law applicable to the airline industry. *Id.* at 39-40 (opinion of Judge Morgan).

242. *Id.* at 50 (Wilkey, J. dissenting).

243. *Id.*

ply a certain methodology in contravention of the proper role assigned to appellate review of agency action. That role, said Judge Wilkey, was aptly characterized in *Daewoo Electronics v. International Union.*

> On review of the issue, like the trial court [CIT], we look to see whether substantial evidence supports the decision of the ITA on this issue . . . . The question is whether the record adequately supports the decision of the ITA, not whether some other opinion could reasonably have been drawn. As frequently stated, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[244]

According to Judge Wilkey, both the Panel and the Committee failed to observe the standard: the Panel by disaffirming Commerce's finding and methodology; the Committee by failing to disaffirm the Panel opinion. Judge Wilkey opined that the Committee's action violated its mandate (implicit in the FTA but made explicit in NAFTA) that a panel which failed to observe the appropriate standard of review had, *per se,* manifestly exceeded its powers.[245] It is notable that Judge Wilkey attributes the majority's error to the fact that

> they are experts in trade law; they are not experts in the field of judicial review of agency action . . . [therefore] we are likely to continue to get a usurpation of the administrative agency functions by well intentioned experts in the field of trade law . . . [and] there are only three ways to become an expert in the matter of judicial review of administrative agency action . . . to spend some years either arguing cases before a reviewing court, teaching courses in administrative law, or sitting on one of those reviewing courts itself.[246]

Pointedly, Judge Wilkey concluded "[w]e always lose something

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244. Daewoo Electronics v. Int'l Union, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (citations omitted). *Daewoo* was a countervailing duty case in which the Federal Circuit, the judicial counterpart of the ECC, overruled the directive of the CIT (the Panel's judicial counterpart) to employ a certain methodology to determine the tax incidence of commodity taxes upon consumers in the Korean market.

245. *Supra* note 208, at 67-71. *See also supra* notes 90-91 and accompanying text. NAFTA also requires an ECC to examine the panel's legal and factual analysis underlying the decision. *Id.*

246. *Supra* note 207, at 74.

by resorting to *ad hoc* Tribunals."[247] Certainly the Softwood Lumber case is evidence of the truth of that statement. Both the charge that the panelists or Committee members lack at least the perception of expertise in the judicial review process, and the charge that panelists were compromised by bias or self-interest, served seriously to weaken the effectiveness of the dispute resolution mechanism of the FTA, or NAFTA, and any of the progeny that adopt it.

As to the latter charge, Judge Wilkey opined that because disclosure is the keystone for the panel selection process, affording each Party the right to reject any panelist on the basis of that disclosure, failure to disclose is fatal to the decision of any panel comprised of non-disclosing panelists. On that basis, Judge Wilkey concluded that the opinion and judgment of the Softwood Lumber panel should have been set aside.[248]

The vehemence with which opposing positions were held in the case was evidenced by the filing of a constitutional challenge in the D.C. appellate court following the Committee's affirming the Panel's decision and the dismissal of the U.S. Trade Representative's extraordinary challenge to that decision.[249]

8. Coalition for Fair Lumber Imports v. United States (Coalition Case)

The Coalition Case requested declaratory and injunctive relief pursuant to Section 401(c) of the U.S. - Canada Free Trade Agreement Implementation Act of 1988[250] on the grounds that it was uncon-

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247. *Id.* at 76.

248. Judge Wilkey concluded

> I cannot think of anything that could more materially affect a Panel's decision then [sic] to have two of the necessary votes cast by members who have failed to disclose matters which would affect their impartiality. Likewise, to tolerate such failure to disclose would constitute the most obvious and dangerous threat to the integrity of the Binational Panel review process . . . .

Id.

249. *See supra* note 209 and accompanying text.

250. Pub. L. No. 100-449, *reprinted in* 1988 U.S.C.C.A.N. 1851, 1879 (codified at 19 U.S.C. § 1516 a (g)(4)(A)) which provides in part:

> (A) . . . An Action for declaratory judgment or injunctive relief, or both, regarding a determination on the grounds that any provision of, or amendment made by, the U.S. - Canada Free-Trade Implementation Agreement Act [sic] of 1988 implementing the binational dispute settlement system under Chapter 19 . . . violates the Constitution may be brought in the United States Court of Appeals for the District of Columbia Circuit. The Circuit's decision is subject to expedited appeal to the Supreme Court. 19 U.S.C.

stitutional on its face and as applied, in a number of respects.

The Coalition alleged that it had been denied Fifth Amendment due process in the Softwood Lumber case. It alleged that Chapter 19's dispute resolution procedure, and the fallback mechanism[251] permitting the President to adopt panel decisions, violated the Appointments Clause of Article II § 2, cl. 2, the due process and equal protection requirements of the Fifth Amendment, and the Doctrine of Separation of Powers implied by Articles I, II, and III. The Coalition's petition was filed on September 14, 1994. On December 15, 1994, the Coalition announced that it was requesting dismissal of its lawsuit. On the same day the U.S. Trade Representative announced an agreement with Canada to establish a bilateral consultative body on trade in Softwood Lumber to resolve the ongoing dispute. Simultaneously, the Department of Commerce announced plans to refund the cash deposits with interest held by Commerce under the countervailing duty order issued by Commerce in 1992.[252] The softwood dispute is not yet resolved in a political sense, although its legal component is now apparently complete. However, it leaves behind a legacy which casts doubt on the strength and legitimacy of Chapter 19's dispute resolution mechanism.

IV. CONCLUSION

The Chapter 19 dispute resolution mechanism, which replaces judicial review of AD/CVD assessments with a binational panel review system, was devised at the "eleventh-hour" of FTA negotiations to ensure Canada's participation in the free trade accord. Congressional approval of the panel review system in 1988, under "fast-track" analysis, was premised upon several assumptions, some of which have been called into question by subsequent events. The Reagan Administration argued in 1988 that the system would have minimal impact on the

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§ 1516a(g)(4)(H).

"The Coalition case is only the second constitutional challenge filed against the FTA's dispute resolution mechanism. An earlier suit filed by the National Council for Industrial Defense in August 1993 was dismissed because it was erroneously filed in the District of Columbia District Court." 10 ITR 152.

251. *See supra* note 146 and accompanying text.

252. *See* USTR Release, Dec. 15, 1994. The refund was expected to be between approximately $450 and $575 million plus interest. II ITR 34 d 31. The first meeting of the consultative body was scheduled for March 1, 1995. II ITR to d 45. The first meeting was held in May. An extended consultation commenced July 7, 1995, in Kelowna B.C. The U.S. government and the Coalition reported they were seeking significant changes in the Canadian marketing system for Softwood Lumber to be reported at the third meeting which is scheduled for September 1995. CALGARY HERALD, 1995 WL 730856 (July 7, 1995).

United States' adjudicatory regime because panels would hear few cases and panelists from both countries share a common legal heritage and would simply "apply" the existing AD/CVD law and applicable standards of review of the importing country. The Softwood Lumber case alone illustrates the naiveté of the argument, and portends increasing difficulties with the panel review system, the mechanism of choice for dispute resolution in proliferating free trade accords to which the United States is a signatory. It requires no prescience to anticipate that increasing disparities in legal traditions and institutions of the member nations in these accords will serve to intensify the problem of simply "applying" the law of an importing nation. And the increasing number of AD/CVD cases the widening free trade spheres will circumscribe can only exacerbate the impact on American legal institutions. Additionally, the conclusion reached in 1988 that Chapter 19's panel review mechanism is constitutional remains open to question. In particular, the mechanism is vulnerable to the charge that it results in a rebalancing or unbalancing of the relative powers of the three branches, thereby running afoul of the Separation of Powers Doctrine.

Constitutional concerns aside, the problems which we can now perceive arising from the Chapter 19 regime warrant a closer look at the efficacy of the mechanism as currently crafted. At the outset, it must be acknowledged that the strictures and exigencies of trade agreements between competing sovereignties preclude the use of Article III courts for judicial review, as a practical matter. Few importing nations would agree to that arrangement. On the other hand, the normative standard of independence which Article III establishes by way of its tenure and salary protections could be adopted to great advantage. Indeed, these protections might be seen as vitally important to dispute resolution tribunals in the arena of international trade. Despite the benign trappings of free trade accords, international trade remains a highly politicized and contentious affair. The economic stakes are extremely high. Absent some provisions for protecting the independence of binational trade tribunals they will be vulnerable to various influences which could compromise their role. Perceptions of bias, conflicts of interest, and political influence will undermine the legitimacy and effectiveness of binational panels. As Hamilton reminds us

> [p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the tribunals'] necessary independence. If the power of making them was committed either to the executive or legislature there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness

> to hazard the displeasure of either; if to the people or persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted by the Constitution and the laws.[253]

Simply put, the effectiveness of binational review tribunals would be well served by the salary and tenure protections that secure the independence of Article III courts.

253. FEDERALIST No. 78 at 471 (Rossiter ed. 1961).