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Dave Resnicoff

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The United States-Canada Free-Trade Agreement and the U.S. Constitution: Does Article III Allow Binational Panel Review of Antidumping and Countervailing Duty Determinations?

INTRODUCTION

The United States-Canada Free-Trade Agreement[1] (FTA or Agreement) entered into force on January 1, 1989.[2] The Agreement is comprehensive and addresses many sources of friction in U.S.-Canadian economic relations.[3] The Agreement not only eliminates all tariffs between the two countries, but reduces many non-tariff barriers, liberalizes investment practices, and covers trade in services as well.[4]

In response to the particular Canadian concern that U.S. antidumping (AD) and countervailing duty (CVD) laws[5] are unfairly enforced against Canadian producers, chapter 19 of the Agreement provides for binational panel review of AD and CVD determinations, and obligates both parties to severely limit domestic judicial review of such determinations.[6] The United States-Canada Free-Trade Agreement Implementation Act of 1988[7] (Im-

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[1] United States-Canada Free-Trade Agreement, Jan. 2, 1988, United States-Canada, _ U.S.T. _, T.I.A.S. No. _ at _, reprinted in 27 I.L.M. 281 [hereinafter Free Trade Agreement or Agreement].

[2] Memorandum on the Canada–U.S. Free Trade Agreement, 24 WEEKLY COMP. PRES. Doc. 1668–69 (Jan. 2, 1989).

[3] *See infra* notes 64–87 and accompanying text.

[4] *See generally* Free Trade Agreement, *supra* note 1.

[5] Antidumping laws provide relief to American firms injured by foreign exporters who dump their goods in the United States. In general, dumping occurs when goods are sold in the U.S. market at a lower price than in the home market. J. BARTON & B. FISHER, INTERNATIONAL TRADE AND INVESTMENT: REGULATION OF INTERNATIONAL BUSINESS 275 (1986). Countervailing duty laws provide relief to American firms injured by foreign exporters who receive subsidies from their government. In general, subsidies take the form of cash payments or other government benefits which allow foreign exporters to lower their U.S. price below what it would otherwise be. *Id.* at 335–40.

[6] Free Trade Agreement, *supra* note 1, at ch. 19. *See also infra* notes 76–96 and accompanying text.

[7] United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L.

plementation Act) brings the United States into compliance with this obligation. In short, the Implementation Act allows any party to an AD or CVD determination to request their government to initiate binational panel review of the domestic determination.[8] The Implementation Act further provides that if binational panel review is requested, then no United States court may exercise jurisdiction to review the determination.[9]

Thus, the Implementation Act dramatically reroutes the avenue of appeal for interested parties in antidumping and countervailing duty actions. Binational Panel Review raises several diverse constitutional considerations.[10] One such consideration is whether article III of the U.S. Constitution limits Congress's power to provide for binational panel review of AD and CVD determinations to the exclusion of U.S. courts. This Note focuses on article III implications for binational panel review in light of the traditional public rights doctrine and the Supreme Court's modern approach toward non-article III adjudication.

Binational panel review satisfies significant and immediate Canadian concerns over application of U.S. trade laws. Such review also allows negotiations to continue over appropriate dumping and subsidy standards to govern the new free trade relationship.[11]

No. 100–449 §§ 401–10, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1851, 1878–98 (1988) (amending scattered sections 19 U.S.C., 28 U.S.C.).

[8] *Id.* § 401(c), 19 U.S.C. § 1516a(g)(8). The Agreement obligates the United States and Canada to initiate binational panel review upon receipt of a request. Free Trade Agreement, *supra* note 1, at art. 1904, para. 5.

[9] United States-Canada Free-Trade Agreement Implementation Act of 1988, *supra* note 7, § 401(c), 19 U.S.C. § 1516a(g)(2). *See infra* notes 115–17 and accompanying text.

[10] First, does article III of the U.S. Constitution require review of final antidumping (AD) and countervailing duty (CVD) determinations by an article III court? If article III does not require article III review, may the President and Congress delegate such review power to a binational panel? May they do so by an international agreement? Do parties to administrative determinations have a substantive due process right to review by an article III court? Do they have a procedural due process right to article III court review? A final question is whether a binational panel, consisting of nonexecutive officers, may constitutionally make binding recommendations as the panel is empowered to do? *See* H.R. REP. No. 816, 100th Cong., 2d Sess. pt. 4 (1988). Several authors have recently addressed some or all of these issues. *See generally* Christenson and Gambrel, *Constitutionality of Binational Panel Review in Canada-U.S. Free Trade Agreement*, 23 INT'L LAW. 401 (1989); Note, *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); Note, *The Binational Panel Mechanism for Reviewing United States-Canadian Antidumping and Countervailing Duty Determinations: A Constitutional Dilemma?* 29 VA. J. INT'L LAW 681 (1989).

[11] *See infra* notes 76–87 and accompanying text.

Because binational panel review is central to the Agreement, its constitutionality is important to the Agreement's continuing vitality.[12]

The constitutionality of binational panel review also impacts on the ability of the United States to establish similar institutions that adjudicate trade claims or claims arising from entirely different policy areas. Canada is not the only foreign state experiencing problems with U.S. trade law.[13] It is possible that other states will seek similar arrangements with the United States.[14] Importantly, however, most negotiators of the Agreement do not view binational panel review as a model for similar arrangements between the United States and its trading partners.[15] Binational panel review presented a viable solution to U.S.-Canadian trading problems because of several factors unique to the U.S.-Canada relationship, such as common legal systems, a shared tradition of appellate review, similar standards for appellate review, similar AD and CVD law, and a common language.[16] The absence of a common legal heritage with Japan, Mexico, and most EEC countries would make similar arrangements with these countries much more difficult.[17] Although short run prospects for similar arrangements appear unlikely, it must be remembered that one hundred years ago a free trade regime between the United States and Canada seemed equally illusory.[18] The conclusion of the United States-Canada Free-Trade Agreement points out, however, that over time, increasing economic interdependence creates new demands and new opportunities for international integration. It is both timely and practical to consider the constitutionality of binational panel review because of its importance to the

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[12] By pacifying Canadian concerns over U.S. antidumping and countervailing duty laws while negotiations over acceptable standards continue, exclusive binational panel review remains a cornerstone of the Agreement's acceptability in Canada. *See supra* notes 76–87 and accompanying text. If article III is held to require review of AD and CVD determinations by an article III court, then that cornerstone will crumble. In the short run, such a scenario would irritate the Canadian business community. In the long run, it might become a political liability for the Canadian Progressive Conservative Party and jeopardize the future of the Agreement, which is cancellable on six months notice. Free Trade Agreement, *supra* note 1, at art. 2106.

[13] Colgan, *Colloquy on ADR*, 40 ME. L. REV. 225, 240 (1988).

[14] Telephone interview with Jeanne Anderson, Deputy General Counsel, International Trade Commission (Feb. 13, 1989).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See infra* notes 25–27 and accompanying text.

Agreement and its implications for the future conduct of U.S. foreign policy.

Part I of this Note explains the political history of the Agreement.[19] Part II surveys the Agreement's economic objectives and central provisions.[20] Part III considers the economic concerns that inspired binational panel review, and explains the general structure of such review.[21] Part IV discusses the impact of the Agreement and its implementing legislation on U.S. antidumping and countervailing duty law.[22] Part V examines the Court's traditional and modern tolerance of non-article III adjudication.[23] Part VI considers whether binational panel review of AD and CVD determinations is compatible with the Court's modern tolerance of non-article III adjudication.[24] This Note concludes that under its modern analysis, the Court would find binational panel review permissible.

I. POLITICAL HISTORY OF THE AGREEMENT

A free trade regime between the United States and Canada has been a common goal of both Washington and Ottowa since the turn of the century.[25] Though such close economic integration promises increased welfare for both parties, the issue has been particularly volatile in Canadian politics.[26] By proposing to establish a free trade regime with the United States in 1911, the Canadian Liberal Party lost its parliamentary majority.[27] The most recent effort by Prime Minister Brian Mulroney, lasting from 1985 through 1987, sparked an acerbic and passionate national election, and nearly dashed his Progressive Conservative Party's chances to retain its majority in the House of Commons.[28]

Prime Minister Mulroney formally requested that the United States and Canada explore the possibility of a comprehensive free

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[19] *See infra* notes 25–63 and accompanying text.

[20] *See infra* notes 64–75 and accompanying text.

[21] *See infra* notes 76–101 and accompanying text.

[22] *See infra* notes 102–117 and accompanying text.

[23] *See infra* notes 118–216 and accompanying text.

[24] *See infra* notes 217–276 and accompanying text.

[25] Janaco, *Painful History Lessons*, MACLEAN'S, Nov. 21, 1988, at FT4. The two nations have tried several times to conclude agreements reducing tariffs between them, only to be scuttled in the end by Canadian nationalist sentiments against a closer economic relationship with the United States. *Id.*

[26] *Id.*

[27] *Id.* at FT5.

[28] *See infra* notes 40–63 and accompanying text.

trade agreement on September 26, 1985.[29] On December 10, President Reagan notified Congress that he would enter into negotiations with Canada toward this end.[30] U.S. and Canadian representatives began negotiations in Ottawa on June 17, 1986.[31] Eighteen months later, on December 9, 1987, they initialed the final text of the Agreement.[32] The Prime Minister and the President signed the Agreement on January 2, 1988.[33]

By its own terms, the Agreement could not enter into force until the United States and Canada each passed implementing legislation bringing domestic law into compliance with it.[34] On July 26, 1988, Representatives Foley and Michel introduced H.R. 5090, a Bill to Implement the United States-Canada Free-Trade Agreement, in the U.S. House of Representatives.[35] On August 9, after substantial committee review, the House passed the bill by a vote of 366 to 40.[36] The House then referred the bill to the Senate, which passed it the next month by a vote of 83 to 9.[37] President Reagan signed the bill into law on September 28, 1988.[38] Though carefully considered by both houses of Congress, the Agreement and its implementing legislation met little opposition in the United States.[39]

In contrast, an intense national debate over the FTA raged throughout Canada and culminated in the dissolution of Parliament and a national election. The Canadian government initially expected smooth passage of implementing legislation. Mulroney, whose government negotiated and concluded the Agreement, enjoyed strong support from his Progressive Conservative major-

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[29] United States-Canada Trade, 21 WEEKLY COMP. PRES. DOC. 1143 (Sept. 30, 1985).

[30] United States-Canada Free-Trade Agreement, 21 WEEKLY COMP. PRES. DOC. 1485 (Dec. 15, 1985).

[31] Office of the United States Trade Representative, Summary of the U.S.-Canada Free-Trade Agreement 2 (February 1988) (unpublished document available from the Office of the U.S. Trade Representative).

[32] *Id.*

[33] Statement on the U.S.-Canada Free Trade Agreement, 24 WEEKLY COMP. PRES. DOC. 4 (Jan. 11, 1988).

[34] Free Trade Agreement, *supra* note 1, at art. 2105.

[35] 134 CONG. REC. H5887 (daily ed. July 26, 1988).

[36] *Id.*; 134 CONG. REC. H6665 (daily ed. Aug. 9, 1988).

[37] 134 CONG. REC. S12857 (daily ed. Sept. 19, 1988).

[38] Remarks on signing the United States Canada Free-Trade Agreement Implementation Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1217–18 (Sept. 28, 1988).

[39] *Canada Endorses Trade Accord with the United States*, 46 CONG. Q. WEEKLY REP. 3631 (Dec. 31, 1988).

ity in the House of Commons.[40] Likewise, Mulroney counted on approval of the House of Commons' action by the Canadian Senate, for despite that body's domination by liberal appointees, it rarely challenges the Commons' measures.[41]

Under pressure by his own Liberal Party to counter a recent surge in support for the Progressive Conservative Party,[42] Liberal leader John Turner recognized that opposition to the Agreement would be a strong electoral base from which to challenge Mulroney.[43] Faced with no prospect of challenging Mulroney's majority in Commons on the free trade issue, Turner announced on July 20, 1988 that the Liberal dominated Senate would delay its approval of FTA implementing legislation until the Prime Minister called a national election.[44]

Because the Agreement specified January 1, 1989, as the deadline for each Party to pass implementing legislation,[45] and because of certain political liability for not confronting the Liberal leader's challenge, Mulroney was forced to demonstrate popular support for the Agreement.[46] On October 1, with his party leading the polls,[47] the incumbent Prime Minister requested Governor General Jeanne Sauveé to dissolve Parliament and announced that a general election would be held on November 21.[48]

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[40] *Canada Bill Submitted, OPIC Measure OK'd*, 46 CONG. Q. WEEKLY REP. 2093 (July 30, 1988).

[41] Members of the Canadian Senate are appointed, and customarily defer to the elected House of Commons. *Id.* There is, however, some precedent for the Senate to block House bills. *See* Janigan, *The Chamber With a Past*, MACLEAN'S, Aug. 1, 1988, at 16. *See generally* Laver & Wallace, *John Turner's Senate Gamble*, MACLEAN'S, Aug. 1, 1988, at 10.

[42] Laver and Wallace, *supra* note 41 at 10.

[43] The Globe and Mail, July 22, 1988, at A1, col. 5. According to the *Globe and Mail*, a Canadian newspaper, one public opinion poll showed that voters who opposed the Agreement felt stronger about the issue than those who supported it. The Globe and Mail, July 22, 1988, at A2, col. 1. Moreover, 70 percent of voters sampled desired to vote on the Agreement before it became law. Laver & Wallace, *supra* note 41, at 12.

[44] The Globe and Mail, July 21, 1988 at A1, col. 2. Laying the cornerstone for his campaign, Turner proclaimed that, "This issue is so fundamental that the people of Canada deserve and must have the right to judge . . . . We're challenging the legitimacy of this Government to enact a fundamental change in the direction of Canada." *Id.*

[45] Free Trade Agreement, *supra* note 1, at art. 2105.

[46] Laver and Wallace, *supra* note 41, at 10. In effect, the liberal leader challenged the Prime Minister to put the Agreement before the electorate. If Mulroney had not risen to the challenge, and instead had attempted to postpone conclusion of the Agreement, he would have exposed himself to accusations of timidity. *Id.*

[47] The Globe and Mail, Oct. 3, 1988, at A7, col. 3.

[48] Janigan, *The Call to Arms*, MACLEAN'S, Oct. 10, 1988, at 10. The Prime Minister claimed Canadians would make their decision "based on the issues of leadership, economic

Despite the Prime Minister's attempt to run on the competence and record of his government, Turner successfully focused national attention on the impending intimate economic association with the United States.[49] Warning of imminent economic and political domination, Turner stirred easily aroused Canadian nationalism[50] and seriously challenged the Conservative's lead.[51] As a matter of substance, Turner claimed that the Agreement left Canadian social, agricultural, and regional development programs vulnerable to attack as unfair trade subsidies.[52] As a matter of nationalism, Turner claimed that the abandonment of economic independence would result in mitigated Canadian sovereignty and diluted cultural integrity.[53] Turner's zealous appeal reached its zenith in a fiery televised debate with Mulroney, as he declared, "I happen to believe you've sold us out,"[54] and accused Mulroney of turning Canada into a U.S. colony "[w]ith one signature of a pen."[55] Mulroney responded weakly; four days later the Liberal Party surged ahead of the Progressive Conservatives in the polls.[56] Having struck a Canadian nerve, Turner kept up his attack on Mulroney's patriotism, and portrayed him "acting as headwaiter at the White House."[57]

Mulroney's Conservatives responded to this shift in momentum by unleashing a new strategy. Instead of focusing on the Agreement's beneficial impact on Canada, Conservative leaders emphasized the potential costs of not ratifying the Agreement. They primarily warned of U.S. protectionism and a general loss of confidence in the Canadian investment environment by foreign investors.[58] The Prime Minister publicly emphasized that two million Canadian jobs were dependent on the FTA.[59]

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prosperity and the ability of the Conservative Party to manage the changes that face the country . . . ." The Globe and Mail, Oct. 3, 1988, at A1, col. 2.

[49] *See* Janigan, *A Critical Debate*, MACLEAN'S, Oct. 24, 1988, at 12–14; Wallace & Tedesco, *Straight to the Heart*, MACLEAN'S, Nov. 14, 1988 at 12; N.Y. Times, Nov. 15, 1988 at A8, col. 1.

[50] The Globe and Mail, Oct. 3, 1988, at A8, col. 1.

[51] *Id.*

[52] The Globe and Mail, Nov. 9, 1988, at A10, col. 3.

[53] *Id.*; *See also* Drouin, *Free Trade Bill May Force Canadian Elections*, Wall St. J., Aug. 8, 1988, at 17, col. 4.

[54] The Globe and Mail, Oct. 26, 1988, at A1, col. 2.

[55] *Id.* at A2, col. 1.

[56] The Globe and Mail, Nov. 1, 1988, at A1, col. 5.

[57] Janigan, *A Critical Debate*, MACLEAN'S, Oct. 24, 1988, at 13–14.

[58] *Id.*

[59] The Globe and Mail, Nov. 2, 1988, at A1, col. 1. Editorials warned of impending

On election day, Mulroney's counter strategy proved triumphant, as Canadians returned a Progressive Conservative majority to the House of Commons.[60] Canadian implementing legislation was reintroduced and passed by the House of Commons on December 24, 1988.[61] The Senate, satisfied that Mulroney commanded a mandate to ratify the FTA, passed the legislation on December 30, 1988.[62] With implementing legislation effective in both the United States and Canada, the Agreement entered into force by its own terms on January 1, 1989.[63]

II. OBJECTIVES AND CENTRAL PROVISIONS OF THE AGREEMENT

The objectives of the FTA include: elimination of barriers to trade in goods and services between the parties, facilitation of conditions of fair competition, liberalization of investment conditions, establishment of effective procedures for joint administration of the Agreement and the resolution of disputes, and facilitation of further bilateral and multilateral cooperation to expand and enhance the benefits of the Agreement.[64] To these ends, the FTA progressively eliminates customs duties on all goods originating in the territories of each party.[65] National treatment is to be accorded to all goods of the other party pursuant to the General Agreement on Tariffs and Trade.[66] The parties also agree to eliminate technical standards which are "unnecessary obstacles to trade,"[67] and increase access to government pro-

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American protectionism. The Globe and Mail, Nov. 1, 1988, at A6, col. 2. Front page news stories stressed the dependence of U.S.-Canadian relations on successful conclusion of the Agreement. The Globe and Mail, Nov. 9, 1988, at A6, col. 6. The Conservatives' tactics received a boost when, in apparent response to enhanced Liberal prospects, the value of the Canadian dollar dropped sharply. The Globe and Mail, Nov. 1, 1988, at B1, col. 4. The fall of the dollar, the spectre of an irate U.S. Congress, and the prospect of a Liberal government inspired the Canadian business community to rally behind Mulroney. Some companies held information sessions for employees to underscore the Agreement's importance to their economic well-being. The Globe and Mail, Nov. 19, 1988, at A1, col. 7. One business lobby, the Canadian Alliance for Trade and Job Opportunities, spent 1.3 million dollars on a four page defense of the Agreement in Canada's national newspapers. *Id.* at A2, col. 6.

[60] MacKenzie, *After the Decision*, MACLEAN'S, Dec. 12, 1988, at 16.

[61] *See Canada Endorses Trade Accord with the United States*, *supra* note 39, at 3631.

[62] *Id.*

[63] *See supra* note 2 and accompanying text.

[64] Free Trade Agreement, *supra* note 1, at art. 102.

[65] *Id.* at art. 401.

[66] *Id.* at art. 501.

[67] *Id.* at art. 603.

curement for each party.[68] Specific attention is given to the controlled reduction of barriers to trade in agriculture, wine, energy, and automotive goods.[69] The Agreement notably provides for national treatment of service industries[70] and for reduction of barriers to financial services as well.[71]

The Agreement also attempts to alleviate tensions over the application of U.S. antidumping and countervailing duty laws.[72] Toward this goal, chapter 19 of the Agreement provides for review of domestic AD and CVD determinations by panels composed of Canadians and Americans.[73] Chapter 19 also obligates each party to limit its court's appellate jurisdiction over AD and CVD determinations.[74] In effect, article 19 reroutes appellate review of AD and CVD determinations from domestic courts to binational panels. Though this scheme represents an innovative mechanism to resolve trade disputes, several questions arise regarding its compatibility with the U.S. Constitution.[75] An analysis of whether article III restricts Congress's power to provide for exclusive binational panel review of AD and CVD determinations, however, warrants an examination of U.S. and Canadian concerns which forged Chapter 19.

III. BINATIONAL PANEL REVIEW

The provisions of chapter 19 represent an innovative compromise between two intractable positions. Throughout FTA negotiations, secure and predictable access to the large U.S. market

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[68] *Id.* at art. 1301.

[69] *Id.* at chs. 7–10.

[70] *Id.* at ch. 14.

[71] *Id.* at ch. 17.

[72] *See infra* notes 76–87 and accompanying text.

[73] Free Trade Agreement, *supra* note 1, at ch. 19.

[74] *Id.* at art. 1904, para. 15(g)(i). In sum, chapter 19 in part provides that through their respective governments, any interested party to a final AD or CVD determination may request review of that determination by a binational panel. If such a request is made, no domestic court may entertain an appeal from any of the parties. Any request for binational panel review must be made within thirty days of publication of the final determination. If a party to the determination desires domestic judicial review, the party may do so only after giving notice to all other interested parties ten days before the last day a panel may be requested and none of the parties subsequently request panel review. *Id.* at para. 15(g)(ii).

[75] *See* H.R. REP. No. 816, *supra* note 10, at 4–5. The U.S. House of Representatives Judiciary Committee concluded that the panel and implementing legislation conforms with the Constitution. *Id.*

remained a central concern of the Canadian government.[76] The Canadian business community perceived that relief available to U.S. producers under U.S. antidumping and countervailing duty laws posed a major obstacle to a stable economic environment.[77] Recent growth in trade law actions against Canadian exporters heightened this concern.[78] Canadian business managers claimed that unpredictable application of AD and CVD laws significantly deterred them from exporting their goods to the United States.[79] To avoid AD and CVD actions, Canadian firms selling in the U.S. market had to modify their pricing and marketing strategies.[80] The significant costs associated with defending against AD and CVD actions also affected their business decisions.[81] Canadian negotiators contended that continuation of such a system would be incompatible with the goals of the FTA and proposed that the two parties clarify what type of subsidies[82] would be appropriately actionable in the context of a free-trade relationship.[83]

U.S. negotiators made it clear that substantive revision of U.S. AD and CVD laws would be impossible in the short run.[84] They were, however, able to agree on a two part solution. First, chapter 19 provides for continuing negotiation over appropriate AD and CVD laws to govern the new U.S.-Canadian trading relationship.[85] Until such an agreement is reached, chapter 19 establishes a procedure for binational panel review of each country's AD and CVD determinations.[86] To facilitate use of binational panel review, chapter 19 obligates each party to limit its domestic courts' appellate jurisdiction to review AD and CVD determinations.[87]

Providing for review of AD and CVD determinations by a panel which includes Canadian participation pacified Canadian con-

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[76] Hart, *Trade Remedy Law and the Canada–United States Trade Negotiations*, in UNITED STATES/CANADA FREE-TRADE AGREEMENT: THE ECONOMIC AND LEGAL IMPLICATIONS 273 (1988).

[77] *Id.* at 274.

[78] Rugman, *A Canadian Perspective on U.S. Administered Protection and the Free Trade Agreement*, 40 ME. L. REV. 305, 310 (1988).

[79] Hart, *supra* note 76, at 286.

[80] *Id.*

[81] Rugman, *supra* note 78, at 320–21.

[82] *See supra* notes 76–96 and accompanying text.

[83] Telephone interview with Jeanne Anderson, Former Deputy General Counsel, International Trade Commission (Feb. 13, 1989).

[84] *Id.*

[85] Free Trade Agreement, *supra* note 1, at art. 1907.

[86] *Id.* at ch. 19.

[87] *Id. See supra* note 74 and accompanying text.

cerns about the application of U.S. trade laws. U.S. negotiators were able to give Canadian producers a window on the arcane world of U.S. trade law, while allowing the United States to retain its current AD and CVD laws and apply them in the first instance.

A. *Structure of Binational Panel Review*

Chapter 19 provides that, upon request of a party to the Agreement,[88] a binational panel shall be established to review final antidumping or countervailing duty determinations of a competent domestic investigating authority.[89] A binational panel's task is to decide whether the determination was in accordance with the antidumping or countervailing duty law of the importing party.[90]

Upon review, a binational panel may decide that the law of the importing country was applied correctly and uphold the final determination,[91] at which point the dispute will be settled.[92] A binational panel may also decide that the importing party's law was applied incorrectly, and remand the final determination for action "not inconsistent with the panel's decision."[93] A decision of a panel to either uphold or remand a final determination is binding on the parties.[94]

The Implementation Act ensures that the United States fulfills its obligations under the Agreement by providing that when a binational panel reviews an administrative determination and remands it to the appropriate agency for action "not inconsistent with a decision of the panel or committee," the agency must take such action.[95] Judicial review of any action taken pursuant to the binational panel's recommendation is specifically prohibited.[96]

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[88] The Agreement obligates the United States and Canada to initiate binational panel review upon request of a person otherwise entitled to commence domestic judicial review of a final determination. Free Trade Agreement, *supra* note 1, at art. 1904, para. 5. A party to the Agreement may also request limited review of final AD and CVD determinations on its own initiative. *Id.*

[89] Free Trade Agreement, *supra* note 1, at art. 1904.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] United States-Canada Free-Trade Agreement Implementation Act of 1988, *supra* note 7, § 401, 19 U.S.C. § 1516a(g)(7).

[96] *Id.*

B. *Composition of a Binational Panel*

When a party requests binational panel review of a final AD or CVD determination, the United States and Canada will select panelists.[97] Each party is to develop a roster of twenty-five candidates and each will choose two panelists from their respective rosters.[98] The parties then jointly determine a fifth panelist.[99] Candidates for a panel must be citizens of the United States or Canada and must be "of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment, and general familiarity with international trade law."[100] Further, no candidate is to be affiliated with either party or take instructions from either party.[101]

IV. BINATIONAL PANEL REVIEW AND U.S. TRADE LAW

A. *U.S. Antidumping and Countervailing Duty Law: Before and After the Implementation Act*

The Tariff Act of 1930[102] provides U.S. firms with a mechanism to attain relief from foreign dumping and subsidization. The Tariff Act of 1930 empowers the International Trade Administration (ITA) and the International Trade Commission (ITC) to investigate instances of alleged dumping and subsidization, make final determinations, and grant relief.[103] Investigations into dumping or subsidies may be commenced by either the ITA or

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[97] Free Trade Agreement, *supra* note 1, at annex 1901.2.

[98] *Id.* at annex 1901.2, para. 1–2.

[99] *Id.* at annex 1901.2, para. 3.

[100] *Id.*

[101] *Id.* Interestingly, judges are not considered as "affiliated with either party." *Id.* That judges are considered unbiased raises the question of whether substantive gains have been achieved in the creation of the binational panel. Presumably, unbiased judges will remain so regardless of whether they sit on a binational panel or in a domestic court. The answer might be that review by a binational panel consisting of members of both states has the appearance of greater integrity from the perspective of a foreign litigant. Thus, despite questionable substantive achievements, the mere form of the binational panel satisfies Canadian concerns, and therein seems to lie its political value to the Canadian government.

[102] Tariff Act of 1930, 46 Stat. 590 (codified as amended in scattered sections of 6, 19, 22, 31, and 46 U.S.C.).

[103] *Id.*, 19 U.S.C. §§ 1671, 1673. Code reference to the "Commission" refers to the International Trade Commission. Code reference to the "Administering Authority" refers to the International Trade Administration. *See Id.*, 19 U.S.C. § 1516a .

by an interested party who files a petition with the ITA on behalf of an industry.[104]

In the case of subsidies, the ITA investigates whether a subsidy is paid with respect to the manufacture, production, or exportation of merchandise imported into the United States.[105] Simultaneously, the ITC investigates whether an established industry in the United States is materially injured or threatened with material injury, or whether the establishment of an industry in the United States is materially retarded by reason of imports of the subsidized merchandise.[106] If both the ITA and the ITC make affirmative determinations, then the ITA must issue a CVD order which imposes a duty on the imported merchandise equal to the amount of the net subsidy.[107]

In the case of dumping, the ITA investigates whether foreign merchandise is sold in the United States at less than fair market value.[108] Simultaneously, the ITC investigates whether an established industry in the United States is materially injured, or threatened with material injury, or whether the establishment of an industry is materially retarded.[109] If the ITA and ITC both make affirmative determinations, then the ITA must issue an antidumping duty order equal to the amount by which the foreign market value exceeds the U.S. price.[110]

Though neither the FTA nor the Implementation Act changes the standards for relief or the mode of investigation and review,[111] the Implementation Act dramatically changes the route for judicial review of final AD and CVD determinations. Prior to the Agreement all parties to AD and CVD proceedings could appeal to the United States Court of International Trade (USCIT) contesting any factual findings or legal conclusions upon which a final determination was based.[112] Appeal of a USCIT decision was available in the U.S. Court of Appeals for the Federal Circuit,

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[104] 19 U.S.C. §§ 1671a, 1673a.

[105] *Id.* § 1671(a)(1).

[106] *Id.* § 1671(a)(2).

[107] *Id.* §§ 1671d(c)(2), 1671e.

[108] *Id.* § 1673(1).

[109] *Id.* § 1673(2).

[110] *Id.* § 1673d(a).

[111] *See* Free Trade Agreement, *supra* note 1, at ch. 19; United States-Canada Free-Trade Agreement Implementation Act of 1988, *supra* note 7, § 401, 19 U.S.C. § 1516a.

[112] Tariff Act of 1930, *supra* note 102, 19 U.S.C. § 1516a.

and finally in the U.S. Supreme Court.[113] Thus, the prior legislative scheme provided parties to final AD and CVD determinations with opportunity for review by an article III federal court.[114] With limited exceptions, the Implementation Act significantly narrows the opportunity for article III court review.[115] Under the Implementation Act, any party to an AD or CVD determination may request binational panel review.[116] If binational panel review is requested, U.S. courts lose jurisdiction to entertain appeals from the lower proceeding,[117] and a binational panel will exercise exclusive appellate jurisdiction over the matter. Use of binational panel review is not mandatory, and if neither party requests such review, federal courts may still hear appeals of AD and CVD determinations. In light of Canadian concerns over bias in U.S. courts, however, it is unlikely that Canadian parties to AD and CVD actions will prefer U.S. courts to a binational panel. Thus, the implementing legislation in effect transfers appellate jurisdiction over AD and CVD actions from article III courts to an international organization. It is this transfer that sparked article III concerns.

V. ARTICLE III AND THE PUBLIC RIGHTS DOCTRINE

Congress' modification of the appellate route for AD and CVD determinations involves two distinct actions. First, Congress severely limited the appellate jurisdiction of all federal courts over AD and CVD determinations. Second, Congress provided for binational panel review and thereby created a judicial structure in which non-article III courts undertake both initial adjudication

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[113] Communication from the President of the United States Transmitting the Final Legal Text of the U.S.-Canada Free-Trade Agreement Implementation Act of 1988, and a Statement of Administrative Action, Pursuant to 19 U.S.C. 2112(e)(2), 2212(a), H.R. Doc. No. 216, 100th Cong., 2d Sess. 13, at 261 (1988).

[114] Dispute Settlement Provisions of the U.S.-Canada Free-Trade Agreement, 1988: Hearings on H.R. 5090 before the United States Senate Committee on the Judiciary, 100th Cong., 2d Sess. __ (1988) [hereinafter Senate Judiciary Committee Hearings](prepared statement of Professor Andreas F. Lowenfeld, New York University).

[115] United States-Canada Free-Trade Agreement Implementation Act of 1988, *supra* note 7, § 401, 19 U.S.C.A. § 1516a(g)(2)–(3). Jurisdiction is not withdrawn from U.S. courts in a case where no party to the final determination requests binational panel review. *Id.* Further, jurisdiction to review challenges to the constitutionality of the implementing legislation is granted to the United States Court of Appeals for the District of Columbia Circuit. *Id.*

[116] *Id.*, 19 U.S.C. § 1516a(g)(8).

[117] *Id.*, 19 U.S.C. § 1516a(g)(2).

and appellate review of AD and CVD actions. This Note undertakes separate analyses of article III limits on each of these actions.

A. *Article III Limits on Congress' Power to Modify Federal Court Jurisdiction*

Article III, section 1 of the U.S. Constitution provides that, "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[118] Though article III establishes the Supreme Court, it does not by itself establish inferior federal courts.[119] Rather, the text clearly leaves Congress discretion whether to create inferior federal courts at all.[120]

Section 2 of article III defines the "judicial Power" that is vested in the Supreme Court and the inferior courts.[121] The language of article III suggests that if Congress does indeed choose to establish inferior federal courts under section 1, then those courts will exercise the whole "judicial Power" as defined in section 2. As a matter of judicial doctrine and Congressional practice, this is not the case.[122] Instead, Congress enjoys significant power to modify federal court jurisdiction.[123]

The Supreme Court has consistently held,[124] and it is generally accepted,[125] that Congress is not constitutionally obligated to establish inferior federal courts. Rather, Congress enjoys complete discretion in prescribing inferior federal court jurisdiction, constitutional issues notwithstanding.[126] In 1845, the Court boldly expressed its views on this congressional power:

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[118] U.S. CONST. art. III, § 1.

[119] *Id.*

[120] Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 23 (1981).

[121] "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. CONST. art III. § 2.

[122] Sager, *supra* note 120, at 33.

[123] *See infra* notes 124–40 and accompanying text.

[124] *See infra* notes 127–28 and accompanying text; *see also* Sheldon v. Sill, 49 U.S. (8 How.) 441, 448 (1850).

[125] A. WRIGHT, LAW OF FEDERAL COURTS 35 (1983); Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 912 (1984); Sager, *supra* note 120, at 33.

[126] Sheldon v. Sill, 49 U.S. (8 How.) at 448. There is serious doubt that Congress may deny jurisdiction to review constitutional issues. *See* Sager, *supra* note 120. The Free Trade

> [T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of witholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.[127]

This passage anchors a "clear—and consistent—line of authority in the Supreme Court," and its principle is valid today.[128]

Events at the Constitutional Convention and subsequent congressional practice explain judicial and academic acceptance of Congress' power. Professor Paul Bator, writing on Congress's power over federal court jurisdiction, explains that two pressure groups forged a compromise that resulted in giving Congress discretion to establish inferior federal courts.[129] One group believed the Constitution itself ought to establish inferior federal courts.[130] The other believed that the Constitution ought to provide for no inferior federal courts at all.[131] This debate reflects the tension running throughout the convention between advocates of a strong federal government and proponents of minimal federal powers. Professor Bator argues that instead of settling the issue as a matter of constitutional principle, the two groups agreed to leave it's resolution to the legislature's political judgment.[132] Professor Sager, writing on this subject, agrees that the clear intent of the framers was "to compromise divergent views about the inferior federal judiciary by placing the matter in Congress' hands."[133] This "Madisonian compromise" was central to the Constitution's eventual approval by the convention.[134]

Agreement implementing legislation preserves article III court review of constitutional issues. United States-Canada Free-Trade Agreement Implementation Act of 1988, *supra* note 7, § 401 19 U.S.C. § 1516a(g)(4).

[127] Cary v. Curtis, 44 U.S. (3 How.) 235, 244 (1845).

[128] Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1032–33 (1982).

[129] *Id.* at 1030.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 1031.

[133] Sager, *supra* note 120, at 33.

[134] Brown, *Article III as a Fundamental Value—The Demise of Northern Pipeline and Its Implications for Congressional Power*, 49 OHIO ST. L.J. 55, 85 n.257 (1988).

Though the compromise left Congress full discretion whether to establish article III courts, the plain logic of article III led to the same conclusion in 1789 as it does today—that if Congress chooses to establish inferior federal courts, those courts will exercise the full judicial power and Congress may not modify their jurisdiction.[135] This same logic was argued in Congress before passage of the first judiciary act, and was rejected.[136] Instead, Congress firmly established its control over the jurisdiction of the federal judiciary. Congress interpreted its ultimate power to breathe life into inferior federal courts to include the lesser power of prescribing jurisdiction.[137] Subsequent congressional practice did not vary.[138] Illustratively, lower courts did not acquire jurisdiction to hear federal law or constitutional questions until 1875,[139] and, "at no time in history has the entire judicial power been vested in the federal courts."[140] Thus, the Madisonian compromise explains the Court's view that Congress's power to create federal courts and prescribe federal court jurisdiction is absolute.

The Supreme Court has consistently held that Congress may modify the jurisdiction of federal courts it has created.[141] Scholars agree that Congress's power to modify federal court jurisdiction is consistent with the history of the Constitutional Convention and subsequent congressional practice.[142] In this light it appears that article III in no way limits the power of Congress to withdraw jurisdiction from federal courts to review final antidumping and countervailing duty determinations. Thus, in its withdrawal of such jurisdiction from federal courts, Congress acted consistently with its past practice as supported by constitutional doctrine.[143]

As Congress brought U.S. law into compliance with U.S. obligations under the Free Trade Agreement, however, it did not just limit federal court appellate jurisdiction over AD and CVD cases. Rather, Congress also provided an alternate forum of re-

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[135] A. WRIGHT, *supra* note 125, at 4.

[136] *Id.*

[137] Bator, *supra* note 128, at 1031.

[138] *Id.* at 1031–02.

[139] *Id.* at 1032; A. WRIGHT, *supra* note 125, at 4.

[140] A. WRIGHT, *supra* note 125, at 4. Professor Sager writes that, "[i]n the end, then, one returns to the rather clear fit between article III and the explicit act of compromise that was intended to let Congress determine the need for lower federal courts." Sager, *supra* note 120, at 36.

[141] *See supra* notes 118–40 and accompanying text.

[142] *Id.*

[143] *Id.*

view.[144] By providing for binational panel review, Congress fundamentally altered the institutional structure of AD and CVD adjudication. Now, administrative agencies perform initial AD and CVD adjudication, and, if requested by a party to the dispute, an international organization will review the agencies' decision. Under this scheme, there may be no article III court participation at any point. The remaining question is whether article III limits Congress' power to create this new scheme of non-article III adjudication and review.

B. *Non-Article III Adjudication and Review: The Traditional Public Rights Doctrine and the Modern Approach*

1. Textual Analysis of Article III

Article III vests the judicial power of the United States in the constitutionally established Supreme Court and the congressionally created inferior courts.[145] Article III also requires that judges serving on article III courts receive irreducible salaries and hold their tenure for life.[146] Behind article III lies the specific intent of the framers to create a judiciary separate from the political pressure of the executive and legislative branches[147] that would exercise the federal judicial power.[148] Thus, article III seems to command that whenever the federal government exercises judicial power, it must do so in article III courts, composed of independent article III judges.[149]

Judicial doctrine and congressional practice indicate that Congress is not limited by a strict interpretation of article III.[150] Rather, several Supreme Court decisions firmly establish Congress's power to create non-article III courts that adjudicate claims, even if such claims fall squarely within constitutionally defined judicial power.[151] The Court has traditionally recognized

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[144] *See supra* notes 102–17 and accompanying text.

[145] *See supra* note 118 and accompanying text.

[146] U.S. CONST. art. III, § 1.

[147] Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 58 (1982).

[148] U.S. CONST. art. III, § 1.

[149] *Northern Pipeline*, 458 U.S. at 57–60.

[150] *Id.* at 916–17.

[151] Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 198. The Supreme Court has consistently recognized Congress' power to establish courts with judges who have neither salary nor tenure protections as mandated by article III. These courts are referred to as legislative courts, or article I courts. *Id.* The Court has also recognized Congress' power to provide for non-article III

this power under the rationale of the "public rights doctrine."[152] Recent Court decisions expand the scope of permissible non-article III adjudication beyond that allowed by the traditional public rights doctrine.[153] In doing so, the Court attempts to escape the confines of the traditional public rights analysis and invoke new considerations in determining permissibility of non-article III adjudication.[154]

For several reasons, article III does not prohibit binational panel review. First, binational panel review of claims arising under AD and CVD laws responds well to the courts modern inquiries, and satisfy the Court's concern that the integrity of the article III judiciary remain intact. Second, to the extent that any new requirements are inferred from the Court's new approach, such as article III court review,[155] these requirements do not seem applicable to purely public rights such as those arising from AD and CVD laws. As the Court developed its modern approach, it never expressed an intent to place new article III constraints on claims long considered susceptible to non-article III adjudication under a traditional public rights analysis. In short, AD and CVD adjudication and review require no more article III court participation than provided for by the Agreement's implementing legislation. Analysis of the traditional public rights doctrine and the Court's modern approach toward non-article III adjudication bears this out.

2. The Traditional Public Rights Doctrine

The historical core of the public rights exception to article III adjudication consists of instances where the government is a party to the suit.[156] Central to the doctrine is the principle that the federal government may chose to lift its veil of sovereignty and expose itself to suit on its own terms.[157] The Court established

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adjudication in military and territorial courts. *See* American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828); Palmore v. United States, 411 U.S. 389, 402–03 (1973).

[152] Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 854 (1986).

[153] *See infra* notes 182–206 and accompanying text.

[154] *Id.*

[155] *See infra* note 267 and accompanying text.

[156] *See e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 (18 How.) 272 (1855); Cary v. Curtis, 44 U.S. (3 How.) 235 (1845).

[157] *See infra* notes 158–74 and accompanying text.

this principle as early as 1845 in *Cary v. Curtis*.[158] In *Cary*, the Court considered a statute providing that the Secretary of the Treasury hear and decide all initial challenges to assessed and paid customs duties.[159] The plaintiff in *Cary* claimed that the legislative scheme was unconstitutional in that it denied citizens access to federal courts.[160] Though the Court did not address the issue of a citizen's right of access to federal courts, it did consider Congress' power to provide for adjudication in a non-article III forum. The Court found that the government's sovereign immunity allowed it to claim an exemption from suit in its own courts.[161] The Court further found that the government's greater power to prohibit challenges to its customs determinations allowed it, if it did consent to suit, the lesser power to prescribe the type of trial.[162] This broad power apparently included providing for initial adjudication in a non-article III forum.

The Court employed similar reasoning in *Murray's Lessee v. Hoboken Land & Improvement Co.*[163] In *Murray's Lessee*, the Court considered a statute empowering Treasury officials to seize and sell lands of customs collectors if an audit of the collector showed a balance due.[164] The appellant claimed that seizure and sale of a collector's land by a Treasury official was a judicial proceeding that could only be carried out under federal judicial power.[165] The statute provided for judicial review of the Treasury official's decision.[166] The Court first noted that, although all administrative acts involving the application of law to facts are by their nature judicial acts,[167] their status as judicial acts does not necessarily require that such acts be carried out under the judicial power.[168] The Court then set out the parameters of its view of the judicial power, and introduced the public rights doctrine, stating:

> [w]e do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the

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[158] Cary v. Curtis, 44 U.S. (3 How.) at 235.

[159] *Id.* at 241.

[160] *Id.* at 245.

[161] *Id.*

[162] *Id.*

[163] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855).

[164] *Id.* at 274.

[165] *Id.* at 273.

[166] *Id.* at 281.

[167] *Id.* at 280.

[168] *Id.*

> subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there 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.[169]

This passage establishes the general principle that there is a broadly defined category for which non-article III adjudication is constitutionally permissible.[170]

The Court did not elaborate on the general contours of the realm of public rights.[171] Instead, the Court focused its inquiry on the nature of the Treasury official's act and on the government's sovereign power to choose the forum in which it subjects itself to suit. Relying heavily on the strong historical practice of summary and non-judicial procedure in revenue collection, and on the pragmatic necessity of such procedure,[172] the Court concluded that such procedures were within Congress's power to make all laws necessary and proper for the exercise of its article I power to lay and collect duties.[173] The Court also emphasized that statutory provision for judicial review did not conclusively demonstrate that the issue fell within the judicial power. Rather, as in *Cary*, the Court found that as sovereign, the federal government could provide for judicial review of the summary proceedings or deny review altogether.[174]

Cary and *Murray's Lessee* establish several important principles. *Murray's Lessee* lays the foundation for permissible non-article III adjudication: some matters must be within the judicial power, namely those which by their nature are common law claims,

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[169] *Id.* at 284.

[170] First adopted by the Court as it established the traditional public rights doctrine, this statement is now relied on by the Court in its modern approach to nonarticle III adjudication. *See* Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 583 (1984); Crowell v. Benson, 285 U.S. 22, 50 (1932). Thus, the origin of the Court's modern tolerance of non-article III adjudication may be traced to the traditional public rights doctrine.

[171] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 281–84.

[172] *Id.* at 281–82.

[173] *Id.* at 281, 283 (quoting U.S. CONST. art. I, § 8).

[174] *Id.* at 282.

equitable claims, or admiralty claims.[175] Other matters may not be brought within a Court's cognizance, though the Court gives us no examples.[176] Between these extremes lie public rights, matters which Congress may choose to include in federal court jurisdiction or not.[177] Both *Cary* and *Murray's Lessee* also help define the core of the traditional universe of public rights, namely, where the federal government lifts its sovereign veil and consents to suit.[178] Finally, both cases provide concrete factual situations in which non-article III adjudication is proper. In *Cary*, challenge of a customs collector's assessment could be initially adjudicated by the Secretary of the Treasury.[179] In *Murray's Lessee*, a summary proceeding used by the government to ensure payment of monies collected could be undertaken by a Treasury official,[180] and provision for judicial review of the official's action was at the complete discretion of Congress.[181] This leads to the final and perhaps most important principle as applied to the FTA—that where there is a public right, the government may not only consent to initial adjudication outside of article III courts, but may provide for no article III review at all.

3. The Modern Public Rights Doctrine

Through its modern approach the Court has expanded the scope of permissible non-article III adjudication and review beyond disputes between the government and its citizens.[182] Specifically, the Court has allowed non-article III adjudication of certain disputes between private parties arising out of claims based on a federal statute. In *Crowell v. Benson*,[183] for example, the Court upheld an act providing for non-article III administrative determination of employer liability under a federal compensation act.[184] Under the act, factual determinations were not subject to

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[175] *See supra* note 169 and accompanying text.

[176] *Id.*

[177] *Id.*

[178] *See supra* notes 161–62, 174 and accompanying text.

[179] *See supra* note 159 and accompanying text.

[180] *See supra* note 164 and accompanying text.

[181] *See supra* note 174 and accompanying text.

[182] *See infra* notes 183–95 and accompanying text. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284. *See also* Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 70 (1981).

[183] Crowell v. Benson, 285 U.S. 22 (1932).

[184] *Id.* at 36–39.

judicial review, but matters of law were reviewable by federal courts.[185] Similarly, in *Thomas v. Union Carbide*,[186] the Court upheld a federal statute mandating non-article III arbitration between private parties over compensation owed by one company for use of the other's registration data.[187] The arbitrator's decision was final, and subject to judicial review only for fraud, misrepresentation, or other misconduct.[188]

The Court's modern approach has even expanded the scope of permissible non-article III adjudication beyond the factual situations of *Crowell* and *Thomas*, and has allowed non-article III adjudication of disputes between private parties arising from common law claims. In *Commodities Futures Trading Commission v. Schor*,[189] for example, the Court considered the Commodities Exchange Act (Act)[190] establishing the Commodities Futures Trading Commission (CFTC).[191] The CFTC administered a reparations procedure in which customers of professional commodities brokers could seek redress for a broker's violation of the Act or CFTC regulations.[192] One regulation allowed the CFTC to adjudicate common law counterclaims that arose from a transaction or occurrence set forth in the complaint.[193] The legal rulings of the CFTC were subject to de novo judicial review.[194] The Court held CFTC jurisdiction over common law counterclaims constitutionally permissible.[195] By allowing non-article III adjudication of disputes between private parties arising from state common law, the Court allowed non-article III adjudication of the type of claim a traditional public rights analysis would require to be brought before article III judges.

In its expansion of the scope of permissible non-article III adjudication, the Court has necessarily abandoned its traditional public rights analysis. Where the traditional analysis would direct a court to inquire whether the government is a party to the

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[185] *Id.* at 44, 46.
[186] Thomas v. Union Carbide, 473 U.S. 568 (1985).
[187] *Id.* at 571. *See* Federal Insecticide, Fungicide, & Rodenticide Act, 7 U.S.C. § 136a.
[188] *Thomas*, 473 U.S. at 573–74.
[189] Commodities Futures Trading Commission v. Schor, 478 U.S. 833 (1986).
[190] Federal Insecticide, Fungicide, & Rodenticide Act, 7 U.S.C. § 1–22, (1976).
[191] *Id.* §§ 35–36.
[192] *Schor*, 478 U.S. at 836.
[193] *Id.* at 837.
[194] *Id.* at 853.
[195] *Id.* at 851–52.

dispute, and whether the claim arises from common law, equity, or admiralty, the modern approach directs a court to consider a number of factors in light of the practical effect of the legislative scheme on the constitutional integrity of the judiciary.[196] In the modern cases, the Court progressively developed its analysis of non-article III adjudication, and articulated its latest analytical structure most recently in *Schor*. In *Schor*, Justice O'Connor identifies several concerns to be considered in the determination of permissible non-article III adjudication. The factors are:

> . . . the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[197]

O'Connor's discussion of these concerns in *Schor* gives these considerations substance. Examining the legislative structure in light of these concerns, O'Connor finds that CFTC jurisdiction over common law counterclaims does not significantly disrupt the constitutional allocation of judicial power.[198] Because CFTC jurisdiction extends over a narrow and particular area of law, the congressional scheme does not threaten the "essential attributes of judicial Power . . . ."[199] Similarly, the availability of de novo article III court review of legal determinations[200] leads O'Connor to find that the legislative scheme does not not seriously undermine the federal judiciary.[201]

As to the origin of the claim, O'Connor admits that the counterclaim asserted is a private right arising from a state law, and therefore is within the "core" of matters normally reserved to an article III court.[202] She continues, however, that "there is no reason inherent in separation of powers principles to accord the state law character of a claim talismanic power in article III inquiries." Rather, the nature of such a claim only demands a searching examination of the congressional attempt to control

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[196] *Id.*
[197] *Id.* at 851.
[198] *Schor*, 478 U.S. at 851–57.
[199] *Id.*
[200] *Id.* at 852.
[201] *Id.* at 853.
[202] *Id.*

the manner in which the rights are adjudicated.[203] Focusing on the substance of the scheme and not the form, O'Connor finds that "limited CFTC jurisdiction over a narrow class of common law claims as an incident to the CFTC's primary, unchallenged, adjudicative function does not create a substantial threat to the separation of powers."[204]

Lastly, O'Connor examines the congressional purpose behind the scheme, and finds that Congress did not intend to undermine the federal judiciary, but instead intended to ensure the effectiveness of the Commodities Exchange Act.[205] The legitimate exercise of Congress's article I powers was sufficient to satisfy O'Connor's inquiry. Thus, three findings led the Court to hold that CFTC counterclaim jurisdiction did not violate article III: 1) CFTC jurisdiction over common law claims was narrow; 2) the legislative scheme afforded de novo judicial review; and 3) the congressional purpose behind the scheme was not to undermine the judiciary.[206]

Schor leaves behind three distinct areas of inquiry in the determination of permissible non-article III adjudication. As discussed, none of the concerns are determinative. As applied, the *Schor* balancing test allows non-article III disposal of claims between private parties even arising under state law, claims which are admitted by the Court to have characteristics of traditionally conceived private rights.

4. Summary of the Court's Traditional and Modern Analyses of Non-Article III Adjudication

Judicial doctrine allowing adjudication in non-article III bodies can be split into two major eras on the basis of the type of analysis used. The first era, consisting of *Cary* and *Murray's Lessee*, establishes the traditional public rights doctrine.[207] The traditional doctrine allows exceptions to article III adjudication when the government consents to suit and chooses the forum in which it may be challenged.[208]

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[203] *Schor*, 478 U.S. at 854.

[204] *Id.*

[205] *Id.* at 856.

[206] *See supra* notes 197–205 and accompanying text.

[207] *See supra* notes 156–81 and accompanying text.

[208] *Id.*

The traditional doctrine does not distinguish between the power to hold initial adjudication in a non-article III forum, the power to provide for appellate review in a non-article III forum, or the prerogative to provide for no adjudication or review at all.[209] Rather, the doctrine is absolute, and the federal government may, as sovereign, prescribe the manner and mode of actions in which it is involved.[210]

Crowell, *Thomas*, and *Schor* compose the modern era. In its development of the modern doctrine, however, the Court has expanded the universe of permissible non-article III adjudication beyond claims between the government and its citizens to include disputes between private parties arising out of federal and common law claims,[211] the matters *Cary* and *Murray's Lessee* require to be brought before article III judges. In doing so, the Court changed the focus of its analysis. Instead of inquiring whether rights are "public" or "private," the Court considers various identified interests.[212]

It is important to note that the Court's consideration of these interests has only occurred in cases involving rights which would be considered private under a traditional public rights analysis.[213] Thus, the Court has created a new analytical structure which accommodates its expansion of the types of adjudication which can take place outside of article III courts. In this light, it is not clear that all the concerns of the modern analysis apply to situations involving traditional public rights like those in *Cary* and *Murray's Lessee*.[214] That the modern doctrine finds its origins in the public rights doctrine's initial departure from article III requirements[215] indicates that the traditional doctrine might still have vitality. Arguably, rights which fall within the traditional public rights doctrine need not be affected by the new analysis. By adopting a new analysis, the Court has only facilitated the expansion of the scope of permissible non-article III adjudication,[216] and has not necessarily placed new restrictions on non-

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[209] *Id.*

[210] *Id.*

[211] *See supra* notes 182–206 and accompanying text.

[212] *See supra* note 197 and accompanying text.

[213] *See* Commodities Futures Trading Commission v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 583 (1984); Crowell v. Benson, 285 U.S. 22 (1932). *See also* notes 182–95 and accompanying text.

[214] *See supra* notes 156–81 and accompanying text.

[215] *See supra* note 170 and accompanying text.

[216] *See supra* notes 182–206 and accompanying text.

article III adjudication of rights traditionally considered public. As section VI of this Note illustrates, the public nature of AD and CVD rights allows binational panel review under both the traditional and modern analyses.

VI. Constitutionality of the Binational Panel: Analysis Under the Traditional Public Rights Doctrine and the Court's Modern Approach to Non-Article III Adjudication

A. *Analysis Under the Traditional Public Rights Doctrine*

Under a traditional public rights analysis, the right to relief from either dumped or subsidized imports appears to be a public right, and susceptible to non-article III adjudication and review. One author has argued that as customs matters, AD and CVD actions have historic roots in common law actions of assumpsit, trover, and replevin, and therefore require article III review.[217] Though rights arising under AD and CVD laws are customs matters, it does not follow that their roots lie in the common law. Rather, federal statutes created the rights to relief from foreign dumping and subsidization.[218] Current federal law creates a mechanism to petition the government for relief from certain kinds of foreign trading competition.[219] Congress has in effect created a procedure by which it bestows benefits on injured U.S. industries or producers.[220] Distribution of these benefits is conditioned on determination that dumping or subsidies exist as Congress defines those terms.[221] The right to this type of governmentally distributed relief does not appear to be the type of right which is at the core of judicial power, such as rights arising from common law, equity, or admiralty. Rather, it seems similar to the

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[217] Customs and International Trade Bar Ass'n., Statement in Opposition to Withdrawal of Jurisdiction in the United States Court of International Trade and its Applicable Tribunals to Review Antidumping and Countervailing Duty Determinations of Federal Agencies Involving Canadian Merchandise, Adopted by the Board of Directors, Customs and International Trade Bar Association, Dec. 3, 1987 (discussed in Christenson and Gambrel, *supra* note 10, at 414).

[218] *See* H.R. REP. No. 816, *supra* note 75, at 10–11 n. 68 (1988). Senate Judiciary Committee Hearings, *supra* note 114, at __ (Prepared statement by Harold H. Bruff, John S. Reditt Professor of Law, University of Texas at Austin) [hereinafter Prepared Statement of Harold H. Bruff]. *See, e.g.*, Tariff Act of 1930, *supra* note 102, 19 U.S.C. §§ 1671, 1673.

[219] 19 U.S.C. §§ 1671, 1673

[220] *See supra* notes 102–17 and accompanying text.

[221] *Id.*

type of right that traditionally would be considered a public right, a right that owes its existence to the sovereign government, and that may be vindicated in the manner and forum that the government prescribes.[222]

Moreover, despite any common law origin of the area of customs law generally, the Court has held consistently that rights in customs matters are public rights, and that as such, they are susceptible to adjudication in non-article III courts. The Congressional scheme in *Cary*, for instance, provided for adjudication of customs assessments by the Secretary of the Treasury.[223] The *Cary* Court considered non-article III customs adjudication to be within the government's competence, reviewable in the manner the government chose, and only if the government chose to provide for review at all.[224] Thus, the matter was exclusively within the prerogative of the government as sovereign.

Antidumping and countervailing duties are similar to ordinary customs matters at issue in *Cary*, for both entail levying duties on imports. Indeed, the major difference seems to be procedural.[225] In the case of ordinary tariffs, Congress predetermines their size. In the case of AD and CVD actions, agencies commence individual investigations into the presence and degree of dumping and subsidization.[226] Rather than incorporate penalties for dumping and subsidization into its ordinary tariff structure, Congress has chosen to develop a more sensitive process to detect the extent of unfair trade practices on a case-by-case basis. In the end, it seems clear that Congress exercises the same power in each case, the power to regulate foreign commerce, which results in duties on imported goods. In this light, *Cary* suggests that rights under antidumping and countervailing duty laws, like rights associated with tariff collection, belong in the sphere of rights which Congress may distribute on its own terms.

Further Supreme Court discussion of the nature of rights under trade laws also supports this conclusion. In *Ex parte Bakelight*

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[222] *See supra* notes 156–81 and accompanying text.

[223] *See supra* notes 159 and accompanying text.

[224] *See supra* notes 161–62 and accompanying text.

[225] Prepared Statement of Harold H. Bruff, *supra* note 218. Antidumping and countervailing duties also differ from tariffs in that they each address a specific economic harm. In contrast, tariffs are set in response to a variety of economic and political pressures. *See generally* I.M. DESTLER, AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS (1986).

[226] 19 U.S.C. §§ 1671, 1673.

Corp.,[227] the Court considered whether Congress established the Court of Customs Appeals pursuant to article III. In its opinion, the Court discussed the nature of the claims which came before the Court of Customs Appeals, "matters arising between the government and others in the executive administration and application of customs laws."[228] The Court stated that "[t]he appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times have been, committed exclusively to executive officers."[229] It is no coincidence that this language sounds much like the first pronouncement of the public rights doctrine in *Murray's Lessee—Bakelight* cites *Murray's Lessee* for this proposition.[230] Moreover, *Bakelight* invokes *Cary* for the proposition that the area of customs law falls within the category of matters which require no judicial involvement.[231]

In light of *Cary*, *Bakelight*, and the nature of rights under AD and CVD laws, it appears that such rights are of the type granted by the political branches of government, and that are to be vindicated in the manner the government chooses. Congress has at times left the adjudication of such rights completely to non-article III bodies with no provision for article III review.[232] The plenary and exclusive power over the manner of trial for the vindication of rights arising under trade laws historically has been exercised by Congress and recognized by the Court. Under a traditional public rights analysis, AD and CVD determinations seem to require no article III court participation, and binational panel review of agency determinations appears compatible with article III.

B. *Analysis under the Modern Doctrine*

As discussed, however, the Court has developed a new approach to analysis of non-article III adjudication and review. The Court probably would employ its modern doctrine to any current challenge to non-article III adjudication. Certainly the Court has expressed no contrary indication. Analysis of the FTA legislative

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[227] *Ex Parte* Bakelight Corp., 279 U.S. 438 (1929).
[228] *Id.* at 458.
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] *Id.*

scheme by the *Schor* criteria, however, demonstrates that binational panel review of AD and CVD determinations is not constrained by article III under the modern doctrine either.

The *Schor* balancing test presents a modern framework for analysis of article III limits on adjudication of antidumping and countervailing duty actions by non-article III bodies. The *Schor* approach is not to focus on the identity of the parties to the dispute, but on the Congressional purpose behind the scheme, the origin and nature of the right asserted, and the intrusion into the prerogatives of article III courts.[233]

1. Congressional Purpose Behind Non-Article III Adjudication and Review

One of the *Schor* considerations is the concern that drove Congress to utilize a forum other than the article III judiciary.[234] In *Schor*, Congress's effort to make a regulatory scheme effective satisfied the Court that the congressional purpose was legitimate.[235] As Professor Brown points out, this test is easily satisfied, for "Congress can seemingly always justify its use of non-article III tribunals by showing some programmatic need."[236]

Congress' legitimate purpose in providing for review of AD and CVD determinations by the binational panel is easily demonstrated. The purpose behind the creation of the panel is to reduce economic and diplomatic tensions between the United States and Canada arising from adjudication of trade disputes.[237] Toward this end, the panel represents an interim measure in the continuing negotiations to find appropriate dumping and subsidy standards for the free trade area.[238] Notably, the binational panel alleviates a central concern of Canadian traders, making the Agreement as a whole more appealing to the Canadian electorate.[239] The binational panel also provides significant benefits to American traders who can now seek review of previously unreviewable Canadian antidumping and countervailing duty deter-

[233] *See supra* note 197 and accompanying text.
[234] *Id.*
[235] *See supra* notes 205–06 and accompanying text.
[236] Brown, *supra* note 134, at 74.
[237] *See* H.R. REP. No. 816, *supra* note 10, at 3.
[238] *Id.*
[239] *See supra* notes 76–87 and accompanying text.

minations.[240] Thus, Congress's purpose in providing for initial non-article III adjudication and binational panel review is demonstrably legitimate.

2. The Nature of the Claim and Consequent Threats to Separation of Powers

The second *Schor* consideration demands inquiry into the origins and importance of the right to be adjudicated,[241] or into, as alternatively phrased, the nature of the claim.[242] In *Schor*, O'Connor makes clear that inquiry into the nature of the claim is not to derive a label which then mechanically determines the type of adjudication required.[243] Rather, the purpose of examining the nature of that claim before a non-article III court is to determine whether there is a substantial threat to the separation of powers.[244] Of particular concern is the adjudication of claims arising from common law, equity, and admiralty, which are presumed to be at the core of the federal judicial function.[245] In *Schor*, the Court found narrow CFTC jurisdiction over state common law claims merely incidental to the regulatory scheme.[246] The Court's search for actual, tangible, and substantial aggrandizement of power by Congress at the expense of the judiciary found no threat to the separation of powers.[247]

Initial adjudication and subsequent review by non-article III bodies threatens neither the integrity of the judicial branch nor separation of powers. Previous conclusions about the nature of rights arising under AD and CVD laws bears this out.[248] AD and CVD rights arise from federal statute, and have no distinct origin in the common law.[249] Further, rights under AD and CVD laws appear similar to rights under other customs laws, rights which the Court has found susceptible of non-article III adjudication.[250] AD and CVD rights seem to be matters which are "susceptible of

[240] *See* H.R. REP. No. 816, *supra* note 10, at 3.
[241] *See supra* note 197 and accompanying text.
[242] Brown, *supra* note 134, at 73.
[243] Commodities Futures Trading Commission v. Schor, 478 U.S. 833, 853–54 (1986).
[244] *Id.*
[245] *Id.*
[246] *Id.* at 954.
[247] *Id.*
[248] *See supra* notes 218–32 and accompanying text.
[249] *See supra* notes 218–19 and accompanying text.
[250] *See supra* notes 218–32 and accompanying text.

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."[251] In this light, non-article III adjudication and review of AD and CVD actions does not appear to threaten the integrity of the judicial branch, and the danger posed to the separation of powers seems minimal.

3. Encroachment on Essential Attributes of Judicial Power

The last *Schor* inquiry is the extent to which the essential attributes of judicial power are reserved to article III courts.[252] The only part of the congressional scheme in *Schor* that posed a threat to the essential attributes of the judicial function was CFTC jurisdiction over the state law counterclaim.[253] The Court, however, found that provision for de novo review of all legal determinations by an article III court left enough of the judicial power undisturbed to satisfy any concerns.[254]

Under the FTA legislative scheme, it appears that the only attribute of judicial power left to article III courts is the power to review constitutional claims,[255] for both initial adjudication and appellate review take place in non-article III bodies.[256] This should not frustrate the congressional scheme for several reasons. First, as discussed,[257] it is difficult to assert that either initial adjudication or appellate review of AD or CVD actions is an essential judicial function. The provision of remedies for unfair trade practices seems to be the prerogative of the political branches of the federal government.[258] Congressional practice and judicial decision indicate that this is the case.[259] Even though article III courts only enjoy jurisdiction over constitutional issues, they miss no essential judicial attributes with respect to enforcement of trade laws. Conversely, the powers exercised by the ITA, the ITC, and a binational panel, though similar to those exercised by a court, are not those normally vested exclusively in article III

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[251] Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 284 (1855).

[252] Commodities Futures Trading Co. v. Schor, 478 U.S. 833, 85 (1986).

[253] *Id.* at 852.

[254] *Id.* at 853.

[255] *See supra* notes 115–17 and accompanying text.

[256] *Id.*

[257] *See supra* notes 241–51 and accompanying text.

[258] *See supra* notes 218–32 and accompanying text.

[259] *Id.*

courts.[260] Rather, they exercise powers which Congress has vested in a variety of article III and non-article III bodies.[261]

Still, the presence of article III review, in one form or another, has been essential to validation of non-article III adjudication in the modern doctrine of *Crowell, Thomas,* and *Schor.*[262] In *Crowell,* the Court found that judicial review of matters of law satisfied requirements of judicial involvement in that type of case.[263] In *Thomas,* the Court found that judicial review of fraud, misconduct, and misrepresentation, "preserves the 'appropriate exercise of the judicial function.'"[264] In *Schor,* the Court found that availability of de novo review by an article III court[265] helped preserve the integrity of the federal judiciary.[266] Several commentators suggest that not only does article III review satisfy the Courts' concern over the usurpation of essential article III functions, but article III review has become a necessity for valid non-article III adjudication.[267] Several considerations caution against accepting article III review as a requirement for non-article III adjudication.

First, the requirement of article III court review as a necessary component of permissible non-article III court adjudication has not evolved into a well-defined principle. In *Thomas,* Justice O'Connor stated that the degree of review required depends on the origin of the right and the congressional purpose of the statutory scheme.[268] Exactly how much review satisfies article III requirements is not entirely clear. In *Crowell,* review of matters of law was enough.[269] In *Thomas,* review of an arbitrator's fraud and misconduct was sufficient.[270] In *Schor,* de novo review allayed

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[260] *Id.*

[261] *See* Senate Hearings (Prepared Statement by Andreas F. Lowenfeld), *supra* note 114. Telephone interview with Jeanne Anderson, Former Deputy General Counsel, International Trade Commission (Feb. 13, 1989).

[262] *See supra* notes 182–206 and accompanying text.

[263] *Id.*

[264] *Id.* at 592 (quoting Crowell v. Benson, 285 U.S. 22, 54 (1932)).

[265] *See supra* note 200 and accompanying text.

[266] *See supra* note 201 and accompanying text.

[267] Professor Fallon contends article III court review could be required by article III. *See* Fallon, *Of Legislative Courts, Administrative Agencies, and Article III,* 101 HARV. L. REV. 916, 918 (1988). Professor Brown suggests that the recent public rights cases imply that article III review is already a constitutional requirement. *See* Brown, *supra* note 134, at 86.

[268] Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 587 (1985).

[269] Crowell v. Benson, 285 U.S. 22, 49 (1932).

[270] *Thomas,* 473 U.S. at 592.

the Court's concern over encroachment on the judiciary.[271] Thus, under *Crowell* and *Thomas*, claims arising under federal statute may not require full article III court review. Under *Schor*, however, claims arising from common law seem to require de novo article III review. But the Court's recent decisions have not considered the degree of article III review required for the situation presented by the FTA and its implementing legislation, that is, a legislative scheme that requires no article III court involvement under a traditional public rights analysis. Indeed, nothing in the modern analysis suggests that article III court review is now a necessary component of all initial non-article III adjudication.

In essence, the Court's emphasis on article III review only arises in cases where it allows non-article III adjudication of rights inherently more private than public.[272] As the Court expanded the scope of permissible non-article III adjudication beyond the traditional public rights core of *Cary* and *Murray's Lessee*, and thus further away from the Framers' clear intent that only independent judges exercise the federal judicial power, article III court review seems to have helped save legislative schemes the Court found otherwise troublesome. Thus, any requirement of article III review does not seem relevant to situations involving non-article III adjudication of rights traditionally considered public. Rather, it seems limited to situations where traditionally conceived private rights are adjudicated in non-article III courts. Because antidumping and countervailing duty laws appear to confer rights that truly appear public under a traditional analysis, even the Court's modern approach to non-article III adjudication seems to require no article III review.

4. Summary of Analysis Under the Modern Doctrine

Analysis of the FTA legislative scheme under the *Schor* considerations demonstrates that the modern doctrine places no limits on binational panel review of antidumping and countervailing duty determinations by the ITA and the ITC.[273] First, Congress has a demonstrably legitimate purpose in establishing the legislative scheme.[274] Second, the public nature of the claims shows

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[271] Commodities Futures Trading Commission v. Schor, 478 U.S. 833 (1986).

[272] *See supra* notes 211–16 and accompanying text.

[273] *See supra* notes 218–72 and accompanying text.

[274] *See supra* notes 234–40 and accompanying text.

that adjudication outside article III courts poses no threat to the separation of powers.[275] Finally, as public rights, AD and CVD claims require no article III court participation in their adjudication, and no essential attributes of the judicial function are spirited from the federal courts.[276]

It should be emphazized that the Court's modern analysis does not require article III court review of claims similar to those traditionally conceived as core public rights.[277] Any requirement for article III review developed through cases involving non-article III adjudication of rights that are clearly within the judicial power. These cases do not suggest that article III review is now a requisite component of a legislative scheme allowing non-article III adjudication of rights traditionally considered public. The Court has not indicated that its expansion of permissible non-article III adjudication imposes new article III requirements on rights traditionally considered public.

5. Reflections on the Analysis of Public Rights Under the Modern Doctrine

In its articulation of the *Schor* considerations, the Court explicitly abandoned the traditional public rights analysis, and focused instead on the substance of the right underlying the claim to be adjudicated. Analysis of antidumping and countervailing duty law illustrates, however, that inquiry into the "nature of the claim" and the "essential attributes of judicial power" uncovers substance identical to the core of any public right. Apparently, rights satisfying the traditional public rights analysis easily satisfy these two *Schor* considerations. In this light it would appear difficult for the Court to exclude a right that satisfies the traditional public rights analysis from non-article III adjudication. Instead, it seems that in the absence of an illegitimate legislative purpose, the Court may rely on non-article III adjudication of such rights as established instances of permissible deviation from the explicit constitutional requirement that the independent federal judiciary exercise the federal judicial power.

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[275] *See supra* notes 241–51 and accompanying text.

[276] *See supra* notes 252–72 and accompanying text.

[277] *See supra* notes 262–72 and accompanying text.

CONCLUSION

Exclusive binational panel review of antidumping and countervailing duty determinations is compatible with the Court's modern tolerance of non-article III adjudication. Congress's power to limit federal court jurisdiction is well established by judicial doctrine and congressional practice. Congress's power to provide for non-article III adjudication of certain types of claims is consistently recognized by the Court. Though certain claims may demand more article III court participation than others, the origin and nature of rights under AD and CVD laws demonstrate that, whether considered under the traditional public rights doctrine or the modern *Schor* analysis, they require no article III court participation at all.

If other constitutional concerns raised by the binational panel are resolved favorably, then the panel will serve effectively as a cornerstone of the Agreement. Binational panel review should function as an important mechanism for alleviating significant trading problems between the United States and Canada.[278] Negotiations ought to continue smoothly over appropriate AD and CVD standards to govern the free trade area.[279] Moreover, binational panel review will enhance the continuing political acceptability of the Agreement as the two nations adjust to greater integration in trade, services, finance, and national resources.[280] If the United States finds it desirable to enter into other similar arrangements, then the binational panel may serve as a successful model.

Dave Resnicoff

[278] *Id.*
[279] *Id.*
[280] *Id.*