Article III, the Foreign Relations Power, and the Binational Panel System of NAFTA

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The North American Free Trade Agreement (NAFTA) creates a free trade zone between the United States, Canada, and Mexico. To safeguard against biased application of antidumping and countervailing duty law, NAFTA creates a binational panel review system. The novelty of the binational panel system, however, raises serious constitutional concerns. After examining Article III of the United States Constitution, the foreign relations power, and the decisions interpreting them, the author argues that NAFTA's binational panel system does not violate the principles and requirements of Article III.

I. INTRODUCTION

On December 17, 1992, the United States entered into the North American Free Trade Agreement (NAFTA) with Canada and Mexico.1 Less than one year later, Congress approved NAFTA and enacted legislation to implement its terms.2 With the signing of NAFTA, the three participating countries created a free trade zone encompassing some 370 million people and representing $6.5 trillion in production.3 NAFTA's principal goal was to reduce trade barriers that have hindered free market competition among the three NAFTA countries.4

One of the key provisions of NAFTA is the binational panel review system.5 This system establishes independent review of antidumping and countervailing duty determinations made by administrative agencies in one NAFTA country with respect to products from one of the other two countries by binational panels of judges. NAFTA does not have its own antidumping and coun-

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4. Id.
5. Id.
tervailing duty law, but instead employs the law of the country that rendered the decision and reviews the decision as a court of that country. This review system plays an important role in liberalizing trade between NAFTA countries. The application of antidumping and countervailing duty law is a contentious issue, even among such relatively friendly trading partners as the United States, Canada, and Mexico. At times the application of such law has led to complaints of protectionist bias against the administering government. The panel system innovatively solves this issue because it provides a crucial check against biased application of domestic law.

The novelty of the binational panel system, however, raises serious constitutional concerns. NAFTA removes jurisdiction to review antidumping and countervailing duty obligations from U.S. courts and places it with the binational panels. Article III, Section 1 of the Constitution of the United States mandates that the judicial power of the United States be vested in the Supreme Court and the inferior federal courts. Federal judges enjoy life tenure and salary protection. Article III protects two values that are fundamental to the U.S. constitutional system—by preventing congressional and executive control over the federal courts, Article III assures an impartial judiciary and preserves separation of powers. Though the binational panel system does not meet Article III requirements, it is not necessarily unconstitutional since the Supreme Court has never read Article III as having no exception. Nevertheless, the Court requires that congressional assignments of judicial power to non-Article III entities not undermine the values that Article III was designed to protect.

This paper argues that NAFTA’s binational panel system passes constitutional muster for two reasons. First, under the balancing test adopted by the Supreme Court in Commodity Futures Trading Commission v. Schor, the panel system does not offend Article III’s mandate. Second, any doubt about the constitutionality of the panel system under Article III can be resolved by examining the issue as a hybrid case implicating both Article III and the executive and congressional power over foreign trade relations. From this perspective, NAFTA’s binational panel system squarely fits into the tradition of executive


7. The United States-Canada Free Trade Agreement (hereinafter CFTA) created the predecessor of NAFTA’s panel system. See United States-Canada Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 (1988). Since the CFTA panel system has been in operation for approximately six years and its provisions are essentially identical to those of the NAFTA binational panels, this paper will extrapolate from its experiences.


9. Id.


11. Id.

12. Id.

resolution of public rights claims involving international trade relations through international arbitration.

Part II of this paper provides an overview of the objectives, authority, selection, and structure of the binational panel system established under NAFTA. Part III examines the constitutionality of the binational panel system in light of Article III of the United States Constitution, the decisions interpreting Article III, and well-established constitutional principles. In Part IV, the author addresses the constitutionality of the binational panel system based on the foreign relations power of Congress and the Executive.

II. BINATIONAL PANEL REVIEW

A. Objectives of the Binational Panel System

The principal purpose of the binational panel system is to replace domestic judicial review of antidumping and countervailing duty claims in cases involving NAFTA Parties. Normally, a national brings a claim against a foreign company for selling its products in violation of the importing Party's antidumping or countervailing duty law to the proper administrative agency. The agency renders a decision which can be appealed in the importing Party's domestic legal system. Under NAFTA, a Party whose national is involved in such a dispute may request review of the agency decision by a panel composed of individuals qualified in trade law and selected by the two NAFTA Parties implicated in the dispute. The system, however, expressly retains the importing Party's substantive law so that the panel reviews the administrative decisions of the importing Party using that Party's antidumping and countervailing duty law.

The United States' antidumping and countervailing duty law addresses the two most common unfair practices in international trade. First, U.S. law remedies the practice of dumping, which occurs when a foreign company sells a

14. NAFTA, supra note 1, art. 1904(1). The binational panels also review changes that the Parties may make in their respective antidumping and countervailing duty laws. If a Party is subject to the new provisions of another Party's antidumping and countervailing duty law, a binational panel must review the legislation and issue a declaratory opinion as to whether the change meets the standards set out in NAFTA. If the panel declares the change to be inconsistent with the trade liberalization policies as expressed in NAFTA, the involved countries must consult to find a solution. In the event no solution is reached, the complaining Party may enact comparable legislation or terminate its involvement in NAFTA altogether. See id. art. 1903.


16. Id.

17. U.S. law, however, provides that only those individuals who normally would be able to challenge a final determination in U.S. courts may request a panel. The U.S. government, though a Party to NAFTA, is prohibited under U.S. law from requesting panel review without a private party request. NAFTA Implementation Act, supra note 2, § 411(4)(L), amending 19 U.S.C. § 516a(g)(8) (C).

18. NAFTA, supra note 1, arts. 1901(1), 1902(2).

product in the United States for less than the fair market value.\textsuperscript{20} Fair market value, also known as foreign market value, is normally the price at which the product is sold by the foreign company in its home market.\textsuperscript{21} To prove a dumping claim, the United States must show that the foreign company sold its product at less than fair market value and that the sales caused material injury or threat thereof to the U.S. industry producing the same or similar product.\textsuperscript{22} If successful, the United States will impose a "dumping duty" on the foreign company in the amount of the difference between the fair market value and the U.S. price.\textsuperscript{23}

Second, U.S. law provides for the imposition of customs duties to counter-vail the sale of foreign products where their manufacturer has received a foreign government subsidy for its manufacture, production, or exportation.\textsuperscript{24} Countervailable subsidies can be of several types. In general, export subsidies—those that target companies based on export performance—are countervailable.\textsuperscript{25} But U.S. law also provides a set of criteria for determining whether other government practices constitute a countervailable subsidy.\textsuperscript{26} If a foreign government’s practice is countervailable, any foreign company selling the product in the United States that has benefited from the foreign subsidy is subject to a duty in the amount of that subsidy.\textsuperscript{27} To assess a countervailing duty, a material injury or threat to the competing U.S. industry must usually be shown.\textsuperscript{28}

Private parties may bring claims under the U.S. antidumping and counter-vailing duty laws if they are "interested parties" as defined by statute.\textsuperscript{29}

\textsuperscript{20} 19 U.S.C. § 1673.
\textsuperscript{21} 19 U.S.C. § 1677b.
\textsuperscript{22} 19 U.S.C. § 1673. A dumping charge can also be supported if the sales materially retarded the establishment of an industry in the United States. 19 U.S.C. § 1673(2)(B).
\textsuperscript{23} 19 U.S.C. § 1673.
\textsuperscript{24} 19 U.S.C. § 1671(a).
\textsuperscript{25} 19 U.S.C. § 1677(5)(A)(i). This section references a list of examples of countervailable export subsidies taken from the GATT Subsidies Code.
\textsuperscript{26} 19 U.S.C. § 1677(5). The criteria include the provision of funds or loans on terms inconsistent with commercial considerations, the provision of goods or services at preferential rates, the granting of funds or forgiving of debts for losses sustained by a specific industry, and the assumption of costs of manufacture, production or distribution by the government. 19 U.S.C. §§ 1677(5)(A)(ii)(I)-(IV). These subsidies must go to a specific industry or enterprise or group of industries or enterprises. 19 U.S.C. § 1677(5)(A)(ii).
\textsuperscript{27} 19 U.S.C. § 1671(a).
\textsuperscript{28} 19 U.S.C. §§ 1671(a)-(b). A finding of injury is required when the government of the foreign company involved is a signatory to the GATT Subsidies Code or otherwise has a similar injury requirement applicable to U.S. companies in its own law. Countervailable subsidies also can be imposed if sale of the subsidized products materially retards the establishment of an industry in the United States. 19 U.S.C. § 1671(a)(2)(B).
\textsuperscript{29} 19 U.S.C. §§ 1671a(b)(1), 1673a(b)(1). In general, interested parties include companies that make or wholesale a like product, industry associations of such companies, or labor associations of workers in such companies. 19 U.S.C. § 1677(9).

In addition, the International Trade Administration of the Commerce Department (ITA) may initiate investigations on its own if the circumstances so warrant. 19 U.S.C. §§ 1671a(a), 1673a(a). Usually, the ITA does not initiate such proceedings on its own, though Congress has suggested that the ITA actively investigate potential countervailing duty claims. See VAREKICS, supra note 19, at 26 n.26, 197-198 n.8.
agencies investigate the claims and render decisions based on the applicable law. First, the International Trade Administration (ITA) of the Department of Commerce decides whether dumping has occurred or whether a countervailable subsidy has been granted. Next, the International Trade Commission (ITC) determines whether an injury to U.S. industry has occurred or whether a threat of injury exists in both dumping and subsidy cases. The procedures of both the ITA and the ITC have become increasingly judicialized so that interested parties can submit briefs and present oral arguments at administrative hearings. Decisions by either the ITA or the ITC can be appealed to the Court of International Trade (CIT). The decisions of the CIT may be appealed to the Court of Appeals for the Federal Circuit.

B. Binding Authority of Panel Decisions

When invoked, the binational panels have complete authority under NAFTA to review “final determinations” of antidumping and countervailing duty claims by the “competent investigating authority” when any two of the Parties are implicated. Decisions by binational panels are binding on the involved Parties with respect to the matter in dispute. In addition, NAFTA prohibits domestic judicial review of final determinations by “the competent investigating authority” of the importing Party if there has been a request for a final determination.

30. 19 U.S.C. §§ 1671b(b), 1673b(b).
31. 19 U.S.C. § 1330(a) (1995). The International Trade Commission (ITC) is an independent agency whose members are appointed by the President with the advice and consent of the Senate. The ITC has six members. No more than three of the members may be from the same political party.
32. 19 U.S.C. §§ 1671b(a), 1673b(a).
35. Id. The CIT, when reviewing administrative decisions, determines whether they are supported by substantial evidence on the record. 19 U.S.C. § 1516a(b)(1). The CIT is a federal court established pursuant to Article III of the Constitution. 28 U.S.C. § 251 (1995).
36. For the United States, NAFTA defines competent investigating authority as either the ITA or the ITC. NAFTA, supra note 1, annex 1911.
37. Id. For the United States, NAFTA defines final determination to include five different decisions by the ITA and ITC: a positive finding as to dumping, illegal subsidies or injury or threat thereof; a negative finding as to dumping, illegal subsidies or injury or threat thereof; a finding that changed circumstances require a reversal of a prior final determination regarding the existence of dumping or illegal subsidies; a finding that changed circumstances require a reversal of a prior final determination regarding the existence of injury or threat thereof from such activities; a finding by the ITA regarding whether a particular import is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order. NAFTA, supra note 1, annex 1911; see also 19 U.S.C. §§ 1671d(a)-(b), 1673d(a)-(b), 1675.
38. The panels do not review such preliminary determinations as decisions not to begin an investigation or to suspend an investigation, even if these decisions are subject to domestic judicial review. NAFTA, supra note 1, art. 1904(10). The panels also cannot review a revised final determination issued in response to domestic court action, if no panel request was made after the original final determination. Id. art. 1904(12).
39. Id. art. 1904(9). U.S. courts are not required to follow panel decisions as precedent. They may, however, look to panel decisions as persuasive authority. NAFTA Implementation Act, supra note 2, § 411(2), amending 19 U.S.C. § 1516a(b)(3).
binational panel. Finally, NAFTA guards against surreptitious attempts at circumventing the panel review process by allowing special committees to review restructurings of domestic law. U.S. law prohibits review of final determinations by the CIT or any other court on any question of law or fact where panel review has been requested. While this means that the constitutionality of particular panel decisions cannot be challenged in U.S. courts, the law does permit constitutional challenges to the panel review system itself. Such challenges can be brought only in the United States Court of Appeals for the D.C. Circuit. The D.C. Circuit Court’s decision, however, can be appealed to the United States Supreme Court. In addition, private parties can request review of final determinations “solely concerning a constitutional issue . . . arising under any law of the United States as enacted or applied” by a three-judge panel of the CIT.

C. Selection and Structure of the Binational Panels

NAFTA requires that the Parties maintain a roster of at least 75 potential panelists to review antidumping and countervailing duty disputes. After the Parties consult with one another, they each select at least 25 candidates for the roster. Panel candidates must have a general familiarity with international trade law and cannot be affiliated with or take orders from a Party. In addition, the roster must include judges and former judges to the fullest extent practicable. The Parties can amend the roster of candidates when necessary and after joint consultation.

Within 30 days after a request for a panel and after consultation with each other, the Parties each nominate two members from the roster of candidates. While the roster may include non-lawyers, the panel must consist of a majority...
of lawyers. Each Party has four peremptory challenges to the nominees of the other Party. These challenges and the selection of alternative panelists must occur within 45 days of the request for a panel. Within 55 days of the initial request for the panel, the Parties must agree on the choice for a fifth panelist. If they cannot agree, then the Parties choose by lot which one will select the final panelist. Once convened, the panelists elect, by majority vote, a chairman from among the lawyers on the panel.

In the United States, the NAFTA Implementation Act establishes the procedures by which U.S. candidates are to be selected for the roster of potential panelists. According to the NAFTA Implementation Act, the United States Trade Representative ("USTR") is responsible for selecting candidates based on the criteria set forth in NAFTA and without regard to political affiliation. The USTR is the only executive officer with the authority to select U.S. candidates for the panel roster. An Interagency Group, composed of individuals selected by the USTR, assists in the preparation of preliminary lists of panel candidates.

The NAFTA Implementation Act provides separate appointment procedures depending on the type of panelist. To recruit sitting federal judges, the USTR consults periodically with the chief judges of the federal judicial circuits to inquire about the availability of potential panelists. If a judge is willing to offer his or her services, the chief judges may recommend the judge to the Chief Justice of the United States Supreme Court, who must approve each recommendation. The USTR must include on the final panel roster any judge approved by the Chief Justice. The USTR must also submit the list of judges to the House Judiciary and Ways and Means Committees, and to the Senate Judiciary and Finance Committees by March 31 of each year.

The USTR, with the assistance of the Interagency Group, selects other roster candidates. The USTR must submit a preliminary list of these candidates with a statement of their professional qualifications to the House Ways and Means Committee and the Senate Finance Committee by January 3 of each

51. Id.
52. Id. The challenges must be exercised simultaneously and in confidence.
53. Id.
54. NAFTA, supra note 1, annex 1901.2(3).
55. Id.
56. Id. annex 1901.2(4).
57. NAFTA Implementation Act, supra note 2, § 402(a)(1) (referring to NAFTA, supra note 1, annex 1901.2(1)).
58. Id. § 402(d)(1).
59. Id. § 402(c)(2). The NAFTA Implementation Act, supra note 2, places the Interagency Group within the interagency organization established under section 242 of the Trade Expansion Act of 1962. The Interagency Group, however, does not assist in the preparation of lists of potential candidates from among federal judicial circuits.
60. Id. § 402(b)(2) (1993).
61. Id. § 402(a)(2), (b)(2).
62. Id. § 402(b)(2).
63. Id. § 402(b)(3).
64. Id. § 402(c)(2)(B).
The USTR must then consult with the congressional committees about the preliminary selection. The NAFTA Implementation Act, however, does not require the committees' approval of the selections.

The USTR is authorized to add or remove individuals from the preliminary list after consulting with the congressional committees and by providing written notice to those committees prior to the final deadline. The congressional committees must receive the final list of candidates along with the list of federal judges from the USTR by March 31 of each year. Candidates on the roster then serve a one-year term beginning on April 1. The NAFTA Implementation Act does not confer the USTR with the authority to remove individuals from the roster during their one-year term of service.

After a request for a binational panel, the USTR selects the appointees on behalf of the United States. The USTR can appoint any person listed on the final roster and any valid amendments thereto. Before appointing a sitting judge, however, the USTR must first consult with that judge to determine his or her availability to serve on the panel at that time.

The NAFTA Implementation Act makes no provision for removal of candidates from the panel roster during their one-year term. Once appointed to a panel, panelists may be removed only for violating the Code of Conduct. When a panelist is suspected of such a violation, the Parties involved in the dispute must consult with each other and agree that a violation did, in fact, occur before the panelists can be removed.

The panel candidates receive no pay unless they are selected for panel service. If selected, panelists are not paid a fixed salary during their time of

65. Id. § 402(c)(3)(B)(i), (ii).
66. Id. § 402(c)(3)(C).
67. Id.
68. Id. § 402(c)(3)(D). To add candidates to the final list, written notice must be provided at least 15 days prior to the final deadline. Id. § 402(c)(4)(A).
69. Id. § 402(b)(3), (c)(4)(A).
70. Id. § 402(c)(4)(a). If, after the final list has been submitted, the USTR decides that additional candidates are needed for the roster, he or she can make amendments to the list following much the same procedure as for the original selection of roster members. See id. § 402(c)(4)(C). A preliminary amendment list must be submitted by July 1, although it can be adjusted up to September 30. The amendments are effective as of October 1, and the new roster members are then eligible for panel service for a six month period.
71. Id.
73. Id. § 402(b)(4).
74. NAFTA, supra note 1, annex 1901.2(6). Panelists can be disqualified prior to their appointment by refusing to sign an agreement to keep business proprietary and other privileged information confidential. Id. annex 1901.2(8). The Code of Conduct established pursuant to Article 1909 of NAFTA imposes certain obligations on panelists. Code of Conduct for Proceedings under NAFTA Chapters Nineteen and Twenty, International Trade Administration Notice, 59 Fed. Reg. 8720-01 (1994). The Code requires that panelists avoid impropriety and the appearance of impropriety. In general, panelists must disclose any conflict of interest or other bias, perform duties thoroughly and expeditiously, remain impartial and independent, and keep confidential all non-public information.
75. NAFTA, supra note 1, annex 1901.2(6).
76. NAFTA, supra note 1, art. 2002.2.
service on the panel. Rather, at the conclusion of their time of service, the panelists submit accounts of their time and expenses to the Free Trade Commission ("FTC") of NAFTA. The FTC then reimburses them after obtaining funds from the Parties involved in the dispute. The Parties share these costs equally.

D. Panel Review of Final Determinations

1. Decision Making

For purposes of Chapter 19 panel review, NAFTA incorporates the antidumping and countervailing duty law of the Parties into the agreement. After a request for panel review has been made, the panels decide whether the competent investigating authority made its final determination in accordance with the importing Party's law. NAFTA limits the panels' sources of authority for judging final determinations to the "relevant statutes, legislative history, regulations, administrative practice and judicial precedents," which must be used in the same manner as they would be used in the Parties' domestic courts.

Additionally, NAFTA requires binational panels to employ the standard of review that would be applied in the domestic courts of the importing Party. For instance, where the United States is the importing Party, binational panels must use one of two standards depending on the type of determination at issue. When reviewing an agency's determination not to reevaluate a prior final determination based on alleged changed circumstances, the panels must uphold this finding unless it is arbitrary, capricious or an abuse of discretion. The panels must uphold all other final determinations unless they are unsupported by substantial evidence on the record. In addition to these specific standards, NAFTA directs the panels to apply the general legal principles that a court of the importing Party would otherwise apply.

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77. Id.
78. Id.
79. Id. The FTC is responsible for supervising the implementation of NAFTA. Id. art. 2001. The Commission consists of cabinet level representatives of the Parties or their designees.
80. NAFTA, supra note 1, art. 1904(2).
81. Id.
82. Id. art. 1904(2). While prior panel decisions are not binding precedent, CFTA panels have used the decisions, to the extent they are "intrinsically persuasive," to interpret the Agreement and the U.S. implementing legislation. Live Swine from Canada, No. USA-91-1904-04, 1993 WL 243072 at *3; see also Homer E. Moyer, Jr., Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort, 27 INT'L L. 707, 721 n.78 (1993) ("CFTA panels have frequently cited prior panel decisions and looked to how they construed and applied the applicable domestic law").
83. NAFTA, supra note 1, art. 1904(3).
84. Id. annex 1911; see also 19 U.S.C. § 1516a(b)(1)(A)(1980).
85. NAFTA, supra note 1, annex 1911; see also 19 U.S.C. § 1516a(b)(1)(B)(1980).
86. NAFTA, supra note 1, art. 1904(3). These principles include standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies, among others. Id. art. 1911.
Binational panels must arrive at all decisions by majority vote based on the votes of all its members. 87 The panels must issue their decisions in writing with the reasons for the decision set forth therein. 88 Written decisions may also include any dissenting or concurring opinions. 89

Binational panels have two options upon completing review. The panels can uphold the final determination 90 or they can remand the determination for action not inconsistent with their decision. 91 The same panel that ordered the remand may then review the action taken by the competent investigating authority for compliance with the panel's decision. 92 NAFTA requires either decision by a panel to be fully binding on the Parties with respect to the matter in dispute. 93

In the United States, the NAFTA Implementation Act establishes the procedure by which the ITA or the ITC accept panel decisions upon remand. First, the NAFTA Implementation Act requires that both agencies take action in accordance with the panel's decision within the time period specified by the panel. 94 The NAFTA Implementation Act, however, also devises a special provision to implement panel decisions in the event that the direct acceptance of the decisions by the ITA or the ITC is ruled unconstitutional by U.S. courts. 95 The provision authorizes the President to accept, as a whole, the decision of a binational panel. 96 The provision then requires the ITA or the ITC, upon acceptance of the decision by the President, to take action not inconsistent with the panel's decision. 97 In fact, President Clinton has already accepted prospectively all decisions of the binational panels in the event the special provision comes into effect. 98

2. Review Timetable

A Party must make its request for a binational panel in writing to the other involved Party within 30 days of the publication of the final determination in question. 99 Failure to request a panel within the allotted time precludes binational panel review entirely. 100 Review is then available only in the domestic
courts of the Party whose administrative agency rendered the final determination.\textsuperscript{101} NAFTA also mandates that private parties, who wish to challenge final determinations in domestic courts, give notice to the other involved Party at least 10 days prior to the deadline for requesting panel review.\textsuperscript{102} The other involved Party then has time to invoke panel review instead.\textsuperscript{103} For example, if the ITA renders a final determination favorable to a Mexican importer, neither that importer nor the Mexican government will want to challenge the decision. The U.S. private party, however, theoretically will want to appeal the decision to the CIT. That private party, however, would have to notify the Mexican government. Then, either the Mexican government or the importer could invoke panel review, thereby precluding review by the CIT. In this manner, the option of panel review is assured regardless of which side wants to challenge the final determination.

The panel review process is designed to reduce substantially the time needed for resolution of antidumping and countervailing duty cases, thereby reducing trade friction among the member countries.\textsuperscript{104} With this goal in mind, NAFTA establishes a timetable for the panel review process requiring panels to reach a final decision within 315 days of the initial request for panel review.\textsuperscript{105} This includes: (1) 30 days to file the administrative record with the panel; (2) 60 days for the complainant to file its brief; (3) 60 days for the respondent to file its brief;\textsuperscript{106} (4) 15 days for the filing of reply briefs; (5) 15 to 30 days for the panel to convene and hear oral arguments; and (6) 90 days for the panel to issue its written decision.\textsuperscript{107} The experience with the CFTA panel review process has shown that the panels operate for the most part within the time frame provided under NAFTA.\textsuperscript{108}

The remand process, on the other hand, has been less efficient.\textsuperscript{109} In the case of a remand, the panel establishes as brief a time as is reasonable for the competent investigating authority to comply with the remand.\textsuperscript{110} The time taken to comply with the remand decision, however, cannot exceed the maximum amount of time that the competent investigating authority has to render a final determination under the antidumping and countervailing duty laws of the importing Party.\textsuperscript{111} When a remand action is completed by the competent investigating authority and resubmitted for panel review, the panel has 90 days in

\textsuperscript{101} Id.
\textsuperscript{102} Id. art. 1904(15)(c)(ii). Under U.S. law, a private party who intends to commence judicial review of a final determination made in the United States must give notice of this intention within 20 days after the publication of a final determination. 19 C.F.R. § 356.3.
\textsuperscript{103} Id. art. 1904(15)(c).
\textsuperscript{104} See Moyer, supra note 82, at 716-18.
\textsuperscript{105} NAFTA, supra note 1, art. 1904(14).
\textsuperscript{106} Id. art. 1904(14)(b)-(g).
\textsuperscript{107} Id.
\textsuperscript{108} Moyer, supra note 82, at 717.
\textsuperscript{109} Id.
\textsuperscript{110} NAFTA, supra note 1, art. 1904(8). When establishing the time allowed for compliance, the panel must consider the complexity of the issues involved and the nature of the panel's decision.
\textsuperscript{111} Id.
which to issue a decision as to the action's compliance with the panel's original decision. NAFTA does not limit the number of possible remands; in cases with multiple remands, the process can almost triple in length.

E. Extraordinary Challenge of Panel Decisions

Though there is no appeal process, binational panel decisions are subject to extraordinary challenge by either of the involved Parties. After a panel renders its decision, an involved Party has a reasonable time within which to allege grounds sufficient to maintain an extraordinary challenge. NAFTA allows only the involved Parties to request extraordinary challenge review, precluding participation by the private parties involved at the panel review stage.

To succeed, the Party’s challenge must satisfy a “three-prong test.” First, the Party must prove one of three grounds: (1) that a panel member is guilty of gross misconduct, bias, serious conflict of interest, or violation of the Rules of Conduct; (2) that the panel seriously departed from a fundamental rule of procedure; or (3) that the panel manifestly exceeded its powers, authority, or jurisdiction, such as by failing to apply the appropriate standard of review. Second, the Party must establish that the action materially affected the panel’s decision. Third, the Party must demonstrate that the decision threatens the integrity of the binational panel review process.

Extraordinary challenge committees consist of three members. To staff the committees, the Parties maintain a 15-member roster comprised of judges or former judges. Each Party selects five members for the roster. Within 15 days of an extraordinary challenge, each involved Party selects one member for the committee. The Parties choose by lot which one will select the third member.

If the complaining Party fails to establish any of the three requirements, the committee must affirm the panel’s decision. If the Party meets its burden, the
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The committee has two options. First, the committee can remand the decision for action not inconsistent with the committee's decision. Second, the committee can vacate the panel decision and establish a new panel in the usual manner to review the matter anew. In either case, the committee must issue its opinion within 90 days of the request for extraordinary challenge review.

The United States and Canada apparently have somewhat different views of the extraordinary challenge procedure, at least as it functions under the CFTA. According to one commentator, the United States has pushed for a more substantial appellate review by the committees, while Canada has argued for a limited role. The two extraordinary challenge committees convened under the CFTA indicate that the process probably will not expand into a broader appellate review of panel decisions. In rejecting both challenges, the committees in these cases held that an extraordinary challenge is not a "routine appeal," but rather a "safety valve" to protect against systemic problems such as aberrant behavior that threatens the panel review process itself.

However, the committee also dismissed the characterization of the extraordinary challenge process proposed by the Canadian government in Live Swine from Canada. The Canadian government analogized the extraordinary challenge to the type of restricted judicial review that private commercial arbitration receives in the United States. The committee rejected this analogy as "inappropriate," reasoning that the panel review system of NAFTA was an "innovative exercise" in international economic relations. The committee did not discuss, however, how its review differed from judicial review of private commercial arbitral decisions.

III.
ARTICLE III AND THE BINATIONAL PANEL SYSTEM

Article III, Section 1 of the United States Constitution mandates 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." Article III further requires that the judges of these courts enjoy life tenure during good behavior and salary protection. Congress has vested ju-

126. Id.
127. Id.
128. Id. annex 1904.13(2).
129. Moyer, supra note 82, at 724. There is no indication of Mexico's position on the matter.
130. Moyer, supra note 82, at 709-10. The two extraordinary challenge decisions are Fresh, Chilled and Frozen Pork from Canada, 1991 WL 153112, and Live Swine from Canada, supra note 82.
131. Fresh, Chilled and Frozen Pork from Canada, 1991 WL 153112 at *3; Live Swine from Canada, supra note 82, at *3.
132. Live Swine from Canada, supra note 82, at *3.
133. Id.
134. Id.
136. Id.
risdiction over, among other things, claims arising under U.S. antidumping and countervailing duty law in the CIT,\textsuperscript{137} whose decisions may be appealed to the Court of Appeals for the Federal Circuit.\textsuperscript{138} Congress established the CIT as an Article III court whose judges enjoy life tenure and salary protection.\textsuperscript{139}

NAFTA and the NAFTA Implementation Act transferred jurisdiction from the CIT to the binational panels in certain instances.\textsuperscript{140} Because binational panelists do not enjoy life tenure or salary protection, the panels are not Article III courts. Rather, panel candidates serve one-year terms on a panel roster that does not guarantee their selection, and after their term of service they may or may not be reappointed.\textsuperscript{141} In addition, potential panelists are paid only for their time and expenses if and when they serve on a panel.\textsuperscript{142} Thus, they have no permanent salary. The question then is whether the Constitution prohibits Congress from vesting jurisdiction over U.S. law in a judicial entity that does not meet Article III requirements.

The United States Supreme Court has never adopted a literal reading of Article III that would require the federal judicial power to be vested exclusively in courts whose judges enjoy life tenure and salary protection.\textsuperscript{143} Rather, the Supreme Court has upheld Congress' ability to vest judicial power upon federal tribunals whose judges do not meet Article III's requirements.\textsuperscript{144} However, the Court has examined congressional delegations of judicial authority to non-Article III bodies more closely in recent years.\textsuperscript{145} Presently, the Court uses a balancing test that allows Congress to delegate many issues to non-Article III adjudication. The Supreme Court, however, has never squarely examined, in terms of Article III, a judicial mechanism wherein judges from various nationalities apply U.S. law to evaluate the determinations of U.S. agencies and issue binding decisions on U.S. claimants and the U.S. government. In this sense, NAFTA's binational panel system and its progenitor under the CFTA are entirely novel.

\begin{itemize}
\item \textsuperscript{137} 19 U.S.C. § 1516a(a).
\item \textsuperscript{138} 28 U.S.C. § 1295(a)(5).
\item \textsuperscript{139} 28 U.S.C. §§ 251, 252.
\item \textsuperscript{140} 19 U.S.C. § 1516a(g)(2). The NAFTA Implementation Act, supra note 2, gave the binational panels jurisdiction to review final administrative determinations of antidumping and countervailing duty claims involving imports from NAFTA Parties when requested.
\item \textsuperscript{141} NAFTA Implementation Act, supra note 2, § 402(c)(4)(A). Panelists may be removed during that year for violations of the Code of Conduct established under NAFTA. NAFTA, supra note 1, annex 1901.2(6).
\item \textsuperscript{142} NAFTA, supra note 1, annex 2002.2. Moreover, panelists are paid based on their own records of their time and expenses. Id. annex 2002.2(3).
\item \textsuperscript{143} See Chemerinsky, supra note 10, § 4.1 (1989); see also Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies and Article III, 101 Harv. L. Rev. 916, 919-21 (1988).
\item \textsuperscript{144} Chemerinsky, supra note 10, § 4.1.
\end{itemize}
A. Article III Jurisprudence

Article III jurisprudence has been a somewhat confused area of constitutional law. The United States Supreme Court admits that its precedents in this area are not easy to synthesize. One commentator pointed out that the Court vacillated from a formalistic interpretation approach of Article III to a functional balancing test in the short span of just four years during the 1980s. Another has criticized the current Article III analysis as being an ad hoc balancing test that is almost wholly open-ended and amorphous. Thus, a review of recent case law in the area is necessary to evaluate whether the binational panel system violates Article III.

1. Northern Pipeline

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Supreme Court appeared to augur much closer scrutiny under Article III. In that case, the Court considered the constitutionality of the non-Article III bankruptcy courts created by the Bankruptcy Act of 1978. The Bankruptcy Act established a system of bankruptcy courts attached as adjuncts to federal district courts, which could review the decisions of the bankruptcy judges. Bankruptcy judges are appointed by the President with the advice and consent of the Senate for a term of 14 years and their salaries are set by federal statute and subject to adjustment pursuant to federal statute. Thus, the bankruptcy courts are not Article III courts because the judges do not have life tenure and are not protected against salary diminution.

The Court noted that the bankruptcy courts' jurisdiction was quite broad. Once a petition is filed under the federal bankruptcy laws, the courts have jurisdiction over all civil proceedings, including claims under federal and state law, arising under or related to the bankruptcy action. The bankruptcy courts possessed all the powers of courts of equity, law, and admiralty, except that they could not enjoin other courts or sanction criminal contempt in certain instances. The courts could hold jury trials and issue declaratory judgments, certain habeas corpus and other writs, and any orders or judgments necessary or

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151. *Id.* at 52.
152. *Id.* at 53. The district courts could review decisions based on a clearly erroneous standard. *Id.* at 55 n.5.
153. *Id.* at 53. The judges could be removed only for incompetency, misconduct, neglect of duty, or mental or physical disability.
154. *Id.* at 54.
155. *Id.* (emphasis omitted).
156. *Id.* at 55.
appropriate to carry out the provisions of the federal bankruptcy laws. The decisions of the bankruptcy courts, however, could be appealed to the federal circuit courts.

The first constitutional challenge to the bankruptcy court system came when Marathon Pipe Line Co., defending a suit in bankruptcy court for breach of contract and other claims, alleged that the courts violated Article III. Although a majority of the Supreme Court agreed that the bankruptcy courts violated Article III, no one opinion was able to garner a sufficient number of votes. Justice Brennan's plurality opinion, however, proffered a strict analysis that would tolerate only a few historical exceptions to Article III's mandate.

First, the plurality opinion explained the two purposes underlying Article III: preserving the system of checks and balances in the constitutional structure, and protecting the impartiality of the federal judiciary. To serve these ends, Article III requires that federal judges enjoy life tenure and salary protection in order to preserve judicial independence. Justice Brennan pointed out that these requirements clearly were not satisfied in the case of the bankruptcy judges.

The plurality asserted that there are two distinct types of exceptions within which the bankruptcy court system must fall in order to survive constitutional challenge. The first type, consisting of three exceptions to Article III, concerns so-called legislative courts. The second type involves the "adjunct system" where a non-Article III body is attached to the federal district court system. The legislative courts, Justice Brennan explained, are a manifestation of such an historically and constitutionally exceptional grant of power to Congress and the Executive that they do not threaten the Constitution's separation of powers values. Two of these exceptions—territorial courts and courts martial—clearly could not be used to justify the bankruptcy court system.

Justice Brennan examined whether the constitutionality of the bankruptcy courts could be upheld under the third exception as legislative courts that handle public rights cases. Public rights, the plurality opinion found, are based on

157. Id.
158. Id.
159. Id. at 56-57.
160. See Chemerinsky, supra note 10, ¶ 4.5.3.
161. Id. Justice Rehnquist, in a concurring opinion joined by Justice O'Connor, objected to the bankruptcy court system because of its jurisdiction over traditional, state common law claims. The opinion expressly stopped short, however, of accepting Justice Brennan's three narrow exceptions. See Northern Pipeline, 458 U.S. at 89-92.
162. Northern Pipeline, 458 U.S. at 58.
163. Id. at 58-59.
164. Id. at 60-61.
165. Id. at 63, 76.
166. Id. at 63.
167. Id. at 64.
168. Id. at 71.
169. Id. at 67-68.
the doctrine of sovereign immunity.\textsuperscript{170} Congress could have exclusively committed these matters to executive determination, but instead had them committed to legislative courts or administrative agencies as a less drastic expedient.\textsuperscript{171} Justice Brennan cited \textit{Ex parte Bakelite Corp.},\textsuperscript{172} an early case upholding the Court of Customs Appeals, as an example of the Court's approval of a legislative court that handled public rights matters.\textsuperscript{173} In \textit{Bakelite}, the Court found that the Court of Customs Appeals' jurisdiction to review determinations by the Customs Court as to the classification and duty level of imports was a matter that could have been exclusively committed to executive determination.\textsuperscript{174} Since its jurisdiction did not concern a matter inherently judicial in nature, the Supreme Court found that the Court of Customs Appeals did not offend Article III.\textsuperscript{175}

Though the plurality did not see fit to define fully the distinction between public and private rights, it held that public rights must at a minimum arise between the government and others.\textsuperscript{176} Private rights, the plurality determined, concern the liability of one individual to another.\textsuperscript{177} The plurality found that bankruptcy courts had jurisdiction over a broad range of state-created rights, such as breach of contract claims, which were quintessentially private rights since they concerned the liability of one individual to another.\textsuperscript{178} Accordingly, the plurality held that the bankruptcy court system could not be justified as a system of public rights legislative courts.\textsuperscript{179}

The plurality noted that the second type of exception, the adjunct system,\textsuperscript{180} was first approved by the Supreme Court in \textit{Crowell v. Benson}.\textsuperscript{181} Adjuncts are generally allowed to handle certain adjudicative functions as long as the essential attributes of judicial power remain in Article III courts.\textsuperscript{182} Justice Brennan reasoned that adjuncts may perform such functions as basic fact-finding or deciding pretrial motions, even when the issues concern civil matters between private individuals or criminal matters.\textsuperscript{183} More fundamental questions of law, however, must remain in Article III courts.\textsuperscript{184} Justice Brennan conceded that Congress has broad discretion to allocate adjudicative functions concerning rights of its own creation to adjuncts, since such a power is incidental to Con-

\begin{itemize}
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} \textit{Id.}
\item \textsuperscript{172} 279 U.S. 438 (1929).
\item \textsuperscript{173} \textit{Northern Pipeline}, 458 U.S. at 67-68.
\item \textsuperscript{174} \textit{Bakelite}, 279 U.S. at 458.
\item \textsuperscript{175} \textit{Id.}
\item Interestingly, the United States Customs Court became the Court of International Trade in 1980, and the Court of Customs Appeals was succeeded by the Court of Appeals of the Federal Circuit. \textit{See Vakerics, supra note 19, at 22.} Both courts are now Article III courts and retain jurisdiction over such customs matters at issue in \textit{Bakelite}.
\item \textsuperscript{176} \textit{Northern Pipeline}, 458 U.S. at 69.
\item \textsuperscript{177} \textit{Id.} at 69-70.
\item \textsuperscript{178} \textit{Id.} at 71-72.
\item \textsuperscript{179} \textit{Id.} at 76.
\item \textsuperscript{180} \textit{Id.} at 77.
\item \textsuperscript{181} 285 U.S. 22 (1932).
\item \textsuperscript{182} \textit{Northern Pipeline}, 458 U.S. at 78-79.
\item \textsuperscript{183} \textit{Id.}
\item \textsuperscript{184} \textit{Id.}
\end{itemize}
gress' power to define that right. Congress, however, has minimal power to define claims arising under the Constitution and state laws by allocating their adjudication to adjuncts because it has not created these rights. Such allocation, according to Justice Brennan, would be an unwarranted encroachment on traditional judicial functions and a violation of Article III.

Justice Brennan found that Congress created the bankruptcy court system as an adjunct to the federal district courts, but noted that the bankruptcy courts possessed many judicial attributes. The courts had broad civil jurisdiction over any claims related to the federal bankruptcy laws, including state law claims. They possessed all the ordinary powers of a district court, including the power to enforce its own decisions. Finally, the bankruptcy courts' decisions could be reviewed in federal district court using only a highly deferential standard. The plurality held that Congress, in removing so many of the essential attributes of judicial power from Article III courts, had exceeded this minimal power, and thus held the bankruptcy court system unconstitutional.

2. Thomas

In Thomas v. Union Carbide Agricultural Products Co., the Court rejected Justice Brennan's formalistic, traditional exceptions approach to Article III for a less structured analysis of congressional delegations of judicial authority to non-Article III bodies. In Thomas, the Court examined a system of negotiation and binding arbitration used to resolve certain disputes among registrants under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). FIFRA required pesticide manufacturers to submit research data on pesticides as a precondition to registration of such products. FIFRA also permitted subsequent follow-on registrants of the same or similar insecticide to use previously submitted data as long as the first registrant was adequately compensated. As an alternative to costly and time-consuming litigation over the appropriate amount of such compensation, Congress amended FIFRA to require negotiation and failing agreement, binding arbitration to determine the issue at the request of either party. The arbitrator's decision was subject to judicial review only for fraud, misrepresentation, or other misconduct. After the Supreme Court's decision in Northern Pipeline, certain pesticide manufacturers, who had submitted data to

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185. Id. at 83.
186. Id. at 82-83.
187. Id. at 84.
188. Id. at 84-85.
189. Id.
190. Id. at 84-86.
191. Id.
192. Id. at 87.
194. Id. at 571.
195. Id. at 572.
196. Id. at 573.
197. Id. at 573-74.
the Environmental Protection Agency ("EPA") in the past for pesticide registration, challenged the arbitration system for violating Article III.\textsuperscript{198}

The Court, in an opinion by Justice O'Connor, began by noting that its jurisprudence has not required a literal reading of Article III.\textsuperscript{199} The majority then made clear that \textit{Northern Pipeline} was a divided opinion that did not define the scope and nature of Article III's requirements.\textsuperscript{200} The majority emphasized that in \textit{Northern Pipeline} the Court only held that Congress cannot give a non-Article III court jurisdiction over traditional contract action arising under state law without consent of the litigants, and subject only to ordinary appellate review.\textsuperscript{201}

The Court also rejected \textit{Northern Pipeline}'s interpretation of the public rights doctrine as requiring that the U.S. government be a party in all cases.\textsuperscript{202} The Court could not accept that the parties' identities would determine whether the right at issue was public or private.\textsuperscript{203} The Court was concerned that this interpretation would place many generally accepted non-Article III bodies that resolve matters of individual liability on constitutionally shaky ground.\textsuperscript{204} Likewise, the Court rejected the notion that Article III is not implicated simply because the United States is a party to the dispute.\textsuperscript{205}

As an alternative to the doctrinaire reliance on formal categories expounded by Justice Brennan's approach in \textit{Crowell}, the Court in \textit{Thomas} vowed to pay practical attention to substance when determining the application of Article III.\textsuperscript{206} Though it did not elaborate on what this would mean in practice, the Court listed three factors to justify its decision to uphold FIFRA's arbitration scheme.\textsuperscript{207} In so doing, however, the Court blurred the distinction between legislative courts and administrative adjuncts, thereby ending the analytical dichotomy that had lasted at least from \textit{Crowell} through \textit{Northern Pipeline}. The Court, in fact, did not mention whether it considered the FIFRA arbitration system to be an adjunct or a legislative court.

First, the Court noted that rights under FIFRA, while partially private rights concerning an individual's liability, closely resembled public rights because they were created by Congress acting pursuant to its valid Article I power to protect the public health.\textsuperscript{208} In addition, the Court determined that Congress could have authorized the EPA to determine at its discretion the costs of follow-on registrants, thus, avoiding any Article III implication.\textsuperscript{209} Congress, instead, chose

\begin{itemize}
  \item \textsuperscript{198} \textit{Id.} at 575-76.
  \item \textsuperscript{199} \textit{Id.} at 583.
  \item \textsuperscript{200} \textit{Id.} at 584.
  \item \textsuperscript{201} \textit{Id.}
  \item \textsuperscript{202} \textit{Id.} at 586.
  \item \textsuperscript{203} \textit{Id.} at 586.
  \item \textsuperscript{204} \textit{Id.} at 587-88.
  \item \textsuperscript{205} \textit{Id.} at 586.
  \item \textsuperscript{206} \textit{Id.} at 587.
  \item \textsuperscript{207} \textit{Id.} at 589-92.
  \item \textsuperscript{208} \textit{Id.} at 589.
  \item \textsuperscript{209} \textit{Id.} at 590.
\end{itemize}
the arbitration scheme.\textsuperscript{210} The Court reasoned that Article III is not so rigid as to prevent Congress from creating an innovative solution to the regulatory problem of cost determination.\textsuperscript{211}

Second, the Court noted that the FIFRA arbitration system did not rely substantially on the courts for enforcement.\textsuperscript{212} The Court reasoned that encroachment on Article III judicial powers by the other branches is at a minimum when no unwilling defendant is subjected to judicial enforcement power as a result of non-Article III enforcement.\textsuperscript{213} Finally, the Court pointed to the limited judicial review for fraud, misrepresentation, and other misconduct as well as constitutional error as preserving the appropriate exercise of the judicial function in Article III courts.\textsuperscript{214}

The last two factors demonstrate the problem of disregarding the distinction between legislative courts and administrative adjuncts. Adjuncts differ from legislative courts in that adjuncts perform only certain kinds of adjudicative functions in addition to their administrative responsibilities.\textsuperscript{215} Legislative courts, on the other hand, perform all judicial functions relating to a limited set of subject matter.\textsuperscript{216} Thus, the requirement that essential judicial attributes remain in Article III courts makes sense for adjuncts. They exist to administer regulatory schemes in the course of which they assist federal courts by performing certain judicial functions. It makes little sense to require this of legislative courts, which are not attached to any federal court, since judicial attributes are necessary if they are to function.

Likewise, while legislative courts are able to enforce their decisions, adjuncts, by definition, are not. As a result, the Court compromised its analysis in order to uphold the scheme. In \textit{Thomas}, the FIFRA scheme appeared to be a legislative court, because it was not attached to any district court and could enforce its own decisions. But, the Court also noted the importance of the judicial attributes factor and hedged somewhat on the issue because the scheme allowed for very deferential appellate review.\textsuperscript{217} The Court's need to hedge or compromise its analysis renders prediction of future outcomes difficult.

\begin{itemize}
\item \textsuperscript{210} \textit{Id.}
\item \textsuperscript{211} \textit{Id.} at 589-90.
\item \textsuperscript{212} \textit{Id.} at 591.
\item \textsuperscript{213} \textit{Id.}
\item \textsuperscript{214} \textit{Id.} at 592.
\item \textsuperscript{215} Fallon, \textit{supra} note 143, at 921-26.
\item \textsuperscript{216} \textit{Id.} Legislative courts, as noted by the Supreme Court in \textit{Northern Pipeline}, can adjudicate all matters relating to three substantive areas: territorial law, martial law, and public rights issues. \textit{Id.} at 922. Administrative agencies or adjuncts today administer a wide array of statutory schemes of federal regulation, in the course of which they perform certain judicial functions. \textit{Id.} at 923. As the court noted in \textit{Northern Pipeline}, there is a distinction between adjuncts that handle public rights and those that handle private rights, with Congress having greater latitude to assign public rights to adjunct determination. But even private right issues can be adjudicated by adjuncts if there remains adequate review in an Article III court. \textit{Id.} at 923-24.
\item \textsuperscript{217} \textit{Thomas}, 473 U.S. at 592.
\end{itemize}
3. Schor

In Commodity Futures Trading Commission v. Schor, the Supreme Court firmly embraced an ad hoc balancing test for analysis under Article III. Schor presented the Court with a challenge to the authority of the Commodity Futures Trading Commission (CFTC) under the Commodity Exchange Act (CEA) to hear state law counterclaims in broker-client reparations proceedings. Congress intended such proceedings to be an inexpensive and expeditious alternative to federal courts which customers could choose to redress fraudulent activity by commodity brokers. In addition to its jurisdiction over CEA-based claims, the CFTC asserted authority in reparations proceedings to adjudicate all counterclaims arising out of the disputed transaction or transactions.

The dispute in the case arose when a customer, Schor, used the reparations proceedings of the CFTC to charge his commodity broker with violations of the CEA. The broker counterclaimed to recover expenses and other debts owed by Schor on his commodity account. The presiding administrative law judge (ALJ) ruled in favor of the broker as to Schor’s claim and the broker’s counterclaim. Schor challenged the constitutionality of the CFTC’s asserted jurisdiction over common law counterclaims. The ALJ rejected this claim and Schor appealed to the United States Supreme Court.

The Supreme Court in Schor announced that congressional delegation of adjudicative functions to non-Article III bodies must be assessed by reference to the underlying purposes of Article III. Once again emphasizing substance over form, the Court announced that it would not adhere to formalistic and rigid rules which would unduly restrict Congress’ ability to take needed and innovative action pursuant to its Article I powers. The Court again ignored the distinction drawn in Northern Pipeline between legislative courts and administrative adjuncts.

As in Thomas, the Court found that Article III served two purposes. First, it safeguards the impartiality of the judiciary. In this sense, Article III protects the personal interests of litigants, rather than the structural interest of government. While the Court pointed out that litigants do not have an absolute
right to plenary consideration by Article III courts in every case, it noted that Schor waived any right to an Article III forum when he invoked the CFTC’s procedure.230 The Court did not indicate how Article III’s goal of securing fairness to litigants would be assessed in the absence of consent by the parties.231

This left the Court to analyze the CFTC’s jurisdiction in reference to the second, structural purpose of Article III: preserving the role of an independent judiciary in the constitutional scheme of tripartite government by preventing the encroachment or aggrandizement of one branch at the expense of the other.232 In its analysis, the Court weighed several factors with a view to the practical effect of the non-Article III delegation on the constitutionally assigned role of the federal judiciary.233 The Court observed that no one factor is determinative.234 After weighing the factors, the Court held that the CFTC jurisdiction over common law counterclaims did not impermissibly intrude on the province of the Article III judiciary.235

First, the Court examined the extent to which the essential attributes of judicial power are reserved to Article III courts.236 The Court found that the CFTC reparations system left much of these attributes to Article III courts.237 For instance, the CFTC had jurisdiction over a particularized area of law, not over all civil actions such as in Northern Pipeline.238 In addition, parties must go to the federal district court for enforcement of a CFTC order.239 Moreover, because CFTC decisions are subject to de novo review, Article III courts need not use a deferential standard of review.240 The Court also weighed the extent to which the CFTC exercised the ordinary powers of Article III courts.241 It found that the CFTC did not exercise many judicial powers, such as the authority to hold jury trials and issue writs of habeas corpus.242

Next, the Court explored the nature and importance of the right at issue.243 The Court found that the common law counterclaim involved a private right that is normally the protected core of Article III matters.244 However, the Court

230. Id. at 848-49.
231. See Fallon, supra note 143, at 932.
232. Schor, 478 U.S. at 850.
233. Id. at 851.
234. Id.
235. Id. at 851-52.
236. Id. at 851.
237. Id. at 851-53.
238. Id. at 852-53.
239. Id. at 853. The Court’s point here directly contradicts, without an explanation, one of the principal rationales in Thomas. See Thomas, 473 U.S. at 591; see also Fallon, supra note 143, at 932 n.114. Of course, this results from the Court’s blurring of the legislative courts/administrative adjuncts distinction. Here, the CFTC resembles an adjunct in that it must rely on the federal district court for enforcement of its decisions. Thus, in order to uphold the CFTC scheme, the Court must reverse its position on this issue.
240. Schor, 478 U.S. at 853.
241. Id.
242. Id.
243. Id.
244. Id.
emphasized that this was not dispositive—when private rights are delegated to non-Article III bodies for adjudication, the courts merely examine the constitutional issues more closely.\textsuperscript{245} The Court found that the CFTC's jurisdiction over a core Article III matter nevertheless did not unduly encroach on the province of the judicial branch. Such jurisdiction was over a narrow class of claims and the federal judiciary was not divested of its jurisdiction over the particular class of claims.\textsuperscript{246}

Finally, the Court examined the concerns that motivated Congress to delegate authority to the CFTC.\textsuperscript{247} In analyzing this factor, the Court emphasized that it would examine whether there was a legitimate need for the delegation or whether Congress was really interested in allocating jurisdiction among federal tribunals.\textsuperscript{248} In the instant case, the Court found that Congress intended the reparations system to be a quick and inexpensive alternative means by which customers could enforce the provisions of the CEA, a scheme which itself was of unquestioned constitutional validity.\textsuperscript{249} The Court then determined that jurisdiction over common law counterclaims was needed to make the reparations process effective and that the jurisdiction was limited to claims closely incident to the underlying CEA claim.\textsuperscript{250} The Court concluded that the delegation of counterclaim jurisdiction was not an attempt to undermine Article III values through control of judicial function but to promote the legitimate regulatory purposes of Congress.\textsuperscript{251}

B. Binational Panels as Public Rights Tribunals

Schor established a flexible balancing test for assessing congressional delegations of judicial authority to non-Article III bodies, thus, completing the progression away from the rigid categorical approach of the \textit{Northern Pipeline} plurality.\textsuperscript{252} In sum, the Court's precedents require that congressional action be examined in light of the two values that underlie Article III. This means that the

\begin{itemize}
\item \textsuperscript{245} \textit{Id.} at 853-54. In dicta, the Court reinforced the understanding of public rights put forth in \\textit{Thomas}: public rights are those not traditionally within the province of the judiciary but rather are matters that could have been conclusively determined by the political branches in the first place. As a result, the danger of encroaching on judicial powers is less when Congress delegates public rights adjudication.
\item \textsuperscript{246} \textit{Id.} at 854-55.
\item \textsuperscript{247} \textit{Id.} at 855.
\item \textsuperscript{249} \textit{Schor}, 478 U.S. at 855-56. The Court stressed that the delegation of CEA claims jurisdiction made sense given that CFTC was impartial, free from political pressures, and in possession of considerable expertise in the substantive area.
\item \textsuperscript{250} \textit{Id.} at 856.
\item \textsuperscript{251} \textit{Id.}
\item \textsuperscript{252} See Chemerinsky, supra note 10, § 4.5.4. As Chemerinsky notes, the \textit{Northern Pipeline} approach is no longer controlling after \textit{Thomas} and \textit{Schor}. \textit{Id.} This helps NAFTA's binational panel system since it would not have fit exactly into any of the historical exceptions. The closest fit, the "public rights legislative courts," would not have justified the panel system since antidumping and countervailing duty claims technically are not matters arising between the government and others. \textit{See Northern Pipeline}, 458 U.S. at 69.
\end{itemize}
benefits of using the congressional scheme will be assessed functionally in terms of its fairness to litigants and its effects on the structural role of an independent judiciary with the tripartite system of government.253

NAFTA's binational panel system passes constitutional scrutiny under the Schor balancing test for four reasons. First, the binational panel system does not unduly infringe on the fairness interest of litigants because functionally the system is insulated from congressional and executive control, and because traditionally this interest has been amenable to compromise. Second, the binational panel system leaves many essential judicial attributes in Article III courts, and is functionally insulated from congressional and executive control, thus, preserving the separation of powers. Third, the binational panel system's jurisdiction over claims arising under antidumping and countervailing duty law concerns a classic "public right" of the kind whose assignment to non-Article III courts traditionally has been tolerated. Fourth, there is strong evidence that Congress and the Executive had valid motives for creating the binational panel system and were not attempting to encroach on the province of the judiciary by assuming effective control of judicial functions.

1. Fairness to the Litigants

First, NAFTA's binational panel system must be examined in light of its effect on the litigants' right to an impartial judiciary. The Court in Schor explained that Article III protects the right of litigants to an impartial judiciary by preventing the other branches of government from influencing the courts.254 The Court resolved the fairness issue in Schor by finding that the appellant had waived any right to Article III adjudication by virtue of his consent to the jurisdiction of the CFTC.255 The Court failed to suggest, however, how Article III's fairness value would be satisfied where the statutory scheme does not require the litigants' consent.256 Importantly, Article III's prevention of undue influence on the judiciary by the political branches is not considered as crucial a function as its role in preserving the separation of powers.257

In the case of NAFTA, at least one set of litigants cannot be said to have the same choice as the appellant in Schor. In any given case, Canadian or Mexican exporters will be the party most likely to invoke panel review to avoid the perceived bias of U.S. courts. U.S. companies, on the other hand, would prefer that final determinations by the ITA or the ITC be reviewed by the CIT. NAFTA, however, requires them to submit to the jurisdiction of the binational panels. Thus, U.S. litigants cannot consent to non-Article III adjudication as did the appellant in Schor.

253. See CHEMERINSKY, supra note 10, § 4.5.4.
254. Schor, 478 U.S. at 848.
255. Id. at 848-49.
256. Id.; see also Fallon, supra note 143, at 932.
257. Schor, 478 U.S. at 848.
The Supreme Court's functional approach, which emphasizes the practical effect on Article III values, should mean that this lack of choice will not have serious constitutional consequences for the binational panel system. As noted, the panel system provides no protection against congressional or executive control of the panel system as Article III provides to the CIT. Though they have no salary as such, the panelists' re-appointment to the panel roster may be affected by the nature of their decisions.

The structure of the panel system, however, does offer other protections that make it functionally as insulated as the CIT from control by the political branches. First, the preservation of review of constitutional issues in Article III courts of administrative decisions by the ITA and the ITC protects litigants' fairness interest from political influence at this first stage of adjudication. Second, NAFTA requires that panelists not be affiliated with nor take instructions from the governments of any of the Parties. The system safeguards this independence by providing for the removal of panelists who violate these strictures and for extraordinary review of panel decisions in the face of such misconduct. While this does not provide the same insulation as life tenure and salary protection, it does establish a strong incentive to remain impartial. Finally, and most importantly, Congress and the Executive, in any given case, will have no control over the selection of at least two panelists and possibly a majority of the panel. Thus, while the political branches may have somewhat more influence over U.S. panelists, Congress and the Executive will have no control over the other half of the panel.

Together with the sanctions against direct influence on panelists, this insulation helps to reduce congressional and executive control over the binational panels, thereby preserving litigants' interest in a judiciary independent from influence by the political branches. The protections afforded by the panel system function, therefore, in a manner similar to the Article III requirements.

Despite the panel system's checks on congressional and executive control, the continued tenure of panelists is dependent on the Executive, unlike the tenure of Article III judges. As a result, panelists will feel political influence to a greater degree, as likely will their Canadian and Mexican counterparts. This element of political influence, however, does not necessarily doom the binational panel system. Article III's protection of impartial adjudication is not as important a function as is its preservation of the separation of powers. Professor Fallon argues that the fairness value is inherently weaker. He points to Article III's toleration of state court judges who often lack the life tenure and salary

259. NAFTA, supra note 1, annex 1901.2(1).
260. Id. annex 1901.2(6), art. 1904(13).
261. Id. annex 1901.2(2)-(3).
protection enjoyed by federal judges as evidence.262 As a result, the fairness value underlying Article III is amenable to compromise.263

The most pertinent example of the Court's willingness to compromise on Article III's protection of fairness to litigants is Thomas. In that case, the litigants challenging the arbitration system were those registrants who originally submitted data to the EPA.264 If no agreement as to compensation could be reached, the original registrants had no choice but to submit to binding arbitration with follow-on registrants.265 Though this arbitration did not provide the same protection as Article III's requirements, the Court did not find the fairness interest to be unduly prejudiced. The Court reasoned that since the compensation determination had been shifted from the EPA to private arbitration, the likelihood of impartial decision making free from political influence had not been reduced.266 Thus, the case law bears out the conclusion that the fairness interest of litigants has been amenable to compromise.267

2. Preservation of the Separation of Powers

Article III's role in preserving the separation of powers is perhaps its most important function.268 As the Supreme Court explained in Schor, Article III's requirements prevent the aggrandizement or encroachment of the political branches upon the province of the judiciary.269 This function of Article III exists independently from its role in securing an impartial judiciary. The framers of the Constitution found that "excessive concentration of power in a single branch" to be tyranny in and of itself.270 Thus, the separation of powers is threatened when Congress or the Executive obtains effective control over judicial functions, such as by allocating jurisdiction to non-Article III entities. The Supreme Court examines several factors in order to determine whether such a delegation to a non-Article III entity impermissibly threatens the constitutional province of the judiciary.271

a. Essential Attributes in Article III Courts

Under the Schor balancing test, the Supreme Court examines the extent to which the essential attributes of judicial power remain in Article III courts under the congressional scheme at issue.272 If the congressional scheme leaves essen-

262. Fallon, supra note 143, at 941-43. The state courts, he notes, still assure fairness to litigants providing impartial judges and reasonable procedures. In addition, Article III review of state court decisions is preserved in the Supreme Court.
263. Id. at 943.
265. Id. at 573.
266. Id. at 590.
267. Id.
268. Fallon, supra note 143, at 937.
269. Schor, 478 U.S. at 850.
270. Fallon, supra note 143, at 937.
271. Schor, 478 U.S. at 851.
272. Id. at 851-52.
tial attributes in Article III courts, Congress cannot be seen as threatening the separation of powers by accumulating control over judicial functions. Thus, to the extent the CIT retains such attributes, the panel system does not represent an impermissible intrusion on the province of the judiciary.

In the instant case, the binational panel system leaves even more of these essential attributes to Article III courts than did the CFTC in Schor. First, the narrow jurisdiction of the binational panels over a “particularized area of law,” much like the CFTC, contrasts sharply with the CIT’s broad jurisdiction. The panels review only U.S. administrative determinations of antidumping and countervailing duty claims involving NAFTA Parties upon request by a Party. Most importantly, the CIT retains jurisdiction in cases involving NAFTA Parties “with respect to a determination solely concerning a constitutional issue . . . arising under any law of the United States as enacted or applied.” The CIT also retains jurisdiction over antidumping and countervailing duty claims involving nationals from any other country and over cases where the NAFTA Parties do not invoke panel review. Moreover, the CIT can review a broader range of actions taken by U.S. agencies on antidumping and countervailing duty claims, such as agency determinations suspending investigations. The CIT also has jurisdiction over civil actions initiated by the U.S. government to enforce administrative sanctions for violations of protective orders issued during binational panel proceedings.

In addition to antidumping and countervailing duty claims, the CIT has jurisdiction over a number of international trade issues over which the binational panels are powerless, even when a NAFTA Party is involved. Importantly, the CIT has jurisdiction over civil actions initiated by the United States in an attempt to impose penalties for a number of fraud and negligence-related claims pertaining to the importation of goods, payments on drawback claims, and cus-

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273. NAFTA, supra note 1, art. 1904(1); 19 U.S.C. § 1516a(g)(2).
274. 19 U.S.C. § 1516a(g)(4)(B). The binational panels may also address certain constitutional issues when reviewing final determinations. The panels may apply the general legal principles of the Party whose determination is to be reviewed. These principles include, among others, due process, standing, rules of statutory construction, mootness and exhaustion of administrative remedies. See NAFTA arts. 1904(3), 1911.
277. 28 U.S.C. § 1584. When review by a binational panel or extraordinary committee commences, the administering authority may make available under protective order “proprietary material” in the administrative record to “authorized persons.” Note that the Supreme Court’s precedents on this point are contradictory: Schor finds reliance on district courts for enforcement to evidence lack of intrusion on the province of the judiciary, while Thomas holds exactly the opposite. See Thomas, 473 U.S. at 590-91; Schor, 478 U.S. at 853. Thus, the implications of this aspect of the binational panel system are unclear.
278. 28 U.S.C. § 1581. These issues include protests over (1) the imposition of customs duties and the classification of products, agency decisions as to the eligibility of workers, businesses and communities for “adjustment assistance” when hurt by imports, (2) agency determinations about government procurement practices, (3) requests to agencies to make confidential information available, (4) agency decisions regarding customs brokers’ licenses, and (5) any civil action regarding revenue from imports or tonnage, tariffs and other fees imposed for reasons, other than raising revenue and embargoes and quotas imposed on imports for reasons other than public health or safety.
The CIT also has exclusive jurisdiction over civil actions to impose penalties for violations of suspension agreements in antidumping or countervailing duty cases. Finally, in any civil action, the CIT has jurisdiction over any counterclaim, cross-claim, or third party claim involving the merchandise that is the subject matter of that action. The binational panels do not enjoy this grant of authority which should make the panels less offensive to the judiciary than the CFTC in Schor, even though the CFTC's counterclaim jurisdiction included state common law claims which lay at the heart of Article III protection. In sum, the CIT retains broad jurisdiction over almost all civil actions relating to international trade issues while the binational panels can review only certain administrative determinations relating to antidumping and countervailing duty claims involving the NAFTA Parties.

Second, the panels do not exercise the "ordinary powers" of Article III courts. The CIT possesses all the powers in law and in equity of or as conferred by statute upon the federal district courts. These include, among others, the power to grant injunctions and other equitable relief and the power to hold jury trials. In contrast, the binational panels did not receive such a broad grant of powers; the panels' powers are limited to those enumerated in NAFTA and the NAFTA Implementation Act. Essentially, the panels can only determine whether a final determination complies with the law of the rendering Party and then either affirm the determination or remand for action not inconsistent with the panel's decision.

The panels are analogous to the CFTC in Schor in that neither can hold jury trials, issue writs of habeas corpus, nor grant equitable relief. The panels do have certain powers to obtain information by requiring testimony or the production of documents and other evidence. The panels can also issue protective orders when they release proprietary information to interested parties. But in both cases the panels are not authorized to compel compliance with these orders; the panels must rely on the federal courts for enforcement. However, the

279. 28 U.S.C. § 1582(1). In addition, the CIT has jurisdiction over civil actions by the United States to recover customs penalties and upon import bonds. 28 U.S.C. §§ 1582 (2)-(3).
280. 28 U.S.C. § 1582(1). Foreign importers under investigation for violating the antidumping or countervailing duty laws can enter into "suspension agreements" whereby they agree to halt or otherwise remedy the illegal action. See 19 U.S.C. §§ 1671c, 1673c.
285. NAFTA, supra note 1, art. 1904(c).
286. NAFTA Implementation Act, supra note 2, § 403(a)-(b).
287. Normally, when an interested party requests access to proprietary information, the responsible administering authority issues the order. Rule 48, 59 Fed. Reg. 8686-01 (1994). However, the requesting party may ask the panel to review a denial of proprietary information, and if the panel agrees, the panel can issue its own order allowing access to such information. 59 Fed. Reg. 8686-01, Rule 48 (1994).
288. NAFTA Implementation Act, supra note 2, § 403(c); 28 U.S.C. § 1584. Any federal district or territorial court can issue a writ of mandamus to compel compliance with orders requiring
Supreme Court's decisions in *Schor* and *Thomas* conflict on the effect of such reliance, and the implication for the panel system is unclear. In sum, the binational panel system, by obtaining only a narrow slice of the CIT's jurisdiction and by possessing only a limited set of judicial powers, leaves many essential attributes of judicial power to Article III courts, thus, supporting the argument for its constitutionality.

The principal problem in this area, and perhaps most damaging for the binational panel system, is the complete lack of appellate review of its decisions by U.S. courts. As noted before, the constitutionality of the binational panel system itself may be challenged in the Court of Appeals for the D.C. Circuit. In addition, constitutional claims based on administrative determinations by the ITA or the ITC may be raised in the CIT. Once binational panel review has been invoked, however, no federal court may review such determinations on any question of law or fact.

Appellate review or the authority to decide questions of law is perhaps the most crucial of the essential judicial attributes that should be left to Article III courts. In *Northern Pipeline*, the Court, when addressing whether bankruptcy courts were adjuncts to the federal courts, found the extremely deferential review standard of the federal court to be inadequate to preserve the essential attributes of judicial power. In the subsequent cases, however, the Court relaxed its position on the issue. In *Thomas*, the Court found a much more deferential standard of review to be sufficient. There, the arbitrator's decision could be reviewed only for fraud, misconduct, or misrepresentation, though review of constitutional error also was maintained. The Court found that this review preserved the appropriate exercise of judicial function since it formed a check against the arbitrators exceeding or abusing their power and satisfied due process concerns. In *Schor*, the Court found that de novo appellate review by the Circuit Court of Appeals using a weight-of-the-evidence standard was sufficient. Nevertheless, the Court has not indicated whether appellate review in federal court is required of the congressional scheme under the Constitution.

Professor Fallon advances an "appellate review theory" the core of which is that "sufficiently searching review of a legislative court's or administrative agency's decisions by a constitutional court will always satisfy the requirements

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289. *See supra* note 277.
293. *Northern Pipeline*, 458 U.S. at 85.
295. *Id.* at 492 (quoting Crowell v. Benson, 285 U.S. 22, 54 (1932)).
296. *Schor*, 478 U.S. at 853. This standard admittedly is less deferential than the clearly erroneous standard in *Northern Pipeline*.
297. *See Fallon, supra* note 143, at 932.
of Article III.\textsuperscript{298} The theory stipulates that such review must include constitutional issues and questions of law, but not necessarily questions of fact.\textsuperscript{299} Essentially, such review protects Article III values by providing a check against the growing control of judicial functions by the legislative and executive branches.\textsuperscript{300}

The binational panel system, however, is not necessarily doomed by the absence of appellate review in the constitutional courts. In fact, the Supreme Court has not required appellate review in Article III courts with respect to decisions by legislative courts that hear public rights matters. This is because such matters, by their very nature, need not involve the judiciary.\textsuperscript{301} Indeed, even Professor Fallon admits that acceptance of his appellate review theory would mean rejecting a line of precedent that did not require review of legislative court decisions by even the Supreme Court.\textsuperscript{302} It is unclear whether this line of precedent will continue to influence the Supreme Court. The Court in \textit{Thomas} and \textit{Schor} ignored the legislative courts/administrative adjunct distinction and mentioned the availability of review by an Article III court as a positive factor in upholding the congressional scheme.\textsuperscript{303} By the same token, however, the Court has not held that such review would be required in every case but has expressed that no one factor is determinative.\textsuperscript{304} However, to the extent that the Supreme Court looks at the existence of some appellate review as a positive factor, its absence from the binational panel system must be addressed.

The Supreme Court's emphasis on functional analysis supports the argument that the binational panel system adequately protects Article III values. As noted before, the panel system's structure protects against the accumulation of congressional or executive control over judicial functions. Political control of administrative decisions of the ITA and the ITC is checked by the availability of Article III court review for constitutional issues.\textsuperscript{305} Panelists cannot be affiliated with or take instructions from the governments of any of the Parties.\textsuperscript{306} Panelists can be removed and their decisions reviewed by extraordinary committees for violations of these strictures.\textsuperscript{307} More significantly, in any given case, Congress and the Executive will have no control over the selection of at least two panelists and possibly a majority of the panel.\textsuperscript{308} Despite these controls, the Executive may still have more influence over American panelists than over the

\begin{itemize}
\item 298. \textit{Id.} at 933.
\item 299. \textit{Id.} at 975-7, 987.
\item 300. \textit{Id.} at 975-8.
\item 301. \textit{Id.} at 922-23 (quoting Professor Strauss). Even Justice Brennan admitted that the Supreme Court has not required such review in public rights cases. \textit{See Northern Pipeline}, 458 U.S. at 69 n.23.
\item 302. Fallon, \textit{supra} note 143, at 947.
\item 304. \textit{Schor}, 478 U.S. at 851.
\item 305. 19 U.S.C. § 1516a(g)(4)(B).
\item 306. NAFTA, \textit{supra} note 1, annex 1901.2(1).
\item 307. \textit{Id.} annex 1901.2(6), art. 1904(13).
\item 308. \textit{Id.} annex 1901.2(2)-(3).
\end{itemize}
judges of the CIT. This, however, does not mean that the Executive can control the judicial function of the panels; at best the Executive can influence only the U.S. portion of the panels. The binational nature of the panels prevents the Executive from exerting effective control over the outcome of any given panel review process. Since the separation of powers value only requires that the political branches not have control over judicial functions, the protections built into the binational panel system are the functional equivalent of the Article III requirements.

b. Nature and Importance of Right

The next factor examined under the Schor balancing test is the nature and importance of the right allocated to non-Article III adjudication.\(^{309}\) This stage of the analysis is rooted in the public rights analysis. Traditionally, public rights have been identified as those rights that do not require judicial resolution, though they are capable of being so decided.\(^{310}\) There are two explanations typically offered to justify Congress' authority to allocate adjudication of public rights to non-Article III determination. First, public rights are traditionally associated with sovereign immunity.\(^{311}\) Congress, the reasoning goes, has the power to decide when to allow the government to sue or be sued. Because Congress can control whether such litigation will be permitted at all, it can condition the right to bring claims as it chooses, such as by requiring that claims be brought in a legislative court. Justice Brennan, in Northern Pipeline, cited sovereign immunity as one of the explanations for the public rights doctrine.\(^{312}\) Perhaps this explains why the plurality in that case insisted that public rights can only arise between the government and others.

A second explanation for the public rights doctrine reflects the notion that the framers of the Constitution understood certain matters to be inherently judicial while other matters could be "exclusively determined by the Executive and Legislative Branches."\(^{313}\) Thus, matters that are "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789" are at the core of Article III protection.\(^{314}\) Other claims traditionally resolved by the Executive or by Congress are then "public rights" that can be resolved as Congress sees fit, such as by allocating decision to a legislative court.\(^{315}\)

The Northern Pipeline plurality asserted a restricted definition of public rights.\(^{316}\) As noted, Justice Brennan argued that public rights must arise between the government and others.\(^{317}\) Private rights, in contrast, concern the

\(^{309}\) Schor, 478 U.S. at 853.
\(^{310}\) Fallon, supra note 143, at 951.
\(^{311}\) See Chemerinsky, supra note 10, § 4.4; see also Fallon, supra note 143, at 951.
\(^{312}\) Northern Pipeline, 458 U.S. at 67.
\(^{313}\) Id. at 68.
\(^{314}\) Id. at 90 (Rehnquist, J., concurring in the judgment).
\(^{315}\) Id. at 68.
\(^{316}\) Id.
\(^{317}\) Id.
liability of one individual to another and lie at the core of the historically recognized judicial power. But, the Supreme Court in *Thomas* and *Schor* rejected this limited definition of public rights. First, the Court emphasized that the distinction between public and private rights would not be determinative in Article III analysis. The Court has also rejected the requirement that the government be a party to the lawsuit for the right at issue to be public. The Court has summarized the present version of the public rights doctrine as reflecting a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that could be conclusively determined by the executive and legislative branches, the danger of encroaching on the judicial power is reduced. Thus, to the extent that claims arising under antidumping and countervailing duty law are rights that could be conclusively determined by the political branches, their allocation to the binational panels do not impermissibly encroach on the judicial power of the United States.

The Supreme Court's relaxed view has allowed approval of non-Article III adjudication of matters that are not traditional public rights. In *Thomas*, the right at issue concerned the liability of follow-on registrants to the original registrant for use of original research data. This certainly concerns the liability of one individual to another, which the *Northern Pipeline* plurality would have found to be a private right that must remain within the purview of Article III courts. But the Court held that the right to recover compensation for use of data was an integral part of a regulatory scheme created pursuant to Congress' valid Article I power, and thus, closely resembled a public right. In *Schor*, the Court approved non-Article III adjudication of a state law right which it conceded was at the core of matters normally reserved to Article III courts. The Court found that this does not require invalidation, but merely closer scrutiny. The Court held that the CFTC's jurisdiction over such claims was not a threat to the judiciary because the class of claims was narrow and the federal courts retained concurrent jurisdiction. The Court also noted that the counterclaim jurisdiction was necessary for the CFTC to function as an adjudicatory body. Thus, both *Thomas* and *Schor* demonstrate that the Court will tolerate the allocation of core Article III claims where those claims are important to the functioning of a valid congressional regulatory scheme.

318. *Id.*
322. *Id.* at 589 (quoting *Northern Pipeline*, 458 U.S. at 68); *Schor*, 478 U.S. at 853-54.
324. *Id.* at 589.
326. *Id.* at 854.
327. *Id.* at 855-6.
329. In a more recent case, the Supreme Court dealt with the related issue of whether Congress could provide for adjudication of claims without the right to a jury trial. See *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 36 (1989) (holding that person sued by a trustee in bankruptcy to recover
Claims arising under antidumping and countervailing duty law are quintessentially public rights since they are matters that could be conclusively determined by the executive or legislative branch. They are not "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," since such laws did not exist until the end of the nineteenth century. In fact, prior to 1979, Congress had allocated exclusive determination of antidumping and countervailing duty claims to the executive branch, principally to the Treasury Department. The executive branch, on the complaint of a U.S. industry, investigated claims and imposed duties upon its own determination.

In 1979, Congress, in response to concerns about excessive executive discretion in the wake of Watergate and Vietnam, decided to provide for judicial review of administrative decisions by Article III courts. To accomplish this end, Congress delegated to private parties the task of policing executive discretion. Congress, thus, gave the power to initiate antidumping and countervailing duty proceedings to private parties, required executive action upon such complaint, and established judicial review of the executive decision.

The U.S., however, retains the authority to initiate claims on its own initiative, though admittedly private parties in practice bring most claims. Moreover, the nature of the parties allowed to initiate actions or otherwise participate in the case strongly suggests that the right to bring claims is a public one. First, in addition to affected individual companies, trade associations and labor groups—in essence the affected public sector—may also initiate claims. Second, the interested parties allowed to appear on behalf of the defense include the government of any foreign companies accused of a violation. Lastly, any duties imposed in the case do not go to the private plaintiff, but to the U.S. Treasury. Antidumping and countervailing duty claims, therefore, do not concern the liability of foreign manufacturers to U.S. manufacturers, as would fraudulent conveyance have Seventh Amendment right to jury trial which Congress cannot deny). In that case, the Court found that Congress' power to withhold the right to a jury trial must be assessed in the same terms as the power to allocate adjudication of the claim to a non-Article III entity. The Court reaffirmed that the government need not be a party for the case to involve a public right, but that other rights closely related to federal regulatory schemes can also be assigned to non-Article III entities.

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...
be the case if the claims involved private rights. Rather, Congress chose to employ private parties to implement a regulatory scheme for international trade. Private parties do not have a "private right" to bring antidumping and countervailing duty claims, but rather bring such claims to further the public good by assuring fair competition in the market place.

Of course, Congress has the power to return resolution of these claims to exclusive executive determination. In fact, in the CFTA, the United States and Canada have agreed to develop under a fixed timetable a "substitute system of rules in both countries for antidumping and countervailing duties as applied to their bilateral trade." Conceivably, this could have meant eliminating private party participation altogether. Curiously, this article was absent from NAFTA, leaving only a provision that calls for discussion regarding the improvement of the antidumping and countervailing duty laws. But the fact remains that Congress can decide how to resolve antidumping and countervailing duty claims despite the present vesting of the right in private parties, which makes such claims public rights in the traditional sense.

Even if the participation of private parties leads to a finding that antidumping and countervailing duty claims do not involve public rights, it is difficult to avoid the conclusion that the claims are closely related to a congressional regulatory scheme. In fact, private party claims are the central mechanism of the antidumping and countervailing duty regulatory scheme. Without such claims, the antidumping and countervailing duty laws would go unenforced for the most part. In this sense, the claims are much more important to this regulatory scheme than either the counterclaim jurisdiction was to the CFTC reparations proceedings or the compensation arbitration was to FIFRA. Thus, antidumping and countervailing duty claims are either public rights or quasi-private rights essential to a congressional regulatory scheme. As a result, the danger of the binational panel system encroaching on the judicial power is reduced.

c. Congressional Concerns

The last factor examined under the Schor balancing test is the concern that drove Congress to depart from the requirements of Article III. Essentially, the Supreme Court examines these concerns in light of the judiciary's constitutionally assigned role to discover whether Congress had a valid purpose and a demonstrable need for the delegation to a non-Article III body or whether Congress was actually concerned with allocating jurisdiction among federal tribunals.

340. See Northern Pipeline, 458 U.S. at 69-70.
341. CFTA, supra note 7, art. 1906.
342. See NAFTA, supra note 1, art. 1907.
343. Schor, 478 U.S. at 851.
344. Id. at 855.
In *Schor*, the Court found that Congress' motives for granting the CFTC jurisdiction over state law counterclaims were valid. The Court found that Congress' purpose was to create an inexpensive and expeditious alternative for commodity customers to enforce violations of the CEA. The Court then noted that Congress had to grant such jurisdiction in order to make the CFTC reparations proceedings, and thus, the entire regulatory scheme more effective. Lastly, the Court pointed to the delegation of only as much counterclaim jurisdiction as necessary for the system's efficacy as evidence that Congress was not attempting merely to evade Article III requirements.

In *Thomas*, Congress' motives in creating the arbitration scheme to hear compensation claims also influenced the Court. The Court noted that Congress had decided to amend FIFRA because disputes over the EPA's determination of compensation had effectively stalled the pesticide registration process. The arbitration scheme was a compromise that Congress adopted at the suggestion of major chemical manufacturers. The Court found that Congress delegated jurisdiction to the arbitrators because it was a necessary step to pass legislation crucial to the public health.

There is ample evidence as to the motives of the Executive and Congress in establishing the binational panel system as part of NAFTA. First, the panel system was seen as a means of expediting decisions on antidumping and countervailing duty claims while preserving the rights of interested parties. The United States reasoned that quick decisions on such claims would reduce trade tensions and company costs, as well as improve business certainty.

Other factors motivating U.S. negotiators were Canadian concerns about a protectionist bias in the CIT and the Court of Appeals for the Federal Circuit. Apparently, Canada was worried, in particular, about the imposition of countervailing duties. U.S. negotiators agreed to the binational panel system partly

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345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.* at 856.
350. *Id.* at 575.
351. *Id.* at 590.
352. The Executive's reasons for creating the binational panel system were set out in *Statement as to How the NAFTA Serves the Interests of United States Commerce*, *supra* note 3. Further evidence is found in *Office of the U.S. Trade Representative, Notice, Statement as to How the NAFTA Achieves Congressional Negotiating Objectives* (1993 WL 561221). The President submitted both of these Statements to Congress with NAFTA when it was submitted for approval. In addition, evidence can be found in *Statement of Reasons as to How the United States-Canada Free Trade Agreement Serves the Interests of U.S. Commerce*, H.R. Doc. No. 100-216, 100th Cong., 2d Sess. 1 (1988).
354. *Id.* at 38.
in response to Canadian demands for a more impartial system of adjudication of antidumping and countervailing duty claims.\(^{357}\) In this sense, the binational panel system was a compromise necessary for the overall agreement much in the way the arbitration scheme was for FIFRA.

U.S. negotiators, however, were also concerned about the inadequacies of the other Parties' antidumping and countervailing laws. First, the United States saw the binational panel system as increasing transparency in the application of Canadian law, since many determinations reviewable by the panels were previously unreviewable in Canadian courts.\(^{358}\) In addition, the panel system requires Canada to maintain an administrative record of decisions by the responsible Canadian agency. Previously, such a record was not available to those involved in an antidumping or countervailing duty dispute.\(^{359}\) The United States also viewed Mexican antidumping and countervailing duty law as greatly lacking in transparency, since decisions by Mexican administrative agencies were unreviewable by Mexican courts.\(^{360}\) The binational panel system became a means to improve the ability of U.S. firms to appeal Mexican decisions.\(^{361}\)

By all accounts, the binational panel system was an innovative solution to a contentious trade issue—application of domestic antidumping and countervailing duty laws to the NAFTA Parties. This conclusion is borne out by the extent of the grant of jurisdiction to the panels. As in Schor, the panels' jurisdiction is limited to remedying the concern at issue—antidumping and countervailing duty claims. Congress did not give the panels complete jurisdiction over all trade issues relating to NAFTA Parties, such as jurisdiction over duty levels or other customs issues cognizable by the CIT. Instead, Congress and the Executive were motivated by valid concerns to address an issue that was problematic for the Parties' goal of liberalizing trade under NAFTA. Since the Executive and Congress do not appear to have created the panel system in order to remove jurisdiction wholesale from the CIT, the motives of the political branches should not raise concerns about separation of powers.

IV.

THE FOREIGN RELATIONS POWER, ARTICLE III, AND NAFTA

As assessed under the balancing test presently employed by the Supreme Court, NAFTA's binational panel system does not offend Article III's mandate. Some doubts about the constitutionality of the system, however, may remain. Such doubts derive from the novelty of the binational panel system, which calls for Canadian, Mexican, and American panelists to issue binding decisions upon review of U.S. agency determinations without any recourse in U.S. courts. The

\(^{357}\) Christenson & Gambrel, *supra* note 355, at 402.

\(^{358}\) *Statement of Reasons as to How the United States-Canada Free Trade Agreement Serves the Interests of U.S. Commerce*, *supra* note 352, at 38.

\(^{359}\) *Id.* at 38.

\(^{360}\) *Statement as to How the NAFTA Serves the Interests of U.S. Commerce, supra* note 3.

\(^{361}\) *Id.*
novelty of the system has prompted one critic to proclaim that the panel system “deviat[es] from the recognized methods for exerting federal adjudicatory power.” In fact, there is no example found in Article III jurisprudence for the allocation of federal judicial authority to an international review panel.

There is, however, strong precedent in support of the binational panel system that falls outside of the traditional Article III jurisprudence. The Supreme Court traditionally has accorded the Executive wide berth in ordering foreign affairs, particularly where Congress expressly supports executive action. More recently, the Court affirmed an executive allocation of private claims from federal court to an international tribunal. This case, *Dames & Moore v. Regan*, provides the precedential bridge between Article III and foreign relations jurisprudence that should eradicate any doubts as to the constitutionality of NAFTA’s binational panel system.

**A. Dames & Moore**

*Dames & Moore* is not typically read as an Article III case. In fact, the Court makes only a summary reference to an Article III claim raised by the petitioner. It is commonly viewed as a separation of powers case concerning the authority of the President to act through executive orders and agreements in the absence of express congressional authority. *Dames & Moore* involved a challenge to an executive action during the Iranian hostage crisis which nullified the attachment of Iranian government assets, transferred those assets out of the United States, and suspended claims against the Iranian government pending in U.S. courts so that those claims could be determined in an international arbitration tribunal.

In the 1981 agreement, which released the hostages, the United States agreed to terminate all litigation between its nationals and the Iranian government and to settle all claims through binding arbitration in the U.S.-Iran Claims Tribunal. The two governments agreed that the Tribunal’s decision would be final, binding and enforceable in any domestic court. President Reagan issued an executive order suspending all claims in U.S. courts that might be presented to the Tribunal. Petitioner Dames & Moore, which had filed a claim in district court prior to the Iranian-U.S. agreement, challenged the executive order as being beyond the statutory and constitutional powers of the Executive.

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365. *Id.* at 660.
366. *Id.* at 664-5.
367. *Id.* at 665.
368. *Id.* at 666.
369. *Id.* at 666.
The Court then referred to Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* as setting the general framework for evaluating the authority of the Executive. The Court noted, with approval, Justice Jackson's analysis, which sets out three types of interaction between the two democratic branches in assessing executive authority to act in any given case. Although the Court found Justice Jackson's categories to be useful, it did not apply them because they were overly simplistic. Instead, the Court declared that executive action in a given case most likely will not fit exactly in any particular category, but will fall along a spectrum running from explicit congressional authorization to explicit congressional prohibition.

The Court found no express congressional approval of the President's suspension of federal claims, but pointed to recent legislative evidence that indicated "congressional acceptance of a broad scope for executive action in circumstances," such as the Iranian hostage crisis. The Court also noted a history of acquiescence in the practice of the President settling claims of U.S. nationals against foreign sovereigns. Based on this evidence, the Court concluded that the President's action had sufficient congressional approval to satisfy constitutional concerns.

In challenging the transfer of claims to the Tribunal, the petitioner argued that the act removed federal court jurisdiction over the claims in violation of Article III. The petitioner contended that the Foreign Sovereign Immunities Act (FSIA), in the interest of depoliticizing certain commercial lawsuits, vested the federal courts with jurisdiction to hear claims which previously had been resolved by the Executive, if at all. The Court rejected this argument, however, finding that the executive order did not divest the federal courts of jurisdiction, since the claims against Iran were merely "suspended" and possibly could have been "revived." The President, the Court reasoned, had merely "effected a change in the substantive law governing" the claims by exercising his power to settle claims against foreign governments.

372. *Id.* at 668.
373. *Id.* at 669.
374. *Id.* at 686.
375. *Id.* at 686.
376. *Id.* at 684.
377. *Id.* at 684.
378. *Id.* at 684-85. Two commentators have argued that the Court's reasoning here could be used to uphold the binational panel system. See Christenson & Gambrel, *supra* note 355, at 415-16. However, there are factual differences that make such an analogy insupportable. While the language of the executive order in *Dames & Moore* allowed the Court to find no divestment of jurisdiction, NAFTA's implementing legislation does not support a conclusion that binational panel review merely "suspends" antidumping and countervailing duty claims. Rather, once invoked to examine a determination, binational panel review is exclusive and no United States court has "power or jurisdiction to review the determination on any question of law or fact." 19 U.S.C. § 1516a(g)(2). In any case, it is clear from the previous sections that the Supreme Court requires much more than a finding that federal courts have concurrent jurisdiction in order to uphold allocation to non-Article III courts.
B. Congressional Authorization for Executive Action

*Dames & Moore* affirms a traditional understanding of concurrent presidential and congressional power over foreign relations that offers strong support for the binational panel system. As noted above, the Court in *Dames & Moore* generally approved Justice Jackson’s analytical framework for examining the constitutional authority of the President to act in a given case.\(^{380}\) Importantly, the Court referred to Justice Jackson’s assertion that executive action, supported by express congressional approval, was entitled to the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.\(^{381}\) Though the Court does not adopt Justice Jackson’s precise categories, Justice Rehnquist’s more flexible “spectrum” approach retains as an endpoint such cases where the executive acts with “explicit congressional authorization.”\(^{382}\) Thus, where the Executive acts with express authorization, such actions should carry a strong presumption of constitutionality.

Unlike the transfer of federal claims to the U.S.-Iran Claims Tribunal in *Dames & Moore*, the binational panel system benefits from express congressional authority. In *Dames & Moore*, the Court sustained the President’s action based only on circumstances that justified an inference of congressional consent.\(^{383}\) In contrast, Congress expressly approved NAFTA in December of 1992.\(^{384}\) In fact, Congress has approved the binational panel system on two occasions: as part of NAFTA and as part of the CFTA.\(^{385}\) The Executive’s action with regard to NAFTA’s binational panel system, therefore, should be entitled to a strong presumption of constitutionality.

C. Congressional and Executive Authority to Allocate Claims to International Adjudication

*Dames & Moore* is also a more precise precedent for the binational panel system, even though the Supreme Court did not engage in any thorough Article III analysis. In *Dames & Moore*, the Court approved executive action which suspended claims from federal court and allocated their adjudication to an international tribunal. Moreover, the President had acted without regard for the litigants’ consent and had not provided for appeal of the Tribunal’s decisions in any U.S. court.\(^{386}\) This delegation of claims to international adjudication without Article III review, thus, closely parallels the binational panel system.

\(^{380}\) *Id.* at 668.

\(^{381}\) *Id.* at 668 (quoting *Youngstown*, 343 U.S. at 637 (Justice Jackson, concurring)).

\(^{382}\) *Id.* at 669.

\(^{383}\) *Id.* at 686.

\(^{384}\) *See NAFTA Implementation Act, supra* note 2, § 101(a).


\(^{386}\) *Dames & Moore*, 453 U.S. at 654-55.
The Supreme Court’s reasoning in *Dames & Moore*, however, is crucial to understanding how the case supports the binational panel system. The Court did not approve of the President’s transfer of claims to the U.S.-Iran Claims Tribunal out of broad deference to any “‘plenary and exclusive power’” of the Executive over foreign relations.\(^{387}\) Rather, the Court appeared to be influenced by the long tradition of claims settling by U.S. nationals against foreign governments by way of executive agreement.\(^{388}\) The Court noted that the claims implicated foreign sovereign immunity, and as such had traditionally been resolved by the Executive alone. This was often done without the consent of the U.S. claimants and with the greater interests of the nation as their foremost goal.\(^{389}\) Such claims, therefore, fit within the rubric of public rights doctrine.\(^{390}\)

As an example of public rights matters delegated to international adjudication, *Dames & Moore* offers substantial support for the constitutionality of the binational panel system. This, however, is not to say that any public rights matter could be allocated to an international tribunal in such a manner. Rather, there is another similarity between the claims in *Dames & Moore* and antidumping and countervailing duty claims that makes allocation of both claims to international adjudication without recourse to Article III courts constitutionally acceptable: both implicate sensitive international trade issues involving government policies of the U.S. and other nations that traditionally have been determined by way of executive action.\(^{391}\) In *Dames & Moore*, the Court approved the U.S.-Iran Claims Tribunal as a practical solution to “a major foreign policy dispute” in the tradition of executive claims settlement.\(^{392}\) Likewise, the Executive created the panel system as a binational mechanism in order to remove the issue of trade dispute resolution as an obstacle to the creation of a free trade zone in North America.\(^{393}\) Since the binational panel system is also in the tradition of executive settlement of trade issues, Article III should not be offended.

In fact, it has been only recently that both types of claims have been cognizable by Article III courts. Claims by U.S. nationals against foreign sovereigns were hampered by the foreign sovereign immunity doctrine until the passage of the FSIA.\(^{394}\) Likewise, private parties and Article III courts have been involved in the resolution of antidumping and countervailing duty disputes for a scant 15 years.\(^{395}\) Therefore, just as the Court in *Dames & Moore* was unwilling to read the FSIA as eliminating the traditional manner of resolving claims against for-

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387. *Id.* at 861-62 (quoting *Curtiss-Wright*, 299 U.S. at 320). In fact, the Court appeared to reject this inference from its reasoning in *Curtiss-Wright*.

388. *Id.* at 679-80.

389. *Id.* at 680.


393. See *supra*, Part III.B.2.c.


eign sovereigns through executive action, private party involvement in antidumping and countervailing duty disputes should not be read as prohibiting the Executive, with the full support of Congress, from resolving an important trade issue through international adjudication.

V. CONCLUSION

The success of NAFTA has encouraged U.S. trade negotiators to seek similar agreements with other major trading partners in this hemisphere. At the present time, the USTR has indicated that it plans to seek authority to open free trade talks with Chile in the hopes of eventually including Chile in NAFTA. As a key mechanism for liberalizing trade relations, the binational panel system will undoubtedly be a major feature of any future agreement. The system will address U.S. concerns about the inadequacy of foreign antidumping and countervailing duty laws, while also assuaging other nations' fears about protectionist bias in the United States.

Fortunately, the present Article III balancing test readily supports the binational panel system. The structure of the system prevents Congress and the Executive from exerting control over the panels' judicial functions, thus, securing the values that underlie Article III. As a result, the binational panel system does not unduly infringe upon the interest of litigants in impartial adjudication, nor does it violate the principle of separation of powers. Furthermore, the binational panel system's jurisdiction over claims arising under antidumping and countervailing duty law concerns a classic "public right," and so its allocation to non-Article III courts does not offend Article III values. Finally, congressional and executive motives for creating the binational panel system do not demonstrate an intent to encroach on the province of the judiciary by assuming effective control of judicial functions, but rather reflect a valid concern for the reduction of non-tariff trade barriers.

Some doubts about the binational panel system may linger, however, since a judicial mechanism is not precisely addressed by Article III jurisprudence. But, these doubts can be resolved by examining the issue as a hybrid case implicating both Article III, and the executive and congressional power over foreign trade relations. Dames & Moore establishes that the panel system constitutes an executive action with the express approval of Congress and should be accorded the strongest presumption of constitutional validity. But, most importantly, the panel system squarely fits into the tradition of executive resolution of public rights claims involving international trade relations through allocation to inter-

396. See Dames & Moore, 453 U.S. at 685-86.
397. Id.
national arbitration tribunals. For these reasons, the binational panel system does not violate Article III of the United States Constitution.