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NAFTA and Article III:

Making a Drama Out of a Crisis

Denis J. Edwards[1]

Introduction

The great scope and aspirations of the North American Free Trade Agreement (NAFTA) means that it often sits uncomfortably with the national constitutions of its signatories. In establishing federal systems subject to the rule of law, the constitutions of Canada, Mexico and the United States, documents of equally great scope and aspirations, may at times be inconsistent with the requirements of NAFTA. That all three countries are prepared to yield some of their constitutional autonomy, or "sovereignty",[2] for the benefits of free trade, is one reason why NAFTA came about. Just as the countries of the European Community have conceded some of their sovereignty in return for the benefits of being part of the common market established by the Treaty of Rome (EC Treaty), with which NAFTA is often compared, Canada, Mexico and the United States have accepted the constraints of NAFTA to establish a free trade area in North America. As the EU countries have often painfully learned, sometimes the most cherished rules of national law, including national constitutional law, have to be qualified so that the treaty's goals can be achieved. Hard as it may be to accept, for NAFTA is still in its infancy, this lesson will have to be learned in the Americas too.[3]

In the United States, some attention has been paid to the dispute resolution procedures of NAFTA and whether they conform with Article III of the U.S. Constitution.[4]

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2. Sovereignty, in the sense of some idea of the political and economic independence of its constituent Member States, bedevils the debate on the future of the European Community (EC), which since the Treaty on European Union (Maastricht) entered force on November 1, 1993 is the principal part of the European Union (EU). In a similar vein, namely, the concern over political independence and democratic control of political institutions, sovereignty has been part of the debate about NAFTA (and more recently GATT) in the U.S. and Canada.
3. In the United States it seems that the lessons of conceding some sovereignty or independence in the wider interests of the community will have to be learned again, since the states had to accept this as part of the federal system established by the U.S. Constitution. *See, e.g. Martin v. Hunter's Lessee* 14 U.S. (1 Wheat.) 304.
4. *See* Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 Cornell Int'l L.J. 141 (1994). The issue had also been looked at in relation to NAFTA's precursor, the Canada U.S. Free Trade Agreement and its dispute resolution procedures: see Senate Judiciary Ctte. Hearing on the Canada-U.S. FTA, 100th Congress, 2nd Session, 96 (1988); Christenson and Gambrel, *Constitutionality of Binational Panel Review in Canada-U.S. FTA*, 23 Int'l Law. 401 (1988).

Article III provides for the judicial power of the United States by establishing a Supreme Court, providing for its jurisdiction and conferring on Congress powers to create lower federal courts. When it was drafted, Article III represented a compromise between the interests of the new federal government and those of the states, the Madisonian Compromise as it came to be known.[5] Like all compromises framed in law, their interpretation is never so clear as it was to the drafters and so Article III has given rise to a large body of jurisprudence and scholarship on its possible different meanings. On one view of this, Congress has no power to create non-Article III courts, at least not without leaving some opportunity for the parties to resort to Article III courts. Accordingly, by establishing an international dispute resolution mechanism the decisions of which are final, thereby excluding recourse to the domestic courts of each of its parties, the argument can be made that NAFTA is inconsistent with Article III of the Constitution.[6]

One commentator has further observed that a recent decision[7] of the Court of Justice of the European Communities (ECJ) striking down proposed dispute resolution provisions similar to those in NAFTA in the original European Economic Area Agreement (EEA) between the European Community (EC) and the European Free Trade Association (EFTA) supports the argument that NAFTA is constitutionally suspect in the U.S.[8] Focusing on some of the constitutional law of the EC, such as the supremacy of EC law over national law and on some features of the original EEA Agreement, such as the appointment of the EEA Tribunal's judges, the argument is made that the ECJ decision condemns the NAFTA dispute resolution procedure.

This article discusses the problems Article III and the ECJ decision present for the NAFTA dispute resolution scheme. Part I briefly sets out the dispute resolution procedures of NAFTA. Part II outlines the problem Article III is argued to raise. Part III discusses the ECJ decision and the issues it raises. Part IV concludes that if NAFTA is put in its constitutional and international context neither Article III nor the ECJ decision provide a sustainable challenge to its dispute resolution scheme.

Part I

A. The NAFTA Dispute Resolution Scheme

One of the great achievements of NAFTA is the dispute resolution mechanisms it

5. *See* Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 Vill. L.R. 1030 (1982) and Dubinsky, *The Essential Function of Federal Courts: The European Union and the United States Compared*, 42 Am.J. Comp. L. 295, 299-300 (1994).
6. A case is now proceeding through the U.S. courts on the issue of whether the similar dispute resolution procedures under Chapter 19 of the Canada-US FTA contravene Article III: *see* Coalition for Fair Lumber Imports v. United States (U.S. Court of Appeals for the D.C. Circuit: Civil Action No. 94-1627) arising out of the ECC Decision ECC-94-1904-01USA of August 3, 1994 which upheld three earlier panel decisions holding certain U.S. countervailing duties imposed on softwood lumber imports from Canada to contravene the FTA; *see* Financial Times, September 16 1994, "Lumber producers at loggerheads over NAFTA".
7. Opinion 1/91 on the Draft Agreement relating to the creation of the European Economic Area, [1992] 1 CMLR 245 (Opinion 1/91).
8. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 Cornell Int'l L.J. 141, 155-160 (1994).

establishes.[9] More sophisticated than those of the GATT,[10] the mechanisms share some similarities with the judicial system established for the EC by the Treaty of Rome (EC Treaty), in particular, through provisions for judicial process, decision-making ultimately by judges from each of the states in NAFTA and final, binding decisions.[11] It might be said, as it is of the judicial system of the EC, that NAFTA's dispute resolution procedures are supranational in that although they are international in scope in so far as they technically confer standing only on the three governments,[12] they share many characteristics of their parties' domestic legal systems, in particular, in the requirements for due process and binding decisions.[13]

Chapters 19 and 20 of NAFTA provide for dispute resolution. They draw on the dispute resolution procedures in NAFTA's predecessor, the Free Trade Agreement (FTA) between Canada and the United States, on which they improve. The key feature of both Chapters is that disputes are to be resolved by legal processes, whether under Chapter 19 by way of binding decisions by a panel of experts with the possibility of review by a further panel so as to ensure the integrity of the system, or by way of advisory opinions by a panel of experts, mediation or conciliation under Chapter 20.[14] In both cases, NAFTA's bureaucracy, the Free Trade Commission and its Secretariat, supervise and administer the dispute resolution procedures.[15]

9. Hufbauer and Schott: NAFTA: An Assessment, (Institute for International Economics: 1993), p104. For a discussion of the NAFTA procedures and a comparison between them and those of GATT see Holbein and Carpentier, *Trade Agreements and Dispute Settlement*, 25 Case W. Res. J. Int'l L. 531 (1993).
10. Or for that matter of the new WTO: *see* Horlick and DeBusk *Dispute Resolution Under NAFTA: Building on the FTA GATT and ICSID*, 27 J. World Trade 21 (1993) and DeBusk, *Antidumping and Countervailing Duty Disputes: Comparisons between the North American Free Trade Agreement and the World Trade Organization Agreement*, 1 NAFTA REV. 31, June (1995).
11. For a discussion of the EC's judicial system see Brown, *The Court of Justice of the European Communities* (4th ed. 1994).
12. All three governments have bound themselves to act on requests of individuals who would have had standing to avail of judicial review procedures in their national courts. *See* NAFTA Article 1904.5: "An involved Party [i.e. one of the governments] on its own initiative may request review of a final determination [concerning antidumping or countervailing duties] ... and shall, on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review ... request such review." Chapter 19 of NAFTA only concerns final antidumping or countervailing duty determinations. The judicial review procedures of the Parties in relation to non-final determinations are not affected by NAFTA: Article 1904.10 (a) NAFTA.
13. Decisions of Chapter 19 bi-national panels under NAFTA are final. *See* NAFTA Article 1904.9, "The decision of a panel under this Article shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel."
14. For a brief overview of NAFTA's procedures see Holbein and Carpentier, *Trade Agreements and Dispute Settlement: Mechanisms in the Western Hemisphere*, 25 Case W. Res. J. Int'l L. 531, 560-565 (1993); for a fuller account see Horlick and DeBusk, *Dispute Resolution under NAFTA: Building on the FTA, GATT and ICSID*, 27 J. of World Trade 21 (1993).
15. The Free Trade Commission is a cabinet level body consisting of government ministers from each of the NAFTA parties. *See* NAFTA Article 2001.1.

It is the procedures under Chapter 19 that are of particular interest in so far as they provide for final decisions.[16] Chapter 19 provides for the resolution of disputes in the field of antidumping and countervailing duties.[17] It provides for the three governments to draw up rosters of experts which shall consist "to the fullest extent possible" of judges or former judges.[18] When a dispute arises between the Parties to NAFTA in relation to the matters covered by Chapter 19, a five member bi-national panel can be requested by one of the Parties to adjudicate the dispute. The panel is chosen from the rosters with two panelists from each of the disputants and the fifth chosen by agreement between them or by lot.[19] A majority of the panel must be lawyers.[20] Under Article 1904 the defendant government must deliver the record concerning the impugned determination and all interested parties (for example, corporations) are entitled to submit written arguments and to appear.[21] Generally, the process is to be "based ... upon judicial rules of appellate procedure,"[22] a value seen most clearly in the requirement that the panel decisions must be in writing supported by reasons.[23] The standard of review and legal principles to be applied by the panel are those that a court of the defendant Party would bring to bear on decisions of the relevant national authority.[24] In the event of an adverse finding, the defendant state is required to change its laws to conform with the panel's determination

16. NAFTA Article 1904.11, "A final determination [of a relevant national authority, *e.g.* the U.S. International Trade Commission] shall not be reviewed under any judicial review procedures of the importing Party if an involved Party requests a panel with respect to that determination.... No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts." However, the no domestic procedures rule does not apply where no Party has requested a Chapter 19 panel: Article 1904.12 (b). This may seem an obvious point but it is still important: only when one of the NAFTA governments internationalizes the issue by requesting a Chapter 19 panel does the exclusivity rule of Article 1904.11 apply. That is, Chapter 19 does not supersede domestic procedures, under Article III of the Constitution or otherwise, until another NAFTA Party makes the dispute international. This is not an unreasonable concession. The alternative put forward by some that NAFTA panel decisions be subject in some way to review in the U.S. courts would be so unacceptable to the other two governments as not to be worth further discussion. *See* Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 Cornell J. Int'l Law 141, 169 (1994).
17. NAFTA Article 1904.3 allows for panels to be established to render declaratory opinions on proposed amendments to a Party's antidumping or countervailing duty laws. Failure by a Party to abide by the panel's opinion can lead to reprisals or, indeed, to the collapse of NAFTA. One ground on which such advisory opinions can be sought is that the proposed amendment breaches a previous panel decision. The discussion in the text proceeds on the Article 1904 panel reviews of final antidumping or countervailing duty determinations by a Party's trade or tax authorities.
18. *See* NAFTA Annex 1901.2.1. Each party is obliged to compile a roster of 25 names about which each Party shall consult the others.
19. *See* NAFTA Annex 1901.2. Provision exists for each Party to challenge the selections of the other four times (NAFTA Annex 1901.2.2).
20. *Id.*
21. NAFTA Article 1904.7.
22. NAFTA Article 1904.14.
23. *See* NAFTA Annex 1901.2.5. Concurring and dissenting opinions are allowed, which improves in one important regard on the European arrangements in the ECJ where there is only ever one opinion, that of the Court.
24. *See* NAFTA Article 1904.3.

of the requirements of NAFTA.[25]

An appeal to an "Extraordinary Challenge Committee" (ECC) is possible on the grounds set forth in NAFTA Article 1904.13, which relates to the classical precepts of judicial review such as ensuring the panel observed natural justice, jurisdictional limits and its own procedures. Where breach of one of these precepts by the panel "has materially affected the panel's decision and threatens the integrity of the binational panel review process,"[26] an ECC can be empaneled. It consists of three members chosen from a roster maintained by each of the Parties of five sitting or retired judges of their superior courts,[27] one chosen by each of the parties and the third chosen by lot.[28] Interestingly, NAFTA added to the grounds of review available before an ECC under the FTA by allowing review of a panel decision where "the panel manifestly exceeded its power, authority or jurisdiction ... for example by failing to apply the appropriate standard of review."[29] This concession by the three governments that judicial review in whichever form it comes does not have one invariable standard is important both in limiting frivolous calls for an ECC and in allowing ECC decisions to outline standards of review that are appropriate in particular cases, thereby establishing a set of precedents which panels can follow. The importance of this point in contributing to the judicial nature of the dispute resolution process, not least in what it offers towards consistency in decision-making, must not be under-estimated.

Under the FTA there had been three ECCs established and in all cases consisted of sitting or retired judges from Canada and the US. It must be observed that the policy of allowing retired judges to sit as panelists, particularly on ECC, allows the governments to draw on a significant resource of legal skill that might not be so formidable with a full-time court.[30] Moreover, these judges and former judges will be people whose integrity and independence is beyond doubt, a crucial factor given the finality of ECC decisions on often sensitive bi-national issues. In any event, Annex 1909 of NAFTA provides a Code of Conduct [See Holbein's *NAFTA Code of Conduct Sets Standard for International Conduct* in this issue, p. 48] for all panel judges in the NAFTA process. This requires interests and possible conflicts of interest to be declared before taking part in a panel hearing and for resignation from a panel if the risk of bias emerges.[31]

Part II

A. The Problem of Article III

Article III of the U.S. Constitution establishes the judicial power of the United States. It does so in the following way. First, it states that the "judicial Power ... shall be vested in

25. *See* NAFTA Article 1904.15. This also provides for the Parties' courts to observe panel decisions.
26. *See* NAFTA Article 1904.13(b).
27. For example, in the U.S. a federal judge.
28. *See* NAFTA Annex 1904.13.
29. *See* NAFTA Article 1904.13(a)(iii).
30. For a very positive assessment of the quality of panel decisions under the Canada-US FTA, see Lowenfield, "Binational Dispute Settlement under Chapters 18 and 19 of the Canada-US FTA: An Interim Appraisal", (1990: Administrative Conference of United States).
31. *See* NAFTA Annex 1909. If a panel member resigns, provision is made for a new panel to be established if the Parties so wish.

one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish."[32] Secondly, it lists the "cases and controversies" to which the judicial power extends, distinguishing between subject-matter cases and party-controversies, so as to include within its ambit, for example, "all Cases ... arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority" and "Controversies to which the United States shall be a Party [and] Controversies between two or more States."[33] Thirdly, amongst these cases, it identifies those over which the Supreme Court shall have original jurisdiction and those where it shall have appellate jurisdiction, but in respect of the latter "with such Exceptions, and under such Regulations as the Congress shall make."[34]

At first glance, Article III seems clear. The only federal court established by the Constitution is the United States Supreme Court. The existence of lower federal courts is left for Congress to determine[35]. The Supreme Court has a constitutionally established original jurisdiction that cannot be taken away, save by constitutional amendment and an appellate jurisdiction which can be regulated by Congress. It follows that Congress did not have to establish lower federal courts and that discretion to do so includes power to establish them on such conditions as Congress ordains. It also follows that if Congress has power over the Supreme Court's appellate jurisdiction, the power extends as far as denying this jurisdiction altogether. This plain-meaning approach to Article III has much to commend it and some scholarly support.[36] However, it is not without its critics.[37]

For present purposes, it is necessary only to outline the key elements of the alternative interpretations of Article III that may pose a danger to NAFTA. Essentially, these can be described as focussing on either the literal minutiae of Article III,[38] always dangerous with respect to a compromise legal text, or on the part Article III plays in the grand design of the constitutional scheme,[39] equally dangerous in a constitution that did not expressly mandate judicial review, an institution which, under the Constitution, rests on

32. U.S. Const. art. 3, §1.
33. U.S. Const. art. 3, §2.
34. *Id.* Although not expressly repeating "controversies" as used in the first paragraph of §2, it must be included within the generic "cases" in the second paragraph.
35. As it did when it passed the Federal Judiciary Act 1789.
36. Redish, *Text, Structure, And Common Sense in the Interpretation of Article III*, 138 U. Pa. L. R. 1633 (1990).
37. The long list of critics with alternative interpretations of Article III includes Justice Story in *Martin v. Hunter's Lessee* 14 U.S. (1 Wheat.) 304, 328-321 (1816); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 H.L.R. 1362 (1953); Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 H.L.R. 17 (1981); Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741 (1984); and Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B. U. L. Rev. 205 (1985). More recent judicial discussion includes *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) and *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986).
38. *See* Amar, *supra* note 37, and criticism by Redish, *supra* note 36.
39. *See* Sager, *supra* note 37.

an implicit assumption.[40] The literal approach emphasizes both the apparently mandatory injunction that the judicial power "shall be vested in one supreme court ..," and the use of the word "all" before the subject-matter "Cases" over which the federal courts[41] have jurisdiction, in contrast to its absence before the party "Controversies." The "grand design" approach seeks to establish a core of federal court jurisdiction that "the history and logic" of Article III protects.[42] If the Constitution is supreme, as Article VI provides, there has to be judicial supervision of at least state law and Article III implicitly mandates this. Congress cannot remove this judicial power.

Versions of the possible approaches to Article III run as follows: If the judicial power "shall be vested," it has to be vested somewhere. The list of the Supreme Court's original jurisdiction does not exhaust the jurisdiction granted by Article III to the federal courts, so it follows that lower federal courts had to be established if meaning is to be given to the other grounds of jurisdiction in Article III.[43] Further, the power given to Congress to regulate the appellate jurisdiction of the supreme court is a power over "exceptions," meaning that a core jurisdiction remains beyond Congressional power to regulate. Finally, since the judicial power of the federal courts extends to "all Cases," it ignores the importance of the word "all" to argue that Congress can withdraw or qualify this jurisdiction. Accordingly, once Congress establishes lower federal courts (as it has to do), the appellate jurisdiction of the Supreme Court is entrenched over "all Cases" and Congress only has power to regulate jurisdiction over the "Controversies."

The danger for NAFTA is that if one or the other of such substantive approaches to Article III is accepted, Congress has no authority to vest judicial power exclusively in non-Article III courts, at least not over those "Cases" listed in Article III, since it confers on the federal courts jurisdiction over "all" such "Cases."[44] Therefore, the panel system established by Chapter 19 of NAFTA is unconstitutional, since it does not allow for U.S. citizens to have recourse to the federal courts. In particular, the statute that gives effect to NAFTA in U.S. law violates due process rights guaranteed by the Constitution, since it denies to U.S. citizens the chance to have their constitutional rights vindicated in the federal courts. Putting it this way, at its highest, this argument from Article III amounts to a weighty challenge to NAFTA.

40. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Nowhere in the U.S. Constitution is judicial review either of state or federal law for conformity with the Constitution expressly provided for. Chief Justice Marshall gave the justification that is still held to today that judicial review follows from the supremacy clause in Article VI and is implicit in a written constitution which establishes a supreme court, albeit with limited jurisdiction. Even so, it is not easy to assert that judicial review had to be integral to the constitutional scheme. Many of the policy arguments in favor of it, for example, the need for uniformity in the interpretation of the Constitution and in the application of federal law, can equally be made in favor of an international dispute resolution scheme such as that in NAFTA, where one binding interpretation of the treaty applicable to all three parties is required.
41. Assuming Congress is obliged to create lower federal courts at all, which is not itself clear.
42. Sager, *supra* note 37, at 55. See also excellent discussion in Dubinsky, *supra* note 5, at 304-306.
43. *See* Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741 (1984).
44. And it is the first "all Cases ... arising under ... the Laws of the United States" ground of jurisdiction that NAFTA (or the law implementing it into U.S. law) will be challenged. Interestingly, however, Congress did not confer this jurisdiction on the federal courts until after the Civil War, a point that somewhat supports the plain meaning of Article III that Congress has exclusive discretion over lower federal courts and their jurisdiction. *See* Dubinsky, *supra* note 5, at 303.

For its part, the United States Supreme Court has not been able to give a clear indication of what Article III means. It has never clearly ruled on whether Article III provides a core of judicial power beyond Congressional regulation (other than the court's express original jurisdiction).[45] Its latest statement on the approach to Article III involves a balancing test that weighs up the extent to which Congress has intruded upon "essential attributes of the judicial power,"[46] the range of jurisdiction and powers given to the non-Article III body, the nature of the individual right subject to the non-Article III adjudication and the policy concerns animating the legislation.[47] This balancing test should be borne in mind when considering the compatibility of NAFTA's dispute resolution procedures with Article III.

Part III

A. THE CHALLENGE OF OPINION 1/91 OF THE ECJ

In 1991, the EC and EFTA decided to enter into a free trade agreement that would establish between them a European Economic Area (EEA). Since 1957, when the EC Treaty founded the European Economic Community, a growing number of European states have agreed to be subject to its quasi-constitutional rules in return for the benefits flowing from free trade and being part of a single European market. The EEA aimed to extend these rules and these benefits to the EFTA countries without them becoming members of the EC.[48]

A difficult aspect of the negotiations leading to the EEA was how disputes under the agreement would be resolved. This was caused by the combination of the EC having an established and effective judicial system which had evolved a range of legal rules binding in the national laws of its member states and the reluctance of the EFTA states to sign up

45. Although it has held that Congress has plenary power over the existence or not of lower federal courts and their jurisdiction. *See Palmore v. United States*, 411 U.S. 389; *See also* Dubinsky, *supra* note 5, at 299-300.

46. It would seem that this is a sort of "traditional judicial function" test. Perhaps it will fare better than the traditional government functions test that did so poorly in the Court's Tenth Amendment jurisprudence. *See Garcia v. San Antonio Met. Transit Authority*, 469 U.S. 528 (1985). Answering the problems over Article III by reference to a "traditional function" type test seems to beg the question of what Article III requires the judicial power to be.

47. *See Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 850-851 (1986); *Cf. Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

48. EFTA had initially been set up by countries, originally including the U.K. and Denmark, which did not want to be part of (or were not wanted by) the EEC. As a number of EFTA members eventually jointed the EEC (now the EC/EU), the Scandinavian countries, Austria, Iceland and Switzerland remained as a rump EFTA. Most of these countries have had constitutional or political problems with joining the EC, but obviously desired the advantages of the EC single market completed after 1/1/93. The EEA was intended to be a compromise, but the concessions the EFTA countries had to make for the EEA impelled them to apply to become EC members. On 1/1/95, Austria, Sweden and Finland did so, leaving the EEA including only Iceland and Norway (Swiss voters having rejected even the EEA).

to this or an equivalent system, without the full benefits of membership of the EC.[49] Accordingly, a compromise was struck borrowing some aspects of the EC system but establishing a new process with a new court, to be known as the EEA Tribunal (the Tribunal). Concerned that the dispute resolution compromises surrounding the new Tribunal might take the EC Commission, the EC's bureaucracy and for these purposes treaty-negotiator, into ultra vires activity, the Commission decided to obtain the opinion of the ECJ on the conformity between the EEA Tribunal and the EC Treaty.[50]

Accordingly, the original EEA Agreement members of the Tribunal was to comprise five judges from the ECJ and one from each of the EFTA states.[51] Its jurisdiction included cases on the interpretation of the EEA Agreement brought before it by the EEA's political branch (the EEA Joint Committee), the EC Commission and any EFTA state.

By virtue of the closeness between the EEA Agreement and the EC Treaty, including the law developed under it by the ECJ, a key question concerned the relationship between EC law and the law to be applied by the new Tribunal. Ideally, the law would be the same, but the EEA Agreement fudged the issue by providing what risked being a sunset provision in Article 6:

> Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the [EC Treaty and subsequent legislation thereunder], shall in their implementation and application be interpreted in conformity with the relevant rulings of the [ECJ] given prior to the date ... of this Agreement.[52]

Seemingly broad, for example, the rule of common interpretation applied to provisions in the two Treaties "identical in substance," Article 6 was, in fact, very narrow. The EFTA states were only prepared to sign up to existing ECJ decisions on EC law and not to future ones.[53] Accordingly, the possibility existed for divergence between the ECJ and

49. The law of the EC now includes a significant caselaw of the ECJ. Many of the constitutional rules of the EC, such as the principle of supremacy of EC law over national law and the quality of direct effects of EC law, whereby individuals can derive rights from both the EC Treaty and legislation enacted under it directly in the national legal system, without intervening national legislation, arise out of decisions of the ECJ and not expressly out of provisions in the EC Treaty: for further discussion, see Steiner, et al., TRANSNATIONAL LEGAL PROBLEMS 1117-1120 (4th ed. 1994).
50. Like the U.S. Constitution, the EC Treaty sets up a government of limited powers. Accordingly, the institutions of the EC must take care to act within their conferred (and implied) powers (or competences in the language of EC law). Under Article 228(6) of the EC Treaty, it is possible for the EC Commission or a Member State of the EC to obtain the opinion of the ECJ on a proposed international agreement to be entered into by the Community.
51. The Court could sit as a plenary court of eight judges, comprising the five from the ECJ and three of the EFTA states' judges on rotation, or in Chambers of three or five judges (pro rated) for less significant matters.
52. EEA Article 6.
53. In this regard, it is difficult to condemn the EFTA states. The ECJ is famous for its creative approach to interpreting the EC Treaty and probably does not consider itself bound by its previous decisions. No state joining the EC can predict what legal rules the ECJ might eventually "discover" in the EC Treaty: see, for example, the creation of a right to damages against Member States for at least some of their breaches of EC law in *Francovich v. Italy* ECR 5357 (1991).

the EEA Tribunal on common legal provisions. The overarching value of uniformity of law was, therefore, endangered and this proved to be the ECJ's principal objection to the EEA Tribunal.[54]

The ECJ was also concerned by the risk that its judges could be compromised through their membership of the EEA Tribunal. Given that up to eight of its thirteen judges would sit on the EEA Tribunal and participate in its potentially divergent decisions on similar legal questions, the ECJ concluded that the EEA Agreement provisions relating to the EEA Tribunal threatened the independence of the ECJ judges.[55] There was a risk that when the ECJ judges returned to the ECJ from the EEA Tribunal, they would be biased.

The charge of possible bias and the potential lack of uniformity of the law caused the ECJ to conclude that the EEA Agreement was incompatible with the EC Treaty. Its reasoning turned on the constitutional nature of the EC Treaty and on its own role as a supreme court within the EC. The ECJ had become the EC's effective supreme court and the integrity of the EC legal order would be jeopardized by the EEA Tribunal's freedom to go its own way. Putting it simply, there could not be two supreme courts.

The dangers for NAFTA posed by Opinion 1/91 of the ECJ are in what it says about biased judges and in the conflict between the supremacy of the U.S. Constitution and the supremacy of NAFTA. On the bias point, the danger is that sitting U.S. federal judges will adjudicate on NAFTA panels and then deal with similar issues in their capacity as U.S. judges. In their latter role, their previous NAFTA experience may compromise them contrary to the value of independence of the judiciary animating Article III, §1.[56] The second point concerns the clash between the supremacy of the U.S. Constitution and the supremacy over all inconsistent national law required by NAFTA. Just as the ECJ could not tolerate a challenge to the supremacy of EC law posed by the EEA Tribunal going its own way, so the U.S. Constitution cannot tolerate a "higher" law. U.S. judges owe ultimate allegiance to the Constitution, not to NAFTA.

Part IV

A. NAFTA IN CONTEXT

If NAFTA is placed in its context under the U.S. Constitution and within the legal order developing to govern international trade, it will be seen that neither Article III nor Opinion 1/91 of the ECJ pose a sustainable challenge to the Agreement.

54. The concern over lack of uniformity was compounded by Protocol 34 of the EEA providing for a counterpart to the novel "preliminary ruling" procedure under Article 177 EC Treaty and the use to be made of it by the EFTA countries. Basically, EFTA courts could refer points arising from the EEA Agreement that were identical to EC law for a ruling of the ECJ on what they meant, in a similar fashion that EC Member State courts can refer questions of EC law to the ECJ under Article 177. However, whereas EC national courts are bound by the ruling of the ECJ, Article 2 of Protocol 34 allowed the EFTA state to determine to what extent the ECJ ruling thereunder would apply in its national legal order. This playing fast and loose with the preliminary ruling procedure, the jewel in the ECJ's crown, was "unacceptable," para. 61, Opinion 1/91.
55. See paras. 50-53 of Opinion 1/19. Article 168 EC Treaty requires the independence of the ECJ judges to be beyond doubt.
56. *See* Metropoulos, *supra* note 4, at 160-162.

1. Article III

Beyond the difficult interpretive issues surrounding Article III of the U.S. Constitution, which it is not the purpose of this paper to attempt to resolve, there are three points that probably make NAFTA constitutionally safe in the U.S. The first concerns the legal fact that NAFTA is an international treaty signed by the U. S. government and implemented into U.S. law by Congress.[57] It is, therefore, broadly an exercise of the treaty power. Secondly, the Legislative and Executive Branches of the government having taken a positive position on NAFTA, including its dispute resolution procedures, there is a chance that the political questions doctrine will work to cause the courts to refrain from questioning NAFTA in light of the political branches' commitment to it. Thirdly, the argument that the NAFTA dispute resolution procedures by their exclusive nature deny U.S. citizens due process rights under the Constitution fails to take account of the differing standards of review, or tiers of scrutiny, that are due under the Fifth and Fourteenth Amendments to the Constitution.

Regarding the Treaty power, it is understood that the Constitution places few if any barriers in the way of the foreign relations responsibilities of the Executive.[58] This was established in *Missouri v. Holland*,[59] where the argument was made that the federal system created by the Constitution placed a restraint on the treaty-making capacities of the federal government and Congress limiting them to making treaties only in areas of conferred federal power. The Court dismissed this argument by observing that the Constitution neither contained "prohibitory words" nor emitted an "invisible radiation" to forbid the challenged treaty.[60] It may fairly be observed that if the rules of the federal system expressed in the Constitution in Article I and the Tenth Amendment cannot cause the courts to invalidate an international treaty, it is unlikely that Article III will be capable of doing so. No one doubts that the Constitution establishes the United States as a federal system and the federal government as a government of limited powers. If little else about the federal system is clear, that much is abundantly clear. Very little about Article III is clear, however. Opportunities may arise where the Supreme Court will have occasion to rule on the true meaning of Article III but it may be doubted that an international treaty, least of all the considered and balanced dispute resolution scheme of NAFTA, will provide the opportunity.[61]

57. North American Free Trade Agreement Implementation Act, Pub. L. No.103-182, 107 Stat. 2057 (1993).

58. Article II, §2 of the Constitution gives the President the power to make treaties "by and with the Advice and Consent" of the Senate. However, this does not exhaust the foreign affairs power of the Executive in U.S. law: it is also possible for the Executive to make treaties and have Congress (both houses) pass implementing legislation giving effect to the Treaty in federal law. This is what happened with NAFTA. In this case, however, it is the federal law and not the Treaty which has domestic effect.At most, the Treaty will be relevant only as an aid to construing the implementing legislation and even then only when the latter is ambiguous. The decision to ratify a treaty under Article II, §2, or to "implement" it through federal legtislation often turns on the distinction in U.S. law between self-executing and non-self-executing treaties, the latter always requiring implementing legislation if they are to confer rights and duties in U.S. law. But even "ratified" treaties under Article II may be non-self-executing. For more discussion, *see* Steiner, *supra* note 49, 563-69 *and also* Ackerman and Golove, *Is NAFTA Constitutional?*, 108 HARV. L.R. 799 (1995).

59. 252 U.S. 416 (1920).

60. *Id.* at 433-34. The Treaty could be sustained under the "Necessary and Proper" clause of the Constitution.

61. For more discussion of the treaty power and its implications for U.S. courts see Steiner, *supra* note 59 at 543-53.

If it does so, the political questions doctrine, of which the restraint demonstrated by the courts in the sphere of international treaties is but a part, might come into play.[62] The political questions doctrine may be difficult to defend, is open to exaggerated claims by the Executive and can serve as a refuge for a cowardly court, but does exist as a constitutional doctrine which sensitive public law litigation must address.[63] It is difficult to conceive a more sensitive constitutional challenge to federal power than any against the hemispheric free trade scheme that has been a central part of the foreign policy of three administrations and has the support of Congress. Whatever may be the limits of the doctrine, it is hard to see that even the strongest case against NAFTA would be able to overcome it.[64]

The third point concerns the scrutiny that a U.S. court would bring to a challenge alleging that the exclusive NAFTA dispute resolution procedures violate due process rights under the Constitution. Even if all things are equal,[65] it is not enough to persuade a U.S. court to act on some abstract claim that a constitutional right has been violated. An action will have to state some real claim that the NAFTA processes have denied a constitutional right. The right in question, due process relating ultimately to the hearing and adjudication of some interest protected or denied by antidumping or countervailing duty law, will be framed in terms of a liberty or property right.[66] Inevitably, the liberty right will be of an economic nature. Now, the Constitution undoubtedly protects liberty and property rights and indicates that they are not to be denied without due process, but the courts do not bring to all liberty and property rights the same degree of scrutiny.[67] Indeed, framed in terms of a violation of due process in relation to rights to (economic) liberty or property, the NAFTA legislation would probably only have to pass a rational basis test to survive. When the objective of free trade and the benefits derived from it by the world's largest trading nation are put in focus and the argument is led that the dispute resolution procedures eventually agreed by all the governments amount to a balanced compromise which does its best to achieve due process in an international setting, when it is further observed that no dispute resolution scheme as agreed means no NAFTA, the rational relationship between the compromise NAFTA processes and the need for free trade will surely be established.[68]

62. *See* Steiner, *supra* note 49, at 124-32.
63. For detailed analysis of the political questions doctrine see Franck, POLITICAL QUESTIONS: JUDICIAL ANSWERS (1992).
64. *Id.* at 63-76 (observing that the Supreme Court is more activist when invasions of property rights and other civil rights are justified by the political questions doctrine). Of course as is seen from my third point, the Court's activism very much depends on the nature of the right allegedly denied. *Cf. Baker v. Carr* 369 U.S. 186 where the Supreme Court noted that it is an "error" to say that every case touching foreign affairs is beyond judicial review. But: "Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* at 211-12.
65. The first two points indicate that they are not.
66. *Cf. Norwegian Nitrogen Productions Co. v. U.S.*, 288 US 294 (1933); (Cardozo J.) - "No one has a legal right to the maintenance of an existing [tariff] rate or duty". *Id.* at 318. It may be added that this decision was given at the height of the protection of economic due process!
67. *See* Tribe, AMERICAN CONSTITUTIONAL LAW 581-587 (2nd. ed. 1988).
68. This approach of balancing the rights allegedly violated by a treaty against the objectives pursued by the treaty has some judicial support. In recent years the U.S. has concluded a number of prisoner transfer treaties with Canada and Mexico under which U.S. citizens tried and convicted

It would be unsatisfying to conclude without contributing in a small way to the Article III debate. Article III confers jurisdiction on the federal courts over "Controversies to which the United States shall be a Party." In the area of antidumping and countervailing duties, it will be the U.S. government using powers conferred by Congress[69] or Congress itself that will levy and modulate the duties. If the U.S. government and Congress jointly decide that they wish to answer on these matters before an international forum and not before the U.S. courts, is there anything in Article III to stop them? These "Controversies" are not part of the original jurisdiction of the Supreme Court nor prefaced by "all" as are the "Cases" under Article III over which jurisdiction is given. If the Executive and Congress determine in view of the exigencies of trade policy to devise an alternative way to deal with a narrow class of disputes to which the U.S. is a party, Article III textually seems to place no bar. The Constitution does not say that the judicial power over all "Controversies" to which the U.S. is a party is absolutely, of necessity, vested in the federal courts. It is quite consistent with Article III to say that although all cases "arising under" federal law are within the exclusive judicial power of Article III courts, a narrow class of controversies to which the United States is a party are to be settled elsewhere, in particular, in an international forum.[70]

2. Opinion 1/91

There are two points that must be remembered when comparing the EEA Tribunal with the NAFTA bi-national panel process: first, it was the possible absence of uniformity of the law that the ECJ condemned in Opinion 1/91; secondly, the judges of the EEA Tribunal were in some cases likely to be the same as those of the ECJ, thereby raising the risk of bias where the same issue came before one court having already been determined differently by the other. Given the importance of uniformity of the law, particularly in a treaty applying as supreme law in several legal systems and the significance of the independence of the judiciary as a value, it is not surprising that the EEA Tribunal was not ideal.[71]

Note 68, continued

in these countries can consent to serve their sentences in the U.S. These treaties usually require no judicial review of the prisoner's foreign trial and imprisonment. What if the prisoner then alleges that he is (now) imprisoned in the U.S. by virtue of a treaty but in breach of his constitutional rights? The courts seem to answer this in policy terms by emphasizing the prisoner's consent to the transfer and all conditions under which it is made. Even so, it should be observed that this "hands off" approach to a treaty is in the context of more fundamental liberty rights entailing higher scrutiny than those raised under NAFTA. *See, Velez v. Nelson* 621 F.2d 1179 (2d Circuit, 1980), and Steiner, *supra* note 49 at 869.

69. Or possibly its own foreign relations power.

70. The U.S.-Iran Claims Tribunal in The Hague is a good precedent showing the U.S. settling international disputes to which it is a party outside the federal courts: *see Dames and More v. Regan* 453 U.S. 654 (1981). More complex issues arise if the International Court of Justice gives a ruling on an international treaty which the U.S. has ratified and which is therefore part of the "supreme" law of the United States by Article VI of the Constitution. It defies common sense to argue that the U.S. courts would not follow the ICJ's interpretation, unless the ICJ ruling conflicted in some way with the Constitution. Compare this with the compromise that allowed the GATT Uruguay Round to be ratified by the Senate.

71. Alterations to the EEA Tribunal system were made to assuage the ECJ's concerns and were approved by the ECJ in Opinion 1/92.

The NAFTA dispute resolution procedures aim to accommodate both the concerns relating to uniformity of the law arising out of NAFTA and the independence of the panel judges. As for uniformity, it is a necessary part of an international treaty such as that of NAFTA. Like the EC Treaty, indeed, like the "treaty" which is the U.S. Constitution, without uniformity in its interpretation the system will break down. The great rewards of free trade, economic improvement and security that NAFTA offers will not be possible if every party has their own self-interested view of what it means. Independent, supreme and final dispute resolution is a necessity so that all the parties are in the same, equal position before the law of NAFTA. This is the main objective of Chapter 19 and it is a fundamental one. If the U.S. wants to be part of NAFTA, it must concede that the supremacy of its domestic judicial process is to this extent qualified. Article III does not clearly prevent this concession.

The risk of NAFTA compromising U.S. judges by making them biased contrary to Article III sounds good but the risk is non-existent. The comparison between all U.S. federal judges and the judges of the ECJ is a non-starter. The ECJ is a collegiate court in which there will be cases where all the judges sit and theoretically contribute equally to the decision for which they are all collectively responsible. That is not the position in which U.S. federal judges find themselves. Each federal judge is responsible for their own decision. If they consider that something they have said in the past may prejudice them, they will decline the case and it will pass to another judge. Indeed, in allowing concurring and dissenting opinions, the NAFTA panel process encourages openness. We shall all be capable of knowing what a sitting U.S. federal judge said or did not say about a matter as a NAFTA panel member. In any event, the process is open to sitting and former judges, not just sitting judges.

Conclusion

Although it is possible to make an arguable case against the constitutionality of the NAFTA dispute resolution procedures, the legal problems such a case must address and the factors independently supporting the NAFTA processes strongly weigh in favor of the constitutionality of the NAFTA system. Bearing in mind the detailed, balanced and fair process for dispute resolution established by NAFTA and the trade context in which it is to work,[72] let us put violations of Article III in context and give the last word to the U.S. Supreme Court:

> Article III safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts, and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other.[73]

72. *See supra* Part I.
73. *Schor*, 478 U.S. at 850.