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In September 1988 the Canada-United States Free Trade Agreement (FTA) received the approval of Congress, and implementing legislation subsequently was signed into law by President Ronald Reagan.[1] Canada approved the FTA on December 30, 1988, and the Agreement entered into force on January 1, 1989. Over a ten-year period, the FTA would eliminate most barriers to trade between the two countries. Among the significant dispute settlement provisions,[2] the FTA establishes binding binational panel review to resolve disputes concerning final

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1. Canada-U.S.: Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 (1988) [hereinafter Free Trade Agreement]; United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988) [hereinafter Implementation Act]. For a history of Canadian-U.S. trade relations, see Battram, *Canada-United States Trade Negotiations: Continental Accord or a Continent Apart*, 22 INT'L LAW. 345, 347–49 (1988); for a discussion of Canada's objectives and a Canadian perspective as to potential U.S. gain from the agreement, see Legault, *The Free Trade Negotiations: Canadian and U.S. Perspective*, 12 CANADA-U.S. L.J. 7 (1987). *See also* Terry, *Sovereignty, Subsidies, and Countervailing Duties in the Context of the Canada-United States Trading Relationship*, 46 U. TORONTO FAC. L. REV. 48 (1988); McLachlan, Apuzzo & Kerr, *The Canada-U.S. Free Trade Agreement: A Canadian Perspective*, 22 J. WORLD TRADE 9 (1988).

For a discussion of constraints on Canadian parliamentary action with respect to the FTA, see Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J. INT'L L. 192, 220–21 (1987).

2. These include a U.S.-Canadian Commission for consultation, nonbinding binational panel review procedures and emergency review for grievous error. Some of those are traditional conciliation, arbitral and mediation procedures; others are purely consultative. *See* Sohn, *infra* note 5, for early recommendations for dispute resolution under a proposed free trade agreement.

antidumping[3] and countervailing duty[4] orders from the administrative agencies of either country. The binding procedure will expire in seven years, during which time the internal laws of both countries will be harmonized to eliminate further need for the dispute resolution mechanism.

The "unique dispute resolution mechanism,"[5] while critical to Canada's acceptance of the FTA to ensure impartiality, stirs controversy in the United States. In addition to criticism of the binational panel provisions on political and economic grounds (reflecting concealed protectionism and internal tensions between the Executive, the Congress, and the courts), the Congress considered and rejected speculation that these provisions may be constitutionally infirm.[6] Though congressional approval has quelled the policy controversy, hidden in the constitutional question is distrust over a perceived protectionist bias of the International Trade Court and the Court of Appeals for the Federal Circuit in their present judicial review function. Some of the fears of the Canadians and United States free traders are well-known in the subsidy and dumping cases,[7] and judicial review of agency orders in the United States has gone both ways. Nonetheless, for as much disinterestedness and impartiality in reviewing orders as possible under the FTA, including as much insulation as possible from unilateral statutory changes, the Canadians insisted and the United States negotiators agreed to Party election to have binding review of these orders in a binational forum outside domestic judicial control.

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3. Free Trade Agreement, *supra* note 1, art. 1904, 27 I.L.M. 281. An antidumping law responds to dumping, i.e. the introduction of items, generally by a private importer, into a country of importation at a price less than the value of a comparable item in the country of origin. For a proposed modification of antidumping duty laws in light of the FTA, see Behm, *A Proposed Modification of U.S. Import Relief Measures in the Context of a U.S.-Canada Free Trade Agreement: Safeguard, Countervail and Antidumping*, 17 GA. J. INT'L & COMP. L. 99, 114–18 (1987).

4. Free Trade Agreement, *supra* note 1, art. 1904. A countervailing duty is levied by a country of importation upon an imported item to offset an unfair export or production subsidy granted by the government of the country of origin. For a proposed modification of countervailing duty laws in light of the FTA, see Behm, *supra* note 3, at 107–113.

5. The Canadian characterization in the Canadian Government's summary explanation. DEPT. OF EXTERNAL AFFAIRS (CANADA) THE CANADA-U.S. FREE TRADE AGREEMENT/TRADE: SECURING CANADA'S FUTURE 268 (1987); *see also* Sohn, *Dispute Resolution Under a North American Free Trade Agreement*, 12 CANADA-U.S. L.J. 319 (1987); *Alternative Dispute Resolution in Canada-United States Trade Relations*, 40 ME. L. REV. 223 (1988).

6. *See* Customs and Int'l Trade Bar Ass'n, Statement in Opposition to Withdrawal of Jurisdiction in the United States Court of International Trade and Its Appellate Tribunals to Review Antidumping and Countervailing Duty Decisions of Federal Agencies Involving Canadian Merchandise, Adopted by the Board of Directors, Customs and International Trade Bar Association, (Dec. 3, 1987) [hereinafter CITBA Statement] (which raises constitutionality questions). *But see Hearings on the Canada-United States Free Trade Agreement Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 100th Cong., 2d Sess. (1988) (Statement of Stewart Abercrombie Baker) [hereinafter Statement of Stewart Abercrombie Baker] (defending the constitutionality of binational panel review).

7. For a history of dumping, price discrimination, and predatory pricing in relation to U.S.-Canada trade relations, see Goldman, *Competition, Anti-dumping, and the Canada-U.S. Trade Negotiations*, 12 CANADA-U.S. L.J. 95 (1987).

This article addresses those constitutional issues relating to the binding binational panel review provisions that may surface under the FTA. We wish to appraise these issues, to appraise ways in which potential difficulties have been resolved by the implementing statute, and to determine whether any other constitutional questions might properly be considered by federal courts in the United States.

The constitutional challenge to the FTA's provisions for the appointment of binational panels rests principally on three grounds. First, the executive and congressional powers encroach impermissibly upon the core article III judicial power in the United States Constitution by limiting judicial review under United States law in federal courts and recognizing this power in a non-article III international tribunal. Second, the FTA confers authority to interpret and administer laws of the United States upon persons not appointed in conformity with the appointments clause of article II. Third, the Congress impermissibly encroaches upon the President's power faithfully to execute the laws by requiring direct implementation of binational panel decisions on remand to the administrative agencies whose orders were under review.

Before addressing these challenges, we briefly review the relevant provisions of the FTA in relation to domestic antidumping and countervailing duty laws and the changes in them.[8] We then consider the preliminary question of the constitutional authority of the United States executive to negotiate and the Congress to agree on binding binational panel review, as well as questions of delegation and due process. The precise nature of the principal constitutional questions should then have a sharper focus.

I. Appointment of Binational Panels to Review Antidumping and Countervailing Duty Orders

Binding binational panel review of final antidumping and countervailing duty decisions is a form of supranational review jurisdiction over national decisions under an international agreement.[9] The FTA does not interfere with each Party's rights under the General Agreement on Tariffs and Trade (GATT) to apply its own antidumping and countervailing duty laws to goods imported from the territory of the other Party that are unfairly priced to distort comparative advantage.[10] It does, however, restrict the ability of each Party to amend existing antidumping and countervailing duty laws applicable to the other Party and

8. For a discussion of the current framework of antidumping and countervailing duty laws, see Horlick & DeBusk, *Commerce Procedures Under Existing and Proposed Antidumping/Countervailing Duty Regulations*, 22 INT'L LAW. 99 (1988).

9. These provisions and the other voluntary tribunals are established in chapter 19 of the FTA. For a different view of dispute resolution under the FTA, see Trakman, *Privatizing Dispute Resolution under the Free Trade Agreement: Truth or Fancy?*, 40 ME. L. REV. 349 (1988).

10. Free Trade Agreement, *supra* note 1, art. 1902(1).

provides nonbinding review for compatibility with GATT.[11] Any amendment to a Party's antidumping or countervailing duty laws must apply specifically to goods from the other Party. In that case, the Party seeking to amend its laws must notify the other Party of its intention to do so and consult with the other Party prior to enactment of the amending statute if the other Party so requests.[12] Any such amendments must also be consistent with the provisions of the Agreement on Implementation of article VI of the GATT (the Antidumping Code), the Agreement on the Interpretation and Application of articles VI, XVI and XXIII of the GATT (the Subsidies Code), and with the object and purpose of the FTA itself.[13]

Under article 1903 of the FTA, a Party may request that an amendment to the other Party's antidumping or countervailing duty laws be referred to a panel for a declaratory opinion as to whether the amendment is consistent with the above-named agreements.[14] This review is purely advisory and does not bind the Parties. If the panel determines that a statutory amendment fails to conform to any of the agreements set forth in article 1902(2)(d), the Parties are required to begin consultations with a view to resolving the inconsistency within ninety days of the issuance of the panel's declaratory opinion.[15] If no solution is reached within this time, the Party that requested the panel is authorized to "take comparable legislative or equivalent executive action," or to give notice to the other Party of its intention to terminate the FTA.[16] This process follows traditional lines of consultation and reciprocity in carrying out international agreements.

The binding review process, limited to antidumping and countervailing duty cases, differs significantly. Functionally, although much less complex, the process is more like supranational review of customs matters handled by the Court of Justice of the European Economic Community than like traditional

11. The GATT promotes the reduction of trade barriers (e.g., tariffs, as well as nontariff barriers) in an attempt to liberalize trade under multilateral nondiscriminatory and most favored nations treatment. The GATT is intended to represent for each contracting party a balance of comparative advantage in the international trade arena. K. DAM, THE GATT LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 18–22 (1970).

12. Free Trade Agreement, *supra* note 1, art. 1902(2)(a)-(c).

13. *Id.* art. 1902(2)(d).

14. A Party may also ask the panel to determine whether or not a prospective amendment has the effect of overturning a prior decision of the panel made pursuant to art. 1904 of the FTA, but a determination that it does would appear to have no effect unless the panel determines that the amendment also contravenes one or more of the agreements mentioned in art. 1902(2)(d). Article 1903(1) gives the Parties a choice between referring prospective amendments to a panel for a declaratory opinion as to whether:

> (a) the amendment does not conform to the provisions of subparagraph (d)(i) or (d)(ii) of paragraph 2 of art. 1902; or (b) such amendment has the function and effect of overturning a prior decision of a panel made pursuant to art. 1904 *and* does not conform to the provisions of subparagraph (d)(i) or (d)(ii) of paragraph 2 of art. 1902 (emphasis added).

15. Free Trade Agreement, *supra* note 1, art. 1903(3)(a).

16. *Id.* art. 1903(3)(b).

international dispute settlement in the context of a bilateral agreement. For this reason, the provision jars the existing constitutional framework, for it would allow private parties to elect to substitute binational panel review for domestic judicial review of final orders of domestic agencies. Moreover, any remand following such review would be directed to the politically appointed head of the agency whose order is reviewed, under both the FTA and the implementing legislation, to carry out the decision resulting from review.

Article 1904 of the FTA requires that the Parties undertake the legislative action necessary to accomplish this supranational review of final antidumping and countervailing duty determinations.[17] Panels are appointed on a casy-by-case basis,[18] consisting, for each case, of five individuals selected from a roster of fifty qualified individuals named by the Parties prior to the entry into force of the FTA.[19]

Either Party may request binational panel review of a final antidumping or countervailing duty determination issued by the competent authority of either Party to determine whether the final order is consistent with the antidumping or countervailing duty law of the importing Party. Binational panels must confine their review of final orders to the administrative record and may rely upon the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents of the importing Party. Under the implementing legislation in the United States, binational panel decisions create no binding precedent.[20] The antidumping and countervailing duty statutes of the Parties are incorporated by reference into the FTA.[21]

A Party to the FTA, either on its own initiative or upon the request of a person who otherwise would have standing to obtain judicial review of a final order under the law of the importing Party, may request binational panel review.[22]

17. *Id.* art. 1904(1), (15). Under U.S. implementing legislation, only the private U.S. national with standing to challenge final orders before the International Trade Court under present law with proper notice may request the United States to trigger binational review proceedings. Without a private request, the United States may not on its own request binational review. While a statutory ministerial duty seems to be imposed upon the executive branch, in other parts of the implementing legislation, mandamus to enforce any aspects of the law is expressly precluded. Implementation Act, *supra* note 1 (Tariff Act of 1930, § 516A, 19 U.S.C. § 1516a (1982) *amended by* additional subsecs. (g)(8)(A), (g)(8)(C) (Supp. IV 1986)). This would place the executive in the anomalous position of being free to breach the FTA by not complying with a request to trigger binational review in violation of both the FTA and the implementing legislation, without judicial recourse in U.S. courts, unless some constitutional override would permit review of the question by an article III court. *See infra* note 56 and accompanying text.

18. Free Trade Agreement, *supra* note 1, art. 1904(4).

19. *Id.* annex 1901.2(1)–(3).

20. Implementation Act, *supra* note 1, § 401(d) (Tariff Act of 1930, § 516A(b), 19 U.S.C. § 1516a(b), *amended by* the addition of para. (3)).

21. Free Trade Agreement, *supra* note 1, art. 1904(2). Countervailing and antidumping are imposed in the United States in accordance with the Tariff Act of 1930, Subtitle IV, 19 U.S.C.A. § 1671 (West 1988); 19 U.S.C. § 1673 (1982 & Supp. IV 1986), respectively.

22. Free Trade Agreement, *supra* note 1, at art. 1904(5). *But see* Implementation Act, *supra* note 1 (Tariff Act of 1930, § 516A, 19 U.S.C. § 1516a, *amended by* additional subsection (g)(8)(C))

Failure to request a binational panel within thirty days after effective notice of a final order precludes review of the final order by a binational panel.[23]

The authority issuing a final order, and all those who, under the law of their respective jurisdictions, would have standing to appear and be represented before a court during judicial review of a final order, have the right to appear and be represented by counsel before the binational panel,[24] whose decisions are final and binding.[25] In cases where a binational panel determines that a final order issued by the competent authority of an importing Party is inconsistent with the laws of that Party with respect to the imposition of antidumping or countervailing duties, the panel will remand the final order for action not inconsistent with the panel's decision. Under implementing legislation in the United States, the remand is communicated directly to the Secretary of Commerce or to the International Trade Commission.[26]

The panel must set a time limit for compliance with the remand not to exceed the maximum period of time that is given by the law of the importing Party to its competent authority to issue a final order.[27] Any judicial review of action taken on remand must be made by the same binational panel within ninety days of the date on which such action is submitted to it.[28] Neither Party may provide for an appeal from the decision of a binational panel to its domestic courts.[29] United States implementing legislation provides an exception to exclusive binational panel review for constitutional issues.[30]

The provisions of the FTA do not affect the judicial review procedures of either Party, or cases appealed under those procedures, until agency determinations are final.[31] If neither Party requests establishment of a binational panel within the time allowed, judicial review under domestic law of either Party may

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(for the limitation in U.S. implementing legislation removing the discretion of the executive to request such review on its own initiative).

23. Free Trade Agreement, *supra* note 1, art. 1904(4).

24. *Id.* art. 1904(7). Procedures for initiating an investigation of conditions allegedly warranting the imposition of a countervailing or antidumping duty are set forth in 19 U.S.C. §§ 1671a, 1673a (1982 & Supp. IV 1986).

25. Free Trade Agreement, *supra* note 1, art. 1904(9)(11).

26. Implementation Act, *supra* note 1 (Tariff Act of 1930, § 516A, 19 U.S.C. 1516a, *amended by* additional subsec. (g)(7)(A)).

27. In countervailing duty cases, see 19 U.S.C. § 1671b(a)–(b) for time limits for issuance of final orders; in antidumping cases see 19 U.S.C. §§ 1673a and 1673b for time limits for issuance of final orders; see also 19 U.S.C. §§ 1671b(c), 1673b(c), and 1673d(a)(2) for possible time extensions.

28. Free Trade Agreement, *supra* note 1, art. 1904(8).

29. *Id.* art. 1904(11). Implementing legislation both removes and limits present judicial review and further precludes mandamus. Implementation Act, *supra* note 1 (Tariff Act of 1930, § 516A, 19 U.S.C. § 1516a, *amended by* additional subsec. (g)(2), (3)).

30. Implementation Act, *supra* note 1 (Tariff Act of 1930, § 516A, 19 U.S.C. § 1516a, *amended by* additional subsection (g)(4)).

31. Free Trade Agreement, *supra* note 1, art. 1904(10).

proceed.[32] Furthermore, neither Party may request binational panel review of a revised final order issued as a direct result of judicial review of a final order in cases where neither Party requested binational panel review of the original final order. Finally, neither Party may request binational panel review of a final order issued as a direct result of judicial review in a court of the importing Party prior to the entry into force of the FTA.[33]

The FTA establishes an "extraordinary challenge procedure"[34] whereby a Party may challenge the decision of a binational panel on grounds that: (1) a member of the panel was guilty of gross misconduct, bias, conflict of interest, or some other material violation of the rules of conduct devised by the Parties; (2) the panel departed from a fundamental rule of procedure; (3) the panel exceeded its authority or jurisdiction as defined by article 1904; or (4) the existence of one or more of the above-named circumstances "materially affected" the panel's decision.[35]

Because the FTA, when implemented, empowers a private party with standing to elect removal of judicial review from article III courts in the United States in favor of binational panel review, as described above, we turn next to the preliminary questions of the authority of the executive to negotiate such an agreement, the power of Congress to limit and create review jurisdiction and limitations of due process, before discussing the separation of powers questions.

II. Preliminary Constitutional Issues

A. Executive Authority to Negotiate Agreements Pursuant to a Congressional Authorization

This agreement and its implementation demonstrate the political utility of the congressional-executive agreement form of entering a self-executing international agreement, in place of the traditional treaty-making mode under the Constitution. Executive authority to negotiate an international agreement providing for binding review of domestic administrative decisions by an international tribunal is supported in part by a line of decisions upholding the

32. Pursuant to current U.S. law, if parties subject to a final order respecting the imposition of countervailing and antidumping duties wish to file a protest against such an order with the Customs Service, they must do so within 90 days of the issuance of the order. Tariff Act of 1930, § 514, 19 U.S.C. §§ 1514, 1515, 28 U.S.C. § 2631(a) (1982 & Supp. IV 1986). The Court of International Trade (CIT) has exclusive jurisdiction of any civil action commenced to contest the denial of a protest under Tariff Act of 1930, § 515, 28 U.S.C. § 1581 (1982 & Supp. IV 1986). Such actions must be commenced within 180 days of the mailing date of the denial of a protest, 28 U.S.C. §§ 2631(a), 2636(a) (1982 & Supp. IV 1986). Decisions of the CIT may be appealed to the United States Court of Appeals for the Federal Circuit, 28 U.S.C.A. § 1585 (1986).

33. Free Trade Agreement, *supra* note 1, art. 1904(12).

34. *Id.* annex 1904.13.

35. *Id.* art. 1904(13).

constitutionality of executive action taken pursuant to congressional authorization rather than under the treaty power exclusively.[36] The executive has greatest power when negotiating under both congressional authority and the President's treaty and foreign relations powers.[37] In the leading case, *United States v. Curtiss-Wright Export Corp.*,[38] the Supreme Court upheld a broad grant of discretion to the President under the inherent foreign affairs power, distinguishing between domestic and international executive powers. The latter "most often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[39]

Trade and tariff agreements introduce special tension between the President and the Congress. The executive agreement negotiated under congressional authorization becomes a favored political device for resolving this tension, especially under a congressional rule allowing an up or down vote on both the agreement and the implementing legislation.[40] The President claims executive power over foreign affairs and seeks political control over the increase to the national wealth through free trade. The Congress claims power over foreign trade and tariff revenues and may reflect protectionist or other parochial interests of constituents injured by the displacements wrought by free trade. Constitutionally, one question is always how far the Congress can circumscribe the President's "inherent power" over foreign affairs as interpreted in *Curtiss-Wright* when exercised to integrate economic markets for public benefit through massive elimination of tariffs and barriers as in the FTA.

Although the Supreme Court has not applied the *Curtiss-Wright* reasoning to congressional authorization to negotiate trade agreements, in *Star-Kist Foods, Inc. v. United States*,[41] the United States Court of Customs and Patent Appeals upheld the Trade Agreements Act of 1934[42] on similar grounds. In fact, the constitutional challenge in *Star-Kist* appears to be stronger than that in *Curtiss-*

36. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1, reporters note 2 (1987).

37. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 105-06 (1972).

38. 299 U.S. 304 (1936).

39. *Id.* at 320; *See also* L. HENKIN, *supra* note 37, at 44-50.

40. Congressional approval of the FTA along with the implementing legislation under the so-called "fast-track" procedure is authorized by The Trade Act of 1974, 19 U.S.C. § 2191 (1982). Pursuant to § 1103(b) of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100–418, 102 Stat. 1107, the applicability of the "fast track" procedures to implementing bills that are submitted to Congress with respect to bilateral trade agreements (and multilateral trade agreements affecting tariff barriers) is extended until June 1, 1993, provided that the agreement in question is entered into before June 1, 1991. (The Act provides for extension of this deadline, subject to congressional approval.)

41. 275 F.2d 472 (1959 C.C.P.A.).

42. Tariff Act of 1930, § 350(a), 19 U.S.C. § 1351 (1982 & Supp. IV 1986), *as amended by* the Act of June 12, 1934 entitled An Act to Amend the Tariff Act of 1930, 48 Stat. 943, *as further amended by* the Joint Resolution of June 7, 1943, 57 Stat. 125.

Wright. Unlike the Joint Resolution at issue in *Curtiss-Wright*, which granted the President discretion only to restrict trade in specified goods in response to a discrete set of exigent circumstances, the Trade Agreements Act of 1934 granted to the President an *ongoing* discretion to vary the terms of existing legislation, taking into consideration precisely the type of information that would have been considered by Congress in amending the relevant legislation under its express power.[43]

The *Star-Kist* court acknowledged that there are constitutional limits to Congress's ability to confer upon the President authority to conclude executive agreements affecting domestic legislation. A constitutional delegation requires "a standard or intelligible principle which is sufficient to make it clear when action is proper. And because Congress cannot abdicate its legislative function and confer carte blanche authority on the President, it must circumscribe that power in some manner."[44] The Trade Agreements Act of 1934 contained adequate standards and limits.

The constitutional standard enunciated in *Star-Kist* operates only to restrict the President's authority to conclude executive agreements pursuant to a congressional grant of authority. The President always can rely upon the treaty power to negotiate international agreements, but in matters of foreign trade and tariffs congressional approval would be necessary in implementation, at some point. The device of negotiation pursuant to congressional authorization is thus not merely constitutional but also prudent and efficient. Read together, *Curtiss-Wright* and *Star-Kist* illustrate the breadth of discretion that may be exercised by the President pursuant to congressional authorization when such discretion is exercised to assist Congress in the regulation of foreign trade.

Section 102(b) of the Trade Act of 1974,[45] as yet unchallenged on constitutional grounds, authorizes the President to "enter into trade agreements with foreign countries or instrumentalities providing for the harmonization, reduction, or elimination of [trade] barriers (or other distortions) or providing for the prohibition of or limitations on the imposition of [trade] barriers (or other distortions)."[46] This congressional authorization restricts the President notably less severely than did the authority at issue in *Star-Kist*, since it does not limit the amount by which the President is authorized to reduce existing trade barriers, nor does it limit the President's authority in reducing trade barriers to the reduction of duties alone.

In the "harmonization, reduction, or elimination" of trade barriers, Congress clearly understood in the authorization that action by the President pursuant to

43. 275 F.2d at 480.

44. *Id.*

45. 19 U.S.C. § 2112(b) (1982 & Supp. IV 1986).

46. *Id.* The President's authority to enter into trade agreements providing for the reduction or elimination of barriers to trade, subject to certain statutory conditions, is extended by § 1102 of the Omnibus Trade and Competitiveness Act of 1988, *supra* note 40.

section 102(b) would have the effect of modifying existing legislation establishing trade barriers. Since the President's authority to conclude such agreements may be circumscribed by time and by requirements that the President adhere to an enunciated policy and make specific determinations, the delegation and restrictions meet constitutional standards. While no such grant of authority would have been required to enable the President to negotiate a treaty, despite the potential effect of a treaty upon domestic law, proceeding under congressional authority avoids a potential conflict with the entire Congress over implementation.

The scope of authority granted by section 102(b), however, and of the limits to the President's discretion in foreign trade initiatives remains uncertain. The President no doubt could enter into agreements that have the effect of modifying domestic legislation on one occasion only, that is, at the time the agreement is concluded. Section 102(b) confers broader authority than did either of the statutes at issue in *Curtiss-Wright* or *Star-Kist*. Agreements providing for a *system* under which trade barriers may be harmonized or eliminated over time reasonably fall within this authorization. Rather than making a mere one-time adjustment or reduction in specific trade barriers, the President may conclude agreements for integrating national economies, such as in the Israel-United States Free Trade Agreement and the Canada-United States Free Trade Agreement. Under such agreements, dispute resolution procedures may be functionally needed as part of implementing the free trade regime. This necessity implies authority to conclude agreements establishing international tribunals for the binding resolution of certain trade disputes. The authority seems clear as long as the operation of the tribunals is limited to the purposes of the Act. This implied authorization, however, might not be sufficient without further specific implementing legislation to remove from domestic courts long-standing judicial review over certain administrative decisions to guard against protectionist bias that would threaten the integrity of the agreement.

Obviously, this broad interpretation adds a dimension to the Act not considered by the courts in *Curtiss-Wright* or *Star-Kist*, and its constitutionality cannot be presumed by reference to those cases alone. Past practice, however, the absence of any constitutional challenge to the Act, and congressional acquiescence support the validity of the FTA and its dispute provisions.[47]

The case of *Dames & Moore v. Regan*[48] most recently shows the deference the Supreme Court gives the President in establishing international arbitral tribunals for the settlement of disputes by executive agreement. Although the Court found

47. The Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT, 26th Supp. BISD 56 (1980); Trade Agreement Act of 1979, § 2, 93 Stat. 147 (the Subsidies Code), concluded pursuant to § 102(b), establishes procedures for consultation, conciliation, and the settlement of disputes concerning the subsidization of goods for export. This Agreement, and any others establishing procedures for the settlement of disputes, may be expected to facilitate the observance of existing or prospective agreements.

48. 453 U.S. 654 (1981).

no authorization for the President's suspension of judicial proceedings[49] pending against Iran and its state enterprises in either the International Emergency Economic Powers Act or the Hostage Act,[50] the Court found congressional authorization of the Iran-United States Claims Tribunal to be implied in emergency legislation and in Congress's longstanding acquiescence to the settlement of claims against foreign governments and nationals via executive agreements.[51]

In sum, we find no constitutional infirmity in the procedures for binding binational panel review of antidumping and countervailing duty orders as part of the FTA negotiated pursuant to a congressional grant of authority for the harmonization, reduction, and elimination of barriers to trade. The only question that conceivably might arise is whether the elimination of judicial review of a longstanding domestic practice affecting private expectations falls within that authority. Even that question, however, is cured by congressional approval of the FTA and implementing legislation, so long as no impermissible encroachment upon the judicial power thereby occurs.

B. Bases of Congressional Power to Authorize Binational Panel Review

Binational panel review in the FTA raises constitutional questions not answered by decisions that merely affirm Congress's power to regulate foreign commerce.[52] Article 1904 of the FTA provides that "the Parties shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review."[53] Under an important corollary, "[a] final determination shall not be reviewed under any judicial review procedures of the importing Party if either Party requests a panel with respect to that determination within the time limits set forth [in article 1904]."[54] Through implementing legislation "[t]he Parties shall . . . amend their statutes and regulations, as necessary, with respect to antidumping or countervailing duty proceedings"[55] in order to give effect to the provisions of this article. For the United States, these provisions meant enacting limitations on the review jurisdiction of the Court of International Trade and the Court of Appeals for the Federal Circuit to hear challenges to final

49. *Dames & Moore*, 453 U.S. at 668–75.

50. Pub. L. No. 95–223, tit. II, § 203, 91 Stat. 1626 (1977) (codified at 50 U.S.C. § 1702); Rev. Stat. § 2001, 22 U.S.C. § 1732 (1982).

51. *Dames & Moore*, 453 U.S. at 678–82. The Court cites Congress's enactment of the International Claims Settlement Act of 1949, 64 Stat. 13, *as amended*, 22 U.S.C. § 1621 (1982), and the establishment of the Foreign Claims Settlement Commission as support for Congress's implied approval of this method of claims settlement.

52. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

53. Free Trade Agreement, *supra* note 1, art. 1904(1).

54. *Id.* art. 1904(11).

55. *Id.* art. 1904(15).

orders of the Department of Commerce and the International Trade Commission with respect to antidumping and countervailing duties and empowering binational panels to conduct final review under United States law. The legislative and judicial history of these courts indicates that they are article III courts, and not legislative courts.[56] Even if the executive agrees, does Congress have power in effect to transfer this judicial review by article III courts to an international tribunal? While the separation of powers part of this question is addressed later, for the moment we briefly review the basis for congressional power to limit judicial review.

Article I, section 8, clause 9 of the Constitution gives Congress the power "[t]o constitute Tribunals inferior to the Supreme Court." Article III, section 7 gives Congress authority to vest judicial power in "such inferior Courts as [it] may from time to time ordain and establish." Congress has created the Court of International Trade and the court of appeals inferior to the Supreme Court. Can it now limit the jurisdiction of those courts? Justice Story thought Congress was under the duty to establish inferior courts and therefore had narrow power to limit their jurisdiction.[57] Others likewise have argued that the vesting of judicial power in federal courts under article III insulates them from congressional interference in the extent of their jurisdiction.[58] Rejecting those views, the Supreme Court stated:

> [T]he political truth is, that the disposal of the judicial power (except in a few specified instances (enumerated in article III, section 2)), belongs to Congress. If Congress has given the power to this court, we possess it, not otherwise; and if Congress has not given the power to us, or to any other court, it still remains at the legislative disposal.[59]

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56. The United States Court of International Trade, created by the Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1728 (1980), was preceded by the United States Customs Court and, before it, the United States Board of General Appraisers. Prior to the creation of the United States Court of Appeals for the Federal Circuit by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, that court's jurisdiction with respect to customs and international trade matters was exercised by the United States Court of Customs and Patent Appeals and the United States Court of Customs Appeals. In *Ex parte* Bakelite Corp., 279 U.S. 438 (1929), the United States Court of Customs Appeals, created by § 28 of the Payne-Aldrich Tariff Act of August 5, 1909, ch. 6, 36 Stat. 11, and the United States Customs Court, created by the Act of May 28, 1926, ch. 411, 44 Stat. 669 (codified at 28 U.S.C. §§ 251 *et seq.*), were declared to be legislative courts under article I and, therefore, entirely dependent upon Congress for their powers. Congress subsequently passed legislation stating that these courts were intended to be article III courts, vested with the judicial power of article III, and with judges who would hold office independent of any restrictions imposed by Congress. Act of July 14, 1956 (Customs Court), § 1, 70 Stat. 532 (1956); Act of Aug. 25, 1958 (Court of Customs and Patent Appeals), § 1, 72 Stat. 848 (1958). In Glidden v. Zdanok, 370 U.S. 530 (1961), the Supreme Court recognized Congress's expressed wish and, after reconsideration of the character of the Customs Court and the Court of Customs and Patent Appeals, determined that they were indeed article III courts. The names of the courts were subsequently changed and their jurisdiction expanded and confirmed. Customs Court Act of 1970, Pub. L. No. 91-271, 84 Stat. 274 (1970); Customs Court Act of 1980, *supra* note 56; Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982). *See* CITBA Statement, *supra* note 6, at 11-4.

57. Cary v. Curtis, 44 U.S. (3 How.) 236, 253 (1845) (dissent).

58. *See* L. TRIBE, *infra* note 67, at 51-52.

59. Turner v. The President, Directors, & Company of the Bank of N.A., 1 L. Ed. 718, 719 n.1 (1799).

This view was affirmed in *Ex parte McCardle*,[60] which upheld Congress's restriction of the Court's jurisdiction to hear appeals in cases of habeas corpus.

Ex parte McCardle dealt only with the repeal of a statute constituting the source of the Court's jurisdiction over particular types of cases. In contrast, *Martin v. Hunter's Lessee*,[61] decided fifty-two years earlier, had held that Congress may not interfere with the jurisdiction of the lower federal courts over disputes listed in article III of the Constitution. Although the ruling in *Martin v. Hunter's Lessee* was unaffected by *Ex parte McCardle*, it has since been overridden by a series of cases.[62] More recently and with great importance to binational panel review, the Supreme Court in *Palmore v. United States* determined that not all cases within the judicial power of the United States must be heard and decided by an article III court.[63] Moreover, in the Second Circuit international agreements having constitutional status equal to acts of Congress "may operate . . . as limitations on [the] diversity jurisdiction" of federal courts.[64] The cases clearly support the interpretation that Congress has the power to limit the jurisdiction of federal courts with respect to cases "arising under . . . the laws of the United States," and "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[65]

III. Separation of Powers Issues: Encroachment on Judicial Power

A. Review Jurisdiction in Non-Article III Tribunal

Professor Richard Fallon argues that judicial review of the decisions of legislative courts and administrative agencies might be necessary to the preservation of the separation of powers. His argument and analysis logically applied also to the binational panel review of agency orders and in extraordinary challenge procedures. "Appellate review," Fallon suggests, "affords an opportunity to correct legal errors, including those that may have resulted from the kind of political influence on judicial decision making that article III was intended to prevent."[66] While this analysis at first seems inapposite to the decisions rendered by a binational tribunal that is subject to the control of neither the executive nor the legislative branches of the federal government, careful scrutiny reveals the potential political nature of the panels and their control in

60. 74 U.S. (7 Wall.) 506, 514 (1868).

61. 14 U.S. (1 Wheat.) 304 (1816).

62. Lockerty v. Phillips, 319 U.S. 182 (1943) and Lauf v. Shinner & Co., 303 U.S. 323, 329–30 (1938) held that the lower federal courts derive their jurisdiction solely from Congress's exercise of its power to ordain and establish such courts.

63. 411 U.S. 389, 397–404 (1973).

64. Smith v. Canadian Pacific Airways, 452 F.2d 798, 802 (2d Cir. 1971).

65. U.S. Const. art. III, § 2.

66. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 916, 939 (1988).

constitution and process by the political branches especially after a request removes a final order from domestic review. In binational panel review, the international agreement and legislation guide decisions, but accountability for abuse is subject to special procedures for appointment and peremptory challenge, or extraordinary review by panels appointed by the governments, under considerable political discretion.

The FTA builds-in structural limitations as well as a limited discretionary framework. The review procedures expire after seven years or sooner if the parties harmonize the domestic laws of antidumping and countervailing duties. Neither the President nor Congress may act unilaterally to alter the jurisdiction of the binational panels once the FTA goes into effect, although they may amend the applicable domestic statutes to be applied by the panels (subject to a declaratory opinion procedure by a binational panel); thus, executive or legislative influence over a binational panel once established is minimal. Do the political branches impermissibly encroach upon the judicial power by excluding judicial review of decisions of legislative courts or administrative agencies in cases requiring review by an article III court? We think it highly unlikely but possible for a constitutional question to arise requiring U.S. judicial review. The implementing legislation provides the means to make such a constitutional challenge. Were that to occur, and Canada believes it should be foreclosed, the question of breach of the provision between the two countries foreclosing judicial review of the agreement in domestic courts would require consultation between the governments. Before reaching that point, however, let us review the constraints within the constitutional power of Congress to limit judicial review even without the benefits of a reciprocal agreement with Canada. These restraints differ from the other constitutional limits on all national power.[67]

B. Congress's Authority to Limit the Jurisdiction of Customs Courts and to Implement the Limitation Required by the Canada-U.S. Free Trade Agreement

The customs bar opposed the removal of judicial review from the Court of International Trade to binational panels for several reasons.[68] First, the limitation accompanying removal would deny judicial review by article III courts in customs matters with deep historic roots grounded in the common law actions of assumpsit, trover, and replevin, which protect private interests. Second, the forum created does not satisfy constitutional expectations of regularity and due

67. L. Tribe, American Constitutional Law 47 (2d ed. 1988).
68. CITBA Statement, *supra* note 6.

process in the operation of temporary panels in applying United States law and may also violate separation of powers principles.

Even before *Ex parte McCardle*, however, the Supreme Court had determined that Congress has the power to limit the jurisdiction of the old Customs Court. In *Cary v. Curtis* the Court upheld Congress's elimination of the jurisdiction of customs and all federal courts to hear and decide actions in assumpsit against customs collectors.[69] The Court pointed out that:

> [T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, *applicable exclusively to this court*), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.[70]

Although the Court did not directly address the due process concerns of the plaintiffs in *Cary v. Curtis*, it did point out that other avenues of redress remained open to persons in the plaintiffs' position who disagreed with the imposition of customs duties. Such persons might refuse to deposit the duties exacted by a customs collector and, when their merchandise was detained as a consequence, proceed to file an action in trover or replevin.[71] Congress then clarified its policy and allowed judicial review.[72]

The FTA restriction upon the jurisdiction of the Court of International Trade and the Court of Appeals for the Federal Circuit differs in two important respects from that rejected by Congress in the Act of February 26, 1845. First, the FTA and implementing legislation do not automatically destroy a private party's ability to challenge in domestic courts final orders in antidumping and countervailing duty cases. They do create a disability in recourse to the courts for thirty days in order to give both Parties to the FTA an opportunity to challenge the final order before a binational panel.[73] As the Supreme Court noted in *Dames & Moore*, a suspension of "claims" that property was taken under the fifth amendment does not, by itself, divest the federal courts completely of "jurisdiction" over such claims. In *Dames & Moore* the Court concluded that the adjudication of the claims of U.S. citizens to Iranian assets by an International Claims Tribunal did not wholly divest the courts of jurisdiction, since constitu-

69. 44 U.S. 236 (1845).

70. *Id.* at 245 (emphasis added).

71. *Id.* at 249.

72. In the Act of February 26, 1845, 5 Stat. 727, Congress provided that the 1839 Act was not to be construed to impair the right of persons who pay duties under protest to bring an action against the collector in order to ascertain the propriety of the collector's demand for the payment of duties. *See* CITBA Statement, *supra* note 6, at 10.

73. Free Trade Agreement, *supra* note 1, art. 1904(4).

tional claims for the taking of property, left unsatisfied by the Claims Tribunal, will "revive" and may be brought in United States courts.[74] The FTA does not require such a strained interpretation in order to be read as preserving the jurisdiction of domestic courts over final orders, subject to party choice.[75] A proper party may challenge a final order respecting antidumping or countervailing duties in a domestic court thirty days after publication of the order, provided that neither Party requests binational panel review of the final order.[76]

Second, the FTA does not deprive the plaintiff of a review forum. The injured party will have a choice of forum in which to challenge a final order, either a binational panel or the Court of International Trade. Furthermore, there is symmetry. Each forum is similarly confined to a review of a final domestic order based upon the administrative record. Each forum must also apply the antidumping and countervailing duty laws of the jurisdiction in which the final order originated. This reciprocal arrangement is unique in that the binational forum must apply the domestic law of each country, within the interpretive context of the GATT principles of nondiscrimination.

Either for its own reasons or for implementing the reciprocal benefits of the FTA, Congress has power to limit domestic judicial review over specific administrative decisions.

C. Congress's Authority to Delegate to the Binational Panels Jurisdiction to Review Antidumping and Countervailing Duty Cases in Accordance with U.S. Law

Without much doubt, Congress may create and limit the jurisdiction of the Court of International Trade and the Court of Appeals for the Federal Circuit in international trade matters. May Congress and the President constitutionally empower a binational panel to review and decide under U.S. law challenges to final orders issued by the Department of Commerce or the International Trade Commission? We think Congress clearly has power, although limited, to create review jurisdiction over cases "within the judicial power of the United States" in forums that do not qualify as article III courts, as affirmed in *Palmore*. The constraint theoretically is part of separation of powers analysis, emerging from the distinction between adjudication of "private rights"

74. 453 U.S. 654, 684–85 (1981). Professor Tribe strongly criticizes this decision. *See* L. Tribe, *supra* note 67, at 241–42.

75. The relationship between the Parties and private persons in exercising this choice is considered in part III *infra*.

76. Free Trade Agreement, *supra* note 1, art. 1904(4), (15)(g). Under implementing legislation in the United States only a proper private party may trigger such a request, in which case the United States must initiate the proceeding with Canada. The United States as a party is foreclosed by statute from triggering such a request on its own initiative, even though the FTA permits such an action. *See supra* note 17.

requiring article III courts and adjudication of "public rights" by non-article III forums.[77] A line of Supreme Court cases beginning with *Northern Pipeline Co. v. Marathon Pipe Line Co.*,[78] suggests that international trade cases such as those that may be decided by the Canada-U.S. binational panels, are "public rights" controversies. Disputes over administrative decisions on welfare or other benefits conferred by government action need not be adjudicated by article III courts, except for constitutional deprivation in process.[79] In contrast, "private rights" disputes, especially claims for infringement of fundamental private rights or liberties (or other acquired rights), require adjudication by article III courts. At once we recognize the artificiality of this distinction and its unsatisfactory grounding in nineteenth century formalism.[80] For the present, however, our discussion will not extend beyond recent cases purporting to furnish guidance for limiting the scope of review in non-article III forums.

In *Northern Pipeline* the defendants challenged the constitutionality of the bankruptcy court's jurisdiction to hear and decide "all civil proceedings arising under title 11 (bankruptcy) of the United States Code or arising from or related to cases under title 11."[81] The Supreme Court held that, with certain exceptions, "[t]he judicial power of the United States must be exercised by courts having the attributes prescribed in Article III."[82] The Court referred to language in *Murray's Lessee v. Hoboken Land & Improvement Co.*[83] stating that Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." Matters forming the basis of a suit at common law or in equity are identified by the Court as "private rights," the adjudication of which lies at the core of historically recognized judicial power.[84]

By contrast, the requirements of article III do not bar the creation of legislative courts to adjudicate cases involving "public rights."[85] "The doctrine [of public rights]," the Court explained, extends only to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative

77. For a critical analysis of review of public rights in different context, see Fallon, *supra* note 66, at 951.

78. 458 U.S. 50 (1982).

79. The most recent expression is in Webster v. Doe, 108 S. Ct. 2047 (1988), reaffirming the right of the Director of the CIA to fire an employee subject only to review for constitutional error.

80. Fallon, *supra* note 66, at 928.

81. Bankruptcy Act of 1978, 28 U.S.C. § 1471(b) (1982 & Supp. IV 1986).

82. *Northern Pipeline*, 458 U.S. at 59.

83. 59 U.S. (18 How.) 272, 284 (1856).

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

85. *Id.* at 64–67.

departments,"[86] "and only to matters that historically could have been determined exclusively by those departments."[87]

In two recent cases the Supreme Court has begun to apply the public rights theory to sustain non-article III adjudications required by Congress. In *Thomas v. Union Carbide Agricultural Products Co.*[88] the Court upheld provisions of a statute that required binding arbitration of amounts of compensation for using proprietary research information previously filed by another company, as an incentive to register products with the Environmental Protection Agency.[89] In the view of the Court, the public rights doctrine "reflects simply 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 powers is reduced."[90] In *Commodity Futures Trading Commission v. Schor*[91] the Court determined that Congress constitutionally could confer limited jurisdiction upon a government agency to hear a narrow class of common law claims incident to the agency's primary adjudicative function.

The jurisdiction of binational panels under the FTA is confined to the review of final orders in antidumping and countervailing duty determinations. Despite the long tradition of court review and early common law writs, we think this process involves public rights as defined in recent Supreme Court decisions and not private rights.[92] The parties to any dispute before a binational panel will be contesting the imposition, or failure to impose, antidumping or countervailing duties, an action which Congress and the executive could decide conclusively under their own powers, especially in wealth-creating trade measures for the common good of the national economy. The correction of market distortions for the broader purpose of greater wealth and economic integration and the adjustments necessary to avoid unfair competition are public problems ill-suited for traditional adjudication. Binational panel review checks against any underlying bias in applying U.S. law on a reciprocal basis for Canada.

86. *Id.* at 67–68 (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).

87. *Id.* at 68.

88. 473 U.S. 568 (1985).

89. Federal Insecticide, Fungicide, and Rodenticide Act [FIFRA]. Manufacturers seeking to register a product with the Environmental Protection Agency (EPA), under FIFRA may rely upon research data previously submitted to the EPA by another manufacturer, provided that compensation is paid to the earlier registrant and that compensation disputes as to amount due are to be resolved through binding arbitration. When Union Carbide challenged the constitutionality of the requirement, the Court held that the arbitral decision would be subject to judicial review only for "fraud, misrepresentation, or other misconduct." *Id.* at 573–77, citing FIFRA § 3(c)(1)(D)(ii), 61 Stat. 163, *as amended* by 92 Stat. 819 (current version codified at 7 U.S.C. § 136a(C)(1)(D)(ii), (1982 & Supp. IV 1986).

90. *Union Carbide*, 473 U.S. at 589 (quoting *Northern Pipeline*, 458 U.S. 50, 68 (1982)) (citing Crowell v. Benson, 285 U S. 22, 50 (1932)).

91. 478 U.S. 833 (1986).

92. *See Ex parte* Bakelite Corp., 279 U.S. 438 (1929).

The strongest argument for requiring article III court review is that in the long history of court review of customs duties, the common law actions of assumpsit, trover or replevin were available, creating expectations of court protection of preexisting private interests from government abuse. This long tradition might have created the expectation that judicial review would continue in article III courts. The FTA, however, creates additional reciprocal benefits. Binational panel review also provides U.S. exporters with a forum in which to challenge any protectionist bias in antidumping and countervailing duty orders of the Canadian Government.

While the review of final orders as "public rights" fits within this recent trend, the textual labels do introduce a circularity broken only by reference to broader questions of purpose underlying separation of powers. Congressional and executive action conferring binding review jurisdiction over these orders in a binational panel falls well within settled constitutional limits because actions by the political branches do not threaten the independence of judicial power. The power to limit jurisdiction of article III courts, the power to authorize dispute settlement in international trade agreements, and the power to establish review of public rights matters in administrative tribunals, all dwell in Congress. Taken together, these powers allow Congress to remove review over antidumping and countervailing duty orders from article III courts to binational panels under the FTA. Any such delegation of quasi-judicial review authority to a binational panel, however, must also be constitutionally defensible against an attack on due process grounds.

IV. Due Process Concerns

Agreeing to binational panel review of domestic decisions in international trade disputes bears little resemblance to international agreements subjecting citizens to actions placing their life, liberty, or property in jeopardy without consent or protection of their constitutional rights through an article III court.[93] Even determinations affecting private interests based upon statutory privilege or entitlements must accord minimum constitutional rights of procedural due process.[94] We think binational panel review facially protects these minimum due process rights of private parties in conformance with constitutional standards. This conclusion follows analysis of three aspects of due process concerns.

A. Delegation

By itself, is congressional approval of jurisdiction in binational panels to review final orders in antidumping and countervailing duty cases an impermis-

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

94. Goldberg v. Kelly, 397 U.S. 254 (1970); Cleveland Bd. v. Laudermill, 470 U.S. 532 (1985); Webster v. Doe, 108 S. Ct. 2047 (1988).

sible delegation to experts without adequate guidance, thereby denying due process of law to affected parties? Facially, in the FTA and implementing legislation the authorization seems quite clear and free from due process problems of adequate notice of standards. The standards of review are those traditionally applied in U.S. law. The panel of experts is appointed by the two governments and operates within clear guidelines of the FTA, subject to extraordinary challenge procedures in the event of alleged abuse. This delegation does not reach even as far as *Berman v. Parker*,[95] which permitted congressional delegation of administrative authority to a private venture to make eminent domain decisions under a predetermined plan.[96] Once a legislative objective is within the authority of Congress, "the means by which it will be attained is also for Congress to determine."[97]

The delegation of the power of eminent domain to a private party under a predetermined plan on its face extends far beyond placing quasi-judicial review authority in a binational panel appointed by two governments. *Berman*, however, stands for an important proposition that is equally applicable to both situations. If an objective properly falls within the authority of Congress, and Congress seeks to attain that objective through the delegation of authority to entities that are not constituent parts controlled exclusively by the government, such a delegation of power does not automatically violate the due process rights of those affected. Congress may delegate quasi-judicial power to administrative bodies and other entities, so long as adequate legislative standards are provided. No article III court is required to adjudicate the matter. For example, if the required compensation paid under an eminent domain power did not meet constitutional standards, access to an article III court must be preserved.

Moreover, as demonstrated in *Union Carbide*, Congress may recognize binding dispute resolution by a non-article III arbitral forum not subject to ordinary judicial review[98] when the arbitral forum resolves cases incidental to those involving public rights, so long as the legislative policy guiding decision is sufficiently clear. A binational panel drawn from qualified persons in a larger roster designated by governments, applying U.S. law and subject to extraordinary challenge procedures, is functionally the equivalent of binding arbitration,

95. 348 U.S. 26 (1954). In that fifth amendment taking case, challenged the congressional delegation, to a private venture, of the power of eminent domain under a redevelopment plan by the National Capital Planning Commission over properties within the District of Columbia. Plaintiffs argued that congressional action violated the fifth amendment provisions that "[n]o person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.* at 31.

96. *Id.* at 31.

97. *Id.* at 33.

98. Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 573–74 (1985), involved a statute which provided for judicial review only in cases of "fraud, misrepresentation, or other misconduct." It may be noted that the FTA also provides for safeguards where the procedure of a binational panel is brought into question. *See supra* note 35 and accompanying text.

under procedures approved in *Union Carbide*[99] and international procedures in *Dames & Moore*.[100] When decisions review public rights matters, without more, the delegation to a binational review panel with standards on its face meets constitutional due process standards.[101]

B. Disability to Challenge No Judicial Review Provision

To challenge statutes precluding judicial review of decisions by an administrative body with exclusive jurisdiction over "public rights" determinations, a claimant must first show that the administrative body, or its procedures, are incapable of affording due process.[102] Where administrative procedures are available, a claimant's disability to press the claim in a federal court is not, without more, a denial of due process of law.[103] After a Party elects to seek binational panel review, the FTA and implementing legislation preclude judicial review in U.S. courts of final orders respecting antidumping and countervailing duties. No interested parties are denied due process of law for the sole reason that they cannot press their claims for judicial review in federal court. It would not matter that the exclusion is triggered by another party who requests binational review. All interested parties have the option of requesting through their respective governments binational panel review of the final order within a thirty-day period. Because this choice of forum is fairly available to all affected parties through their governments, any challenge to the exclusion must show that the binational panels as constituted are incapable of affording due process in reviewing final orders. To hear such a claim in proper cases, however, article III courts must always be available.[104]

Might U.S. beneficiaries of the FTA be estopped from challenging the jurisdiction of the binational panels even for a constitutional question such as denial of due process or denial of private rights? This view might find support in *Rosado v. Civiletti*,[105] which upheld the Mexico-United States Treaty on the Execution of Penal Sentences.[106] Under the treaty, U.S. citizens incarcerated in Mexican prisons are permitted to serve out their sentences in American prisons, but are not permitted access to U.S. courts in order to challenge their convictions

99. *Union Carbide*, 473 U.S. at 571.

100. Dames & Moore v. Regan, 453 U.S. 654, 678–82 (1981). For discussions of Canadian and U.S. reception of international commercial arbitration, see Brierly, *Canadian Acceptance of International Commercial Arbitration*, 40 Me. L. Rev. 287 (1988); Carbonneau, *The Reception of Arbitration in United States Law*, 40 Me. L. Rev. 263 (1988).

101. H.R. Rep. No. 816, 100th Cong., 2d Sess., pt. 4, at 5 (1988) [hereinafter House Report].

102. Yakus v. United States, 321 U.S. 414, 434 (1944).

103. *Id.*

104. Fallon, *supra* note 66.

105. 621 F.2d 1179 (2d Cir. 1980).

106. Mexico-United States Treaty on the Execution of Penal Sentences, Nov. 25, 1976, 28 U.S.T. 7399, T.I.A.S. No. 8718, *reprinted in* S. Exec. Doc. D, 95th Cong., 1st Sess. (1977); 18 U.S.C. § 3244 (1982 & Supp. IV 1986) [hereinafter Execution of Penal Sentences].

or sentences under U.S. law.[107] Certain parties had access to U.S. courts to challenge the constitutionality of the treaty, but the courts would not review the underlying basis for the conviction in Mexico even if without due process.[108] Since there was mutual benefit and the prisoner presumably would not be worse off, the waiver of the constitutional right not to be deprived of liberty without due process was sufficient to preclude jurisdiction, on a petition of habeas corpus, despite *Reid v. Covert*.[109]

Although interested parties under the FTA will not be required to forgo any benefits in order to preserve their access to U.S. courts, neither will they be compelled by the FTA to forfeit their right to due process of law or to raise constitutional questions on any aspect of the agreement or implementing legislation in an article III court.[110] We think it highly unlikely that a due process question would not be resolved under the FTA procedures, but the possibility remains.

C. Provisions of the FTA that Facially Meet Requirements of Due Process

Chapter Nineteen of the FTA preserves the essentials of notice and fairness constitutionally required in cases of potential loss by government action in the United States. Binational panels must confine their review of final orders of U.S. agencies to the administrative record,[111] and must adhere to the standard of review set forth in the FTA as well as to the general legal principles that the Court of International Trade would apply to review a final order.[112]

Any person who otherwise would have had access to a domestic court to challenge a final order may elect exclusive access to a binational panel by requesting such review through the appropriate government. The government *must* comply.[113] When the government triggers review, the possibility of domestic judicial review of the final order terminates. Review of a final order by a binational panel would be precluded if a proper person does not request such review within thirty days of publication of the final order. In that event, any

107. The court noted that under the terms of the treaty, "each transferring prisoner is required to consent to his transfer, *and is permitted to contest the legality of any change of custody in the courts of the receiving nation*." Rosado, 621 F.2d at 1182 (citing Execution of Penal Sentences, *supra* note 106, art. IV, para. 2, art. V, para. 1; 18 U.S.C. § 3244(5)) (emphasis added). Paust is highly critical of this decision. *See* Paust, *The Unconstitutional Detention of Mexican & Canadian Prisoners by the United States Government*, 12 VAND. J. TRANSNAT'L L. 67 (1979).

108. The treaty, of course, required the prisoner's consent before transfer. Execution of Penal Sentences, *supra* note 106, art. 4, ¶ 2, art. 5, ¶ 1.

109. Execution of Penal Sentences, *supra* note 106.

110. Implementation Act, *supra* note 1 (Tariff Act of 1930 § 516A, 19 U.S.C. § 1516a (1982 & Supp. IV 1986), *amended by* the addition of subsec. (g)(4)(A)).

111. Free Trade Agreement, *supra* note 1, art. 1904(5).

112. *Id.* art. 1904(3); Implementation Act, *supra* note 1, § 516a(b)(1)(A), (B).

113. Free Trade Agreement, *supra* note 1, art. 1904(5).

person with standing to challenge the final order may then proceed to do so in a domestic court,[114] but not until after it notified all other parties with standing to request a binational panel of its intention to seek domestic review. This notice must be given at least ten days prior to expiration of the thirty-day period.[115] The notice requirement avoids a race to domestic judicial review as a means to close off binational review.

The two Parties and all persons who otherwise would have had standing to appear and be represented in a domestic judicial review proceeding will also have the right to appear and be represented by counsel before a panel.[116] In addition, to guard further against potential abuses of constitutional limitations, either government as Party may invoke the extraordinary challenge procedure[117] if it thinks a decision taken by a binational panel does not meet standards of due process. Under the U.S. implementing act, the U.S. may initiate such a procedure only on request of a private party. The question remains whether, if either government fails to initiate extraordinary challenge procedures when clear evidence of abuse is furnished by a private party, a constitutional claim may be made before a federal court. In summary, the provisions of the Free Trade Agreement relating to the establishment of binational panels on their face seem to provide adequate due process protection. In addition, implementing legislation preserves the jurisdiction of article III courts to review constitutional questions brought by private parties not remedied by the FTA's procedures.[118] Unless serious failure of fundamental fairness or abuse of discretion in the extraordinary challenge process were to occur, the due process accorded would be substantially the same as that given a private party in the Court of International Trade.

V. Separation of Powers: Encroachment on Appointment, Control, and Removal Powers

Binding binational panel review has raised the possibility that in its implementing statute Congress may encroach impermissibly upon the executive branch through limiting the executive's appointment, control or removal powers. In *United States v. Germaine*[119] the Supreme Court concluded that "all persons who can be said to hold an office under the government" must be appointed in the manner prescribed by the Appointments clause. The Appointments clause effectively restricts the exercise of executive authority by persons not properly appointed. By the implementing legislation, panel members are not employees of

114. *Id.* arts. 1904(4), 1904(12a).
115. *Id.* art. 1904(15g).
116. *Id.* art. 1904(7).
117. *Id.* art. 1904(13); *see also supra* note 1.
118. Implementation Act, *supra* note 1 (Tariff Act of 1930 § 516A, 19 U.S.C. 1516a (1982 & Supp. IV 1986), *amended by* the addition of subsec. (g)(4)(A)).
119. 99 U.S. 508, 509-10 (1879).

the United States.[120] As members of an international tribunal, no executive function is performed, so why might a problem arise? The arguments are: (1) Panels may not exercise executive power of directing a remand to an executive agency if they are not appointed under the Appointments clause; and (2) if panels are independent, then they may not by remand direct agencies under remand except through the President (effectively allocating to the President the exclusive power to decide whether to breach the international agreement by executive failure to direct implementation of a panel decision).[121]

We shall examine these arguments through various settings in which the Supreme Court has considered related separation of powers arguments.

A. Appointments to Elections Commission: Congressional Encroachment on Executive's Power of Control

The appointment, control and removal argument finds some support in the Supreme Court's decisions in *Buckley v. Valeo*[122] and *Bowsher v. Synar.*[123] In *Buckley,* appellants challenged the constitutionality of the Federal Election Campaign Act of 1971, partly because appointment of members to an administrative commission under the Act did not satisfy the Appointments Clause. Of the eight members who comprised the commission, two were to be appointed by the President pro tempore of the Senate, two by the Speaker of the House, and two by the President (all subject to confirmation of both Houses of Congress). The Secretary of the Senate and Clerk of the House would serve as ex officio, nonvoting members. The Act empowered the commission to conduct investigations into campaign expenditures subject to regulation by the Act, to serve as a "clearinghouse" for information filed pursuant to the Act, to promulgate rules and issue advisory opinions for the purpose of implementing the Act, and to execute the Act's provisions through the adoption of informal procedures, the issuance of administrative determinations, and the filing of civil suits against violators. The Supreme Court concluded that, although the Commission could exercise such investigative and informative powers as Congress might otherwise delegate to one of its own committees, it could not constitutionally exercise the administrative and executive powers conferred upon it by the Act, since such powers are reserved exclusively to "Officers of the United States" appointed in conformity with the Appointments clause.[124]

Since members of traditional international tribunals in general and the members of the FTA's binational panels in particular are not officers or

120. Implementation Act, *supra* note 1, § 405(b).
121. *See generally* L. Tribe, *supra* note 67, at 246.
122. 424 U.S. 1 (1976).
123. 478 U.S. 714 (1986).
124. *Id.* at 3192.

employees of the United States,[125] we think the above analysis does not apply at the appointment stage (which includes an interagency group advising the Trade Representative who compiles a list of qualifying persons in consultation with congressional committees) but may apply at the implementation or control stage.[126] While we think a question fairly may be raised, we also think that where a congressional-executive agreement becomes supreme law of the land, the duty upon an agency to execute directly a panel's decision to remand is no different from an act of Congress placing a similar duty upon an agency.[127] Were direct implementation to be mandated to the agency on direct remand bypassing the President's control, a serious problem indeed might result. The implementing legislation, however, apparently cures the problem by anticipating the objection and curing it in advance by sending any remand through the President should the direct route prove unconstitutional.[128] In effect, this channel would leave the President with the executive decision to order remand or to breach a duty under the FTA.

B. Congressional Restrictions on Executive Control and Removal of Officers

Binational panel review arguably may violate the Appointments clause, absent proper accountability, for two reasons: first, neither the Canadian nor the U.S. members of the binational panels who apply U.S. law will be officers under article II, section 2 of the U.S. Constitution; and second, the binational panels will have the authority to administer U.S. law (also incorporated by reference into the agreement), a power which in *Buckley* and *Bowsher* is reserved to officers of the United States appointed in conformity with the Appointments clause. Analytically, we think this argument depends upon whether the panel can order a remand directly or must go through the President who has agreed to implement thereby providing political accountability. If the latter, the only meaningful difference would be that the executive may have non-reviewable power to breach an international agreement. As we explain later, we have difficulty with the proposition that the executive may not be held to a duty before an article III court when created by congressional-executive agreement and implementing legislation.

In *Myers v. United States*[129] the Supreme Court held that Congress may not

125. Implementation Act, *supra* note 1, annex 1901.2.

126. Implementation Act, *supra* note 1, § 405(a)(1)(c).

127. Implementation Act, *supra* note 1, § 405(b). The United States Secretariat to be established in a federal agency under § 405(e) of the Implementation Act is not an agency of the U.S. Government, under 5 U.S.C. § 552(e) (1982) but its facilitative mission remains under executive control.

128. Implementation Act, *supra* note 1 (Tariff Act of 1930 § 516A, 19 U.S.C. § 1516a (1982 & Supp. IV 1986), *amended by* the addition of subsec. (g)(7)(B)).

129. 272 U.S. 52 (1926).

require congressional approval when the President removes an officer appointed by him with the advice and consent of the Senate. As the Supreme Court pointed out more recently in *Bowsher,* an officer of the United States appointed and confirmed pursuant to article II, section 2, may be removed by Congress only upon impeachment by the House of Representatives and conviction by the Senate for "Treason, Bribery or other high Crimes and Misdemeanors."[130] In *Bowsher,* the Court struck the Balanced Budget and Emergency Deficit Control Act (Gramm-Rudman Act) for encroaching on executive power. The Act charged the Comptroller General, an arm of the Congress, with the duty to review the federal budget deficit, to recommend cuts and to effect certain cuts should Congress and the President fail to enact conforming legislation. The Court concluded that implementing the legislative mandate is "the very essence of 'execution' of the law,"[131] and that by conferring this responsibility upon the Comptroller General, Congress had given him an essentially executive power. Under Presidential control, that delegation could stand. Under 31 U.S.C. section 703(e)(1), however, the Comptroller General may be removed by a joint resolution of Congress "at any time" for reasons of permanent disability, inefficiency, neglect of duty, malfeasance, or the commission of a felony or conduct involving moral turpitude. The Court held that Congress could not constitutionally reserve for itself the power to remove an officer charged with the execution of the laws except by impeachment. "To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws."[132] These cases would pose more difficult questions for the appointment of binational panel members if in effect they remain under congressional control. Since Congress has denied U.S. members the status of U.S. Government employees, the question of control and removal of panel or roster members as between the executive and Congress becomes urgent only if political accountability for any panel remand is absent.

All panel members are appointed under authority of an international agreement, where until peremptory challenges and a fifth member is designated, the panel is not constituted. At most, the executive (the Trade Representative), after consultation with committees of Congress and an interagency group, appoints twenty-five members of a roster of fifty qualified persons from which the panel of five may (but not must) be appointed. The claim that an international procedure violates the Appointments clause differs significantly from the constitutional meaning in those cases where one political branch is encroaching internally upon the powers of another political branch. In both *Buckley* and *Bowsher* the Court reasoned that the exercise of executive authority by persons not appointed in conformity with the Appointments clause was impermissible

130. Bowsher v. Synar, 478 U.S. at 720; *see also* U.S. CONST. art. II, § 4.
131. *Bowsher,* 478 U.S. at 722.
132. *Id.* at 721; *see also* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

when Congress retained control over the appointees in question. By giving Congress the power to remove (through means other than impeachment) persons with the authority to administer and execute the laws, the Federal Election Campaign Act and the Gramm-Rudman Act created excessive legislative intrusion upon the core function of executive accountability to the people to take care that the laws be faithfully executed, expressly preserved apart from congressional power by the Constitution.

Unless the statutory requirement that the executive consult with the Congress in making appointments to the panel of fifty and subsequently in the designation for specific panels and their removal is undue interference with the executive's foreign relations power, we see no undue encroachment on the executive power to appoint under the agreement. Indeed, we think the shared arrangements for controlling the U.S. panel members fall well within the shared power over international trade within both branches. Moreover, as Professor Henkin wrote to the House Judiciary Committee, the President's power to implement the agreement derives from the international community of nations as a duty under international law.[133] Other encroachments upon the executive's power might exist under the FTA, as we explain later.

C. Congressional Conditions for Appointment and Removal of Quasi-Legislative and Quasi-Judicial Officers

Congress may impose conditions on the removal of quasi-legislative and quasi-judicial officers charged with rule-making and with determining whether the law is being properly followed.[134] The binational panels to be appointed pursuant to the FTA will be quasi-judicial under the foreign relations function to provide review and reciprocal fairness insuring against protectionist bias in administrative orders that apply each country's antidumping and countervailing duty laws.[135] This function supports the FTA's overriding purpose to create a vast, North American free market. After a period of time, the panel review process expires by its own terms, presumably at which time each country's internal trade laws will be harmonized with the other's.

The panels have no exclusive internal administrative or executive function. Each panel will be appointed to hear an existing controversy concerning the administration of the antidumping or countervailing duty laws of Canada or the United States. The lack of a provision for removal probably means that the executive of each country may remove an expert from the panel of fifty by revision of the roster, but may not remove a particular panel member once chosen to review an order. The panels' decisions will be binding upon the Parties, who

133. *See* House Report, *supra* note 101, at 15.
134. 295 U.S. 602 (1935); L. Tribe, *supra* note 67, at 248-50.
135. *See* House Report, *supra* note 101, at 3.

ensure compliance through implementing legislation. Execution of the binational panels' decisions is left to the administering authorities of each country, under international law and the implementing legislation. Since the Canada-U.S. binational panels perform a quasi-judicial function under international authority, rather than an internal executive function, the reciprocal limitations imposed by the FTA upon each country's executive power over these panels is not only permissible under the U.S. Constitution but appropriate for the laudable purpose of a free trade area with mutually fair rules between the two countries.

Just as the Supreme Court was unwilling to allow Congress to interfere excessively with the President's authority to remove officers responsible for carrying out exclusively executive functions in *Bowsher*, also it was unwilling to permit the President to exercise unlimited discretion in removing officers charged with judicial or legislative duties in *Humphrey's Executor*. We find no comparable separation of powers problem in the process by which members of a binational panel are appointed to make decisions under the FTA or removed from the larger panel. No provision requires Congress to approve the appointment of panelists from the United States or permits Congress to retain control over persons named to the roster from which panelists are selected, except in protected information received by panel members. The implementing legislation at most requires consultation with Congress.[136] The effect of consultation might limit the President's discretion in naming panelists by the practical suggestion that certain experts, retired federal judges, for example, be considered (CIT judges specifically). We find no impediment, however, to the voluntary service of article III judges with international tribunals. Justice Jackson served as prosecutor in the Nuremberg war crimes trials[137] and Chief Justice Taft served as sole arbitrator in the Tinoco arbitration between Costa Rica and Great Britain.[138] Both served in independent capacities not controlled by Congress or the executive. Nor does the FTA or implementing legislation permit Congress to exercise any control over United States panelists after they are appointed; all panelists have a mandate under the FTA to act independently of their respective governments. Moreover, since each panelist is permitted to participate in the decision of just one case for each separate review,[139] the FTA does not present the same magnitude of concern about the integrity of the separation of legislative

136. Implementation Act, *supra* note 1, § 405(a)(3).

137. In regard to the presidential appointment of judges to sit on the International Military Tribunal in Nuremberg, U.S. Attorney General Tom C. Clark suggested "[t]here is no express prohibition against federal judges performing other services of a general nature for the Federal Government. On the contrary, it is a well-established practice for the president to secure the services of federal judges in connection with various matters." 40 OP. ATT'Y GEN. 423 (1945). Examples cited included Chief Justice Jay's appointment as special envoy to England, and Circuit Judge Putnam's appointment as a commissioner pursuant to a convention with Great Britain concerning the seizure of vessels in the Bering Sea. *Id.*

138. 1 UNITED NATIONS REPORTS OF INT'L ARBITRAL AWARDS 375 (1923).

139. Free Trade Agreement, *supra* note 1, art. 1901.2(2).

and executive powers that preoccupied the Court in *Buckley* and *Bowsher*. If a particular panel member decides a case that offends the President, however, that member might not be named to another panel and could be moved from the larger roster.

D. Executive and Legislative Control over Judicial Power

The Sentencing Reform Act,[140] challenged on grounds of separation of powers, provides yet another opportunity for analysis in encroachment by the political branches into judicial powers. Even though upheld,[141] we think this challenge should be distinguished as well from binational panel review under the FTA. Judges are appointed to the U.S. Sentencing Commission having both legislative and judicial powers. The Commission consists of seven members, three of whom must be federal judges, appointed by the President, confirmed by the Senate, and subject to removal by the President for cause. The Commission has established federal sentencing guidelines that bind federal judges in their exercising sentencing discretion, even without congressional approval. This delegation, while held unconstitutional by many federal district courts and upheld by many, was upheld by the Supreme Court with only one dissent.[142] In addition, the Commission allegedly exercises a quasi-legislative (or executive according to Solicitor General Charles Fried in his oral argument), rather than judicial function. Because the decisions of the binational panels will consist of binding interpretations of existing law, rather than guidelines which must be applied or interpreted by other tribunals, the function of the binational panels must be characterized as essentially judicial, not legislative. More importantly, though, the binational panel provisions do not raise the main concern expressed by a lower court with respect to the Sentencing Act: that the delegation of an essentially legislative duty to a commission avoids accountability on the part of the legislature for the law generated by the Commission. The decisions of the binational panels will be grounded entirely on law generated by the political branches and international agreement, and have no formal status as precedent. Accountability is both to the national constituencies through the executives of each country and to the community of states under the law of treaties.

E. Congressional and Judicial Encroachment on the Executive: The Special Prosecutor Statute

One might argue that binational panels functioning independently of the executive are equivalent to special prosecutors appointed under the Ethics in

140. Comprehensive Crime Control Act, Pub. L. No. 98-473, title II, *codified at* 28 U.S.C. §§ 991-998 (Supp. II 1984 & Supp. III 1985 & Supp. IV 1986).

141. Mistretta v. United States, 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989).

142. *Id.*

Government Act.[143] That act created a "special division" of three Federal appellate judges empowered to appoint special prosecutors responsible for the prosecution of charges brought by the Attorney General against high-level executive branch officials. The relevance of this argument became more serious when the Act was struck down in January of 1988 by the Court of Appeals for the D.C. Circuit[144] on the grounds that special prosecutors are executive, or "principal," not inferior officers. Pursuant to the Appointment clause,[145] special prosecutors must therefore be appointed by the President with the advice and consent of the Senate and must be removable by the executive.

In *Morrison v. Olson* Solicitor General Fried argued to the Supreme Court that the Ethics in Government Act "absolves Congress of its weightiest and most painful duty, which is the scrutiny of the executive backed up by the painful duty of impeachment."[146] In June 1988, the Supreme Court rejected Fried's argument and reversed the Court of Appeals to uphold the act.[147] Special prosecutors are not principal officers, and they may be appointed and removed for cause under the stringent conditions in the act effectively limiting the executive's plenary removal power.

In contrast to the Sentencing and the Ethics in Government acts, the FTA and its implementing statute require binational panel review of disputes arising between beneficiaries of free trade and government agencies seeking to protect national constituencies. Here both Congress and the President share with Canada the highest political responsibility of constructing a free trade regime. Although important, panels at most are inferior functional parts of this regime. Let us consider these international functional tribunals more closely under separation of powers principles.

F. Appointment as Quasi-Judicial Officers Serving International Functions

International tribunals with narrow jurisdiction tied to a congressionally-approved arrangement between the United States and another country pose no threat to the separation of powers preserved by the Constitution.[148] The Appointments clause logically applies only to domestic officers exercising authority under one of the delegated powers. Even if this were not so, the constitutionality of the delegation of authority to an international tribunal is clearly justified under the foreign relations and foreign commerce powers as a

143. 28 U.S.C. §§ 49, 591-8 (1982).
144. *In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988).
145. U.S. Const. art. II, § 2.
146. N.Y. Times, Apr. 27, 1988, at A1, col. 5.
147. Morrison v. Olson, 108 S. Ct. 2597 (1988).
148. *See* House Report, *supra* note 101, at 4–5, 8–18.

desirable part of an international regime in cooperation with another country. The Appointments clause does not by itself require that binding interpretations of the laws of the United States, which include international agreements, be carried out exclusively by persons appointed in conformity with the Appointments clause. Historically, from the Jay Treaty Commissions to the mixed claims tribunals of this century and the U.S. Iranian Claims Tribunal, the appointment of international judges or arbitrators has been controlled by international agreement.[149] With the exception of the appointments challenge by the Senate to the Permanent Court of International Arbitration under the Hague agreements at the turn of the century,[150] no serious constitutional challenge to these tribunals has ever been mounted. But then neither has such a tribunal been given binding power of judicial review applying U.S. law in substitution of an existing article III court's judicial reviews.

1. *Policy Favoring Party Choice in Binding International Commercial Arbitration*

Our conclusion finds support in the policy favoring international commercial arbitration agreements, exemplified most recently by the Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[151] In that case the Court approved a national policy favoring party choice in international commercial arbitration. In *Mitsubishi* a Japanese corporation had entered into a distribution and sales agreement with a Puerto Rican corporation. The agreement contained a clause providing for arbitration by the Japanese Commercial Arbitration Association of disputes arising out of the agreement. Subsequently, when Soler refused arbitration to resolve a dispute concerning the distribution of automobiles to be shipped by Mitsubishi to Puerto Rico, Mitsubishi sought an order to compel arbitration[152] in accordance with the sales agreement. Soler counterclaimed, asserting causes of action under the Sherman Antitrust Act[153] and other federal and Puerto Rican statutes. Relying on *Scherk v. Alberto-Culver*

149. *See id.* at 7–11.

150. In regard to presidential appointment of judges to the Permanent Court of International Arbitration, which was created by ch. II of the Hague Convention for the Pacific Settlement of International Disputes of 1899, 32 Stat. 1779, T.S. 392, U.S. Attorney General John Riggs suggested that

> members of the arbitration board . . . do not seem . . . to be officers of the United States in the ordinary acceptation of the phrase. Nor are they . . . persons holding office. . . . Their work is not only occasional, but contingent upon an appointment by foreign powers to act as arbitrators in the settlement of disputes between the nations so appointing them.

23 OP. ATT'Y GEN. 313, 315 (1900).

151. 473 U.S. 614 (1985).

152. Pursuant to 9 U.S.C. §§ 4, 201 (1982 & Supp. IV 1986).

153. 15 U.S.C. § 1 (1982 & Supp. III 1985).

Co.,[154] the district court held that the international commercial character of the parties' agreement required enforcement of its arbitration provisions with respect to the federal antitrust claims,[155] even though the court of appeals had previously held that antitrust laws were " 'of a character inappropriate for enforcement by arbitration' " in a domestic context.[156] Predictably, the court of appeals reversed.[157]

After granting review, the Supreme Court shifted its recognition of a policy of reluctance to oust federal courts of jurisdiction over claims under federal statutes and held that antitrust claims are indeed arbitrable pursuant to the arbitration provisions of contracts in international commerce. As the Court stated:

> [C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require [the enforcement of] the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[158]

The review of final antidumping and countervailing duty orders by binational panels under the FTA differs from the arbitration of federal claims in this case, since the jurisdiction of a binational panel will not depend upon an international commercial agreement between the private parties to a dispute. But it does depend upon party choice of forum and process. An important policy underlies each of these choices, as the Supreme Court observed with respect to international arbitration agreements:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[159]

The public policy justification for a supranational forum for the resolution of the legitimate anti-protectionist claims of producers and importers who ought to enjoy the benefits and assume the risks of a free trade agreement is at least as persuasive as the policy encouraging the enforcement of binding arbitration clauses of disputes in international commercial contracts by rules of an extra-national arbitration association. Because the free trade agreement affects all commerce in goods between the signatories, individual importers and

154. 417 U.S. 506, 515-20 (1974). The Supreme Court ordered arbitration, pursuant to an international agreement, of a claim arising under the Securities Exchange Act of 1934, despite the existence of precedent barring the arbitration of claims under the Securities Act of 1933 in a domestic context.

155. 473 U.S. 614, 620-21 (1985).

156. Wilko v. Swan, 201 F.2d 439, 444 (2d Cir.), *rev'd*, 346 U.S. 427 (1953).

157. *Id.*

158. *Mitsubishi*, 473 U.S. at 629 (citing Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)).

159. *Mitsubishi*, 473 U.S. at 614, 629 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1953)). *But see* Carbonneau, *supra* note 100.

exporters need access to a tribunal capable of reviewing agency decisions to assure fairness and nondiscrimination in the application of domestic law of subsidies and dumping to all parties, pending the harmonization of domestic laws, as is occurring in the European Common Market. The existence of such a review tribunal promotes stability and predictability in international trade between countries in the market, even if the tribunal's decisions are not binding precedent, thus buttressing economic efficiency. The availability of a forum where individual importers and exporters may seek review of the manner in which the customs laws of either country are administered in subsidy and dumping cases should speed the development of a stable free trade regime by encouraging those persons most immediately affected to view the FTA as equitable and responsive to their claims. The review process also seeks to ensure compliance with the GATT exceptions for imposing duties in subsidy and dumping cases where market forces are thwarted.

2. *Inter-State Compact Analogy*

Because the existing antidumping and countervailing duty laws of Canada and the United States will be incorporated into the FTA by article 1904(2), binational panels established under the FTA will be responsible for the interpretation of the international agreement itself, under international law. Any changes in domestic law can be reviewed in a declaratory opinion procedure between governments to minimize legislative changes that seek to reverse unpopular decisions. In view of the Supreme Court's decision in *Seattle Master Builders v. Pacific Northwest Electric Power & Conservation Planning Council,*[160] this incorporation by reference allows the tribunal to remain functionally responsive to the international agreement, not only domestic law. *Seattle Master Builders* upheld the constitutionality of the Pacific Northwest Electric Power and Conservation Planning Council (Council), a policy-making body established with the approval of Congress under the Pacific Northwest Electric Power Planning and Conservation Act.[161] The Council was charged with preparation of a conservation and electricity usage plan for the region affected by the Bonneville Project Act.[162] Each of the states affected[163] in the case enacted legislation authorizing the governor to appoint two members to the Council.[164] Because the Council exercised influence primarily over federal rather than state action, the petitioner asserted first that it qualified as a federal agency, and second, that its members were required to be appointed in accordance with article II, section 2 of the Constitution.

160. 786 F.2d 1359 (9th Cir. 1986).
161. Pub. L. No. 96-501, 94 Stat. 2697, 16 U.S.C. § 839b(a)(1) (1982).
162. 16 U.S.C. § 832a (1982).
163. Washington, Oregon, Montana, and Idaho.
164. WASH. REV. CODE ANN. § 43.-52A.010 (1986); OR. REV. STAT. § 469.800 (1985); MONT. CODE ANN. § 90-4-401 (1985); IDAHO CODE § 61-1201 (1985).

After determining that the Council qualified as part of an interstate compact under express Constitutional authorization, rather than a federal agency, the Supreme Court focused upon the Appointments clause. The Court held that, because the Council members derived their authority from a compact that required both state legislation and congressional approval, they did not in fact perform their duties "pursuant to the laws of the United States."[165] The Court stated:

> Without substantive state legislation, there would be no Council and Council members to appoint. While congressional consent gives an interstate compact some attributes of federal law, the Council members' appointment, salaries and administrative operations are pursuant to the laws of the four individual states. . . . More important, the states ultimately empower the council members to carry out their duties.[166]

Despite the significant influence exercised by the Council over federal action, the Appointments clause therefore did not operate to require Council members' appointment by the President.

Two similarities between the interstate compact and the congressional-executive agreement may be found. First, like a commission established pursuant to a state compact, any authoritative body which is established pursuant to an international agreement must exercise its authority with both the approval of the Senate or Congress and in cooperation with countries under international law through a functional organization such as an international commission. Although its activities may affect actions of the federal government, an authoritative body created by an international agreement derives authority from the agreement itself as sanctioned under the law of nations. Senate or congressional approval may be part of the constitutive and implementing process, but it is not the exclusive source of the delegation.[167]

Second, neither the state compact challenged in *Seattle Master Builders* nor the FTA's provisions for the establishment of binational panels represents a threat to the separation of powers protected by the Constitution. They are properly viewed as questions of division of power between levels of government, not horizontal checks on national powers meant to limit abuse. This division analysis admittedly was one of the Court's reasons for upholding the state compact in *Seattle Master Builders*. As the Court stated, "The appointments clause is addressed to the separation of powers between the President and Congress. . . . No court has yet held that the appointments clause prohibits the creation of an interstate planning council with members appointed by the states."[168] Application of the Appointments clause is similarly inappropriate in the case of members

165. Seattle Master Builders v. Pacific N.W. Elec. Power & Conservation Planning Council, 786 F.2d 1359, 1365 (9th Cir. 1986).

166. *Id.*

167. *See* HOUSE REPORT, *supra* note 101, at 14–15.

168. 786 F.2d at 1364–65.

(who are not U.S. employees) appointed to the Canada-U.S. binational panels from a roster of experts assembled under an international agreement.

VI. The Fate of Judicial Review of Constitutional Claims

The FTA text obligates the Parties merely to eliminate any possibility of domestic judicial review of a final determination of a binational panel. The United States implementing statute goes at least as far as this and denies power and jurisdiction to all federal courts to review a final determination on any question of law or fact by any kind of action, including mandamus.[169] Nothing in the language of the agreement, however, forecloses review by a United States article III court of a constitutional claim not satisfactorily addressed by the operation of the FTA, so long as no domestic judicial review of the determination of fact or law under the FTA and statutes is available. United States implementing legislation explicitly preserves constitutional review of the binational panel system under the FTA by a named article III court with expedited procedures.[170]

As we have analyzed the FTA, it seems highly unlikely that a constitutional due process or other claim could ripen. The explicit provision for hearing any such review, however, does invite any constitutional challenge, so we should expect it. A binational panel might be seen to have "manifestly exceeded its powers, authority or jurisdiction" pursuant to article 1904 of the FTA. If so, its decision would be subject to the extraordinary challenge procedure by either Party.[171] The extraordinary challenge provision seems to contemplate the great care the parties took to avoid constitutional cases or controversies that would have to be raised in article III courts. The negotiators were surely aware that precluding review of such questions, were they to arise, would unduly encroach upon the judicial power over interpreting treaties, especially when constitutional limitations must be decided by courts exercising such power. Those limitations apply equally to any congressional act limiting the jurisdiction of federal courts, including the broad exclusion from judicial power in the implementing legislation. The negotiators thus sought to craft process provisions of review to avoid just such a contingency, but without an express exclusion of ultimate judicial power in either country to review constitutional claims.[172]

We make no attempt to analyze the Canadian constitutional questions regarding the FTA, but we do note that in the implementing legislation, the Congress conditions its approval on a finding by the executive that Canada under its constitution has power to implement the FTA. Even answering the question of

169. Implementation Act, *supra* note 1 (Tariff Act of 1930 § 516A, 19 U.S.C. § 1516a (1982 & Supp. IV 1986), *amended by* the addition of subsec. (g)(2)).

170. *Id. amended by* the addition of subsec. (g)(4). For summary of reasons, see HOUSE REPORT, *supra* note 101.

171. *See* Free Trade Agreement, *supra* note 1, art. 1904(13)(a)(iii)-(b), annex 1904.13.

172. For history, see HOUSE REPORT, *supra* note 101.

power (currently involving the division of power between Parliament and the Provinces) might not fully resolve the question whether Canadian courts might retain jurisdiction over the possibility, however remote, of a violation of a constitutional limitation to Canadian national power.

A. Executive Refusal of Duty under FTA and Statute: Control over Initiating Bipanel Review and Remand

Congressional-executive balances worked out in the implementing legislation reflect tensions about who controls free trade or protectionist interests and policy. Many complex issues do not reach constitutional proportions although they present potential statutory conflict or conflict between statutes and the FTA. Several potential problems, however, could raise constitutional issues that could be adjudicated through the special judicial review procedures of the implementing statute. These problems are essentially separation of powers questions but begin with the relationship of international agreements to statutes. One involves a variance between the FTA and the implementing legislation in requesting binational panel review over final determinations in either country or in requesting extraordinary panel review. The other involves the implementation of the binding binational panel decisions by the executive branch.

1. *Requesting Binational Panel Review under United States Law*

Under the FTA, either Canada or the United States on its own initiative may request binational panel review of a final determination, but must make such request when a proper private person asks for it.[173] In contrast, under U.S. implementing legislation the United States government may not request review unless first initiated by a proper private person of the United States.[174] By the specific language, Congress limited the exercise of discretion by the executive to that of the mandatory international duty under the FTA triggered solely by a private request by an appropriate party. No executive initiative is permitted by statute, although available under the FTA. The limitation of executive discretion by statute poses no constitutional problem. Under separation of powers principles, however, may Congress limit the executive choices solely to mandatory and ministerial action required under the FTA when a proper private party requests binational panel review? May an international agreement in effect create private procedural rights bypassing executive discretion and control, or, in other words, create a mandatory right of direct access to an international tribunal?

173. Free Trade Agreement, *supra* note 1, art. 1904(5).

174. The implementing legislation deems the filing of a request by such private party with the Secretary of Commerce to be a request for establishment under the FTA. Implementation Act, *supra* note 1 (Tariff Act of 1930 § 516A, 19 U.S.C. § 1516a (1982 & Supp. IV 1986), *amended by* the addition of subsec. (g)(8)(C)).

We may understand the question more clearly by testing it against each of two different interpretations of the statute. First, if congressional approval of the FTA places a mandatory international obligation upon the government to trigger review when requested by a proper private party, then what remedy would the private party have were the President for important policy reasons to order the Secretary of Commerce not to make such request? Could the party seek mandamus in a federal court in the face of the statutory limitation on federal jurisdiction barring mandamus or other actions reviewing antidumping or countervailing duty determinations of binational panel review?[175] Could the private party go directly to the secretariat of the panel of experts in the name of the Party, claiming a procedural right under international law of direct access to binational panel review (akin to the ex rel. proceeding at common law)? Or does the executive have a valid separation of powers claim against congressional encroachment into the power of the executive, including the decision whether to breach an international agreement by barring private access, through the implementing statute? Could a federal court enforce against the executive a mandatory duty to trigger review on request, created by congressional-executive international agreement? Would the congressional limitation to federal jurisdiction of the courts in these cases deny a private party due process by removing any judicial remedy for denying a procedural right created by international agreement by the executive and Congress?[176]

Second, if congressional approval of the FTA does not convert the international obligation to trigger review on request into a statutory duty as well, what internal effect does the mandatory international obligation have in the face of congressional silence about such duty? Would a federal court, given the statutory limitation on its jurisdiction, have power to order the Secretary of Commerce to comply with the FTA's mandatory duty to trigger a review on request? Suppose the Secretary has been ordered by the President for important policy reasons not to comply with that duty. Can the federal courts under the supremacy clause order compliance with the executive's own agreement or must the discretion to breach an agreement constitutionally be preserved for executive decision under the political question doctrine? We think Judge Palmieri addressed this question in deciding that Congress had not intended the Anti-terrorist Act to breach an obligation under the Headquarters Agreement with the United Nations. He refused to consider requiring the United States to arbitrate the Anti-terrorist Act under provisions of the Headquarters Agreement with the United Nations before reaching the merits of whether to enforce the Act. Judge Palmieri interpreted the agreement between the United States and the United Nations as creating international obligations regarding a third party, the Palestine Liberation Orga-

175. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

176. For a review of possible due process questions, see *supra* notes 58–67 and accompanying text. *See also* Goldwater v. Carter, 444 U.S. 996 (1979).

nization (comparable to interested parties under the FTA). More significant to our concern, the judge found constitutional limits to enforcing the obligation in the separation of powers principle that gives the executive control over the question whether to arbitrate or breach the agreement. This question seems the same, except for its political significance, as the executive's control over the choice to request binational review as required under the FTA or to breach the agreement. The same choice arises in whether to implement a panel decision as mandated by congressional-executive agreement.[177]

We raise these questions not to impugn the good faith of the executive in fulfilling international and statutory duty, for we doubt that any administration would seriously consider consciously breaching an important agreement with Canada reached after extensive policy discussions and negotiations. Rather, as in other integrated markets such as the European Economic Community, we may have future need for functional supranational tribunals capable of direct review of decisions reducing or increasing barriers to trade when employment and economic stability may be disrupted. Sooner or later, we shall have to work out these institutional relationships and perhaps accept direct access by all affected parties, despite policy disagreements, to functional international tribunals charged with impartial review of trade law being harmonized between countries.[178] We believe the modest bipanel review procedures even with potential problems are creative innovations for the United States as well as Canada and, despite skepticism from the City Bar of New York,[179] could well be a model for other international economic institutions short of a common market.

2. *Implementing Remand*

The Implementation Act provides that decisions of binational panels to remand a final determination shall be directed to the Department of Commerce or the International Trade Commission. The statute also provides that the Court of International Trade has no jurisdiction to review any such determination on remand and that federal courts have no power by mandamus or otherwise to review determinations of fact or law by the binational panel. Enforcement of the binational panel decisions rests exclusively with executive agencies under the statute.[180] The House Judiciary Committee concluded that implementation

177. *See* United States v. Palestine Liberation Organization, 690 F. Supp. 1243 (S.D.N.Y. 1988).

178. One of the authors studied this question of procedures for direct access to international tribunals surveying known experience to 1961 in a doctoral dissertation. Christenson, Individuals Before International Tribunals: Direct Access in Private Matters (unpublished S.J.D. dissertation, on file Law Library, The George Washington University, 1961).

179. *See* Koh, *supra* note 1, at 248–49. There is some disagreement on this matter among members of the international legal community. *See Record*, Association of the Bar of the City of New York (Oct. 1988).

180. Implementation Act, *supra* note 1 (Tariff Act of 1930 § 516A, 19 U.S.C. § 1516a (1982 & Supp. IV 1986), *amended by* the addition of subsec. (g)(7)(A)).

constitutionally does not require Presidential involvement.[181] If constitutional challenge to direct remand succeeds, however, the Implementation Act authorizes the President to accept the remand and presumably direct the remand to the agencies.[182]

While preserving exclusive executive power, does the congressional limitation upon judicial power mean that the courts are completely barred from any jurisdiction in aid of enforcement of an international and statutory obligation should the President, for important policy reasons, order the agencies not to implement a remand? Would the sole remedy for this failure of duty other than theoretical impeachment be at the international level between governments for breach of agreement? Would there be no judicial remedy available to private parties in United States courts for failure of process created by congressional-executive agreement under the supremacy clause and the take-care clause? A serious constitutional problem is whether a congressional limitation on the judicial power in these antidumping and countervailing duty cases bars judicial review over the executive's failure to implement a decision of a binational panel, as required under the congressional-executive agreement. Does such limitation impermissibly encroach upon the judicial power under article III? Or does the executive retain power under separation of powers principles to be free from judicial review of a political decision to breach a clear mandatory duty? Here we return full circle to our beginning questions about constitutional limits to removing judicial review. Here, as before, we think the domestic distinction applied in limiting judicial review of administrative decisions to facts and law under the statute but not to other constitutional questions such as due process should apply as well to attempts at limiting the judicial power under a congressional-executive trade agreement despite a possible political question objection. Article III court review for such questions, however remote they may be, must always be available. We should not lightly presume that Congress intended its limitations to jurisdiction to exclude such claims even when the power of the political branches is at its greatest. Even if this narrow review would fall outside the special constitutional review judicial procedures, the core power to review a separation of powers question not otherwise contemplated should be available in an article III court. The House Judiciary Committee report never reached this question, expressing instead its confidence only that were a fallback necessary as an unusual measure to involve the President, "all binational panel or extraordinary challenge committee decisions will be fully implemented, providing certainty to our Canadian partner."[183]

181. *See* HOUSE REPORT, *supra* note 101, at 17-18.

182. Implementation Act, *supra* note 1 (Tariff Act of 1930 § 516A, 19 U.S.C. § 1516a, *amended by* the addition of subsec. (g)(7)(B)).

183. HOUSE REPORT, *supra* note 101, at 18.

VII. Conclusion

The Canada-United States Free Trade Agreement's provisions for the establishment of a binational panel with jurisdiction to review final antidumping and countervailing duty orders are constitutionally sound for three reasons. First, the authority of the President to enter into an international agreement that provides for the establishment of a binational panel for the binding resolution of trade disputes under the agreement is supported by legislative grants of authority to the President, as well as by judicial precedent. Second, Congress may constitutionally limit the jurisdiction of the Court of International Trade and Court of Appeals for the Federal Circuit, as article III courts, to hear appeals from final antidumping and countervailing duty orders of administrative agencies under U.S. statutes, since such appeals require the adjudication of only "public" rights. These are generated by a federal statute and do not arise out of or replace rights created by state or common law, although a long history gives some credible argument that private expectations have traditionally found judicial remedy for customs overcharges, beginning with common law actions of assumpsit and trover. Third, Congress may agree to confer jurisdiction to review final determinations in such "public rights" cases upon non-article III tribunals such as the binational panels, provided that in doing so it does not abridge the constitutional rights of litigants to due process of law or of any other fundamental rights or constitutional questions. The provisions of the FTA seek to avoid any questions of abuse or of denial of due process by providing individuals with the right to appeal final orders to a binational panel charged with the duty of due process, by extraordinary review procedures, by allowing all interested parties to appear and be represented before the panels, and by requiring a panel to apply the standard of review that is required of domestic courts, including constitutional standards.

The FTA confers upon the binational panels the power to prevent constitutional due process claims from arising but it does not create the exclusive competence to adjudicate all issues, despite the FTA's provision and statute precluding domestic law from providing domestic judicial review of a final decision of a binational panel. A congressional-executive agreement may not bar judicial review by article III courts of constitutional questions. Rather, the FTA confines the jurisdiction of binational panels to a determination of whether or not a final order is consistent with the antidumping and countervailing duty laws of the country in which it was issued. The FTA's extraordinary challenge procedure provides the parties with a means of challenging the fairness of process. The availability of special constitutional review jurisdiction is preserved by the implementing legislation.

Appointment of both Canadian and United States members to a binational panel with authority to render binding decisions does not violate the appointments clause. In the past, the Supreme Court has invoked the appointments

clause to invalidate acts of Congress only where Congress sought to confer upon itself continuing control over an executive function. The process by which the members of a binational panel are to be appointed under the FTA presents no such threat to the separation of powers between the legislative and executive branches of government, and would threaten the separation of powers between the judicial and political branches only if federal judges were mandated for appointment and they exercised a nonjudicial function.

A supranational tribunal with the authority to resolve specific trade disputes is a functionally necessary part of a free trade area. Such a tribunal functions as an institutionalized means of cooperation assuring the appearance and reality of fairness to guard against protectionist biases in administrative decisions in either country and furthers the profound advantage of an integrated North American economy. While traditional analyses of the constitutionality of non-article III tribunals in the domestic context might be used to clarify whether the Canada-United States binational panels afford adequate protection to the rights of affected private parties, they ought not seriously challenge the constitutionality of the binational panels solely by virtue of their supranational character. An article III court should always be available to review constitutional questions should they arise after all procedures in the agreement have been exhausted, including any denial of due process in the executive's duties to implement. We doubt if a congressional-executive agreement as implemented by statute could ever preclude such jurisdiction explicitly. We agree with the House Judiciary Committee as far as it went on this subject. Understandably, however, it avoided the question of judicial review over the breach of executive duty to implement a panel decision. In effect, this question becomes the next interesting problem: whether the President has the power, free from court review, to breach an international and statutory duty prescribed clearly by the political branches at their highest point in the exercise of shared power. In our view the judicial power must be available at that point to preserve the rule of law.[184]

184. Nixon v. United States, 418 U.S. 909 (1974).