[Oral Argument Not Yet Scheduled]

No. 05-1366

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COALITION FOR FAIR LUMBER IMPORTS EXECUTIVE COMMITTEE,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al*.,
Respondents.

ON COMPLAINT AND PETITION FOR DECLARATORY JUDGMENT

BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. We believe that all of the parties, intervenors, and *amici curiae* are described in the certificate filed by the petitioner in its opening brief.

B. Rulings under Review. This is an original action in this Court; there is no ruling under review.

C. Related Cases. This case has not previously been before this Court. The only related case is listed in petitioner's certificate.

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GLOSSARY

"CIT" refers to the United States Court of International Trade.

"ITC" refers to the United States International Trade Commission.

"JA ___" refers to citations to the Joint Appendix.

"NAFTA" refers to the North American Free Trade Agreement.

"NAFTA Act" refers to the North American Free Trade Agreement Implementation Act.

"USTR" refers to the Office of the United States Trade Representative.

STATEMENT OF SUBJECT MATTER JURISDICTION

Original jurisdiction rests in this Court under 19 U.S.C. 1516a(g)(4)(A).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether federal legislation implementing the binational dispute resolution mechanism in the North American Free Trade Agreement ("NAFTA") concerning disagreements regarding tariffs for goods imported into the United States from Canada or Mexico is unconstitutional under the Due Process Clause, the Appointments Clause, and Articles II and III of the Constitution.

2. Whether the "fallback mechanism" for NAFTA dispute resolutions – which would go into effect if the primary mechanism is struck down – is invalid insofar as it authorizes the President to accept determinations made by NAFTA dispute resolution panels regarding tariffs.

3. Whether this Court has original jurisdiction over petitioner's claim that a particular NAFTA dispute resolution with regard to Canadian softwood lumber imports violated any due process rights petitioner might have.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the Constitution, pertinent statutes, and NAFTA are reprinted in an addendum to petitioner's brief.

STATEMENT OF THE CASE

I. Nature Of The Case

This case has been filed as an original action in this Court against the United States, the President of the United States, and various federal agencies and officials implementing the Nation's tariff laws. Petitioner Coalition for Fair Lumber Imports Executive Committee ("the Coalition" or "petitioner") is an organization that includes various parts of the U.S. lumber industry. The Coalition has challenged the constitutionality of the statutory scheme through which Congress has implemented NAFTA, a trade agreement between the United States, Canada, and Mexico.

Under that scheme, when Canada or Mexico challenge antidumping and countervailing duty determinations made by the United States concerning goods imported from those countries, those disputes may be resolved by binational panels composed of individuals qualified in international trade law and selected by the United States and the other nation involved. These panels utilize the substantive law of the importing country in resolving the dispute. The decisions rendered by such panels are not reviewable in the domestic courts of either country involved. Petitioner contends that this scheme violates several constitutional provisions including the Due Process Clause, the Appointments Clause, and Articles II and III of the Constitution.

The Coalition brought this action under a provision of the statutory scheme allowing parties to a binational dispute resolution to bring suit directly in this Court, challenging only the constitutionality of that international arbitration mechanism.

II. Statement Of The Facts

A. The NAFTA Binational Panel Dispute Resolution Scheme

This case involves provisions in the United States-Canada Free Trade Agreement Implementation Act of 1988, and the North American Free Trade Implementation Act ("the NAFTA Act"). The former statute implemented the 1988 free trade agreement between Canada and the United States, and the latter statute implemented the subsequent 1994 free trade agreement that included the United States and both Canada and Mexico. (For simplicity, we refer in this brief to the latter statute because its binational dispute resolution mechanism covers this matter.) These agreements were negotiated by the United States in the context of the Trade Act of 1974 (19 U.S.C. 2101 *et seq*.), which grants broad discretion to the President to enter into trade agreements with foreign countries, seeking the elimination or reduction of barriers to trade. 19 U.S.C. 2111 and 2112(c).

1. Antidumping and countervailing duty laws are intended to protect a country's domestic industries from unfairly traded imports by providing for imposition of special duties on certain imports. Thus, Congress has provided, in 19

U.S.C. 1673 *et seq*., for imposition of a duty if dumped imports materially injure or threaten an industry in the United States.

Similarly, U.S. countervailing duty law (19 U.S.C. 1671 *et seq*.) provides for the imposition of a countervailing duty if the imports benefitting from the countervailable subsidies materially injure or threaten an industry in the United States. Both of these laws therefore provide for the imposition of a tariff by the U.S. Government on the importation of certain foreign goods.

Private parties may initiate claims under our antidumping and countervailing duty laws if they are "interested parties" within the meaning of the statutory scheme. Such claims are then investigated and determined by two federal agencies. Depending on the nature of the allegation, the Department of Commerce decides whether dumping has occurred and/or whether a countervailable subsidy has been provided by the exporting nation. See 19 U.S.C. 1671b(b), 1673b(b). For both types of cases, the U.S. International Trade Commission ("the ITC") next determines whether material injury to a U.S. industry has occurred, or whether a threat of such injury exists. See 19 U.S.C. 1671b(a), 1673b(a).

Under current U.S. law, private parties injured by administrative antidumping and countervailing determinations may seek judicial review in the U.S. Court of International Trade ("the CIT") (19 U.S.C. 1516a), which is composed of Article III

judges. 28 U.S.C. 251. Decisions from that court are reviewable by the U.S. Court of Appeals for the Federal Circuit. 28 U.S.C. 1295(a)(5).

2. This case concerns the provisions in the NAFTA Act implementing an international arbitration scheme for resolution of certain tariff disputes involving goods imported from Canada or Mexico. (NAFTA also provides a parallel mechanism when the United States, on behalf of a domestic interested party, requests review of antidumping and countervailing duty determinations made by Canada and Mexico against goods exported from the United States.) This scheme is described in Chapter 19 of the agreement, and is implemented in the NAFTA Act.

a. NAFTA creates a dispute settlement regime through binational panels that resolve disagreements concerning specified tariff determinations.[1] Under this scheme, a binational panel will consider claims by interested parties challenging an antidumping or countervailing duty determination made by an administrative agency of one NAFTA country relating to goods imported from another NAFTA country.

When a binational dispute resolution panel has been requested, each of the

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[1] If a binational panel is not sought by either the Canadian or Mexican parties, review of final U.S. agency antidumping and countervailing duty determinations involving goods from Canada or Mexico is available in the CIT to an interested party. If an interested party wishes to challenge an agency ruling in that court, it must give timely notice so that the foreign state involved may instead, if it wishes, invoke the binational panel mechanism. 19 U.S.C. 1516a(g)(3)(B).

governments involved nominates two members from a roster of arbitrator candidates, with each country entitled to four peremptory challenges. The governments involved then agree on the fifth panelist, and, if they cannot agree, they choose by lot which one will select the final panelist. NAFTA Annex 1901.2. Panelists must have a general familiarity with international trade law, and (except for sitting judges) may not be affiliated with, or take orders from, a government involved. NAFTA Annex 1901.2(1). Panelists are subject to a code of conduct established under NAFTA Article 1909.

Under the NAFTA Act, the Office of the United States Trade Representative ("the USTR") selects panel candidates from the roster, without regard to political affiliation. Once selected, panel candidates serve a one-year term on the U.S. candidate list. When a request for a dispute resolution panel is made, the USTR selects the members of that panel for the United States from that roster. Members of the roster are not paid unless they are selected to serve on a panel; if chosen, they receive payment for their time, with both state parties sharing the costs equally. 19 U.S.C. 3432; NAFTA Annex. 2002.2(2)(a).

The relevant government agency and the private parties involved may participate in the panel proceedings. NAFTA Art. 1904.7 Dispute resolution panel decisions are taken by majority vote, and decisions must be in writing, giving the

reasons for the decision. NAFTA Annex 1901.2(5). Panels use the antidumping and countervailing duty laws (including the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents) of the importing country. NAFTA Article 1904(2)). They may either uphold the final determinations of the government involved, or remand the matter for further action consistent with their decisions. If there is a remand, the same panel will then review the ensuing governmental action for compliance with the panel's decision. NAFTA Art. 1904.8.

This binational panel review process is designed to resolve tariff disputes between the NAFTA countries expeditiously; panels must reach a final decision within 315 days of the date of the request for panel review. NAFTA Art. 1904(14).

Under the NAFTA Act, both the Commerce Department and the ITC must take action not inconsistent with dispute resolution panel decisions. 19 U.S.C. 1516a(g)(7). And, decisions by these dispute resolution panels are binding on the countries involved with respect to the disputed matter; domestic judicial review of panel determinations is prohibited. Art. 1904(11). This NAFTA provision is implemented in the United States by the NAFTA Act. See 19 U.S.C. 1516a(g)(2).

b. Dispute resolution panels are subject to "extraordinary challenge" by either of the governments involved; private parties cannot request such a process. These Extraordinary Challenge Committees consist of three members taken from a list of

judges or former judges maintained by the governments. Each government chooses one Committee participant from the list, and the participants then choose by lot which one will select the third Committee member. NAFTA Annex 1904.13(1); 19 U.S.C. 3432.

An Extraordinary Challenge Committee must affirm the decision of the binational panel unless a party shows that: (1) a panel member was guilty of gross misconduct, bias, or conflict of interest; (2) the panel seriously departed from a fundamental rule of procedure; or (3) the panel manifestly exceeded its authority, such as by failing to apply the appropriate standard of review. In addition, the party must also establish that one of these circumstances materially affected the panel's decision, and that the decision threatens the integrity of the binational panel process. NAFTA Art. 1903(13).

These Extraordinary Challenge Committees are not for routine appeals, but serve rather the function of a safety valve to protect the panel review process. See E. Boyer, *Article III, the Foreign Relations Power, and the Binational Panel System of NAFTA*," 13 International Tax & Business Lawyer 101, 113 (1996).

In sum, under NAFTA, disputes among the signatory states regarding antidumping and countervailing duty determinations are to be resolved through an arbitration scheme utilizing binational dispute resolution panels. Each state party

may request that a panel consider final antidumping or countervailing duty determinations of the other relevant state party, and the relevant private parties may participate in that arbitration process. That arbitration is binding; dispute resolution panel decisions are conclusive on the state parties with respect to the particular matter involved.

3. Congress provided for limited constitutional review of this NAFTA international dispute resolution scheme through an action brought directly in this Court:

> **Constitutionality of binational panel review system** -- An action for declaratory judgment or injunctive relief, or both, regarding a determination on the grounds that any provision of, or amendment made by, the [NAFTA Act] or the United States-Canada Free-Trade Implementation Agreement Act of 1988 implementing the binational panel dispute settlement system under chapter 19 of the Agreement, violates the Constitution may be brought only in the United States Court of Appeals for the District of Columbia Circuit, which shall have jurisdiction of such action.

19 U.S.C. 1516a(g)(4)(A). A judgment under this provision is appealable to the Supreme Court. *Id*. at 1516a(g)(4)(H).

A constitutional challenge in this Court can be commenced "within 30 days after * * * a binational panel review has been completed, [by] an interested party who is a party to the proceeding in connection with which the matter arises * * *."

Id. at 1516a(g)(4)(C). (For constitutional issues arising out of the U.S. administrative agency proceedings in antidumping and countervailing duty cases, Congress has provided jurisdiction in the CIT. 19 U.S.C. 1516a(g)(4)(B).)

In addition, Congress has provided that, if the provisions of the NAFTA Act requiring that a binational panel decision be followed by the relevant United States agency is held unconstitutional,

> the President is authorized on behalf of the United States to accept, as a whole, the decision of a binational panel or extraordinary challenge committee remanding the determination to the administering authority [the Commerce Department] or the Commission [the ITC] within the period specified by the panel or committee. Upon acceptance by the President of such a decision, the administering authority or the Commission shall, within the period specified by the panel or committee, take action not inconsistent with such decision. Any action taken by the President, the administering authority, or the Commission under this subparagraph shall not be subject to judicial review, and no court of the United States shall have power or jurisdiction to review such action on any question of law or fact by an action in the nature of mandamus or otherwise.

19 U.S.C. 1516a(g)(7)(B). Thus, this "fallback" provision authorizes the President to accept binational dispute resolution review panel determinations.

By Executive Order 12662, President Reagan accepted prospectively all decisions by binational review panels in the event that this fallback authority took

effect. 54 Fed. Reg. 785 (1988). By Executive Order 12889, President Clinton did the same. 58 Fed. Reg. 69,681 (1993).

B. The Coalition's Challenge To The NAFTA System

Petitioner Coalition filed its complaint in this Court in September 2005. The complaint attacks the constitutionality, on a variety of grounds, of the binational dispute resolution scheme set out in NAFTA and the NAFTA Act. In addition, the Coalition asks this Court to consider its claim that the particular dispute resolution in this instance was unfair to the Coalition because one of the binational panel members assertedly had a conflict of interest and was biased.

Petitioner's complaint arises out of a dispute between the United States and Canada concerning softwood lumber imported into the United States. In 2001, the Coalition and others petitioned the U.S. Government to impose antidumping and countervailing duties on softwood lumber imports from Canada alleged to be subsidized and sold at less than fair value JA 50-59.[2]

As provided for under U.S. law, the Commerce Department and the ITC

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[2] Under the statute providing for jurisdiction in this Court, the record of proceedings before a binational dispute resolution panel "shall not be considered part of the record for review." 19 U.S.C. 1516a(g)(4)(G). However, for the convenience of the Court, the parties here have agreed upon a Joint Appendix containing the relevant publicly available decisions and actions by the U.S. Government and the NAFTA review bodies, all of which would be subject to judicial notice.

conducted investigations into these allegations. These agencies determined respectively that the subject imports were indeed being dumped and subsidized by the Canadian provincial governments, and that the U.S. lumber industry was being threatened with material injury by these imports. Accordingly, the Commerce Department issued orders imposing duties on the relevant products. JA 356-80.

The Canadian Government then invoked the NAFTA binational dispute resolution mechanism in order to initiate review of the ITC determination concerning threatened injury to the U.S. lumber industry. As provided for in NAFTA, a binational panel ("the Lumber Panel") of three Americans and two Canadians was selected and considered the issues. The Lumber Panel issued several decisions, remanding issues to the ITC on several occasions for further analysis. In its final decision in October 2004, the panel affirmed a revised ITC determination that the record evidence did not support a finding of threat of material injury to the U.S. Lumber producers. JA 381-447.

One of the Lumber Panel members was Louis Mastriani, a private attorney from the United States. During the panel proceedings, the Coalition raised allegations of a conflict of interest by Mastriani, arising out of his participation as counsel in a separate ITC proceeding involving allegations of unfairly traded goods from China. Mastriani denied the Coalition's claims, and the panel declined the

Coalition's request that he be removed. JA 466-68.

As permitted by NAFTA, the U.S. Government requested that an Extraordinary Challenge Committee review the Lumber Panel's decision.[3] The United States raised several arguments that the Lumber Panel had erred, including a contention that Mastriani's participation on the panel created an apprehension of bias. JA. 449-50. In August 2005, after extensive briefing and argument by the United States and Canada, as well as the interested private parties, that Committee unanimously rejected the arguments made by the United States, and affirmed the Lumber Panel's decision. JA 448-73.

STANDARD OF REVIEW

Because this is an original action raising constitutional issues, this Court exercises plenary power. As described above, this Court's jurisdiction is limited by 19 U.S.C. 1516a(g)(4)(A) to considering solely the question of whether the NAFTA binational dispute resolution mechanism is constitutional.

SUMMARY OF ARGUMENT

The Coalition attacks the fact that, through the NAFTA Act, Congress implemented an Executive agreement by the President by providing that decisions

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[3] The Challenge Committee consisted of three members, one of whom was Judge Edward Re, the former Chief Judge of the CIT, who served as chairman of the Committee. JA 448.

issued under the NAFTA binational dispute resolution mechanism regarding antidumping and countervailing duty determinations are conclusive; they cannot be challenged in U.S. domestic courts. However, this type of binding international arbitration has a sterling history. Since the first days of our Republic, beginning with the Jay Treaty, under which private claims by U.S. citizens against the British Government were definitively resolved, Presidents and Congress have utilized international arbitration commissions composed in part of persons selected by foreign sovereigns.

The Supreme Court has instructed on numerous occasions that the meaning of the Constitution is heavily informed by the practical methods by which our government has worked over many decades. And, the methods utilized by the generation of the framers of our Constitution are extremely influential in determining what the Constitution means. Given these principles of constitutional interpretation, the long-established use by the United States of binding international arbitration to settle private claims is highly significant and requires rejection of the Coalition's various constitutional claims.

The constitutional arguments raised by the Coalition are individually flawed in any event. The Coalition argues initially that the NAFTA Act is invalid because it deprives the Coalition of an asserted constitutionally protected property interest in

having a tariff imposed on competing Canadian goods. There is no such property interest because the Supreme Court has ruled that there is no right to maintenance of a particular duty. In addition, the property interest claimed by the Coalition does not exist because the Coalition's claim to a right of a tariff on Canadian softwood lumber imports arose after the NAFTA Act went into effect, meaning that it was contingent at the outset on the binational dispute resolution process.

Moreover, that NAFTA process minimizes any risk that interested parties will have their claims decided in an unfair manner. Under NAFTA, international trade experts, operating under rules and a code of conduct designed to provide impartiality, use U.S. law to make their determinations, which are subject to review by an Extraordinary Challenge Committee composed of current or former judges. In this instance, the Lumber Panel and the Challenge Committee were composed of both American and Canadian members, who decided the issues unanimously after considering extensive briefing and argument, and explaining their reasoning in written opinions.

This mechanism in no way violates any asserted constitutional principle that final tariff determinations must be made Article III judges. Supreme Court opinions reveal that tariff decisions were made for many decades by the Executive under an assignment from Congress, without Article III judicial review at all.

Further, it is clear that NAFTA panelists are not Officers of the United States who can serve only pursuant to the Appointments Clause. Our history makes clear that international arbitrators such as these have carried out their functions for many decades without being considered Officers. This practice is fully consistent with the Appointments Clause, which does not cover the type of temporary *ad hoc* services that these international arbitrators perform.

The NAFTA scheme also does not violate any constitutional rules against delegation of executive authority to those outside the Executive Branch. Once again, years of history establish that binational arbitrators can validly perform their functions under an agreement negotiated by the President and implemented by Congress through legislation.

The Coalition attacks the "fallback" provision that Congress placed in the NAFTA Act in case the primary NAFTA dispute resolution mechanism is struck down by the courts. The Coalition fails to identify any valid constitutional theory under which that mechanism, which merely grants the President authority to treat NAFTA dispute resolution decisions as recommendations, which he can adopt in his discretion, would be improper. In addition, under the special limited constitutional review section that provides jurisdiction here, this Court obviously cannot consider the Coalition's statutory construction claim that Presidents Reagan and Clinton acted

invalidly by in advance accepting such recommendations, should the fallback provision go into effect.

Finally, despite the restricted nature of this Court's jurisdiction, the Coalition asks the Court to exercise discretion to take supplemental or pendent jurisdiction over the Coalition's claim that the NAFTA dispute resolution scheme in this instance was flawed because Panelist Mastriani participated as a member of the Lumber Panel. There is no such jurisdiction over this claim, which does not address the validity of the binding NAFTA dispute resolution mechanism. Even if there were, the Coalition has not stated any actual due process violation, as the Challenge Committee fully considered the parties' arguments regarding Mastriani's participation, and rejected them on their merits, giving its reasons for doing so.

ARGUMENT

I. The NAFTA Binational Dispute Resolution Scheme, Governing Conflicts Between Sovereign States About Tariffs, Is Fully Consistent With The United States Constitution.

The Coalition attacks the NAFTA binational dispute resolution scheme as unconstitutional with a variety of arguments. For the reasons set out below, each of these theories is legally flawed. However, the highest hurdle faced by the Coalition in this litigation is the fact that the type of international arbitration mechanism contained in NAFTA has a sterling constitutional pedigree. Throughout our nation's

history, from its earliest days to modern times, the President and Congress have utilized this type of system to resolve definitively disputes between the United States and other nations, as well as claims by U.S. citizens.

A. Comparable Dispute Resolution Mechanisms Have Been Used By The President And Congress For Over Two Centuries, Demonstrating The Validity Of The NAFTA Scheme.

1. Since its earliest days, the United States has agreed to dispute resolution mechanisms, including those in which non-U.S. arbitrators definitively resolve the claims of U.S. citizens.

For example, the Jay Treaty established two mixed claims commissions devoted to resolving individual claims by U.S. citizens and British subjects. Treaty of Amity, Commerce and Navigation, Nov. 19, 1794 (8 Stat. 116, 118-21). Each commission consisted of two members appointed by the British King, two members appointed by the President, and a fifth selected by consent of the others or by lot.[4]

Pinckney's Treaty, concluded the following year, included a provision for resolving war-related claims by U.S. citizens against Spain, before a similarly-composed mixed commission. Treaty of Friendship, Limits and Navigation Between

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[4] The commission appointed pursuant to Article VII of the Jay Treaty issued a total of 565 awards, 553 of which were to American claimants. 1 John Bassett Moore, *History and Digest of International Arbitration to Which the United States Has Been a Party*, 342-43 (1898) (hereafter " Moore, *History and Digest*).

the United States and the King of Spain, Oct. 27, 1795 (8 Stat. 138, 150). A similar provision was included in a later treaty addressing war-related claims by individuals from either nation. Convention between His Catholic Majesty and the United States of America, Aug. 11, 1802 (8 Stat. 198, 200).

Decisions by all of these commissions were final and conclusive, with no possibility of appeal.

The United States agreed to a number of similar arrangements over the next century. In 1839, the Convention for the Adjustment of Claims between the United States and Mexico, Apr. 11, 1839 (8 Stat. 526-30), created a commission, half of whose members were appointed by Mexico, to make final decisions regarding all claims by U.S. citizens against Mexico. (If the four commissioners were split, the King of Prussia or his representative was to serve as the arbiter. *Id.* at 530.)

The Reciprocity Treaty with Great Britain, June 5, 1854 (10 Stat. 1089, 1090) established a two-person commission – with the United States and Great Britain each selecting a member, and those members to settle on an umpire – to settle conclusively the fishing rights of U.S. and Canadian fishermen. Likewise, the United States and Spain each appointed arbitrators (who were, again, themselves to select an umpire) to decide finally the claims of U.S. citizens for wrongs and injuries against their persons or property sustained in Cuba. Agreement between the United States and Spain, Feb.

12, 1871 (17 Stat. 839).

One of the best-known examples from this period was the Treaty of Washington, which addressed the so-called *Alabama* claims, establishing a mixed tribunal – with members appointed by the United States, Great Britain, Italy, Switzerland, and Brazil – to reconsider on certain points the "correctness" of prize cases, including some cases that had been decided by the Supreme Court or the House of Lords. Treaty between the United States and Great Britain, May 8, 1871 (17 Stat. 863); Moore, IV *History and Digest*, at 4057-78. This commission reached its decisions "according to justice and equity"; its decisions were accepted by the parties as conclusive.

This treaty also established a mixed commission – one member appointed by Great Britain, one by the United States, and the third conjointly or by Spain – to resolve, also conclusively, "all" private claims by U.S. or British citizens or companies arising out of other acts committed by the counterpart government "against [their] persons or property" during the period of the Civil War. 17 Stat. 867-68.

The above arrangements are merely representative; between the Jay Treaty and the onset of World War II there were at least 249 documented instances in which non-sovereign claims were adjudicated by international tribunals, mainly by mixed commission arbitrations, and a large number involved the United States. 1 Richard

B. Lillich & Burns H. Weston, *International Claims: Their Settlement by Lump Sum Agreements* 26-27 (1975); John Bassett Moore, *Treaties and Executive Agreements*, 20 Pol. Sci. Q. 385, 398-417 (1905) (providing numerous additional examples).

More recently, following the Iranian hostage crisis, the Iran-U.S. Claims Tribunal was created to decide claims by U.S. nationals against Iran. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), Jan. 19, 1981, art. II, 20 I.L.M. 230 (1981). The Tribunal consists of at least nine members, one third appointed by each government and the remaining third appointed by the previously selected members, which sits in panels of three comprising one member from each method of selection. *Id*. art. III. The Tribunal's decisions are deemed to be "excluded from the jurisdiction of the courts of Iran, or of the United States, or any other court." *Id*. art. VII.

2. This history of reliance on international arbitration to settle disputes between the United States and other foreign states, as well as claims by U.S. citizens, is highly significant for this case. As the Supreme Court has repeatedly explained, "traditional ways of conducting government * * * give meaning' to the Constitution." *Mistretta v. United States*, 488 U.S. 361, 401 (1989). See, *e.g.*, *American Ins. Ass'n v.*

Garamendi, 539 U.S. 396, 414 (2003) (invoking "the historical gloss on the 'executive Power' vested in Article II of the Constitution"); *Myers v. United* States, 272 U.S. 52, 175 (1926) ("[C]ontemporaneous legislative exposition of the Constitution * * * acquiesced in for a long term of years, fixes the construction to be given its provisions"); *Field v. Clark*, 143 U.S. 649, 691 (1892) ("[T]he practical construction of the constitution, as given by so many acts of congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land").

Reference to historical practice is particularly appropriate in the context of this case for two reasons.

First, the interpretation of the Constitution by the generation of that document's framers is highly instructive regarding its meaning. See *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986). In this instance, as noted above, the Jay Treaty established a mechanism under which claims by U.S. citizens against the British government were conclusively resolved by a commission whose members included those selected by the King of England. That treaty was negotiated by John Jay, the first Chief Justice of the United States and one of the authors of *The Federalist Papers*; it was then pressed through the Senate by President George Washington. Under the Coalition's argument

here, however, the Jay Treaty – and Pinckney's Treaty, among others – would be deemed unconstitutional on a variety of grounds.

Second, the Supreme Court has particularly relied on the practical statesmanship of the political branches when considering constitutional questions involving foreign relations. See, *e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (longstanding practice of settling citizens' claims against foreign countries by executive agreement, coupled with Congressional acquiescence, held to establish legitimacy of the practice).

Indeed, in *Dames & Moore*, the Supreme Court discussed at some length the fact that claims by the citizens of one country against another constitute sources of friction, which are often resolved by agreements to settle such claims: "[t]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries" through renunciation of claims in favor of lump sum payments or arbitration. 453 U.S. at 679. As the Supreme Court reported, "during the period 1817-1917, no fewer than eighty executive agreements were entered into by the United States looking toward the liquidation of claims of its citizens." *Id.* at 680 n.8. The Supreme Court also made clear that the existence of this power did not depend on the U.S. Government providing an alternative forum for claims by U.S. citizens. *Id*. at 687. See also *Joo v. Japan*, 413 F.3d 45, 51 (D.C. Cir. 2005) (noting the President's power to settle claims of U.S. citizens as "a necessary

incident to the resolution of a major foreign policy dispute").

The NAFTA binational dispute resolution scheme involves a key element in our relations with Canada, our largest foreign trading partner. NAFTA limits our tariff laws, which are created under Congress' plenary power to regulate trade between the United States and foreign nations, a subject over which the Supreme Court has ruled Congress exercises a high level of discretion. See U.S. Const. Art. I, Sec. 8, cl. 3. Tariffs plainly involve important questions of international relations, as they generally are imposed for reasons related to public policy. See *Analysis of Judicial Review of Administrative Determinations of Antidumping and Countervailing Duties under Present Law and Under the Proposed United States-Canada Free Trade Agreement*, Congressional Research Service (1988), 11-13 (reprinted in *United States-Canada Free Trade Agreement: Hearing before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the House Comm. of the Judiciary,* 100th Cong. No. 60, 262-63 (1988) (hereafter "*Judiciary Comm. Hearing*")).

More specifically, NAFTA's binational dispute resolution mechanism was designed to ameliorate serious frictions between the United States, Canada, and Mexico, and amounts to a bargained-for element of an agreement among them to reconcile competing interests in the highly charged area of regulation of assertedly unfair international trade.

For example, at the time of NAFTA's negotiation, there was concern in Canada that various government regional development and social welfare programs would be considered countervailable subsidies under U.S. law, and that political pressures in the United States had made antidumping and countervailing duty determinations here unpredictable. See *Report on the Binational Review Mechanism for Antidumping and Countervailing Duty Case under the United States-Canada Free Trade Agreement*, American Bar Association Section of International Law and Practice, April 24, 1988, 5-7, reprinted in *Judiciary Comm. Hearing*, at 150-52.

From the standpoint of the United States, the binational panel mechanism was critical to affording review, on the basis of an administrative record that had not previously been available, of dumping and countervailing duty determinations that had not been reviewable in Canadian courts. *Statement of Reasons as to How the United-States Canada Free Trade Agreement Serves the Interests of U.S. Commerce*, reprinted in *United States-Canada Free-Trade Agreement: Communication from the President of the United States*, H.R. Doc. No. 100-216, 100th Cong., 2d Sess. 1, 38 (1988).

Thus, the NAFTA dispute resolution mechanism is a critical aspect of the foreign affairs and foreign commerce policies of the United States, and stands in a long line of comparable agreements adopted by the President and Congress since the

first days of our Republic. In passing the NAFTA Act, Congress acted with full awareness of the similar prior U.S. agreements. See *Judiciary Committee Hearing*, at 384-410 (describing history of international arbitration agreements entered into by the United States including mechanisms for multinational dispute resolutions).

Accordingly, in attacking the validity of the NAFTA Act, the Coalition asks this Court to interpret the Constitution in a manner contrary to the understanding of both the Framers and the many Presidents and Members of Congress who have negotiated and utilized like schemes in the ensuing two centuries. Notably, although these agreements have been invoked numerous times before federal courts, not one has been held unconstitutional.

3. The Coalition tries to dodge this flaw in its argument by asserting that (Br. 6) no prior international agreement by the United States has provided for international binding arbitration before a mixed (or foreign) tribunal of legal claims by private U.S. parties with respect to their rights under U.S. law, without their consent. This contention is incorrect, and too narrowly states the actual question at issue here.

Various agreements entered into by the United States have provided mixed tribunals with decisive authority to adjudicate domestic law claims of U.S. citizens, while others have applied more broadly to all claims. For example, the Convention between the United States and the Dominion of Canada, April 15, 1935 (49 Stat. 3245,

3247), established a mixed tribunal to conclusively decide claims of damage in the United States caused by the operation of a Canadian smelter, in light of the interests of "all parties concerned" and "interested parties," by applying "the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice." *Ibid*.

The Agreement between the United States and Spain, Feb. 12, 1871, (17 Stat. 839), required mixed-nation arbitrators to decide Cuba-related claims of U.S. citizens "according to public law and the treaties in force between the two countries and these present stipulations."

Further, the Convention between the United States of America and the Republic of Mexico, for the Adjustment of Claims, July 4, 1868 *(*15 Stat. 679), established a mixed-nation commission to decide conclusively "[a]ll claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the government of the Mexican republic arising from injuries to their persons or property by authorities of the Mexican republic," which had already been presented to the U.S. government for interposition with Mexico, but which remained unsettled. See *Frelinghuysen v. Key*, 110 U.S. 63 (1884).

Other mixed-nation commissions have been required to turn to U.S. or other municipal laws to determine the validity of contracts or prerequisite property rights.

The Iran-United States Claims Tribunal provides a contemporary example, as it provides jurisdiction over claims and counterclaims by U.S. nationals arising out of debts or contracts, which are necessarily governed by municipal law – including, in many instances, U.S. law.

The Coalition nevertheless mistakenly attempts to depict the constitutional issue as unprecedented. The issue here is, however, not unique, as the Coalition challenges a mechanism establishing binding arbitration panels to resolve disagreements between the United States and either Canada or Mexico concerning the setting of tariffs on imported goods from those countries; these are not simply private disputes by U.S. companies or citizens concerning their rights under U.S. law, but rather are regulatory disputes that NAFTA properly assigns in part to the initiative of the state parties to this international agreement. Obviously, resolution of these disputes can have a substantial impact on private citizens or groups within the United States, such as the Coalition. But the agreements we described above also all had that effect; many of the agreements submitted traditional private-law claims to binding arbitration by mixed commissions as the sole, non-consensual recourse for claimants, or entrusted to the U.S. government the resolution of boundary, fishing, or similar questions having a direct and obvious impact on many private individuals.

Given the frequent practice of the United States – stretching from 1794 until

modern times – of utilizing international binding arbitration mechanisms no different in relevant respect from the NAFTA binational dispute resolution panels, the Coalition's varied constitutional claims are wrong, and should be rejected on this ground alone. In any event, as we show next, those claims are individually incorrect under Supreme Court case law.

B. A Coalition Of U.S. Producers Has No Constitutionally Protected Property Interest In A Tariff Imposed By The U.S. Government On Goods Imported From Canada.

1. The Coalition's first argument (Br. 23-27) is that the Constitution forbids the deprivation of a property interest by governmental action without an opportunity to be heard by a neutral and detached decision maker, and that the NAFTA dispute resolution scheme assertedly does not meet this requirement. This argument is flawed at the outset for two reasons. First, as we have just demonstrated, historical practice establishes that the U.S. Government may enter into international arbitration agreements under which the interests of U.S. citizens are resolved by commissioners appointed in part by foreign sovereigns. Second, in any event, the Coalition is wrong in arguing that it has a constitutionally protected property interest in a duty imposed by U.S. Government agencies on imported products from another country, subject from the outset to international arbitration. We turn to that point now.

The Coalition correctly points out (Br. 25) that an industry in the United States

is allowed under current U.S. law to petition the Commerce Department and the ITC to investigate whether foreign producers or exporters are engaging in unfair practices by dumping goods in the United States for less than their fair value or are shipping subsidized goods to the United States, and whether these practices cause or threaten material injury to U.S. industry.

The Coalition next asserts that (Br. 26), once the Commerce Department and the ITC make their determinations, "like any final judgment," the Coalition then has a constitutionally protected property interest in that administrative decision. Not surprisingly, the Coalition cites no valid legal authority for this startling proposition, which is contrary to the history of tariff law in the United States. In support, the Coalition refers only to a concurring opinion by Justice Bradley in *Louisiana v. City of New Orleans*, 109 U.S. 285, 291 (1883). This citation is merely to a concurring opinion in a case involving an asserted property interest in a final judgment issued by a state court.

In fact, the apposite Supreme Court precedent contradicts the Coalition's property-interest claim. Writing for the Court in *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294 (1933), Justice Cardozo described the development of tariff setting under U.S. law and practice, and rejected an importer's challenge to an increase in the duty on certain imports.

Justice Cardozo explained that, under tariff legislation enacted in 1815, the President was empowered to repeal duties on imports when he found that foreign countervailing duties had been eliminated. *Id.* at 308-09. Justice Cardozo further noted that, in 1909, the President had been given even broader discretionary power over the setting of tariff rates, and "[i]n the fulfilment of his duties, the President consulted whatever sources of information appeared to be appropriate, and, when satisfied as to the facts, made proclamation of the action." *Id.* at 309. The Supreme Court's bottom line reasoning in *Norwegian Nitrogen* is central here: "No one has a legal right to the maintenance of an existing rate or duty." *Id*. at 318. Accord *United States v. George S. Bush & Co.*, 310 U.S. 371, 379 (1940).

In *Field*, 143 U.S. at 680-94, the Supreme Court had earlier denied a claim that the assignment of authority to the President to impose countervailing duties in his complete discretion was an unconstitutional delegation. The Court found important the long history of such broad assignments to the President over foreign trade. Previously, the Court had upheld a statute that in effect denied importers the right to challenge in court an allegedly illegal duty imposed by the Executive. See *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845).

More recent Supreme Court precedent further undermines the validity of the Coalition's claim to a constitutionally protected interest in having a tariff placed on

competitive imports from Canada. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 673 (1999), the Supreme Court noted that the plaintiff there has "point[ed] to no decision of this Court (or of any other court, for that matter) recognizing a property right in freedom from a competitor's false advertising about its own products." The Court went on to state that "business in the sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense – and it is only *that*, and not any business asset, which is impinged upon by a competitor's false advertising." *Id*. at 675 (emphasis in original).

In light of such precedent, it is clear that the Coalition cannot claim a constitutionally protected property interest in maintenance of a tariff imposed on imported goods that assertedly unfairly competed with the businesses of the Coalition's members.

2. Despite this case precedent, the Coalition claims (Br. 26) some form of property right in the fact that Congress had previously granted a right of judicial review in the CIT of final decisions by the Commerce Department and the ITC. However, the Coalition's claim to a property interest in some form of process different from what the NAFTA Act provides is wrong from the outset. The Coalition's claim of Article III injury is based on the fact that the ITC found that the domestic industry

was threatened with material injury from dumped and subsidized imports, and this finding allowed the Commerce Department to impose duties on Canadian softwood lumber imports – which would have benefitted the Coalition. But the benefit claimed as property by the Coalition – the asserted right to have a tariff imposed on softwood lumber imports from Canada – arose **after** the NAFTA scheme was already in effect; as described above, that scheme provided for challenges against tariff determinations made by U.S. administrative agencies, and resolution of such disputes by binational arbitrator commissions.

In other words, the Coalition is not asserting a property right to some U.S. Government agency decision that existed before NAFTA and which was then eliminated by that agreement and its implementing legislation. To the contrary, when the alleged property right in a particular tariff claimed by the Coalition was created, it was at all times only contingent because it was subject to the NAFTA arbitration scheme from the outset.

Consequently, this right is at best like those asserted by the private parties in *Dames & Moore*, where the Supreme Court pointed out that the claimed right to a legal action there had at all times been subject to revocation by the President. See 453 U.S. at 673. See also *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) (denying an asserted right to prevent Congress from

eliminating the ability of state employees to withdraw from the Social Security program, in part because any participation terms were from the beginning subject to change).

The contingent nature of the property right the Coalition seeks is constitutionally important. As the Supreme Court instructed in *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 59 (1999), "[o]nly after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process." As in *American Manufacturers*, the asserted property right claimed by the Coalition – to have a duty imposed on Canadian softwood lumber imports – has not been established in this instance, because the duty was subject to the NAFTA dispute resolution mechanism.

Moreover, the Coalition's claim of a constitutionally recognized property right in the form of a tariff against specific foreign trade is particularly weak because "the United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole." *Dames & Moore*, 453 U.S. at 679-80; *Abrahim-Youri v. United States*, 139 F.3d 1462, 1468 (Fed. Cir. 1997) (settlement of claims against a foreign country by the United States does not constitute a "taking" of property for which compensation must be paid under the Fifth

Amendment).

3. As a final point on this argument, we note that, even if the Coalition had some property right to the maintenance of the duty on Canadian softwood lumber imports, that right was not taken away without due process. The Coalition had ample opportunity before both the Lumber Panel and the Extraordinary Challenge Committee to make its arguments regarding the ITC determination, and to argue before the Committee that a member of the Lumber Panel should have been recused. After extensive briefing and argument, the Lumber Panel and the Committee considered and rejected the Coalition's claims. The Coalition's position thus reduces to the obviously incorrect one that its property rights were violated because the Lumber Panel and Extraordinary Challenge Committee issued decisions that the Coalition contends were mistaken.

4. The Coalition also contends (Br. 27-36) that the NAFTA dispute resolution mechanism is constitutionally faulty because: it contains the "mere 'possibility' of bias"; panel members might be partial because Canadian panelists might rule in favor of Canada, given that export of Canadian lumber is assertedly critical to the Canadian economy, and because panel members might be private practitioners handling other matters before the ITC or Commerce Department; Canadian panelists "lack the requisite knowledge of U.S. law to carry out their duties" (Br. 33); and the

Extraordinary Challenge Committee system does not ensure that all mistakes by binational panels will be rectified.

These arguments all founder in light of the reliance by the U.S. Government on binding international arbitration schemes for over two centuries. Many members of the various commissions charged with resolving disputes regarding claims of U.S. citizens were appointed by foreign sovereigns who would have been hostile to such claims. For example, the British King appointed commissioners under the Jay Treaty, with no restriction in the treaty at all as to whom he might appoint, and what their backgrounds, professional qualifications, impartiality, and motivations might be.

Moreover, as described above (at 7), under NAFTA, binational panel members are subject to peremptory challenges by each state party, and must comply with a code of conduct; if one of the state parties believes that a panelist has violated that code, the two involved state parties consult and may together remove that panelist. And, panelists are selected from a roster that requires that persons be of good character, high standing and repute, with objectivity, sound judgment, and general familiarity with international trade law. NAFTA Annex 1901.2. In addition, panel members cannot take instructions from the various governments involved. *Ibid.*

We also note that, in this instance, the Lumber Panel comprised three U.S. members and two Canadian members. Yet, the Panel's several orders were all

unanimous (Panel Member Joelson concurred separately in two of the panel decisions). The Challenge Committee, which included one U.S. member to two Canadian members, also issued a unanimous decision.

Furthermore, the Supreme Court has made clear that final and binding decisions can indeed constitutionally be made concerning claims of U.S. citizens under the Medicare program by private carrier employee hearing officers, who assertedly had financial incentives rendering them biased against claimants. See *Schweiker v. McClure*, 456 U.S. 188 (1982). Reversing the lower court, the Supreme Court held that the burden of establishing a disqualifying interest rests on the party making the assertion, and that reliance on "generalized assumptions of possible interest" are insufficient. *Id.* at 195-96.

C. NAFTA's Binational Review Panels Are Consistent With The Requirements Of Article III.

The Coalition next contends (Br. 36-48) that the NAFTA Act's provision for binding binational panel dispute resolution concerning final antidumping and countervailing duty determinations violates Article III of the Constitution and the Due Process Clause because it does not allow for judicial review in our domestic courts. This contention is wrong; not every matter susceptible to determination by the federal judiciary must be adjudicated in an Article III court. And, no Article III adjudication

is required here given that the case involves matters the Supreme Court has already described as not "inherently * * * judicial." *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929).

1. In *Bakelite*, the Court held that the then-existing Court of Customs Appeals, an Article I tribunal, could properly hear disputes not amounting to a "case or controversy" justiciable in an Article III court. The *Bakelite* Court stated that customs appeals involve "matters arising between the Government and others in the executive administration and application of the customs laws," and therefore include "nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers." 279 U.S. at 458. See also *Cary v. Curtis*, *supra* (upholding a statute depriving importers of the right to challenge in court an allegedly illegal import duty).

Indeed, it was not until the enactment of the Trade Agreements Act in 1979 that judicial review of antidumping and countervailing duty matters became widely available. See P. Ehrenhaft, *The Judicialization Of Trade Law*, 56 Notre Dame L. Rev. 595, 599, 603 (1981). As described earlier, for many decades there was no judicial review of the setting and changing of tariff rates – this function was done by a combination of Congressional action and delegations to the President's discretion.

Thus, although Congress has more recently vested jurisdiction over antidumping and countervailing duty cases in the Article III Court of International Trade, its current choice of forum in no way shows that Article III adjudication is a constitutional necessity.

Moreover, the Coalition's argument disregards the fact that the Supreme Court has upheld statutory schemes under which claims by U.S. citizens are determined in a binding manner by agency administrators or employees of private companies, without any judicial review. See *McClure*, 456 U.S. at 198-200; *United States v. Erika, Inc.*, 456 U.S. 207 (1982).

2. Thus, the Supreme Court has refused to adopt a rigid reading of Article III because doing so would "unduly restrict Congress' ability to take needed and innovative action pursuant to its Article I powers." *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851 (1986). The Court instead resolves Article III scope issues under a pragmatic balancing test, weighing "a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Ibid*.

In determining whether Congress has the authority to assign adjudicative obligations to nonjudicial tribunals, the Supreme Court has given careful consideration

to "the concerns that drove Congress to depart from the requirements of Article III." *Schor*, 478 U.S. at 851. See also *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 587 (1985) (Article III's limits are fixed by reference to "the concerns guiding the selection by Congress of a particular method for resolving disputes").

The Court held in *Schor* that Congress's interest in creating "an inexpensive and expeditious alternative forum" for the resolution of commodities trading disputes (478 U.S. at 855), justified the legislature's decision to permit administrative adjudication even of state law counterclaims, claims "of the kind assumed to be at the 'core' of matters normally reserved to the Article III courts." 478 U.S. at 853. See also *Thomas*, 473 U.S. at 590 (administrative adjudication of public rights represents a permissible "pragmatic solution" to a complex problem).

Accordingly, to the extent that the Executive and Legislative Branches have chosen non-Article III adjudication as a reasonable way to vindicate an important interest, Article III tolerates some limited intrusion into the traditional province of the courts. Under these standards, the creation of NAFTA's binational panels is fully consistent with the requirements of Article III.

3. The Coalition's argument here also overlooks the international nature of the NAFTA scheme. Because, as discussed above, the NAFTA binational panel mechanism was a bargained-for element of an international agreement, implemented

through domestic legislation, any interest in Article III determination of the limited class of disputes at issue must be analyzed in light of the authority of Congress and the President over foreign policy and international trade. Nothing in the jurisprudence of the Supreme Court or of this Court suggests that Article III forbids the United States from agreeing with other nations to submit a limited class of antidumping and countervailing duty disputes to binational arbitration panels.

The Executive's power over foreign affairs is at its zenith in this case because the President and Congress acted together in the negotiation and implementation of NAFTA and its system of binational panel arbitration. See *Palestine Information Office* v. *Shultz*, 853 F.2d 932, 934 (D.C. Cir. 1988) ("The authority of the executive branch, always great in the foreign policy field, is at its apex when it acts, as here, pursuant to an express congressional authorization"). Such a joint exercise of the legislative and executive power is "'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion [rests] heavily upon any who might attack it.'" *Dames & Moore*, 453 U.S. at 668.

The concerns that drove the President and Congress to adopt binational arbitration in NAFTA are certainly weighty. Indeed, as described above, from its earliest days, the United States has entered into international agreements – such as the Jay Treaty – establishing multinational tribunals similar to NAFTA's panels, without

domestic judicial review, in order to resolve disputes with other countries.

4. Furthermore, where "public rights" are at issue, "the danger of encroaching on the judicial powers is reduced," and Congress has broader authority to provide for adjudication by bodies other than the federal judiciary. *Thomas*, 473 U.S. at 589.

As the Supreme Court has held, "'there are matters, involving public rights, which * * * are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.'" *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 458 U.S. 50, 67 (1982) (plurality opinion) (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856)).

A suit involving public rights concerns rights created by, or involving, the Government – for example statutory rights "closely intertwined with a federal regulatory program Congress has power to enact." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989). Purely private rights, by contrast, ordinarily are common law rights that govern the relationships between private parties. See, *e.g.*, *Schor*, 478 U.S. at 854.

Antidumping and countervailing duty cases manifestly involve public rights. As we have explained above, both types of cases are brought under statutes whose purpose is to regulate international trade. Indeed, in countervailing duty and

antidumping cases, the governmental entities – including national and state or provincial governments – that allegedly provide subsidies to their domestic industry may participate in the administrative proceedings. 19 U.S.C. 1677(9).

Hence, the antidumping and countervailing duty statutes provide a mechanism in which U.S. and foreign businesses may participate in the regulation of international trade, an area that traditionally involves negotiations between sovereigns. By regulating particular unfair practices in international trade, antidumping and countervailing duty statutes implicate the tension between a nation's trade remedy laws and its relations with its international trading partners. The rights determined in these cases are thus public rights that do not require adjudication in Article III courts.

5. The Coalition separately argues (Br. 46-48) that the NAFTA dispute resolution scheme is unconstitutional because it does not provide for review of as-applied constitutional claims concerning how a particular binational panel operated. The Coalition points out that, besides authorizing this facial constitutional challenge to the dispute resolution scheme itself, the NAFTA Act provides explicitly only for review in the CIT for constitutional challenges arising out of the underlying administrative proceedings conducted by the Commerce Department and the ITC. See 19 U.S.C. 1516a(g)(4)(B).

Once again, the Coalition's argument runs headlong into the fact that numerous

international arbitration schemes similar to this one have provided that the resolutions made under those systems are final and binding. None that we have found provides that a private party may nonetheless raise constitutional attacks against the way that a commission actually carries out its responsibilities for a particular matter. This fact provides strong evidence that neither Article III nor the Due Process Clause requires a domestic judicial forum for such complaints.

In any event, the Coalition's contention that the NAFTA Act is flawed because it fails to provide for judicial review of as-applied constitutional claims rings hollow because ample protections have been established to minimize any risk of unfair process. As noted earlier, the NAFTA dispute resolution process is governed by rules that establish a fair arbitration mechanism, ample opportunity for presentation of a party's case, and a Challenge Committee to cure errors.

D. Because NAFTA Panel Members Are Not Filling An Office Within The Meaning Of The Constitutional Appointments Clause, Nothing In The Binational Review Panel Scheme Violates That Clause.

The Coalition next contends (Br. 48-52) that the NAFTA dispute resolution scheme violates the Appointments Clause of Article II of the Constitution because the members of binational panels assertedly must be Officers of the United States

appointed pursuant to this clause.[5] This argument is mistaken for a straightforward reason: panel members are not filling offices of the United States within the meaning of that clause. We are aware of no legal precedent or history of practice that requires members of case-specific international arbitral panels established under an international agreement entered into by the United States to be appointed under the Appointments Clause, and the Coalition has pointed to none.

1. Historically, numerous international arbitration commissioners who have issued conclusive decisions affecting the United States and its citizens in highly significant ways – and thus served the same functions as NAFTA panelists – have not been treated as officers covered by the Appointments Clause.

Controversy surrounding the Jay Treaty provides a perfect example of this point because the commissions established under that Treaty were in fact attacked as violating the Appointments Clause. See A. Hamilton, *The Defence* No. 37 (Jan. 6, 1796), reprinted in 20 *The Papers of Alexander Hamilton* 13, 14 (H. Syrett ed., 1974).

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[5] The Appointments Clause provides: "[The President,] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, Sec. 2, cl. 2.

Alexander Hamilton in response easily dismissed this objection:

> As to what respects the Commissioners agreed to be appointed [under the Jay Treaty], they are not in a strict sense OFFICERS. They are arbitrators between the two countries. Though in the Constitutions, both of the United States and of most of the Individual states, a particular mode of appointing officers is designated, yet in practice it has not been deemed a violation of the provision to appoint Commissioners or special Agents for special purposes in a different mode.

See *id*. at 20.

At the end of the Nineteenth Century, the Attorney General in two leading opinions employed the same reasoning as Hamilton to similar facts, relying on Supreme Court case law. In 1898, Attorney General Griggs opined that a commissioner appointed by the President pursuant to a treaty between the United States and Great Britain to arbitrate claims arising from the seizure of British vessels in the Bering Sea did not hold an "office" because "the temporary character of the employment, which was to consist of and to terminate at the end of the examination of a limited number of specified claims, withdraws one of the elements of an office which the Supreme Court regards as essential." *Office — Compensation*, 22 Opin. Att'y Gen. 184, 188 (1898). See *id.* at 187 (commissioner is "sent to adjudicate upon certain named claims," and his employment was thus "to perform a certain task which might take a month or several months"); *id* at 188 (referring to "occasional and temporary commissionerships").

In 1900, the Attorney General reaffirmed his 1898 opinion, and found it constitutional for the President alone to appoint, pursuant to a treaty, persons to a list from which panels of arbitrators could be drawn to resolve future disputes between signatory nations. *Members of the General Board of Arbitration*, 23 Opin. Att'y Gen. 313 (1900). Those on this list would not be "in the ordinary acceptation of the term, persons holding office," because they would have no ongoing duties or authority: "Nominally they may be appointed for six years, but they may never actually exercise any functions at all. Their work is not only occasional, but contingent upon what is practically an appointment to act as arbitrators, to be received from foreign powers in the future." *Id.* at 315.

A similar description applies to the NAFTA arbitrators. The conclusion by the Attorney General in 1898 is equally applicable to those carrying out the binational dispute resolution function under NAFTA; they cannot be said to hold an office under the Government, but rather are simply carrying out *ad hoc* duties pursuant to an international agreement. Accordingly, nothing about the NAFTA dispute resolution scheme violates the Appointments Clause.

2. The Coalition's argument to the contrary based on *Buckley v. Valeo*, 424 U.S. 1 (1976) is mistaken. In that case, the Supreme Court held that the Appointments Clause sets out the only means by which Congress may provide for the

appointment of Officers of the United States. *Id*. at 124-37. The *Buckley* Court further explained that the term "Officers of the United States" as used in Article II is defined to include "all persons who can be said to hold an office under the government," and that the "term [is] intended to have a substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States'" within the coverage of the Appointments Clause. 424 U.S. at 125-26.

The Coalition properly quotes this formulation from *Buckley*, but fails to discuss the critical footnote that the Court included on the same page, making clear that the Court understood "significant authority" in light of the historical understanding of what constitutes an "Officer." See *id.* at 126 n.162. There, the Supreme Court made clear that not everyone performing duties for the Federal Government is an "Officer" within the meaning of the Appointments Clause. Most relevant here, the term long has been understood to embrace the idea of duration in a position that has authority under federal law.

From the early days of the Republic, the term "Officer" has been understood to embrace the ideas of "tenure, duration, emolument, and duties." *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868). The *Hartwell* Court explained that "[a]n office is a public station, or employment, conferred by the appointment of government.

The term embraces the ideas of tenure, duration, emolument, and duties. The employment of the defendant was in the public service of the United States. * * * His duties were continuing and permanent, not occasional or temporary. * * * A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects." *Id*. at 393.

Similarly, Chief Justice Marshall, sitting as Circuit Justice, earlier wrote: "Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one," and "if those duties continue though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer." *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747).

The distinction between officers and persons whose relationship to the Government takes some other form also appears in later decisions. The question in *United States v. Germaine*, 99 U.S. 508 (1879), concerned whether a surgeon appointed by the Commissioner of Pensions "to examine applicants for pension, where [the Commissioner] shall deem an examination * * * necessary" (*id*. at 508) was an officer within the meaning of the Appointments Clause. The surgeon in question was

"only to act when called on by the Commissioner of Pensions in some special case"; his only compensation from the Government was a fee for each examination that he did in fact perform. *Id.* at 512.

The Supreme Court stated that, under these circumstances, the Appointments Clause applies to "all persons who can be said to hold an office under the government," and concluded that "the [surgeon's] duties are not continuing and permanent and they are occasional and intermittent." *Ibid.* The surgeon, therefore, was not an officer of the United States. *Ibid.*

The Court employed the same reasoning in *Auffmordt v. Hedden*, 137 U.S. 310 (1890). Pursuant to statute, an importer dissatisfied with the Government's valuation of dutiable goods was entitled to demand a reappraisement jointly conducted by a general appraiser (a government employee) and a "merchant appraiser" appointed by the collector of customs for the specific case. Despite the fact that the reappraisement decision was final and binding on both the Government and the importer (*id.* at 329), the Court rejected the argument that the merchant appraiser was an "inferior Officer" whose appointment had to be accomplished under the Appointments Clause:

> He is an expert, selected as such * * * . He is selected for the special case. He has no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case * * * . He has no claim or right to be designated, or to act except as he may be designated * * * . His position is without tenure, duration,

> continuing emolument, or continuous duties * * * . Therefore, he is not an 'officer,' within the meaning of the clause.

Id. at 326-27.

The teachings from these opinions remain critical today in applying the Appointments Clause, given that the Court in *Buckley* cited both *Germaine* and *Auffmordt* approvingly. See 424 U.S. at 125-26 & n.162. And, in several of its statements addressing the definition of "Officers," *Buckley*, sometimes citing *Germaine* explicitly, said that the term applies to appointees or appointed officials who exercise significant authority under federal law, thus recognizing the possibility that non-appointees might sometimes exercise authority under federal law. See, *e.g.*, 424 U.S. at 131 ("Officers" are "all appointed officials exercising responsibility under the public laws").

Thus, while the lines delineating the coverage of the Appointments Clause are not always bright ones, several critical factors can be drawn from the relevant precedents. An office covered by the Appointments Clause can exist where a position that possesses delegated federal sovereign authority is permanent, meaning that it is not limited by time or by being such that it will terminate by the very fact of its performance. Further, if a position with delegated federal sovereign authority is temporary, it can still qualify as continuing, and thus as an office, when: (1) the

position's existence is not personal to the current office-holder; (2) the position is not transient, meaning that it is generally enduring as a seat of governmental power; and (3) the duties involved are more than incidental to the regular operations of the Government.

Under these standards, the members of the NAFTA binational panels are not Officers of the United States covered by the Appointments Clause. As described earlier, these panelists' names are on a roster for a year, but they have no functions unless they are actually placed on a panel for a specific case, and they are paid only for their time and services on that panel; their service is limited to the boundaries and duration of the case on which they serve. They are therefore like the surgeon in *Germaine* and the merchant appraiser in *Auffmordt*, both of whom were found not to be Officers. Moreover, the NAFTA panelists do not fill appointments to positions of employment within the Federal Government. Rather, they have been engaged to serve as arbiters on a specific case, and for that case alone.

E. There Is No Constitutional Doctrine Prohibiting The President And Congress From Agreeing To International Arbitration Panels To Resolve Disputes Between The United States And Foreign States.

The Coalition also contends (Br. 53-56) that the NAFTA dispute resolution mechanism is unconstitutional because it violates Article II by delegating binding international arbitration authority outside the Executive Branch. As the history we

have relied upon demonstrates, there is no constitutional principle compelling this conclusion. Thus, in the Jay Treaty, as in numerous other international agreements entered into by the United States over the ensuing decades, decision making authority was ceded to binational commissions that definitively resolved claims by U.S. citizens. Moreover, the Coalition's non-delegation argument is particularly weak in this instance, given that its claimed right is one created by Congress in the first place, and that is to be resolved pursuant to an Executive agreement negotiated by the President and implemented by Congress. Thus, as noted earlier, this is an instance in which the political branches have acted together at the height of their shared constitutional powers.

In any event, the Coalition's argument fails to take account of applicable Supreme Court precedent. The Court has in various contexts upheld delegations to private parties or state officials to exercise executive power over other private persons.

Thus, the Supreme Court approved a statutory authorization for a private railroad industry group to write safety codes governing the entire industry. See *St. Louis & Iron Mountain Railway. v. Taylor*, 210 U.S. 281, 285-87 (1908). And, the Court has also upheld Congress' power to assign authority to groups of private miners to promulgate binding rules governing mining claims. See *Butte City Water Co. v. Baker*, 196 U.S. 119, 127 (1905). Further, the Supreme Court gave effect to a federal

statute authorizing state officials to determine how much compensation was owed to private landowners when their land was condemned by the Federal Government. *United States v. Jones*, 109 U.S. 513, 519-20 (1883). See also H. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw.U. L. Rev. 62, 80-90 (1990) (describing statutory authorizations for state officials and private persons to carry out executive functions under federal law).

The Coalition, however, cites *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). But reliance on those cases is heavily suspect given that the constitutional analysis used in them to strike down New Deal legislation has been changed so significantly by the Supreme Court in the following decades.

The Coalition also looks to *Printz v. United States*, 521 U.S. 898 (1997), for support. There, the Court struck down a statute through which Congress forced responsibilities on state and local law enforcement officials to carry out certain duties under federal handgun control legislation. The Court ruled that, because of the dual sovereignty principle at the heart of our federalist system, Congress had no power to do this. *Id.* at 918-22. The Court went on to discuss (*id*. at 922-23) that the Constitution is based on the Article II provision that the federal Executive will carry

out the laws. The *Printz* Court, though, certainly did not issue some broad new constitutional doctrine prohibiting the President and Congress from together utilizing a binding binational mechanism for settling international trade disputes concerning imposition of tariffs, a mechanism that the U.S. Government has used for many decades in related contexts.

F. The NAFTA Act Fallback Mechanism Is Fully Constitutional, As It Simply Grants The President Discretion To Decide Whether Or Not To Adopt A Recommendation Made By Binational Panels.

1. As explained previously, the NAFTA Act created a fallback mechanism if the dispute resolution system is struck down; it provides that the President can treat binational panel decisions as advisory, and choose in his discretion to accept them if he wishes. See 19 U.S.C. 1516a(7)(B). Thus, this Court would reach this issue only if it has rejected our various prior arguments. The Coalition attacks (Br. 56-62) the fallback mechanism and its implementation on several grounds, none of which has merit.

The Coalition asserts first that the fallback is invalid because it empowers the President to "disregard a judicial determination that a panel or committee decision is unconstitutional * * *." Br. 57. This argument is wrong first because this Court obviously would not have ruled that a decision by a NAFTA panel or committee is invalid – this Court lacks jurisdiction to review decisions by those bodies if they

constitute merely recommendations to the President. See *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 112-13 (1948).

This Court would instead hold that Congress could not make binational panel decisions binding on the United States, thereby rendering those decisions merely recommendatory. We are aware of no constitutional authority, and the Coalition cites none, for the proposition that Congress cannot provide the President with the authority to decide whether or not to adopt a recommendation from a group such as NAFTA binational panels.

The broad new rule of constitutional law urged by the Coalition could have devastating ramifications. For example, Congress has provided in the United Nations Participation Act that the President may in his discretion take action to carry out certain decisions of the United Nations Security Council. See 22 U.S.C. 287c(a). The Coalition's argument would seem to threaten such authority.

In any event, as pointed out above, the Supreme Court has made clear that, for much of our nation's history, Congress properly vested in the President discretion to set tariff rates. See *Norwegian Nitrogen*, 288 U.S. at 308-09. Accordingly, there can be no constitutional problem with Congress assigning authority to the President to adopt tariffs by accepting or rejecting recommendations from a binational panel.

The Coalition nevertheless argues that the bicameralism and presentment

requirements in the Constitution (Art. I, Sec. 7) prohibit Congress from granting the President authority to either accept or reject in whole a recommendation from a binational panel. But, we know of no prohibition under Article II's non-delegation doctrine on the power of Congress to authorize the President to reject or accept in whole a recommendation. Cf. *Dalton v. Specter*, 511 U.S. 462 (1994) (upholding statute providing that the President must accept or reject as a whole recommendations made by a military base closing commission).

Undaunted, the Coalition presses on to argue that its due process rights would be violated if the President can accept recommendations from binational panels – before whom the Coalition could appear and make all of its arguments – unless the Coalition also enjoys the right to a hearing before the President. Again, the Court's opinion in *Norwegian Nitrogen*, 288 U.S. at 308-09, demonstrates otherwise, as the Court made clear that the President could do as he wished after receiving recommendations from the Tariff Commission, consulting whomever he wanted, if anybody.

Moreover, we note that the Supreme Court has on various occasions refused to overturn decisions made by the President on the basis of recommendations, and there is no indication in those opinions that private parties were accorded hearings before the President in the White House. See *Dalton*, *supra*; *Franklin v. Massachusetts*, 505

U.S. 788, 798 (1992); *Waterman Steamship*, 333 U.S. at 106.

2. Next, the Coalition argues that the Executive Orders issued by Presidents Reagan and Clinton were inconsistent with the statutory authority granted by Congress. (As described above (at 12), both Presidents issued orders that, if the fallback mechanism goes into effect, decisions by the NAFTA binational panels are in advance adopted.)

This Court plainly lacks jurisdiction over this statutory construction claim. Under the special constitutional facial review scheme, the Court may adjudicate whether the NAFTA dispute resolution scheme is constitutional (see 19 U.S.C. 1516a(g)(4)(A)); this provision says nothing about providing jurisdiction to consider a claim that an Executive Order that has not yet gone into effect is actually inconsistent with the NAFTA Act. Such a statutory – rather than constitutional – claim would obviously require full briefing and argument before the correct court (if there is one) at the appropriate time.

In any event, the Coalition points to nothing in the NAFTA Act or the Constitution prohibiting the President from issuing an Executive Order, in the interests of resolving disputes with Canada and Mexico over tariffs, adopting NAFTA binational panel decisions as a whole in advance, rather than on a case-by-case basis as they arise.

II. This Court Lacks Jurisdiction Over The Coalition's As-Applied Constitutional Claim That Panelist Mastriani's Participation On The Lumber Panel Violated The Coalition's Due Process Rights, And No Such Rights Were Indeed Violated.

Lastly, the Coalition asks (Br. 62-66) this Court to consider its as-applied argument that the Lumber Panel and Challenge Committee decisions violated due process rights because Panelist Mastriani assertedly had such a serious conflict of interest and bias that his participation on the Lumber Panel caused a Due Process Clause violation of the U.S. Constitution, which was not cured by Challenge Committee review. This Court has no jurisdiction to hear this claim, and it is wrong in any event.

A. As the Coalition implicitly concedes, the special statute giving this Court jurisdiction over a facial constitutional attack on the NAFTA dispute resolution mechanism does not cover this claim. The Coalition nevertheless urges the Court to hear the case under supplemental or pendent jurisdiction. Neither doctrine applies in this case.

The Coalition argues that supplemental jurisdiction can be exercised here under 28 U.S.C. 1367, which permits district courts with original jurisdiction to consider all other claims "that are so related to the [original claims] that they form part of the same case or controversy under Article III of the Constitution." The district courts may

decline such supplemental jurisdiction "in exceptional circumstances, [when] there are other compelling reasons for declining jurisdiction." *Id*. at 1367(c)(4). This Court has never ruled on whether or not this provision applies to the courts of appeals, despite its plain wording to the contrary.

It would be quite odd, however, for this Court to use whatever power it has under Section 1367 to exercise supplemental jurisdiction here to consider as-applied challenges to a particular binational dispute resolution proceeding, given that Congress stated explicitly in the NAFTA Act that any action by the U.S. Government taken consistently with a binational dispute resolution panel or committee decision "shall not be subject to judicial review." 19 U.S.C. 1516a(g)(7)(A)).

With regard to the Coalition's argument for pendent jurisdiction, the Supreme Court has expressed skepticism about the existence of such jurisdiction, and in particular about a liberal or flexible approach to it. See *Swint v. Chambers County Commission* 514 U.S. 35, 47 n.5 (1995). The Court has, however, recognized pendent jurisdiction when the otherwise inappropriate claim is both "inextricably intertwined" with the proper claim, and "necessary to ensure meaningful review" of the cognizable claim. *Clinton v. Jones*, 520 U.S. 681 (1997).

This Court has found pendent jurisdiction in some rare instances, but has insisted that either of the conditions mentioned in *Clinton* be met, or that the

inappropriate issue involves "logically antecedent or threshold issues." *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1134 (D.C. Cir. 2004).

The Coalition's as-applied claim fits none of those grounds for recognizing jurisdiction that otherwise does not exist. Thus, it should not be heard in this case. That claim is certainly not an antecedent or threshold issue, and is not inextricably intertwined with the facial constitutional attack on the NAFTA dispute resolution scheme. The validity of that scheme can be determined without any reference to whether or not Panelist Mastriani should have removed himself from the Lumber Panel, or the Challenge Committee should have found him ineligible to serve.

Moreover, there is a special circumstance here strongly counseling against jurisdiction. There is no record before this Court concerning Mastriani: as noted earlier, the record created by the Lumber Panel is not before this Court. See 19 U.S.C. 1516a(g)(4)(G). Therefore, this Court would either itself have to conduct an inquiry to develop the facts regarding Mastriani, or appoint a special master to do so. In light of this problem, the text of the special constitutional review provision (19 U.S.C. 1516a(g)(4)(A)) demonstrates that Congress did not contemplate that this Court would engage in such an obviously fact-intensive inquiry.

This point is confirmed by the subsection providing a right of appeal to the Supreme Court for actions under the special review section (see *id*. at 1516a(g)(4)(H)).

Thus, this Court's final judgment under the facial constitutional review provision would be appealed as of right to the Supreme Court, while any accompanying ruling on the as-applied challenge could be brought to the Supreme Court only through its certiorari jurisdiction. Such a system makes no sense.

B. If this Court does nevertheless choose to exercise some form of discretionary jurisdiction, the Coalition's as-applied due process challenge should be rejected.

While the Coalition correctly notes that the U.S. Government argued to the Challenge Committee that Mastriani should not have served on the Lumber Panel, our arguments were fully considered and denied in a thorough discussion by the Challenge Committee, which determined that Mastriani had not violated the NAFTA Code of Conduct. See JA 466-73. Although the United States stands by the arguments it made to the Challenge Committee, we accept the Committee's conclusions, which find that Mastriani could properly serve on the Lumber Panel. The fact that the Coalition had an ample opportunity to raise and litigate its claims regarding Mastriani before the Challenge Committee, and that those claims were rejected in a fully considered and explicated opinion relying on facts and law, negates the Coalition's contention that its due process rights were violated.

CONCLUSION

For the foregoing reasons, judgment should be entered for the respondents United States, *et al*., dismissing the petition here.

Respectfully submitted,

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March 6, 2006

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I certify that this brief was prepared using WordPerfect 9, Times New Roman font, 14-point type, and contains 13,944 words.

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