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Robert P. Deyling

FREE TRADE AGREEMENTS AND THE FEDERAL COURTS: EMERGING ISSUES

ROBERT P. DEYLING*

I. INTRODUCTION

For the past eight years, the United States and Canada, and more recently Mexico, have tried to resolve certain types of international trade disputes through a unique process that initially seemed promising, but increasingly appears unworkable. Under

* Attorney-Advisor, Administrative Office of the United States Courts; 1994-95 Federal Judicial Fellow; B.A., Stanford University; J.D., New York University.

the United States-Canada Free Trade Agreement (CFTA),[1] and its successor, the North American Free Trade Agreement (NAFTA),[2] disputing parties may choose binational panels, rather than national courts, to review disputes over antidumping and countervailing duty determinations.[3]

Binational panel review entirely replaces national judicial review for each case in which the parties choose the panel process.[4] The panels are convened on a case-by-case basis from a list of trade experts submitted by the disputing countries.[5] Panels must, however, follow relevant national trade law in making their decisions.[6] Binational panel review promotes the worthy policy goal of free trade and solves the difficult political problem that results when one country is hesitant to trust another country's courts to resolve trade disputes. At the same time, however, the panel process rests on the elusive premise that it can effectively substitute for the system of judicial review it replaces.

In cases involving the United States as the importing country, trade disputes are first addressed at the administrative level by the United States Department of Commerce.[7] Judicial review is available in the Court of International Trade (CIT), an Article III court established in 1980 with nationwide jurisdiction over trade matters.[8] CIT decisions may be reviewed by the Court of Appeals for

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1. United States-Canada Free Trade Agreement, Dec. 22, 1987–Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281 [hereinafter CFTA].

2. North American Free Trade Agreement, *drafted* Aug. 12, 1992, *revised* Sept. 6, 1992, U.S.-Mex.-Can., 32 I.L.M. 289 (pts. 1–3) & 32 I.L.M. 605 (pts. 4–8 & annexes) (entered into force Jan. 1, 1994) [hereinafter NAFTA].

3. *See id.* ch. 19, art. 1904(2), 32 I.L.M. at 683 (stating that parties may seek panel review to determine whether antidumping or countervailing duty determinations are "in accordance with the antidumping or countervailing duty law of the importing Party"); CFTA, *supra* note 1, ch. 19, art. 1904(2), 27 I.L.M. at 387 (allowing for panel review of final antidumping or countervailing duty determinations).

4. *See* NAFTA, *supra* note 2, ch. 19, art. 1904(1), 32 I.L.M. at 683 (noting that "each Party shall replace judicial review . . . with binational panel review").

5. *See id.* ch. 19, annex 1901.2(1)–(2), 32 I.L.M. at 687 (describing how binational panels are established).

6. *See id.*, ch. 19, art. 1904(3), 32 I.L.M. at 683 (stating that panel must apply same legal principles and standard of review that court of importing country would apply).

7. *See* 19 U.S.C. § 1673a(a)(1) (1994) (noting that antidumping investigations are initiated at agency level); *id.* § 1671a(a) (stating that countervailing duty investigations are initiated at agency level).

8. *See* Edward D. Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. XIII, XIII–XLV (West Supp. 1995) (discussing history, operation, and current

the Federal Circuit, and by the United States Supreme Court on writ of certiorari.[9]

The binational panel system set forth in the CFTA, and later in the NAFTA, added a new option for parties who are not satisfied with the Commerce Department's decision. Instead of seeking judicial review of the agency's decision, either disputing country may request the creation of a binational panel.[10] When a binational panel convenes to review a United States trade case, its task is to review the Commerce Department's final administrative decision in light of relevant CIT and Federal Circuit precedent.[11]

Upon review, a binational panel may either affirm the administrative decision or remand the case to the Commerce Department for further proceedings.[12] Panel decisions are binding[13] and may not be reviewed by any court.[14] The decisions are appealable only on a discretionary basis to an Extraordinary Challenge Committee (ECC), a binational panel consisting of three current or former federal judges.[15] ECC review is limited to situations in which a panel "manifestly exceeded its powers, authority, or jurisdiction," or a panel member was guilty of misconduct, bias, or conflict of interest.[16]

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jurisdiction of CIT). The CIT is the successor to the United States Customs Court, which was established in 1926. *Id.* at XIV. The Customs Court, in turn, had replaced the Board of General Appraisers, a branch of the Department of the Treasury established in 1890 to review determinations by customs officials regarding the valuation of imported goods and the appropriate customs duties to be assessed. *Id.*

9. *See* 28 U.S.C. § 1295(a)(5) (1994) (stating that Federal Circuit has exclusive jurisdiction over appeals from final decisions of CIT); 28 U.S.C. § 1254(1) (1994) (noting that cases in courts of appeals may be reviewed by Supreme Court by writ of certiorari).

10. NAFTA, *supra* note 2, ch. 19, art. 1904(2), 32 I.L.M. at 683; CFTA, *supra* note 1, ch. 19, art. 1904(2), 27 I.L.M. at 387.

11. *See* NAFTA, *supra* note 2, ch. 19, art. 1904(3), 32 I.L.M. at 683, 691–93 (stating that panels must use standards of review and legal principles similar to those used by court of importing country); *id.* ch. 19, art. 1904(2), 32 I.L.M. at 683 (requiring panels to consider relevant judicial precedent when reviewing administrative decisions). While the NAFTA also provides for binational panel review of Canadian and Mexican trade decisions, this Article addresses only binational panel review of United States decisions.

12. *Id.* ch. 19, art. 1904(8), 32 I.L.M. at 683.

13. *Id.* ch. 19, art. 1904(9), 32 I.L.M. at 683.

14. *Id.* ch. 19, art. 1904(11), 32 I.L.M. at 683.

15. *See* NAFTA, *supra* note 2, ch. 19, annex 1904.13, 32 I.L.M. at 688 (noting that judges may come from federal courts of United States, Mexico, or Canada).

16. *Id.* ch. 19, art. 1904(13), 32 I.L.M. at 683.

Only a few years' experience has demonstrated the difficulty of operating an international dispute resolution system designed to mimic national courts. Despite early favorable commentary in the United States concerning the quality of panel decisions and the professionalism of the individual panelists,[17] recent assessments have been more critical.[18] In addition to the inherent risk that panels will not properly apply United States law, there is a danger that panels will interpret trade law differently than the courts they replace. If this occurs, as the United States has argued in recent cases, trade jurisprudence may become increasingly unpredictable. Doubts also persist about the constitutionality of the panel system and the potential conflicts of interest of individual panelists. This Article examines these tensions, focusing on the interplay between the binational panel system and the United States federal courts.

Part II of this Article provides background information about the CFTA and NAFTA dispute resolution process and the types of trade disputes that binational panels may address.

Part III examines the relationship between binational panel review and the United States courts. While panelists are carefully selected based on their knowledge of trade law, objectivity, and judgment, they serve on an ad hoc basis and do not enjoy the usual protections associated with judicial independence. Further, the use

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17. *See* Michael H. Greenberg, *Chapter 19 of the U.S.-Canada Free Trade Agreement and the North American Free Trade Agreement: Implications for the Court of International Trade,* 25 LAW & POL'Y INT'L BUS. 37, 42 (1993) (expressing opinion that "panelists approach their task seriously, cautiously, and with a respect for the pronouncements of the courts"); Andreas Lowenfeld, *Binational Dispute Settlement Under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal,* 24 N.Y.U. J. INT'L L. & POL. 269, 272 (1991) (characterizing panel process under CFTA as "clear success," and suggesting that panels usually reach same result as CIT would be expected to reach); *see also* Joint ABA/CBA/BM Working Group on Dispute Settlement, *American Bar Association Section of International Law and Practice Reports to the House of Delegates*, 26 INT'L LAW. 855, 865 (1992) ("Whether or not [the binational panel system] is altogether logical and whether or not it responds fully to the real legal difficulties in the trade relationship, as between Canada and the United States, experience has shown that the system works.").

18. *See* Robert E. Burke & Brian F. Walsh, *NAFTA Binational Panel Review: Should It Be Continued, Eliminated, or Substantially Changed?*, 20 BROOK. J. INT'L L. 529, 559–62 (1995) (criticizing panels' lack of deference to administrative decisions and misapplication of proper standard of judicial review, conflicts of interests of panelists, and barriers to constitutional challenge of panel system); Jordan B. Goldstein, Note, *Dispute Resolution Under Chapter 19 of the United States-Canada Free-Trade Agreement: Did the Parties Get What They Bargained for?* 31 STAN. J. INT'L L. 275, 303–04 (1995) (discussing uncertainties of panel system).

of binational panels increases the risk of inconsistent decisions, which may result in a divergent body of trade law. This concern is difficult to remedy given the lack of appellate review of panel decisions. Even assuming that binational panels can successfully replicate United States judicial review, significant questions remain concerning the compatibility of such a system with the United States judicial process.

Part IV addresses the potential service of federal judges on NAFTA binational panels. Both the CFTA and the NAFTA urge the parties to include judges on the roster for ECCs,[19] and the NAFTA also adds a strong preference for judges on binational panels.[20] Yet, no American sitting judge has served as a panelist, and there is no mechanism in place in the federal judiciary to encourage such service. The prospect of using judges to help decide cases that are otherwise within the jurisdiction of the CIT raises legal, practical, and constitutional questions.

Part V highlights unresolved questions concerning the constitutionality of the binational panel system. Although review of the binational panel process is technically available in the United States, the two cases that have been filed challenging the constitutionality of the process have both ended in dismissal.[21] This section summarizes the constitutional arguments against the binational panel system, as well as procedural and statutory provisions that undermine the likelihood, and perhaps the effectiveness, of judicial review of the panel system.

Finally, Part VI reviews a recent congressional proposal that would require federal judges to give advisory opinions on all World Trade Organization (WTO) panel decisions involving the United

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19. *See* NAFTA, *supra* note 2, ch. 19, annex 1904.13, 32 I.L.M. at 688 (noting that ECC members are to be selected from 15-person roster composed of "judges or former judges of a federal judicial court" of United States, Canada, or Mexico); CFTA, *supra* note 1, ch. 19, annex 1904.13, 27 I.L.M. at 395 (stating that ECC members must be selected from 10-person roster composed of judges or former judges of United States federal court or Canada court of superior jurisdiction).

20. *See* NAFTA, *supra* note 2, ch. 19, annex 1901.2(1), 32 I.L.M. at 687 (stating that binational panel rosters "shall include judges and former judges to the fullest extent practicable").

21. *See* Coalition for Fair Lumber Imports v. United States, No. 94-1627 (D.C. Cir. filed Sept. 14, 1994) (granting motion to dismiss for lack of subject matter jurisdiction); National Council for Indus. Defense, Inc. v. United States, 827 F. Supp. 794, 800 (D.D.C. 1993) (noting that case was dismissed with prejudice).

States. Like the problems inherent in the NAFTA binational panel process, the proposed WTO legislation raises both practical and constitutional issues that are likely to be the subject of continued debate. These issues include whether the Constitution permits judges to serve on a tribunal whose decisions would be purely advisory, and related separation of powers concerns.

II. BACKGROUND

A. *Antidumping and Countervailing Duty Laws*

In an effort to promote not only "free" trade but also "fair" trade, many countries have developed domestic legal remedies designed to enforce free-trade principles. The United States uses two major legal tools to ensure that domestic industry is not undercut by foreign trading practices—"antidumping" and "countervailing duty" laws.[22] Canada, Mexico, and other countries apply similar laws to protect their domestic industries from foreign practices viewed as unfair.[23]

Antidumping laws are designed to prevent one country from "dumping" products into another country by selling the products at unfairly low prices. When products are dumped, a domestic producer of the same product may be unable to meet the artificially low prices and, therefore, may be pushed out of the market either temporarily or permanently. The United States antidumping laws allow the affected domestic industry to petition the United States government to impose a penalty tariff against the offending foreign producer.[24] A successful antidumping case consists of two main elements: (1) proof that the foreign product is priced at "less than its fair value"; and (2) actual or threatened injury to a domestic industry.[25]

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22. *See* 19 U.S.C. §§ 1671, 1673 (1994) (setting forth United States antidumping and countervailing duty laws and addressing economic factors pertinent to such laws). These determinations are, of course, difficult to make and involve detailed analyses of numerous economic factors, including domestic and foreign production costs, the volume of imports and exports, and the impact of imports on domestic prices.

23. *See generally* JOHN H. BARTON & BART S. FISHER, INTERNATIONAL TRADE AND INVESTMENT: REGULATING INTERNATIONAL BUSINESS *passim* (1986) (discussing international foreign trade practices and regulations).

24. *See* 19 U.S.C. § 1673 (1994) (describing amount of duty that may be imposed).

25. *Id.*

Countervailing duty laws address a similar problem for domestic industry. Foreign products are sometimes exported at artificially low prices when a foreign government gives its industry a subsidy to promote exports. The effect on domestic industry is similar to the effect of dumping, because in both situations the foreign industry enjoys an artificial price advantage that domestic industry lacks. Under the United States countervailing duty laws, a domestic industry may seek to impose a penalty tariff on the foreign products to counteract the effect of the foreign government subsidy.[26] The two main elements of a countervailing duty case are: (1) proof that a foreign government has granted a subsidy that allows the foreign producer to export at an artificially low price; and (2) injury to the affected domestic industry.[27]

In the United States, antidumping and countervailing duty claims must follow a two-step administrative process.[28] First, the Department of Commerce conducts an investigation and makes a preliminary determination concerning whether products are being sold at less than fair value,[29] or whether the foreign producer is enjoying the unfair benefit of a government subsidy.[30] The International Trade Commission, an independent federal agency, must then determine whether the dumpings or subsidies "materially injure" a United States industry.[31] If both agencies make final affirmative determinations, United States law authorizes the imposition of a penalty tariff to offset the price advantage provided by the unfair trade practice.[32]

B. *The Origin of Binational Panels*

Conflict over trade law interpretation led to the creation of binational panels. In negotiations over the CFTA, Canada sought substantive changes in United States trade law to address what Canada viewed as unfair bias against Canadian firms and a lack of

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26. *See id.* § 1671(a) (providing for imposition of countervailing duty).

27. *Id.*

28. *See* 19 U.S.C. § 1673a (1994) (setting forth procedures for initiating antidumping duty investigation); *id.* § 1671a (describing procedures for initiating countervailing duty investigation).

29. *Id.* § 1673b(b)(1)(A).

30. *Id.* § 1671b(b)(1).

31. *Id.* § 1673b(a)(1); *id.* § 1671b(a)(1).

32. 19 U.S.C. § 1673e(a) (1994); *id.* § 1671e(a).

impartiality by United States courts in reviewing administrative agency determinations.[33] The United States would not agree to change its trade laws and wished to avoid weakening existing trade law as interpreted by United States courts.[34] The binational panel scheme is an outgrowth of this disagreement, and represents a political compromise adopted to gain support for the CFTA.

The United States and Canada intended to follow the CFTA with negotiations over a new system of antidumping and countervailing duty principles that would eventually eliminate the need for national laws on those issues.[35] Pending the negotiation of such "substitute rules," and in any event for a maximum of seven years, the countries agreed to use the binational panel process.[36] Ultimately, the substitute rules were never adopted, and the binational panel system became permanent when it was incorporated into the NAFTA in 1994.[37] Under the NAFTA, there is no limit on the duration of the binational panel system, nor is there any requirement for the development of a new system of antidumping and countervailing duty rules for the United States, Canada, and Mexico.

C. *The Panel Process*

The binational panel process is quite different from the United States system of judicial review of trade disputes. Once the Commerce Department and the International Trade Commission issue final decisions, any interested participant from either country may request panel review in lieu of CIT review.[38] A panel is then cho-

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33. *See* Judith Bello et al., *Midterm Report on Binational Dispute Settlement Under the United States-Canada Free-Trade Agreement*, 25 INT'L LAW. 489, 493–95 (1991) (discussing American and Canadian motivations in negotiating CFTA).

34. *Id.*

35. *See* Jordan B. Goldstein, *Dispute Resolution Under Chapter 19 of the United States-Canada Free-Trade Agreement: Did the Parties Get What They Bargained for?*, 31 STAN. J. INT'L L. 275, 276–77 (1995) (discussing agreement between Canada and United States that binational panel review would be temporary solution for dispute resolution relating to unfair pricing and government subsidization until new system of rules was developed).

36. *See* CFTA, *supra* note 1, ch. 19, art. 1906, 27 I.L.M. at 390 (explaining duration of Chapter 19 provisions).

37. *See* NAFTA, *supra* note 2, ch. 19, art. 1904, 32 I.L.M. at 683 (establishing binational panel review).

38. *See id.* ch. 19, art. 1904(5), 32 I.L.M. at 683 (noting that while NAFTA only states that countries may be "parties" in binational panel cases, it also obligates each member

sen from a roster established earlier by the parties.[39] The CFTA provided that potential panelists could be lawyers or others with knowledge of trade law, but required ECC members to be chosen from a roster of sitting or retired federal judges.[40] The NAFTA introduced a preference for federal judges as both panelists and ECC members, stating that the rosters should include judges or former judges "to the fullest extent practicable."[41]

A panel for an individual case consists of five members, a majority of whom must be lawyers.[42] Two panelists are chosen by each country, and the fifth panelist is chosen by mutual agreement or by lot.[43] Operating under strict time limits that require a decision within 315 days in most circumstances, panels are to reach majority decisions and provide them in writing.[44] Although panel decisions have no explicit precedential effect, the United States implementing legislation allows courts to consider panel decisions as persuasive authority.[45]

Panel decisions are binding and there is no right of appeal.[46] Parties may, however, seek ECC review by arguing that a panel exceeded its authority or deviated from a fundamental rule or procedure, or that panelists exhibited bias or conflicts of interest.[47] If the ECC determines that one of the limited grounds for ECC review has been established, the ECC must remand the case for fur-

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country to make requests for binational panel review on behalf of "a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review").

39. *Id.* ch. 19, annex 1901.2(2), 32 I.L.M. at 687.

40. *Compare* CFTA, *supra* note 1, ch. 19, annex 1901.2, 27 I.L.M. at 393 (stating that panelists must be familiar with international trade law) *with id.* ch. 19, annex 1904.13, 27 I.L.M. at 395 (asserting that ECC members must be judges).

41. NAFTA, *supra* note 2, ch. 19, annex 1901.2(1), 32 I.L.M. at 687; *see also id.* ch. 19, annex 1904.13(1), 32 I.L.M. at 688 (establishing that ECC selection is to be made from pool of judges or former judges).

42. *Id.* ch. 19, annex 1901.2(2), 32 I.L.M. at 687.

43. *Id.* ch. 19, annex 1901.2(3), 32 I.L.M. at 687.

44. *Id.* ch. 19, art. 1904(14), 32 I.L.M. at 684.

45. *See* 19 U.S.C. § 1516a(b)(3) (1994) (stating that United States courts are "not bound by, but may take into consideration, a final decision of a binational panel or extraordinary challenge committee"); *see also* NAFTA, *supra* note 2, ch. 19, art. 1904(9), 32 I.L.M. at 683 (indicating that panel decisions are binding "with respect to the particular matter between the Parties that is before the panel").

46. NAFTA, *supra* note 2, ch. 19, art. 1904(9), (13), 32 I.L.M. at 683.

47. *Id.* ch. 19, art. 1904(13), 32 I.L.M. at 683.

ther proceedings before a binational panel.[48] If the grounds for an ECC challenge are not established, the panel decision is affirmed without further review.[49]

There is a limited exception to the rule that United States courts may not review panel decisions. United States law allows a party to a binational panel proceeding to seek declaratory or injunctive relief from a panel decision on the ground that the statute implementing either the CFTA or NAFTA panel system is unconstitutional.[50] However, there have not yet been any judicial decisions concerning the constitutionality of the panel system.

As of August 1995, sixty-nine binational panels had been convened under either the CFTA or the NAFTA.[51] Thirty-six of the panels, a slight majority, reviewed United States antidumping and countervailing duty decisions.[52] Of the remaining thirty-three panels, twenty-seven reviewed Canadian administrative agency decisions,[53] three reviewed Mexican agency decisions,[54] and three ECCs were formed to review United States decisions concerning Canadian imports.[55]

III. Tensions Between Binational Panel Review and Judicial Review of Trade Disputes

Congress viewed the notion that "a panel must operate precisely as would the court it replaces" as a central tenet of the binational panel process.[56] Thus, in reviewing United States administrative agency decisions, panels should reach decisions that are consistent

48. *See id.* ch. 19, annex 1904.13(1)-(3), 32 I.L.M. at 688 (outlining extraordinary challenge procedures).

49. *See id.* ch. 19, annex 1904.13, 32 I.L.M. at 688 (providing that original panel decision is affirmed when party fails to prove ground for extraordinary challenge as set forth in article 1904(13)).

50. 19 U.S.C. § 1516a(g)(4)(A) (1994).

51. *Active Dispute Settlement Matters*, Status Rep. of FTA and NAFTA, Aug. 1995, at 1-6 (NAFTA Secretariat, Washington, D.C.) [hereinafter *Active Matters*]; *Completed NAFTA and FTA Dispute Settlement Panel Reviews*, Status Rep., Aug. 1995, at 1-12 (NAFTA Secretariat, Washington, D.C.) [hereinafter *Completed Reviews*]. Six of these panel decisions are completed Chapter 18 cases. *Completed Reviews*, *supra* at 12.

52. *Active Matters*, *supra* note 51, at 1–2, 5–6; *Completed Reviews*, *supra* note 51, at 1–5, 12.

53. *Active Matters*, *supra* note 51, at 3; *Completed Reviews*, *supra* note 51, at 1, 7–11.

54. *Active Matters*, *supra* note 51, at 4.

55. *Completed Reviews*, *supra* note 51, at 6.

56. 139 Cong. Rec. S16,105 (daily ed. Nov. 18, 1993) (statement of Sen. Moynihan).

with United States international trade law as interpreted by the CIT and the Court of Appeals for the Federal Circuit. Although the panels' interpretation of trade law should be consistent with that of the courts, commentators initially regarded the panel review process as having two basic advantages over review by the national courts.[57] First, because panelists work under tight deadlines, they may reach decisions more quickly than the national courts they replace.[58] Second, the binational nature of the panels may increase the disputing parties' confidence that the ultimate decision is fair.[59]

Notwithstanding these potential advantages, the replication of national judicial review through binational panel review, while theoretically possible, raises troubling questions in practice. This section considers several factors that underscore the inherent tension between the panel system and the pre-existing judicial review process.

A. *Nonjudges as Panelists*

A fundamental reason that panel review may be a poor substitute for judicial review is the identity of the decisionmakers. Panelists are not CIT judges. While there is no doubt that many panelists are experts in the field of trade law,[60] their expertise does not necessarily imbue them with judicial qualities. In fact, panelists may have too much technical expertise in trade law to allow them to objectively review the underlying administrative decisions. Because panelists are often accomplished trade lawyers, they have extensive experience practicing before the agencies whose decisions they are called upon to review. Although this expertise may be helpful, it may also create a tendency to second-guess agency determinations. For instance, past litigation experience before the Commerce Department may leave expert panelists with strong views

57. *See* Jordan B. Goldstein, *Dispute Resolution Under Chapter 19 of the United States-Canada Free-Trade Agreement: Did the Parties Get What They Bargained for?*, 31 STAN. J. INT'L L. 275, 276–77 (1995) (discussing perceived advantages of binational panel review system).

58. *Id.*

59. *Id.*

60. Both the CFTA and the NAFTA require panelists to be knowledgeable in international trade law. NAFTA, *supra* note 2, ch. 19, annex 1901.2(1), 32 I.L.M. at 687; CFTA, *supra* note 1, annex 1901.2(1), 27 I.L.M. at 393.

about certain issues that are relevant to the agency cases they review.

Retired Judge Malcolm Wilkey of the Court of Appeals for the District of Columbia Circuit, an American who served on an ECC, addressed this potential problem with relying on expert panelists. Judge Wilkey served on an ECC convened in 1994 to review a 1993 panel decision that rejected United States penalties against the Canadian lumber industry.[61] In testimony concerning the proposed expansion of the NAFTA, Judge Wilkey observed that panelists with trade expertise may be tempted to "redo the work of the experts in the administrative agency."[62] To the extent that Judge Wilkey's concerns are valid, they illustrate that binational panelists may approach the review process differently than CIT judges.

Another reason that panels composed of trade law experts have difficulty duplicating judicial review is that panelists may have little expertise in the art of judging. Unless they have been judges, panelists may lack the judicial skills of balancing competing interests, following precedent, and making independent decisions—all qualities that are developed through judicial experience. Trade experts who have never served as judges simply cannot be expected to take on the judicial temperament for one case.

Furthermore, nonjudge panelists may lack expertise in American administrative law. Even if panelists have a general knowledge of administrative law, they do not have the CIT judges' historical perspective on the development of trade law principles at the agency level.[63] In contrast, the CIT, through continuous review of cases

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61. *See In re* Certain Softwood Lumber Prods. from Can., No. ECC-94-1904-01USA, 1994 FTAPD LEXIS 11, at *1, 123 (CFTA Binational Panel Aug. 3, 1994) (noting that Wilkey served as chairman of panel and filed dissenting opinion based on binational panel's failure to apply United States law).

62. *Should the NAFTA Chapter 19 Dispute Settlement Mechanism of Ad Hoc Panels and Extraordinary Challenge Committees Be Continued or Extended to Other Countries?: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 104th Cong., 1st Sess. 2 (1995) (written testimony of Malcolm Wilkey, retired United States Circuit Judge and retired United States Ambassador).

63. *See* Edward D. Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. XIII, XVIII (West Supp. 1995) (noting that CIT's narrow jurisdiction includes cases arising from adverse agency decisions relating to trade disputes between countries).

coming from the same agencies, is able to harmonize conflicting principles over time.[64]

Panelists may also misunderstand both the relevant American substantive law and the appropriate standard of review of administrative agency determinations. In fact, the United States argued in its three requests for ECC review that panelists misapplied United States law.[65] The NAFTA directs panels to apply both the "standard of review . . . and the general legal principles that a court of the importing party otherwise would apply."[66] The definition of general legal principles includes "principles such as standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies."[67] Under United States law, most antidumping and countervailing duty determinations are reviewed under the "substantial evidence" test.[68]

These principles may be especially difficult for foreign panelists to apply. At least two members of every panel are either Canadian or Mexican,[69] and there is no guarantee that they will understand United States trade law. Particularly with respect to Mexico, contrasts between the civil-law and common-law approaches to cases may complicate a panel's mission to be a mirror image of the CIT in a particular case. Moreover, foreign panelists may be unwilling

64. *See id.* (finding that purpose of CIT's jurisdiction is to allow for consistent application of United States trade law).

65. *See Softwood Lumber*, 1994 FTAPD LEXIS 11, at *77–94 (alleging that rejection of Department of Commerce's finding of preferentiality in provincial stumpage programs and application of effects test, coupled with panel's imposition of new requirements for specificity determination, was contrary to United States law); *In re* Live Swine from Can., No. ECC-93-1904-01USA, 1993 FTAPD LEXIS 1, at *7–11 (CFTA Binational Panel Apr. 8, 1993) (arguing that panel applied inappropriate standard of review by substituting Department of Commerce's specificity determination for "appropriate test"); *In re* Fresh, Chilled, or Frozen Pork from Can., No. ECC-91-1904-01USA, 1991 FTAPD LEXIS 7, at *18–21 (CFTA Binational Panel June 14, 1991) (contending that panel violated United States law by considering nonrecord evidence and by imposing rule of finality).

66. NAFTA, *supra* note 2, ch. 19, art. 1904(3), 32 I.L.M. at 683.

67. *Id.* ch. 19, art. 1911, 32 I.L.M. at 687.

68. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (1994) (establishing standards of review). In limited cases, however, the standard of review is whether the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See id.* § 1516a(b)(1)(A) (referring to review of agency decisions not to initiate investigations, not to review other determinations based on changed circumstances, or that there is no material injury to domestic industry).

69. NAFTA, *supra* note 2, ch. 19, annex 1901.2(2), 32 I.L.M. at 683.

to set aside legal principles of their own country that conflict with United States law.

Criticism of the panel process, particularly with respect to panelists' inability to properly apply the relevant national law, has been noted. For example, in both his dissenting opinion in *In re Certain Softwood Lumber Products from Canada*,[70] and in testimony before Congress, Judge Malcolm Wilkey faulted foreign panelists and ECC members for their inability, or even unwillingness, to apply the proper standard of review to United States agency determinations.[71] The inability of some panelists to set aside their own views of the law is also evident in recent panel and ECC decisions. In *Softwood Lumber*, for instance, a Canadian ECC member complained that the American standard of review required too much deference to the agency determination.[72] The Canadian ECC member noted: "If this is the correct law to apply then there is no need for a binational panel . . . ."[73]

Misapplication of the relevant national law is particularly important in the context of binational panel review because, as subsection C discusses, panel errors are difficult to correct. There is no right to appellate review in the binational panel process, and no United States court is permitted to correct panel mistakes or to reconcile panel decisions that are in tension with each other or with United States case law.[74] The possibility of review by an ECC cannot fulfill the error-correction role of the Court of Appeals for the

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70. No. ECC-94-1904-01USA, 1994 FTAPD LEXIS 11 (CFTA Binational Panel Aug. 3, 1994).

71. *See Softwood Lumber*, 1994 FTAPD LEXIS 11, at *174 (discussing how panel members impose their own interpretation and methodology in evaluating evidence); *Should the NAFTA Chapter 19 Dispute Settlement Mechanism of Ad Hoc Panels and Extraordinary Challenge Committees Be Continued or Extended to Other Countries?: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 104th Cong., 1st Sess. 2–3 (1995) (written testimony of Malcolm Wilkey, retired United States Circuit Judge and retired United States Ambassador) (stating that inherent conflicts arise when foreigners attempt to apply American legal traditions that are in direct opposition to laws of their home country).

72. *See Softwood Lumber*, 1994 FTAPD LEXIS 11, at *80–81 (rejecting dissenting opinion of American panelist because of his demands for absolute deference to Commerce Department).

73. *Id.*

74. *See* 19 U.S.C. § 1516a(g)(2)(B) (1994) (asserting that binational panel review is exclusive and United States courts do not have jurisdiction or power to "review the [panel's] determination on any question of law or fact").

Federal Circuit. Furthermore, ECC review is discretionary and limited to the most egregious errors; basic mistakes in legal interpretation are unlikely to trigger ECC review.[75]

A final concern with binational panels composed of nonjudges is that the panelists may not be impartial. Panelists lack the salary and tenure protections that CIT judges enjoy. Further, because the CFTA and the NAFTA both require panelists to have expertise in trade law,[76] lawyers who practice before the national agencies and courts that normally address trade cases are a logical choice to serve on panels. Using such "interested" experts on panels creates a high potential for conflicts of interest. Most recently, this problem surfaced in the panel proceedings concerning Canadian softwood lumber, in which two Canadian panelists failed to disclose that their law firms' clients included several Canadian lumber companies and agencies of the Canadian government that were involved in the panel proceeding.[77]

B. *Risk of Inconsistent Decisions*

In addition to the numerous problems associated with panel review by nonjudges, another tension exists between the binational panel system and the existing CIT jurisdiction over trade cases, namely, the risk that the two systems will develop divergent trade law. Over time, one body of law may develop for non-NAFTA parties, while different principles may be applied to the NAFTA treaty parties. For example, a complaint about Honduran lumber imports may be addressed by the CIT, while a complaint about Canadian lumber imports may be addressed differently by a binational panel.

Divergent trade law may develop in one of two ways. First, panels may confront issues that have not been addressed by the CIT. Presumably, when the panels do confront such issues they will make a decision, thus creating "new" law in that case. While

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75. NAFTA, *supra* note 2, ch. 19, art. 1904(13), 32 I.L.M. at 683.

76. *See* NAFTA, *supra* note 2, ch. 19, annex 1901.2(1), 32 I.L.M. at 687 (requiring panelists to be familiar with international trade law); CFTA, *supra* note 1, annex 1901.2(1), 27 I.L.M. at 393 (stating that panelists must be familiar with international trade law).

77. *See Softwood Lumber*, 1994 FTAPD LEXIS 11, at *227–43 (Wilkey, Chairman, dissenting) (describing alleged code of conduct breaches by Panelist Hunter and Chairman Dearden, all stemming from identity of their respective law firms' clients and from their firms' financial interests).

the CIT may refer to panel decisions, it is not required to follow those decisions as precedent.[78] Thus, panels act as more than surrogates for the CIT when they address novel legal issues; they are also developing their own common law.

Second, cases involving both NAFTA and non-NAFTA parties compound the risk of inconsistent results. If a complaint is filed against several countries, part of the case may proceed before a binational panel, while another part might be addressed by the CIT.[79] Thus, on the same factual record, the CIT and the panel could reach different conclusions. Although it is true that two judges of the CIT could reach differing conclusions on the same facts, conflicting CIT decisions, unlike conflicting panel decisions, may be corrected through appellate review.[80]

C. *Effects on the Development of United States Law*

Binational panel review may also have unexpected effects on the development of United States trade law. For instance, the non-precedential nature of NAFTA panel decisions may stifle the evolution of the law over time. As the CIT addresses fewer antidumping and countervailing duty cases, and more parties are added to the NAFTA,[81] more cases will be decided by binational panels. Over time, it would not be surprising if panels increasingly look to other panels for guidance, rather than to CIT decisions. This may result in "frozen-in-time" case law, with panels either looking to each other for answers, or looking back to older and increasingly less relevant CIT decisions as guiding precedent. Such

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78. *See* Jordan B. Goldstein, *Dispute Resolution Under Chapter 19 of the United States-Canada Free-Trade Agreement: Did the Parties Get What They Bargained for?*, 31 STAN. J. INT'L L. 275, 288–89 (1995) (noting differences in decision-making process of panel members and CIT judges).

79. *See* NAFTA, *supra* note 2, ch. 19, art. 1904(2), 32 I.L.M. at 683 (stating that binding panel review *may* be requested by either country or any interested party).

80. *See* 28 U.S.C. § 1295(a)(5) (1994) (providing jurisdiction for appeals from CIT decisions).

81. Negotiations are currently underway to add Chile and possibly other South American countries to the NAFTA. *See Accession of Chile to the North American Free Trade Agreement: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 104th Cong., 1st Sess. *passim* (1995) (considering whether to include other countries in NAFTA while continuing to discuss dispute settlement mechanisms).

a result would undermine the basic purpose of the panel process—to promote fidelity to the national trade law of the treaty parties.[82]

Additionally, despite their lack of precedential value, there are indications that binational panel decisions may influence the substantive development of United States law. The CFTA and the NAFTA implementing legislation allows United States courts to consider panel decisions in trade cases.[83] Moreover, both treaties provide a mechanism to allow parties to bring particular issues to the attention of national courts.[84] NAFTA Article 2020 provides, for example, that if an issue arises in a national court and a NAFTA country or interested party wishes to have the court consider its views, a special NAFTA commission may communicate those views to the court, presumably in the form of an amicus-style brief.[85] A national court may also solicit the NAFTA commission's views on a particular topic.[86]

The extent of a court's responsibility to consider the commission's views is unclear. Nonetheless, the existence of this provision illustrates the potential for legal principles developed by binational panels to influence national law. The national courts may increasingly rely on either panel decisions or the views of the commission, especially as fewer trade cases are brought in national courts because of the availability of the panels. This possibility also illustrates a basic paradox of the binational panels, which were created to follow, not make, national trade law.[87]

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82. *See* Jordan B. Goldstein, *Dispute Resolution Under Chapter 19 of the United States-Canada Free-Trade Agreement: Did the Parties Get What They Bargained for?*, 31 STAN. J. INT'L L. 275, 282–84 (1995) (discussing objectives and purposes behind binational panel review process).

83. *See* 19 U.S.C. § 1516a(b)(3) (1994) (stating that United States courts are not bound by NAFTA or CFTA binational panel or ECC decisions, but may take them into consideration).

84. *See* NAFTA, *supra* note 2, ch. 20, subsec. C, art. 2020, 32 I.L.M. at 698 (allowing issues of interpretation or application regarding NAFTA agreement to be submitted to national court); CFTA, *supra* note 1, ch. 18, art. 1808, 27 I.L.M. at 386 (noting that interpretations of CFTA agreement that cannot be agreed upon may be submitted to national court).

85. NAFTA, *supra* note 2, ch. 20, subsec. C, art. 2020, 32 I.L.M. at 698.

86. *Id.*

87. *See* Jordan B. Goldstein, *Dispute Resolution Under Chapter 19 of the United States-Canada Free-Trade Agreement: Did the Parties Get What They Bargained for?*, 31 STAN. J. INT'L L. 275, 284 (1995) (noting that panels should rely on precedent of court of importing country, rather than other panel decisions).

D. *Lack of Appellate Review*

Yet another problem associated with utilizing binational panel review in place of judicial review is the lack of appellate review of panel decisions. There is no right to appellate review of panel decisions, and the NAFTA provides for only a limited check on binational panel decisions through the availability of ECC review.[88] ECC review is intended to promote uniformity between panel decisions and domestic law, in keeping with the NAFTA requirement that binational panels act as if they were a national court and apply the same standard of review that a national court would apply.[89]

The United States has been the only NAFTA party to seek review by an ECC. In all three ECC proceedings, the United States has argued, albeit unsuccessfully, that panels have failed in their basic task of applying United States law in the same manner as the United States courts would. In the first ECC proceeding, *In re Fresh, Chilled, or Frozen Pork from Canada*,[90] the United States argued that the panel had applied the wrong standard of review, considered evidence outside the administrative record, and created a due process principle that did not exist in United States law.[91] In the second ECC case, *In re Live Swine from Canada*,[92] the United States again argued that while the panel had articulated the correct standard of review, it had failed to apply the standard correctly to the facts of the case.[93]

In the most recent ECC proceeding, *In re Certain Softwood Lumber Products from Canada*,[94] the United States argued that the

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88. *See* NAFTA, *supra* note 2, ch. 19, art. 1904(13), 32 I.L.M. at 683 (noting that ECC review is available if panel engages in misconduct, violates rule of procedure, or exceeds its power and such act undermines integrity of panel review process).

89. *See id.* ch. 19, art. 1904(3), 32 I.L.M. at 683 (stating that panel must apply "general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority"); *see also id.* ch. 19, annex 1911, 32 I.L.M. at 693 (defining standard of review for United States cases).

90. No. ECC-91-1904-01USA, 1991 FTAPD LEXIS 7 (CFTA Binational Panel June 14, 1991).

91. *Fresh, Chilled, or Frozen Pork*, 1991 FTAPD LEXIS 7, at *18–25.

92. No. ECC-93-1904-01USA, 1993 FTAPD LEXIS 1 (CFTA Binational Panel Apr. 8, 1993).

93. *See Live Swine*, 1993 FTAPD LEXIS 1, at *10 (stating that United States alleged panel "manifestly exceeded its jurisdiction in failing to apply appropriate standard of review").

94. No. ECC-94-1904-01USA, 1994 FTAPD LEXIS 11 (CFTA Binational Panel Aug. 3, 1994).

panel had failed to defer to the agency's determinations to the same degree that a court would have under United States law.[95] The American ECC member, Judge Malcolm Wilkey, agreed. In a dissent to the ECC decision, Judge Wilkey cited numerous instances in which the panel had deviated from United States law.[96] Judge Wilkey concluded that the panel opinion may have "violate[d] more principles of appellate review of agency action than any opinion by a reviewing body" that he had ever read.[97]

Through its positions in the ECC proceedings, the United States has argued that the threshold for ECC review is too high, and that an ECC should be more willing to look behind panel decisions to ensure that they apply both the proper standard of review and substantive law. Noting the central importance of panel adherence to the standard of review of the importing country, the United States has insisted that a panel may "manifestly exceed its powers" by failing to apply the proper standard of review or by misinterpreting United States substantive law.[98]

In recognition of these problems, the United States succeeded in strengthening the ECC procedure during the NAFTA negotiations. In contrast to the CFTA, which required an ECC only to verify that a panel correctly articulated the domestic standard of review,[99] the NAFTA requires an ECC to examine "the legal and factual analysis underlying the findings and conclusions of the panel's decision."[100] Since only three ECC proceedings have been completed, however, and all of those were the result of CFTA panel decisions, it is too early to evaluate whether the new ECC standards are adequately addressing the United States concerns.

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95. *See Softwood Lumber*, 1994 FTAPD LEXIS 11, at *33 (noting that standard of review that panel should have applied would have reconciled agency's finding with substantial evidence and United States law).

96. *See id.* at *219 (Wilkey, Chairman, dissenting) (asserting that panel ignored United States law by failing to consider extensive legislative history and failing to apply relevant federal case law).

97. *Id.* at *177–78.

98. H.R. Doc. No. 159, 103d Cong., 1st Sess. 644 (1993).

99. CFTA, *supra* note 1, annex 1904.13(3), 27 I.L.M. at 395.

100. NAFTA, *supra* note 2, ch. 19, annex 1904.13(3), 32 I.L.M. at 688.

IV. The Prospect of Judges as Panelists

In comparing the panel process with judicial review of trade disputes, perhaps the most debate has centered around the question of whether panelists should be judges as opposed to lawyers or trade experts. The NAFTA broadens this debate by expressing a strong preference for judicial participation on both panels and ECCs. Under the CFTA, there was no preference for judges to serve on panels. Instead, the treaty called for service by persons knowledgeable in trade law, including both practicing trade lawyers and academics.[101] The NAFTA attempts to expand the involvement of judges as panelists by requesting countries to include judges or former judges on panel rosters "to the fullest extent practicable."[102] The Statement of Administrative Action issued when the NAFTA was signed in 1993 suggests that using judges as panelists would ensure that panels apply the proper law, and would "diminish the possibility" that panels will reach inconsistent decisions.[103]

The debate over whether lawyers or trade experts, as opposed to judges, make better panelists is likely to continue. On the one hand, the prospect of a trade lawyer practicing before the same agency whose decisions the lawyer may evaluate as a panelist creates a high risk of conflict of interest. Yet, on the other hand, using nonjudges as panelists seems consistent with the concept of panel review. If panels are to substitute for the national courts that would otherwise review trade cases, then it is logical that they would consist of persons other than federal judges. This section addresses several questions, both practical and legal, relating to judicial service on binational panels.

A. *The United States Rationale for Using Judges*

The United States has cited three main reasons for judicial service on binational panels. First, judges may ensure that panels will review an administrative agency decision "precisely as would a court of the importing country," as the NAFTA requires.[104] This premise assumes not only that nonjudges are inherently less likely

101. CTFA, *supra* note 1, annex 1901.2(1), 27 I.L.M. at 393.
102. NAFTA, *supra* note 2, ch. 19, annex 1901.2(1), 32 I.L.M. at 687.
103. H.R. Doc. No. 159, at 644.
104. *Id.*

to be faithful to the legal precedent that should be applied in a particular case, but also that judges are more likely to both find the correct law and apply it in a "judicial" manner. Second, a judicial presence on binational panels may lessen the possibility that panels and courts will develop separate and distinct bodies of law on the same issues.[105] Again, the presumption is that judges are sensitive to issues of precedent, and will guide panels in the proper application of United States law. Finally, the United States has suggested that because judges are accustomed to reviewing the work of administrative agencies, they are more likely to be appropriately deferential to those decisions.[106]

Even these premises concerning judicial service on panels, however, may have several flaws. For example, they assume that any federal judge, not just a CIT judge, will be able to interpret and follow trade law as well as a CIT judge. However, judges who do not handle trade cases will likely have a more difficult time correctly applying trade law than would lawyers who specialize in trade law. In fact, the most logical choice for judicial panelists may be current or retired judges of the CIT itself, and it seems unlikely that CIT judges would consent to serve as panelists. Moreover, using CIT judges as panelists contradicts the political compromise that inspired the creation of the panel process.[107]

Similarly, the risk of inconsistent decisions is still present even if panels are composed solely of judges. Panel decisions would still lack precedential value, and panels would need to resolve for themselves any novel legal issues that arise. Additionally, as the number of relevant CIT and Federal Circuit cases available to guide panelists diminishes over time, the need for panels to make new law will grow, which will only compound the problem of inconsistent decisions. Unfortunately, using judge-panelists will not solve this problem.

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105. *Id.*

106. *See id.* (stating that panelists with judicial experience ensure that administrative decisions are reviewed in manner similar to that of courts).

107. *See* Kristen L. Oelstrom, *A Treaty for the Future: The Dispute Settlement Mechanisms of the NAFTA*, 25 LAW & POL'Y INT'L BUS. 783, 793–95 (1994) (noting that Canada sought strong dispute settlement mechanism sufficient to "keep it free from U.S. protectionist forces," and recognizing that Mexico, with similar goals, wanted to "neutralize disparities in power").

B. *The Future of Judge-Panelists*

The NAFTA encourages judicial service on panels and the United States law implementing the NAFTA established a multi-step process to involve judges in the panel process.[108] First, the chief judges of the circuits are directed to canvass their judges to determine whether sitting or senior judges are interested in serving.[109] The chief judges then send a list to the Chief Justice of the United States Supreme Court.[110] Finally, the Chief Justice *may* forward the names to the United States Trade Representative for inclusion on the roster of potential panelists.[111]

This process has gotten off to a slow start. In early 1994, the Judicial Conference, a select group of federal judges that makes policy decisions for the judiciary as a whole, referred the matter of binational panel service to the Conference Committee on Judicial Resources. The Conference Committee recommended that the judiciary explore the possibility of using senior judges, who are not retired but maintain a lighter caseload, on NAFTA panels.[112] Thereafter, the Judicial Conference considered the matter at its meeting in September 1994 and decided to refer the question of panel service back to the Judicial Resources Committee for further study.[113] In March 1995, the Judicial Resources Committee tabled the proposal to recruit senior judges to serve as panelists.[114] No further public action has been taken, a fact that may signal the federal judiciary's lack of interest in providing judges for panel service.

Even if the judiciary expresses an interest in panel service, it is not clear that any individual judge would ever choose to serve. Federal judges have shown no obvious interest in serving on NAFTA panels. Additionally, the statute gives a final veto to individual judges to decide whether they are "available for such ap-

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108. 19 U.S.C. § 3432(b)(2) (1994).

109. *Id.*

110. *Id.*

111. *Id.*

112. Report of the Judicial Conference Committee on Judicial Resources 7 (Sept. 1994) (on file with author).

113. Report of the Proceedings of the Judicial Conference of the United States 54 (Sept. 20, 1994) (on file with author).

114. Report of the Judicial Conference Committee on Judicial Resources 15 (March 1995) (on file with author).

pointment."[115] Under judicial ethics guidelines set by the Judicial Conference, a judge may serve in an extra-judicial capacity only if that service does not compromise the performance of judicial duties.[116]

Finally, while the United States Trade Representative is required by statute to report to Congress twice annually on efforts to recruit federal judges for panel service,[117] no such reports have been made since the NAFTA went into effect in January 1994. This may be another indication that the proposal to recruit judges for panel service may be difficult to implement.

The question of judicial service on panels appears to have come full circle. Nonjudge panelists have been criticized for their conflicts of interest and inherent inability to replicate the national judicial review system in trade cases.[118] As a result of such criticism, the NAFTA re-emphasizes the desirability of using judges as panelists. Nonetheless, there is no immediate prospect that American judges will serve on panels. Whether or not judges become involved in the panel system, this debate illustrates the difficulties of resolving trade disputes through a nonjudicial mechanism that is designed to replicate the work of a court.

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115. 19 U.S.C. § 3432(b)(4) (1994).

116. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 5G & cmt., 150 F.R.D. 307, 318-20 (1992) (noting that, although legislatively prescribed extra-judicial assignments should be discouraged, when Congress requires appointment of judge to perform extra-judicial duties, judge may accept appointment, provided that judge's services would not interfere with performance of judge's judicial responsibilities or tend to undermine public confidence in judiciary). *Id.* For a detailed discussion of the policy considerations of involving the federal judiciary in the extra-judicial resolution of international trade disputes, see Jane A. Restani & Ira Bloom, *The Quick Solution to Complex Problems: The Article III Judge*, 18 FORDHAM INT'L L. J. 1501 *passim* (1995).

117. 19 U.S.C. § 3432(h) (1994).

118. *See* Robert E. Burke & Brian F. Walsh, *NAFTA Binational Panel Review: Should It Be Continued, Eliminated, or Substantially Changed?*, 20 BROOK. J. INT'L L. 529, 535–37 (1995) (discussing difficulty nonjudge panelists encounter in following and applying established law); Christopher J. Murphy, *Canada-U.S. Free Trade Resolution Dispute Mechanism Panel Procedures: Will They Hold?*, 4 TRANSNAT'L LAW. 585, 600 (1991) (noting difficulty in finding panelists who meet conflict of interest requirement, and listing example of American panelist who declined selection to panel roster four times due to potential conflicts of interest); *see also* Carolita L. Oliveros, *International Distribution Issues: An Overview of Relevant Laws*, C888 A.L.I.-A.B.A. 553, 580 (1994) (stating that use of judges improves nonjudge panel system because it emphasizes precedent and current domestic laws in decision-making), *available in* Westlaw, JLR Database.

V. CONSTITUTIONAL ISSUES

Aside from the practical difficulties associated with binational panel review, there may be constitutional problems as well. The constitutional aspects of the panel system have been the subject of speculation and commentary since the signing of the CFTA in 1988, yet there has been no resolution of these issues. Despite the lack of judicial decisions, however, there are several real constitutional concerns that are unlikely to dissipate with time. This section will only briefly address these issues; for more detailed analyses, the reader should review some of the numerous articles that address the constitutional questions surrounding the CFTA and the NAFTA.[119]

A. *Potential Constitutional Problems*

One potential constitutional argument is rooted in separation of powers principles. Some commentators have asserted that panel review constitutes an unconstitutional exercise of the judicial power of the United States. This argument compares binational panels to legislative courts established under Article I of the Constitution, and focuses on whether, in authorizing the binational panel system, Congress has usurped the authority of Article III courts.[120]

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119. *See, e.g.*, Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free-Trade Agreement*, 49 WASH. & LEE L. REV. 1455, 1463–96 (1992) (finding that CFTA violates Article III and Appointments Clause of United States Constitution by delegating federal judicial power to persons who have not been appointed as officers of United States); Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L L.J. 141, 159–68 (1994) (discussing constitutional problems associated with binational dispute resolution under NAFTA); Alan Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1299, 1303–08 (1992) (asserting that provisions for resolution of United States-Canada disputes are unconstitutional because persons not appointed under Appointments Clause as officers of United States are permitted to overrule persons appointed as officers of United States); Patricia Kelmar, Note, *Binational Panels of the Canada-United States Free Trade Agreement in Action: The Constitutional Challenge Continues*, 27 GEO. WASH. J. INT'L L. & ECON. 173, 183–208 (1993) (arguing that CFTA dispute procedures might violate Article III by removing power from federal courts, and that procedures may also infringe on parties' Fifth Amendment rights by denying them fair hearing).

120. *See* Patricia Kelmar, Note, *Binational Panels of the Canada-United States Free Trade Agreement in Action: The Constitutional Challenge Continues*, 27 GEO. WASH. J. INT'L L. & ECON. 173, 190–;95 (1993) (suggesting that removal of panel disputes from

The CIT was established in 1980 as an Article III court with specialized jurisdiction and expertise in trade matters.[121] It was intended to give litigants the benefit of adjudication of trade matters by life-tenured judges, free from political pressure.[122] While the CIT will continue to exercise jurisdiction over antidumping and countervailing duty cases involving non-NAFTA parties, the binational panel system may be viewed as a de facto transfer of a portion of the CIT's jurisdiction to the panels. By effectively forcing litigants to forego their right to an Article III forum at the election of the opposing party, the binational panel system may be irreconcilable with Article III.

Regardless of the courts' ultimate answer to this question, it seems clear that the long-term effect of binational panel review will be to diminish the importance of the CIT and the Federal Circuit in interpreting United States trade law. From the perspective of the CIT, the aggregate effect of the panel system may be to diminish the precedential value of its decisions, because CIT decisions will be subject to potentially inconsistent or incorrect application by nonjudicial binational panels. Without the possibility of appellate review, there is no mechanism to correct panel decisions that misinterpret United States law. Thus, as the CIT addresses fewer cases from the NAFTA parties, this shared jurisdictional arrangement is likely to tilt adjudicatory power strongly in favor of the binational panels.

Another potential constitutional argument against the panel system focuses on the appointment of panelists. Under the Appointments Clause, as interpreted by the Supreme Court in *Buckley v. Valeo*,[123] individuals who exercise "significant authority pursuant to the laws of the United States" must be appointed by the President,

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federal courts threatens dual purpose of Article III courts—to preserve separation of powers and judicial impartiality); *see also* Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L L.J. 141, 162-68 (1994) (arguing that binational panels, rather than serving judiciary, encroach upon judicial powers granted to Article III courts and represent "a bold assault . . . designed to affect substantive change in legal interpretation").

121. *See* Edward D. Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. XIII, XIII–XV (West Supp. 1994) (stating that CIT was established to review cases affecting international trade).

122. *See id.* (noting purposes and jurisdiction of CIT).

123. 424 U.S. 1 (1976).

with confirmation by the Senate.[124] Since at least three members of each panel are foreign, and the American members are not appointed by the President,[125] it follows that the binational panel system does not comply with the Appointments Clause.

There are, however, some strong counter-arguments on this issue. First, the Appointments Clause may not apply to binational panels, either because they act pursuant to international law, such as the NAFTA treaty,[126] or because the panel process is analogous to international arbitration, which is outside the scope of the appointments process.[127] In addition, United States panelists may qualify as "inferior officers" who need not be appointed by the President.[128]

Other constitutional arguments focus on the Due Process Clause of the Constitution. Some have suggested that by steering litigants into a non-Article III forum against their will, the binational panel system violates litigants' due process rights.[129] This argument equates the denial of a hearing before the CIT, as well as the lack of appellate review of panel decisions, with a constitutionally protected property interest.[130]

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124. *See Buckley*, 424 U.S. at 126 (discussing effect of Appointments Clause).

125. *See* NAFTA, *supra* note 2, ch. 19, annex 1901.2(2), (3), 32 I.L.M. at 687 (noting that panels are composed of five members, with each nation choosing two members from roster of potential panelists and fifth panelist agreed upon by both countries or chosen by lot from roster if unable to agree). Each party also may assert four peremptory challenges. *Id.*

126. *See* William J. Davey, *The Appointments Clause and International Dispute Settlement Mechanisms: A False Conflict*, 49 WASH. & LEE. L. REV. 1315, 1316–17 (1992) (stating that panel authority is derived "exclusively from the Free Trade Agreement itself," rather than laws of United States).

127. *See* Harold H. Bruff, *Can* Buckley *Clear Customs?*, 49 WASH. & LEE L. REV. 1309, 1312–13 (1992) (describing how extension of Appointments Clause to international arbitration is inherently inconsistent with settlement goal of arbitration).

128. *See* Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455, 1487–88 (1992) (discussing characteristics, such as limited power, which link panelists to inferior officers); William J. Davey, *The Appointments Clause and International Dispute Settlement Mechanisms: A False Conflict*, 49 WASH. & LEE L. REV. 1315, 1320–21 (1992) (arguing that panelists meet criteria for being considered inferior officers).

129. *See* Plaintiff's First Amended Petition at 12–13, Coalition for Fair Lumber Imports v. United States, No. 94-1627 (D.C. Cir. filed Sept. 14, 1994) (alleging that binational proceeding and resulting decisions led to denial of due process).

130. *See* Patricia Kelmar, Note, *Binational Panels of the Canada-United States Free Trade Agreement in Action: The Constitutional Challenge Continues*, 27 GEO. WASH. J. INT'L L. & ECON. 173, 204–06 (1993) (arguing that one's right, ability, and expectation to

B. *Obstacles to Constitutional Challenges*

Regardless of the correct answers to these constitutional questions, a troubling aspect of the NAFTA as implemented in the United States is the method by which the panel system may be challenged in United States courts. The remainder of this section addresses the obstacles that make judicial review of the constitutional questions surrounding binational panels unlikely and, if it occurs, possibly ineffective.

While panel decisions are final and binding under both the CFTA and the NAFTA, the United States legislation implementing both treaties provides for constitutional challenges to the binational panel process.[131] Such challenges must be filed in the Court of Appeals for the District of Columbia Circuit within thirty days of the panel decision at issue.[132] The District of Columbia Circuit decision may be appealed within ten days to the Supreme Court.[133] Despite the availability of judicial review, only two cases have challenged the constitutionality of the panel process,[134] and neither of these cases has led to a decision on the merits. As discussed below, the small number of challenges may be due to legal barriers that discourage parties from seeking judicial review.

United States law creates a strong financial disincentive to challenging the panel process. A provision of the CFTA and NAFTA implementing legislation requires the party filing a constitutional challenge to pay the opponent's litigation costs if the challenge is unsuccessful.[135] While the court has discretion not to award attor-

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trade fairly between countries constitutes property interest deserving of constitutional protection).

131. 19 U.S.C. § 1516a(g)(4)(A) (1994).

132. *Id.* § 1516a(g)(4)(C).

133. *See id.* § 1516a(g)(4)(H) (noting that review is by direct appeal, as opposed to writ of certiorari, to Supreme Court).

134. *See* Coalition for Fair Lumber Imports v. United States, No. 94-1627 (D.C. Cir. filed Sept. 14, 1994) (challenging panel decision, but settling before court issued any decision on merits); National Council for Indus. Defense, Inc. v. United States, 827 F. Supp. 794, 800 (D.D.C. 1993) (dismissing nonprofit agency's claim that CFTA is unconstitutional for lack of subject matter jurisdiction).

135. *See* 19 U.S.C. § 1516a(g)(4)(F)(ii) (1994) (stating that prevailing party in constitutional challenge to binational panel review shall be awarded fees and expenses unless court finds that claim was "substantially justified or that special circumstances make an award unjust").

ney's fees, this "loser pays" rule is likely to be a strong deterrent to seeking judicial review.

The executive and legislative branches have combined to erect a further barrier to constitutional review. Together they have blunted the practical value of judicial review by assuring that the underlying panel decision will continue to be binding, at least in the case under review. First, Congress passed the NAFTA implementing legislation, which authorizes the President to accept any panel or ECC decision on behalf of the United States as a party to any binational proceeding.[136] Next, in an action not reversed by his successors, President Reagan issued Executive Order 12,662, which states that the President "accepts, as a whole, all decisions of binational panels and extraordinary challenge committees."[137] The President's acceptance of a panel decision is valid even if the decision has been declared unconstitutional by a United States court.[138] Moreover, the President may direct the Commerce Department to take action consistent with the panel decision.[139] Neither the President's actions, nor the agency's action at the direction of the President, are subject to judicial review.[140]

To a party contemplating a constitutional challenge, Executive Order 12,662 must have a significant chilling effect. If the President has already accepted the decision a party wishes to challenge, the only incentive for seeking judicial review would be the possible effect of a favorable judicial decision on the future of the panel process as a whole. A decision by the District of Columbia Circuit declaring any aspect of the panel process unconstitutional may, for example, prompt a renegotiation of the treaty. However, the result in the underlying case would not change.

Aside from its effect on the parties, the Executive Order itself may violate separation of powers principles. The practical effect of Executive Order 12,662 may be to undermine the precedential effect of any judicial opinion about the constitutionality of binational panel review. At a minimum, the combined effect of the implementing legislation and the Executive Order is to reduce such judi-

136. *See id.* § 1516a(g)(7)(B) (establishing that President may accept decisions that are held unconstitutional).

137. Exec. Order No. 12,662, 3 C.F.R. 624 (1989), *reprinted in* 19 U.S.C. § 2112 (1994).

138. 19 U.S.C. § 1516a(g)(7)(B) (1994).

139. *Id.*

140. *Id.*

cial opinions to the status of unenforceable advisory opinions. Recent Supreme Court decisions suggest that it may violate separation of powers principles for Congress to grant federal courts jurisdiction, but at the same time limit the courts' authority to issue binding decisions.[141] Executive Order 12,662, which appears prospectively to limit the effect of future judicial review of the binational panel process, may raise the same constitutional concerns.

VI. JUDGES AND THE WORLD TRADE ORGANIZATION

In addition to the problems inherent in the binational panel process, a recent congressional proposal raises similar practical and constitutional questions concerning the relationship between the federal courts and nonjudicial trade dispute resolution. The effort to recruit judges to serve on binational trade dispute panels has now moved beyond the CFTA and the NAFTA. The creation of the World Trade Organization (WTO)[142] in 1994 has resulted in a new proposal to involve Article III judges in trade dispute resolution—this time not as panel members, but instead as "commissioners" who would review panel decisions at the behest of Congress.

Under the WTO regime, the trade dispute resolution system created by the General Agreement on Tariffs and Trade (GATT) has been strengthened to provide for binding decisions by WTO dispute settlement panels.[143] These panels, like NAFTA binational panels, are ad hoc groups of five panelists chosen from established rosters.[144] Decisions of WTO dispute settlement panels are not reviewable by national courts, but they may be appealed to a permanent WTO panel, the "Appellate Body."[145]

In an effort to blunt the effect of WTO panel decisions unfavorable to the United States, Senator Dole in early 1995 introduced the

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141. *See* Plaut v. Spendthrift Farms, Inc., 115 S. Ct. 1447, 1463 (1995) (holding that Congress cannot interfere with courts' authority to issue final judgments).

142. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1140, 1144 (establishing World Trade Organization) [hereinafter WTO Agreement].

143. *See id.* annex 2, art. 3, 33 I.L.M. at 1227–28 (outlining general provisions of dispute settlement system).

144. *See id.* annex 2, art. 8, 33 I.L.M. at 1231 (detailing procedures for composition of panels).

145. *See id.* annex 2, art. 17, 33 I.L.M. at 1236–37 (stating that appellate body report "shall be adopted by the [Dispute Settlement Body] and unconditionally accepted by the parties to the dispute").

WTO Dispute Settlement Review Commission Act, Senate Bill 16.[146] The bill would establish a commission of five sitting appellate judges, appointed by the President,[147] to review decisions by WTO dispute settlement panels that involve the United States.[148] In introducing Senate Bill 16, Senator Dole stated that its purpose is to avoid a "nightmare scenario" in which panelists motivated by national self-interest "abuse their role, and reach inappropriate results."[149] Focusing on the need for judges to correct aberrant WTO panel decisions, Senator Dole described the Review Commission's intended role:

> The Commission will be empowered to review every adverse decision produced by the WTO dispute settlement process. In cases where the dispute settlement panels adhered to the proper standard of review, and where they did not exceed or abuse their authority, no further action will be taken. But if a panel decision reaches an inappropriate result that amounts to abuse of its mandate, the Review Commission would transmit that determination to Congress. Any Members would then be permitted to introduce a privileged resolution requiring renegotiation of the WTO dispute settlement rules.[150]

In serving on the Review Commission, judges would be required to perform tasks far different from their usual judicial duties. Despite its judicial membership, the Commission's powers and its procedures would not resemble those of a court. For example, no litigants would appear before the Commission. Instead, the Commission would be required to review all WTO decisions that are "adverse" to the United States.[151] In addition, the United States Trade Representative would have the authority to require the Commission to review any decision of a WTO dispute settlement

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146. S. 16, 104th Cong., 1st Sess. (1995); *see* 141 CONG. REC. S177 (daily ed. Jan. 4, 1995) (statement of Sen. Dole) (stating that commission consisting of highly competent and impartial judges will protect against inappropriate panel decisions).

147. S. 16, § 3(b)(1).

148. *Id.* § 4.

149. 141 CONG. REC. S177 (daily ed. Jan. 4, 1995) (statement of Sen. Dole).

150. *Id.*

151. S. 16, § 4(a)(1)(A). An adverse decision is defined in the bill as one that "holds any law, regulation, or application thereof by a government agency to be inconsistent with international obligations under the Uruguay Round Agreement . . ., whether or not there are other elements of the decisions which favor arguments made by the United States." *Id.* § 8(2).

panel, whether or not the decision is adverse to the United States.[152]

The scope of the Commission's review authority would be quite broad. The Commission would determine whether a WTO panel "exceeded its authority," violated United States treaty rights, acted "arbitrarily or capriciously," engaged in "misconduct," or "demonstrably departed" from specified panel procedures.[153] Moreover, the Commission would determine whether a WTO panel decision "deviated from the applicable standard of review," under both United States trade law and the standards set forth in the GATT.[154] In addition, the Commission's work would not end with review of the WTO decision itself. If the Commission determined that a WTO panel had deviated from appropriate standards, the Commission would also be required to decide whether the panel's mistakes "materially affected the outcome" of the case.[155]

The proposed Review Commission procedure does not involve briefs and oral argument, but instead resembles the rulemaking process of an administrative agency. For example, "interested parties" could file "comments" with the Commission concerning WTO decisions to be reviewed.[156] The Commission could then hold hearings based on the record obtained either from the WTO itself or from United States agencies involved in the underlying case.[157] Furthermore, instead of issuing judicial decisions, the Commission would be required to report its decisions to the House Ways and Means Committee and the Senate Finance Committee.[158] Congress would use the Review Commission's decisions as the basis for potential resolutions requesting the President either to improve the WTO dispute settlement process, or to withdraw from the WTO altogether.[159]

The creation of a WTO Review Commission would require federal judges to play a role in trade disputes well outside their traditional Article III role. Unlike judicial participation in NAFTA

152. *Id.* § 4(a)(1)(B).
153. *Id.* § 4(a)(2).
154. *Id.*
155. S. 16, § 4(a)(3).
156. *Id.* § 5(b)(2).
157. *Id.* § 5(a).
158. *Id.* § 4(b)(2).
159. S. 16, § 6.

panels, which is voluntary, Senate Bill 16 would allow the President to appoint five court of appeals judges to five-year terms as commissioners.[160] Because the decisions subject to review are already binding on member states by the terms of the GATT treaty,[161] there would be no "case or controversy" for the Commission to decide in the Article III sense. The Commission's product would not be a decision on the merits of the parties' arguments in the underlying case. Rather, a Commission decision would be an evaluation of the WTO panel's procedures and legal reasoning, as measured against United States standards. While a Commission decision presumably would have some value for Congress, and may even lead the United States to withdraw from the WTO, the decision would not have any direct effect on the disputing parties.

Aside from the possibility that federal judges will be drawn into political debates concerning the desirability of United States participation in the WTO, Senate Bill 16 also raises separation of powers concerns. Because the Commission's decisions would not be directed to individual litigants, but rather to Congress, it seems clear that they would have no binding force. The decisions would be purely advisory; even Congress, the audience for the decisions, could choose to ignore them.

The advisory nature of Commission decisions seems contrary to the fundamental principle that judicial decisions should have binding and precedential value. An early Supreme Court case, as well as a very recent holding, prohibit not only the rendering of purely advisory opinions by Article III judges, but also the "revision" of judicial decisions by other branches of government.[162] In 1995, the Supreme Court in *Plaut v. Spendthrift Farms, Inc.*[163] reaffirmed the fundamental principle that the Constitution provides the Federal Judiciary with the power to decide cases conclusively, subject only to review by Article III courts.[164] *Plaut* involved a statute that pro-

160. *Id.* § 3(b)(1), (c)(1).

161. WTO Agreement, *supra* note 142, annex 2, art. 3, 33 I.L.M. at 1227–28.

162. *See* Plaut v. Spendthrift Farms, Inc., 115 S. Ct. 1447, 1453–56 (1995) (reviewing Framers' purposes for separation of legislative and judicial powers, and noting that Legislature cannot reverse judicial decisions once made); Hayburn's Case, 2 U.S. (2 Dall.) 409, 411–12 (1792) (finding that power of Congress to assign duties to federal judiciary is limited to assignment of judicial duties only, and concluding that Congress may not require judges to make decisions that are subject to review outside judiciary).

163. 115 S. Ct. 1447 (1995).

164. *Plaut*, 115 S. Ct. at 1453.

vided for the reinstatement, on plaintiff's motion, of certain securities fraud cases that were dismissed as untimely filed.[165]

Hayburn's Case,[166] a 1792 Supreme Court case referred to in *Plaut*, also illustrates the difficult separation of powers questions raised by statutes that purport to limit the effect of judicial decisions. In *Hayburn's Case*, the Court stated that the Constitution does not authorize review or revision of the judgments of federal courts by the executive or legislative branches.[167] *Hayburn's Case* involved the administration of a pension statute for disabled Revolutionary War veterans.[168] The statute essentially allowed the Secretary of War to reverse a circuit court's determination that an individual veteran was eligible for a pension.[169]

In separate opinions in *Hayburn's Case*, both Chief Justice Jay and Justice Cushing stated that "by the Constitution, neither the Secretary [of] War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court."[170] Similarly, Justices Wilson and Blair concluded that the "revision and control" of judicial judgments by the executive and legislative branches conflicts "with the independence of that judicial power which is vested in the courts."[171] Finally, Justice Iredell concluded that "no decision of

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165. *See id.* at 1463 (declaring statute unconstitutional because it required federal courts to reinstate final judgments that were entered prior to statute's enactment).

166. 2 U.S. (2 Dall.) 409 (1792).

167. *Hayburn's Case*, 2 U.S. (2 Dall.) at 410. *Hayburn's Case* itself became moot before the Supreme Court had occasion to address the constitutionality of the pension statute. *See id.* at 409–10 (noting that before Supreme Court rendered decision, Congress provided legislative relief for petitioners). Five of the six Justices, however, expressed their views on the statute in their capacity as circuit judges. Thus, *Hayburn's Case* actually is a collection of the opinions of six Justices who each reviewed the statute at issue. These opinions "have since been taken to reflect a proper understanding of the role of the Judiciary under the Constitution." Morrison v. Olson, 487 U.S. 654, 677 n.15 (1988).

168. *See Hayburn's Case*, 2 U.S. (2 Dall.) at 409 (stating that petitioner filed mandamus motion to verify pension eligibility).

169. Under that statute, the circuit courts were directed to examine pension applicants to determine the nature and degree of their disability, and to "transmit the result of their inquiry" to the Secretary of War if, "in their opinion, the applicant should be put on the pension list." Act of Mar. 23, 1792, ch. 11, 1 Stat. 243, 244 (repealed in part and amended in part by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324). The Secretary of War, in turn, was authorized to "withhold the name of such applicant from the pension list, and make report of the same to Congress," in any case in which he had "cause to suspect imposition or mistake." *Id.*

170. *Hayburn's Case*, 2 U.S. (2 Dall.) at 410.

171. *Id.* at 411.

any court of the United States can . . . be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested."[172] Justice Iredell further noted that the Constitution does not grant the federal courts the power to act in any manner that is not judicial in nature.[173]

The opinions in *Hayburn's Case* reflect two related Article III concerns. First, because the Constitution vests the judicial power exclusively in the federal courts, neither the executive branch nor Congress may act as a "court of errors" by reviewing the judgments of Article III courts.[174] Second, Article III precludes the federal courts themselves from carrying out "any duties, but such as are properly judicial."[175]

Like the statute at issue in *Hayburn's Case*, Senate Bill 16 would require the WTO Review Commission to make nonbinding recommendations to Congress. Moreover, the judicial power given to the courts by Article III includes the authority to find facts and determine the rights of the parties under the law,[176] duties the Review Commission would not perform. Therefore, Senate Bill 16 appears to require the courts to play a nonjudicial role in violation of separation of powers principles.[177]

The Review Commission bill also raises practical problems that prompted the Judicial Conference to oppose the bill. Testifying before the Senate Finance Committee on behalf of the Judicial Conference, Judge Stanley Harris of the United States District Court for the District of Columbia raised several concerns similar

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172. *Id.* at 413.

173. *Id.* at 412.

174. *See Hayburn's Case*, 2 U.S. (2 Dall.) at 410 (noting that Constitution divides government into three distinct branches, none of which may encroach upon the others).

175. *Id.*.

176. *See* U.S. CONST. art. III, § 2 (stating that "the Supreme Court shall have appellate jurisdiction, both as to law and fact").

177. *See Hayburn's Case*, 2 U.S. (2 Dall.) at 410 (finding that pension eligibility statute, which subjected circuit court determinations to suspension by Secretary of War or revision by Legislature, required judges to perform tasks that were "not judicial"). These principles have been reiterated by commentators and in recent cases. *See, e.g.*, Plaut v. Spendthrift Farms, Inc., 1 F.3d 1487, 1493 (6th Cir. 1993) (citing *Hayburn's Case* for principle that "Congress may not retroactively disturb final judgments of the Federal courts"), *aff'd*, 115 S. Ct. 1447 (1995); 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3529.1, at 301 (1984) (asserting that "[a] judicial declaration subject to discretionary suspension by another branch of government may easily be characterized as an advisory opinion").

to those the judiciary has raised in regard to judicial service on NAFTA panels.[178] Judge Harris cited the "drain of scarce judicial resources" that taking five appellate judges away from judicial duties would involve.[179] Moreover, in response to questions from the Senate, Judge Harris noted that few judges have expertise in trade law.[180] He suggested that retired judges might serve as commissioners, but admitted in response to a senator's question that the pool of retired judges willing to serve—let alone retired judges with trade expertise—is likely to be quite small.[181]

The proposed WTO Review Commission, like the call for judges to serve on NAFTA binational panels, is another attempt to involve Article III courts in the essentially political world of international trade dispute resolution. The use of judges—either as panelists or as the reviewers of decisions by nonjudge panelists—seems to be an effort to give credibility to controversial, quasi-judicial dispute-settlement bodies. Yet, it is clear that federal judges are not eager to engage in such service, and it is uncertain whether the Constitution even permits it.

VII. CONCLUSION

The ultimate goal of the binational panel system, as well as the proposed WTO Review Commission, is the equitable resolution of trade disputes. While these unique approaches to dispute resolution may help solve both foreign and domestic political problems, they may also be incompatible with the existing United States judicial process.

Binational panel review requires potential litigants to forego judicial review in Article III courts and to instead make their claims before ad hoc panels whose members do not enjoy the protections

178. *World Trade Organization Dispute Settlement Review Commission Act: Hearings on S. 16 Before the Senate Comm. on Finance*, 104th Cong., 1st Sess. 40–41 (1995) (statement of Stanley S. Harris, Judge, United States District Court for the District of Columbia, and Chairman, Committee on Intercircuit Assignments of the Judicial Conference, Washington, D.C.).

179. *Id.* at 40. In addition, Judge Harris questioned whether it is consistent with the Constitution to require Article III judges to "discharge duties other than exercising the judicial power of the United States." *Id.* at 41.

180. *Id.* at 79 (transcript of oral testimony of Stanley S. Harris, Judge, United States District Court for the District of Columbia, and Chairman, Committee on Intercircuit Assignments of the Judicial Conference, Washington, D.C.).

181. *Id.* at 78-79.

of judicial independence. The unreviewable nature of decisions of binational panels creates a significant risk that erroneous applications of United States trade law will not be corrected, and that inconsistent bodies of trade law will develop. Further, the binational panel system raises numerous constitutional issues that remain unresolved. These constitutional questions may be difficult to address due to the financial and legal barriers to judicial review.

The attempt to recruit federal judges to serve as panelists, while likely to be unsuccessful, also illustrates the inherent weaknesses of the binational panel system. It is ironic that a system designed to avoid the national courts may—if judges were to serve as panelists—involve federal judges reviewing the same cases that they could also review as Article III judges. More recent proposals to use appellate judges to review decisions by World Trade Organization panels illustrate the practical and constitutional problems in using judges in roles other than resolving "cases and controversies" as set forth in Article III of the Constitution. Thus, the concept of trade dispute resolution by either nonjudge panels or judicial advisory commissions presents difficult issues concerning the compatibility of these approaches with the United States judicial system.