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NAFTA/USMCA Dispute Settlement Mechanisms and the Constitution

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NAFTA/USMCA DISPUTE SETTLEMENT MECHANISMS AND THE CONSTITUTION

John S. Baker, Jr, Ph.D.*
with Lindsey Keiser**

INTRODUCTION	2
I. <i>The Dispute over Dispute Settlement Mechanisms</i>	4
A. The Conflict over Settling Conflicts.....	8
B. Canada’s Complaint	10
C. The Constitutional Issue of Federal Court Deference to Administrative Agency Action	13
D. Fixing What is Not Working	16
II. <i>The Constitutionality of Chapters 10 and 14</i>	19
A. Congress’ Failure to Focus on the Constitutionality of the DSMs in NAFTA	20
1. Constitutional Confusion Caused by Non- Treaty, Trade Agreements.....	21
2. NAFTA: More than a Simple Evolution from CUSFTA.....	24
B. Unresolved Constitutional Issues	26
1. Chapter 14 (Formerly Chapter 11).....	27
2. Separation of Powers and Binational Panels.....	28
a. Article II—The Appointments Clause	29
b. Article III: Withdrawing Jurisdiction from U.S. Courts.....	32
1) International versus Domestic Law.....	33
2) Exceptions to Article III.....	34
3) Exceptions to Article III Do Not Include Giving Jurisdiction to an International Body	36
III. <i>The Constitutional Tension Between Sovereignty and</i>	

<i>Harmonization of Trade Law</i>	38
A. How the Constitution Frees Commerce Among the States.....	40
B. NAFTA/USMCA and Harmonization: The Triumph of Hope over Sovereignty?	44
C. NAFTA/USMCA’s Significance for the Regional and Global Governance of Trade.....	47
D. The Rule of Law or The Rule of Rules?.....	50
CONCLUSION.....	53

INTRODUCTION

The United States, Canada, and Mexico have renegotiated the North American Free Trade Agreement (NAFTA). For a time, the three-party negotiations actually broke into bilateral negotiations, first between the U.S. and Mexico and then between the U.S. and Canada. Now that the three countries have reached a new agreement, it is incumbent upon Congress to inquire thoroughly into the dispute settlement mechanisms (DSMs) contained in the United States Mexico Canada Agreement (USMCA). Congress’ hearings held prior to approving NAFTA failed to consider serious constitutional questions, particularly about the DSMs and more generally about U.S. sovereignty. It is imperative that Congress not make the same mistake when considering approving the new USMCA.

The most important dispute in the renegotiation over NAFTA – at least as between Canada and the United States – was not about tariffs and trade barriers themselves, but about the mechanisms for resolving disputes under the agreement. NAFTA’s DSMs received minimal mention in the U.S. media, though Canadian media were much more attuned to the issue. Mexico apparently also opposed dismantling the dispute settlement mechanism,¹ but Mexico was

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¹Ana Swanson, *Here’s What Canada and Mexico will Hate about Trump’s NAFTA Plans*, THE WASHINGTON POST (July 18, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/07/18/heres-what-canada-and-mexico-will->

likely more concerned about matters related to the trade imbalance with the United States.² Trade between the U.S. and Canada has been more closely balanced—at least if you calculate both goods and services, rather than only goods.³

Indeed, the U.S. “Summary of Objectives for the NAFTA Renegotiation”⁴ mostly targeted issues with Mexico, according to some trade experts:

Overall, the U.S. Objectives reflect a tweaking of NAFTA rather than a full overhaul as Donald Trump had suggested as a Presidential candidate on the campaign trail. In many cases, the proposed changes echo the provisions of the Trans-Pacific Partnership (“TPP”) Further, the U.S. Objectives generally seem heavily tilted towards addressing perceived imbalances and issues regarding the U.S. trade relationship with Mexico. *Many of the provisions relate to*

hate-about-trumps-nafta-plans/?utm_term=.77beedb6ebcc; Dave Graham, *Mexico Congress Backs Motion Defending NAFTA Dispute Mechanism*, U.S. NEWS (July 26, 2017), <https://www.usnews.com/news/world/articles/2017-07-26/mexico-congress-backs-motion-defending-nafta-dispute-mechanism>.

² Joshua Partlow, *As NAFTA Talks Resume, Mexicans say Trump is Wrong to Focus on the Deficit*, THE WASHINGTON POST (Sept. 1, 2017), https://www.washingtonpost.com/world/the_americas/as-nafta-talks-resume-mexicans-say-trump-is-wrong-to-focus-on-the-deficit/2017/09/01/7a8f1294-8ccf-11e7-9c53-6a169beb0953_story.html?utm_term=.50f63a2fc716.

³ There is about a \$20.5 billion trade deficit with Canada in goods according to the Canadian government’s calculation, which is the basis for President Trump claiming that Canada runs a trade surplus with the United States. However, if trade in services is also included, then the U.S. ran a surplus of only \$2.8 billion. John Carney, *Trump’s Quarrel with Canada over Trade Numbers May Point Toward NAFTA Exit*, BREITBART (Mar. 15, 2018), <http://www.breitbart.com/big-government/2018/03/15/trumps-quarrel-with-canada-over-trade-numbers-may-point-toward-nafta-exit/>.

⁴ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATIONS (July 17, 2017) (updated Nov. 2017), available at <https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf>.

*matters in which there is already a great deal of coherence between the stated U.S. position and current Canadian law.*⁵

The United States Trade Representative (USTR) expressed dissatisfaction with NAFTA's DSMs. Yet, for the most part, the DSMs were retained in the USMCA. This paper contends that the unconstitutionality of the binational panel system for settling disputes should be more apparent by now than it was when they were first adopted as part of the Canada-U.S. Free Trade Agreement (CUSFTA) and, therefore, should have been rectified in the new USMCA.

NAFTA was not a treaty, but an executive-congressional agreement. This paper explains how the use of a trade agreement, rather than a treaty, complicates the constitutional analysis. It does not, however, directly consider the constitutionality of using a congressional-agreement rather than a treaty.⁶ Part I of this paper provides the background for the dispute over the dispute settlement processes. Next, Part II addresses the constitutionality of NAFTA's Chapters 11 and 19 dispute settlement mechanisms as they have been carried over into the USMCA. Finally, in Part III, the paper discusses whether the USMCA represents an advance of the Rule of Law or only a Rule of Rules.

I. The Dispute over Dispute Settlement Mechanisms

As between Canada and the U.S., the real stumbling block in the NAFTA renegotiations was not a substantive one. It concerned process and enforcement. When disagreements occur about how one country interprets or enforces the provisions of the agreement, including who will resolve the dispute and how the dispute is to be

⁵ John W. Boscarriol et al, *The Art of Trade: Knowing the US Position in NAFTA Renegotiations* (July 20, 2017), http://www.mccarthy.ca/article_detail.aspx?id=7371 (emphasis added).

⁶ This issue has already been discussed and written about. *See, e.g.*, John Yoo, *Law as Treaties: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001); Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801 (1995); Lawrence H. Tribe, *Taking Text and Structure Seriously, Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

handled, NAFTA contained three provisions for resolving those disputes – and the USMCA has largely incorporated those three provisions.

NAFTA's Chapters 11,⁷ 19,⁸ and 20⁹ included three distinct DSMs. The USTR favored changes for all three. Chapter 11 pro-

⁷ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. Chapter 11 of NAFTA established procedures for settling investment disputes. To bring a claim under Chapter 11, a party must show it has an investment in the territory of a NAFTA country against whom the claim is being brought, and the party has to renounce any recourse in domestic courts of the country against whom the claim is brought. NAFTA art. 1121. A Chapter 11 tribunal is made up of three arbitrators: one appointed by each of the disputing parties and one appointed by agreement of the disputing parties. NAFTA art. 1123. Any award made by the tribunal is binding on both the investor and the respondent party and is enforceable in domestic courts, but the awards under Chapter 11 are only binding between the disputing parties and with respect to the particular case. NAFTA art. 1136.

⁸ Chapter 19 sets out the dispute resolution process for anti-dumping and countervailing duties cases, allowing parties to request a binational panel review the case. Panels are comprised of five experts who are chosen from a roster of at least seventy-five people. Each party involved in the dispute selects two panelists either from the roster or someone who meets the criteria for roster members. *See* NAFTA Annex 1901.2. The fifth panelist is chosen by agreement of the parties. Chapter 19 panels are required to apply the standard of review of the country whose agency or law is being appealed. NAFTA art. 1904.3; NAFTA Annex 1911. Decisions by Chapter 19 panels cannot be appealed in domestic courts. An appeal is only available after the final decision has been issued if 1) a panelist has violated specific rules of conduct, 2) the panel seriously departed from a fundamental rule of procedure, or 3) the panel manifestly exceeded its powers, authority, or jurisdiction. NAFTA art. 1904.13; *see also* Donald McRae and John Siwiec, *NAFTA Dispute Settlement: Success or Failure?* (2010), available at <https://archivos.juridicas.unam.mx/www/bjv/libros/6/2904/21.pdf> (This form of appeal was a continuation of the “extraordinary challenge procedure in the Canada U.S. Free Trade Agreement). A finding of one of these does not entitle a party to appeal the decision in a domestic court; instead it would result in the creation of a new Chapter 19 panel.

⁹ Chapter 20 of NAFTA governs all disputes related to the interpretation and application of NAFTA. The resolution process under Chapter 20 first asks parties to attempt to arrive at a mutually satisfactory resolution through consultations. NAFTA art. 2006. If no resolution can be reached, a party may request a meeting of the Free Trade Commission. The Commission's sole role is to assist the parties in reaching an agreement; it will not rule on the dispute. NAFTA art. 2007. If still no resolution can be reached, a party may request arbitration by a five-member panel. Chapter 20 of NAFTA establishes that this five-member panel shall be

vided investor-state-dispute-settlement (ISDS) protection for investors from one country making investments in one of the other countries. These types of arbitration provisions, widely adopted since 1959,¹⁰ have been generally favored by business interests; opposed by the populist, left-wing interests;¹¹ and should be of concern to those protective of state interests. While NAFTA's ISDS did not appear to be a major focus of the Trump Administration, the USTR had expressed lack of support for its continuation.¹² In the USMCA, Chapter 11 has become Chapter 14. The dispute settlement mechanism of NAFTA's Chapter 11 has been retained as between Mexico

made up qualified panelists chosen from a roster of up to thirty individuals who have been appointed by consensus of the United States, Canada, and Mexico. NAFTA art. 2009. After the panel issues a final report, the parties are to agree on a resolution that conforms with the panel's recommendations. However, the findings of the panel are not binding, so the parties do not have to follow the exact recommendations of the panel. Marc Sher, *Chapter 20 Dispute Resolution Under NAFTA: Fact or Fiction*, 35 GEO. WASH. INT'L L. 10001 (2003).

¹⁰ David Singh Grewal, *Investor Protection, National Sovereignty, and the Rule of Law*, AMERICAN AFFAIRS (2018), <https://americanaffairsjournal.org/2018/02/investor-protection-national-sovereignty-rule-law/>.

¹¹ *Id.* (“While Bernie Sanders, Elizabeth Warren, and other left-wing critics have made opposition to ISDS a part of their criticism of neoliberal trade policies, Republicans have tended to waffle on the issue because of its perceived benefits to big business.”).

¹² Steven Trader & Caroline Simson, *Lighthizer Defends Skepticism of NAFTA Arbitration to GOP*, LAW360 (Mar. 21, 2018), <https://www.law360.com/articles/1024510/lighthizer-defends-skepticism-of-nafta-arbitration-to-gop> (Appearing in a Congressional hearing, U.S. Trade Representative Lighthizer suggested that in place of ISDS, “investors could invoke the state-to-state dispute resolution mechanism of NAFTA, or that they could incorporate arbitration provisions in their contracts”). *But see* OFFICE OF THE U.S. TRADE REPRESENTATIVE, FACT SHEET: INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) (2015), available at <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds> (last visited Apr. 11, 2018) (“For some critics there is a discomfort that ISDS provides an additional channel for investors to sue governments, including a belief that all disputes (even international law disputes) should be resolved in domestic courts. Others believe that ISDS could put strains on national treasuries or that ISDS cases are frivolous. *Based on our more than two decades of experience with ISDS under U.S. agreements, we do not share these views. We believe that providing a neutral international forum to resolve investment disputes under international law mitigates conflicts and protects our citizens.*”) (emphasis added).

and the United States;¹³ Canada, however, will be subject to the ISDS only for “legacy investments.”¹⁴

The most contentious DSM, however, is Chapter 10 (formerly Chapter 19 in NAFTA), which deals with anti-dumping (selling below cost or below the market price in the home or another country) and countervailing duties (imposing extra tariffs on subsidized, imported goods). The U.S. and Canada were literally at loggerheads as to the DSM that was formerly contained in Chapter 19.¹⁵ The language of NAFTA’s Chapter 19 was carried over almost verbatim to the USMCA Chapter 10 with a few new additions for digitizing filing and decisions. This paper focuses heavily on Chapter 10.

NAFTA’s Chapter 20, the state-to-state mechanism, was rarely invoked;¹⁶ but the USTR proposed that it be changed from a binding to a non-binding process.¹⁷ Suggesting breaking the binding character of the three DSMs, either through modification or elimination of the provisions, indicated concerns that the DSMs conflict with U.S. sovereignty. Chapter 20 is now Chapter 31 in the USMCA and the binding character was retained despite these concerns.¹⁸ This paper does not focus on the DSM in Chapter 31 (formerly Chapter 20) because it has not caused significant problems for the United States.

¹³ Agreement between the United States, the United Mexican States, and Canada, Nov. 30, 2018, *available at* <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter USMCA].

¹⁴ USMCA Annex 14-C. A legacy investment is: “an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement.”

¹⁵ Many of the AD/CVD cases between the United States and China have been about lumber. *See, e.g.*, Opinion and Order of the Extraordinary Challenge Committee, In the Matter of Certain Softwood Lumber Products from Canada 67, NAFTA Secretariat File No. ECC2004-1904-01USA (Aug. 10, 2005).

¹⁶ *See* McRae & Siwec, *supra* note 8, at 371–72.

¹⁷ *U.S. Proposes Non-Binding State-to-State Dispute Settlement Chapter in NAFTA*, WORLD TRADE ONLINE (Oct. 15, 2017), <https://insidetrade.com/trade/us-proposes-non-binding-state-state-dispute-settlement-chapter-nafta>

¹⁸ USMCA art. 31.

A. The Conflict over Settling Conflicts

Canada desperately wants to avoid American courts. USMCA's Chapter 10 - just like NAFTA's Chapter 19 - provides that protection. The DSM in Chapter 19 predated NAFTA, having been incorporated at the insistence of Canada in the prior Free Trade Agreement between the U.S. and Canada. Canada's prime minister at the time, Brian Mulroney, was willing to walk away from the Canada-U.S. Free Trade Agreement negotiations if the dispute settlement mechanism was not included.¹⁹ In the NAFTA re-negotiations, Canada insisted that the DSMs, in particular NAFTA's Chapter 19, were critical to its trade relations with the United States.²⁰ There was even speculation that dismantling the trade dispute settlement mechanisms might be a deal breaker for Canada.²¹ Among the trade *cognoscenti* in Canada, NAFTA'S Chapter 19 DSM has been considered its "Crown Jewel."²² As one Canadian expert put it, "That's why we sought a free trade agreement in the first place. It's the dispute resolution process, not low tariffs, that is the jewel in the NAFTA crown."²³

Opposition to NAFTA's Chapter 19 DSM came at least from some U.S. business interests.²⁴ Canada, however, prevailed, and in the end, the USMCA retained the language of NAFTA's Chapter 19 almost verbatim. In return, Canada apparently gave ground on dairy

¹⁹ Chris Fournier, *This Obscure NAFTA Chapter Could be Canada's Deal Breaker Again*, BLOOMBERG (July 24, 2017), <https://www.bloomberg.com/news/articles/2017-07-24/this-obscure-nafta-chapter-could-be-canada-s-deal-breaker-again>.

²⁰ David Ljunggen & Andrea Hopkins, *Canada Suggests it Could Quit NAFTA Talks over Dispute Mechanism*, REUTERS (Aug. 14, 2017), <https://www.reuters.com/article/us-usa-trade-nafta-canada/canada-suggests-it-could-quit-nafta-talks-over-dispute-mechanism-idUSKCN1AU1CK>.

²¹ Fournier, *supra* note 19.

²² Jesse Snyder, *The 'Crown Jewel' of NAFTA: Why Canada Must Fight to Retain Dispute Resolution Clause Despite Tough Talks*, FINANCIAL POST (Oct. 13, 2017), <http://business.financialpost.com/news/the-crown-jewel-of-nafta-why-canada-must-fight-to-retain-dispute-resolution-rule-despite-tough-talks>.

²³ *Id.* (quoting CIBC economist Avery Shenfield).

²⁴ *See, e.g.*, Zoltan van Heyningen, *Recent U.S. Supreme Court Decision Reinforces Doubts About Constitutionality of NAFTA Chapter 19 Panel System*, Coalition for Fair Lumber Imports (July 2, 2010), <https://www.news-wire.ca/news-releases/recent-us-supreme-court-decision-reinforces-doubts-about-constitutionality-of-nafta-chapter-19-panel-system-544592012.html>.

issues. That should have been a political win for the Trump Administration, but one that did not come home on election day in Wisconsin.²⁵

NAFTA's Chapter 11 ISDS was added due to concerns about Mexico's history of nationalization. As a result, however, the provision also applied as between Canada and the United States. This was the first time an ISDS provision became applicable as between two developed countries. Creative lawyers have attempted to use the situation against the U.S. and Canada, and although they have largely not been successful, these efforts pointed to a threat to U.S. and Canadian sovereignty.²⁶

The attempts to use Chapter 11 have involved situations where a final decision by a state court in the U.S. ends up being reviewed by a NAFTA ISDS panel.²⁷ State judges, in particular, have been

²⁵ Perhaps partly a result of the mixed response by Wisconsin farmers to the new USMCA, the GOP did not perform as well as hoped in Wisconsin in the November 2018 elections. See Hope Kirwan, *Wisconsin Farmers Weigh In On NAFTA Replacement*, WISCONSIN PUBLIC RADIO (Oct. 2, 2018), <https://www.wpr.org/wisconsin-farmers-weigh-nafta-replacement>; Monica Davey, *Tony Evers Wins Wisconsin Governor's Race, Scott Walker Concedes*, THE NEW YORK TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/us/elections-wisconsin-governor-evers-walker.html>.

²⁶ Riyaz Dattu & Sonja Pavic, *Canada Seeks to Reform NAFTA's Investor-State Dispute Settlement Chapter*, OSLER (Aug. 23, 2017), <https://www.osler.com/en/resources/cross-border/2017/canada-seeks-to-reform-nafta-s-investor-state-disp> ("When the dispute settlement provisions were introduced into NAFTA, it was expected that Mexico would be the country that would face the largest number of claims under Chapter 11. Instead, Canada has been the subject of the highest number of investor-state arbitration claims . . ."); Dan Healing, *NAFTA's Chapter 11 Dispute Mechanism Too Costly for Canada at \$314M, says Report*, CBC (Jan. 16, 2018), <http://www.cbc.ca/news/politics/chapter-11-report-ccpa-1.4489102> (reporting that Canada is sued more than twice as much as Mexico and the U.S.).

²⁷ See, e.g., *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003); *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002). See "Loewen" NAFTA Case: *Foreign Corporations Unhappy with Domestic Jury Awards in Private Contract Disputes Can Demand Bailout from Taxpayers*, PUBLIC CITIZEN, available at <https://www.citizen.org/sites/default/files/loewen-case-brief-final.pdf> (explaining the Loewen Group case series, in which the Mississippi Supreme Court made a final judgment

quite surprised and very concerned upon discovering that their decisions are reviewable by an international tribunal.²⁸ Though few in number, claims attempting to expand the reach of Chapter 11 have required interpretation by NAFTA's Commission. That Chapter 11 potentially could affect a state's legal system was clearly not considered by the Congress.²⁹ Chapter 11 raises constitutional questions about NAFTA's impact – and now USMCA's impact – on state and federal law, in particular judicial independence.³⁰

Chapter 11, thus, has presented a constitutional threat to judicial independence that should have been quite apparent. American corporate interests, however, clearly favor the ISDS, at least as to Mexico. That is reflected by a statement from Republican senators objecting to a statement by the USTR questioning whether ISDS should be continued in a renegotiated NAFTA.³¹

B. Canada's Complaint

The Canadian concern is directed at the "bias" of U.S. federal courts, namely in the Court of International Trade and the U.S. Court of Appeals for the Federal Circuit. The claim about federal courts being biased in civil litigation may shock many U.S. lawyers. Certainly, U.S. lawyers representing corporate defendants in civil litigation often complain that courts in certain states are biased in favor of plaintiffs. Aside from ideological bias among federal judges on constitutional matters, however, bias in federal civil litigation as between corporations would not seem to be a matter of major concern.

which was reviewed by a NAFTA panel, opening up the possibility that all decisions by U.S. Courts – even the Supreme Court – could be reviewed by and changed by a NAFTA panel).

²⁸ Adam Liptak, *Review of U.S. Rulings by NAFTA Tribunals Stirs Worries*, THE NEW YORK TIMES (Apr. 18, 2004), <http://www.nytimes.com/2004/04/18/us/review-of-us-rulings-by-nafta-tribunals-stirs-worries.html>.

²⁹ *See id.* (“‘When we debated NAFTA,’ Senator John Kerry of Massachusetts, the presumptive Democratic presidential nominee, said in 2002, ‘not a single word was uttered in discussing Chapter 11. Why? Because we didn’t know how this provision would play out. No one really knew just how high the stakes would get.’”).

³⁰ *See id.* (“‘This is the biggest threat to United States judicial independence that no one has heard of and even fewer people understand,’ said John D. Echeverria, a law professor at Georgetown University.”). *See also infra* sec. II.

³¹ Trader & Simson, *supra* note 12.

U.S. lawyers and judges, especially those who lecture around the world touting the federal judiciary, speak of our Supreme Court and the lower federal courts as the “crown jewel” of the U.S. Constitution and of bias-free adjudication.

Consider the Canadian perspective, however. In any suit against the U.S. Department of Commerce in the U.S. Court of International Trade (CIT), the odds are the U.S. will prevail. That result follows because the CIT is generally required to defer to the defendant-agency’s interpretation of the laws and rules as a result of Congress having delegated rule-making authority to the agency. While there are different deference doctrines, the main one used by U.S. federal courts, known as *Chevron* deference,³² must be applied by the CIT as well.

Mittal Canada v. United States,³³ a case lost by Canadian challengers, grudgingly explains the standard of review the CIT is forced to apply:

Mittal has filed a motion for judgment on the agency record under USCIT Rule 56.1Section 706 of Title 5 requires a reviewing court to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” 5 U.S.C. § 706(2)(A) (2000). In this case, the administrative action challenged by Mittal is the issuance of liquidation instructions directing Customs to assess antidumping duties at the deposit rate in effect at the time of entry, which was 8.11 percent for the entries at issue. *Normally, “[i]t is emphatically the province and duty of the judicial department to say what the law is,” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), but when Congress has cloaked an administrative agency with interpretive*

³² *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Another deference doctrine comes from *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (holding that an administrative agency’s interpretative rules deserve deference according to their persuasiveness).

³³ 461 F. Supp. 2d 1325 (Ct. Int’l Trade 2006).

*authority, the federal courts' authority is concomitantly reduced.*³⁴

The court went on to discuss the two types of deference involved in the case. First, the court gave the Department of Commerce deference under the *Chevron* doctrine, meaning that because Congress had delegated authority to Commerce, the court must follow the agency's interpretation of the statute as long as the interpretation is reasonable and not arbitrary.³⁵ Finding that it was a reasonable interpretation, the court deferred to the agency's interpretation.³⁶ The court also gave deference to the Department of Commerce for its interpretation of the agency's own ambiguous regulation. Under the *Seminole Rock/Auer* deference doctrine, U.S. courts will only overturn agency interpretations of their own regulations if the interpretation is plainly erroneous or inconsistent with the regulation.³⁷ Here, again, the court found that Commerce's interpretation was neither plainly erroneous nor inconsistent with the regulation, so it deferred to the Department of Commerce.³⁸ To Canada, it must appear that the result is foreordained by a process biased against it.

Federal AD/CVD litigation is biased not only against Canadian and Mexican parties, however. The "bias" extends, as well, to American parties challenging decisions of the Commerce Department and the International Trade Commission. In the case of *Ford Motor Co. v. United States Dept. of Homeland Security*,³⁹ for example, Ford challenged a decision by the Department of Customs and Border Patrol in the Court of International Trade, but the Court of International Trade found that the agency decision was not reviewable in the particular instance.⁴⁰ The bias of deference doctrines in trade litigation favors the U.S. federal government, and works against private parties, regardless of whether they are domestic or foreign.

³⁴ *Id.* at 1328 (emphasis added).

³⁵ *Id.* at 1328–29.

³⁶ *Id.* at 1332.

³⁷ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997).

³⁸ *Mittal*, 461 F. Supp. 2d at 1339.

³⁹ 716 F. Supp. 2d 1301 (Ct. Int'l Trade 2010).

⁴⁰ *Id.*

Moreover, as U.S. lawyers know well, deference doctrines apply generally in litigation challenging federal agency action. The doctrines do not derive from, or peculiarly relate to, trade dispute litigation. Deference to administrative agencies rests on the dubious assumption that agencies have expertise which justifies Congress giving them great discretion, to which federal courts should defer.⁴¹

That the deference doctrines apply generally to all challenges to agency actions is small comfort to Canadian and Mexican parties in trade disputes. Naturally, foreign parties will believe U.S. agency action favors U.S. businesses. After all, in the absence of independent judges, the general tendency of all governments will be to favor their own businesses. Also, in both trade and other matters addressed by federal agencies, U.S. corporations do have the advantage of being generally more involved in the administrative processes which produce the administrative decisions.⁴²

C. The Constitutional Issue of Federal Court Deference to Administrative Agency Action

The various types of judicial deference to agency action are dictated neither by the Constitution, nor the Administrative Procedure

⁴¹ Compare *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”), with JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 416–19 (2002) (arguing that judicial deference of agency decisions may amount to post hoc rationalizations of policy preferences).

⁴² Potential influence by U.S. corporations differs as between the Department of Commerce and the International Trade Commission. The Department of Commerce’s role is more political in that it formulates and executes trade policies reflecting the views of the current President. As evident in the change from President Obama to President Trump, those policy preferences can shift quickly and dramatically. Nevertheless, the Department of Commerce does employ methods to establish the reasonableness of its decisions. Unlike the Department of Commerce, the U.S. International Trade Commission (USITC) is an “independent” agency. Moreover, it differs from other agencies by having an equal number of Republican and Democrat commissioners. Other federal independent agencies typically have a membership split in favor of the President’s party. As a result, the USITC operates in a more balanced manner. See UNITED STATES INTERNATIONAL TRADE COMMISSION, https://www.usitc.gov/press_room/about_usitc.htm (last visited Dec. 12, 2017).

Act.⁴³ As evident from *Chevron*, they are judicially-created doctrines not based on the Administrative Procedure Act.⁴⁴ These deference doctrines raise much more fundamental questions with far-reaching consequences beyond the AD/CVD DSM.

Professor Philip Hamburger's 2014 opus, *Is Administrative Law Unlawful?* challenges the long-held, foundational assumptions about Administrative Law. His work begins the chapter on "Deference" by describing how England's James I demanded that the law courts defer to prerogative legislation. "The royal claim for deference to prerogative legislation rested on the king's claim of absolute power."⁴⁵ Hamburger explains how America's modern Administrative State makes the same "demands for deference to administrative power."⁴⁶

Without the several deference doctrines applicable in the federal courts, those challenging the interpretation and application of trade rules in the CIT and the Federal Circuit would stand on equal footing with the U.S. government. It is rule deference, fact deference, and interpretation deference, in addition to deference to administrative orders and warrants, that biases the process.⁴⁷

Professor Hamburger devastates long-held assumptions among American lawyers, professors, and judges about the Administrative law.⁴⁸ He makes a compelling case that federal courts have abdicated their constitutional duty to interpret the law.⁴⁹ The process of appeals from administrative agencies "often has reduced the courts to extensions of the administrative state, nearly making the court proceedings yet another layer of administrative hearings."⁵⁰ Ham-

⁴³ Administrative Procedure Act, 5 U.S.C. §§ 500–96 (2012).

⁴⁴ See Richard O. Faulk, 'Chevron' Deference Conflicts with the Administrative Procedure Act, WLF LEGAL PULSE (Sept. 18, 2015). It does not appear from the language of the Administrative Procedure Act that the Court is required to give deference, and the Court's decision in *Chevron* does not mention the Administrative Procedure Act.

⁴⁵ PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 285 (2014).

⁴⁶ *Id.*

⁴⁷ *Id.* at 312, 319.

⁴⁸ David E. Bernstein, *Is Administrative Law Unlawful?*, 33 LAW & HIST. REV. 759, 759–60 (2015) (reviewing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014)).

⁴⁹ Hamburger, *supra* note 45, at 283–322.

⁵⁰ *Id.* at 303.

burger is convinced – and is convincing – that eventually fundamental constitutional principles about the role of judges will require reconsideration of Supreme Court precedents repeatedly reaffirming agency-deference.⁵¹ The importance of Hamburger’s work is to lay the intellectual foundation for the re-working of constitutional precedents to reject the judicial deference to administrative agencies.⁵²

Justice Gorsuch is the person most likely to lead a reworking of the Court’s precedents related to judicial deference to administrative agencies. During his confirmation process, students of the Court quickly realized that – unlike his predecessor, Justice Scalia – Justice Gorsuch strongly believes that the deference doctrines are unconstitutional.⁵³ Of course, the change in one vote on the Court on this issue will not immediately mean that the deference doctrine will be de-throned anytime soon. While Justice Thomas has long expressed the opinion that the deference doctrine is unconstitutional,⁵⁴ the necessary additional three votes for a change are lacking at this time.

A fundamental change in the Supreme Court’s jurisprudence on judicial deference to administrative agencies could take years to occur. Congress, in considering whether to approve the new USMCA, however, faces the immediate, practical problem of determining how to deal with the binational dispute-settlement mechanism (DSM).

⁵¹ *Id.* at 486–92.

⁵² *Id.* at 498 (“Once it is clear how administrative power revives absolute power, and how this power conflicts with the nature of American law, liberty, and society, one can dig into the details of how it violates the Constitution.”).

⁵³ Allan Smith, *Trump’s Supreme Court Nominee had his first real day of grilling - and there’s more to come*, BUSINESS INSIDER (Mar. 22, 2017), <http://www.businessinsider.com/neil-gorsuch-senate-confirmation-hearing-2017-3>.

⁵⁴ *See, e.g.,* Michigan v. EPA, 135 S. Ct. 2699 (2015) (Thomas, J., concurring) (“The ‘judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.’ . . . *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is ‘the best reading of an ambiguous statute’ in favor of an agency’s construction. It thus wrests from Courts the ultimate interpretative authority to ‘say what the law is’, and hands it over to the Executive.) (internal citations removed).

The DSM in Chapter 10 (formerly Chapter 19) is a constitutionally questionable vehicle for getting around a constitutionally questionable practice of judicial deference to administrative agencies

D. Fixing What is Not Working

Even if the agency-deference doctrine is constitutional and even if it continues as to other administrative agencies, it is not working in the realm of AD/CVD cases. The Supreme Court's deference doctrines supposedly reflect respect for the intention of Congress in assigning rule-making power to a particular agency⁵⁵ and the expertise of the agencies.⁵⁶

Congress's intention expressed in NAFTA was that the binational panels apply agency deference.⁵⁷ In practice, however, that did not happen. The binational panels may pay "lip service" to the deference requirement, without following it.⁵⁸ Once a binational panel makes a decision, no possibility exists for having U.S. Supreme Court review.⁵⁹ As to binational panels, the Supreme Court cannot enforce *Chevron* or other forms of agency deference. This remains true in the USMCA.

Binational dispute panels resolve most disputes covered by USMCA.⁶⁰ Even if a U.S. party first files in the CIT, another party

⁵⁵ See, e.g., *Mittal*, 461 F. Supp. 2d 1325, 1328 (Ct. Int'l Trade 2006) ("[W]hen Congress has cloaked an administrative agency with interpretive authority, the federal courts' authority is concomitantly reduced.").

⁵⁶ See, e.g., *id.* at 1329 ("As a general matter, Commerce is the 'master' of antidumping law, and where its rules and regulations implement a statutory provision or scheme, it is entitled to considerable deference.").

⁵⁷ See Patrick Macrory, *NAFTA Chapter 19: A Successful Experiment in International Trade Dispute Resolution*, THE BORDER PAPERS, 4 (Sept. 2002), <http://www.worldtradelaw.net/articles/macrorychapter19.pdf.download> (explaining that to prevent the binational panels from creating their own body of law, the U.S. negotiated to have the panels apply the domestic law of the country where the decision under challenge was made).

⁵⁸ See Juscelino F. Colares & John W. Bohn, *NAFTA's Double Standards of Review*, 42 WAKE FOREST L. REV. 199, 199 (2007) (arguing that NAFTA binational panels have shown great deference to Canadian agency determinations, but have not shown the same deference to applying the standard of review of U.S. law)

⁵⁹ See NAFTA, *supra* note 7, at art. 1904, § 10.

⁶⁰ USMCA art. 10; see Macrory, *supra* note 57, at 6 ("The Chapter 19 procedures have been used extensively, both under the FTA and under the NAFTA.

can successfully request that the case be heard by a binational panel.⁶¹ USMCA's binational panels – like NAFTA's binational panels – will force U.S. parties into a process that deprives them of their access to U.S. courts and U.S. law.⁶²

NAFTA required binational panels to apply the law of the country applicable to the dispute,⁶³ but they did not necessarily do so. The process lacks consistency because there is no “supreme court” to resolve conflicts among decisions. In place of appeal to a national court, NAFTA, and now USMCA, provides the possibility for filing an Extraordinary Challenge,⁶⁴ which is rarely invoked. Retired U.S. Court of Appeals Judge Malcolm Wilkey, writing in dissent in a rare Extraordinary Challenge, has questioned the legitimacy of the process:

If this substitute appellate system had not been intended to achieve similar results in applying U.S. law, the United States would never have agreed to it. The United States never contemplated that United States law would be changed by a binational body. If

Indeed, almost every appeal of a US decision involving Canadian or Mexican imports has been taken to a Chapter 19 panel rather than to the CIT.”).

⁶¹ *Bhullar v. United States*, 259 F. Supp. 2d 1332 (Ct. Int'l Trade 2003) (holding that no statutory exception applied to the exclusive jurisdiction of the NAFTA binational panels, so because Canada had requested binational panel review of the contested determinations, the CIT no longer had jurisdiction). This decision was upheld on review. *Bhullar v. United States*, 93 Fed. Appx 218 (Fed. Cir. 2004) (holding that “the law ousts jurisdiction in the Court of International Trade to review a final antidumping/countervailing duty order when binational review proceedings have been instituted under NAFTA”). *See also* *Mitsubishi Elec. Indus. Canada, Inc. v. Brown*, 917 F. Supp. 836, 838 (Ct. Int'l Trade 1996) (finding that once a binational panel review has been requested, the binational panel has exclusive jurisdiction).

⁶² *See* J. Todd Applegate, *Chapter 19 of the NAFTA: Are Binational Panels Constitutional?*, 3 *LAW & BUS. REV. AM.* 129, 141–44 (1997).

⁶³ NAFTA, *supra* note 7, at art. 1904.3; NAFTA, *supra* note 7, at Annex 1911; USMCA, *supra* note 13, at art. 10.10.

⁶⁴ *See id.* at art. 1904.11-1904.13; USMCA Annex 10-B.3.

the substitute appellate system does not achieve similar results in applying U.S. law, it may not be long continued.⁶⁵

Ideally, a renegotiated NAFTA would have satisfied both the concerns of Canada about bias in any settlement process and of Congress that U.S. law be followed, where applicable. At least one article suggested making the decisions of binational panels reviewable by U.S. federal courts as are rulings by federal agencies.⁶⁶ That, however, would have only compounded the structural constitutional problems raised by Professor Hamburger. Chapter 10 binational panels are not U.S. bodies. Bringing the decisions of non-U.S. panels under the jurisdiction of the federal courts raises even more Article III issues than the NAFTA binational panels already did and would effectively extend the expansion of the Administrative State.

NAFTA “suspended” the Canada-U.S. Free Trade Agreement of 1987 (CUSFTA).⁶⁷ Some in Canada had argued that its Free Trade Agreement with the U.S. would once again become effective if NAFTA had simply been terminated.⁶⁸ Those who actually thought this likely had an unwarranted belief.⁶⁹ Nevertheless, such a belief reflected the importance that Canada places on preserving the DSM created in the CUSFTA and continued in NAFTA’s Chapter 19.

To resolve the conflict over NAFTA’s Chapter 19, the U.S. could have agreed to eliminate the deference doctrines in AD/CVD cases brought under NAFTA in U.S. courts. Such a change should

⁶⁵ *Softwood Lumber Products from Canada*, ECC-94-1904-01USA (1994) (Wilkey, J., dissenting).

⁶⁶ *See, e.g., Applegate*, *supra* note 62, at 151 (suggesting that although the Supreme Court has not held that the availability of review by an Article III Court is required in every case, the Supreme Court’s positive view of appellate review lends “support to the position that the lack of such appellate review for binational panel decisions” presents constitutional problems).

⁶⁷ *See* Mark Warner, *Mark Warner Interviewed about the Fate of the Canada-U.S. FTA if U.S. Withdraws from NAFTA*, MAAW LAW (Aug. 14, 2016), <http://www.maawlaw.com/tag/canada-u-s-fta/> (Canada considers the CUSFTA to be suspended rather than terminated).

⁶⁸ Alexander Panetta, *If NAFTA dies, the old Canada-U.S. Free Trade Agreement would live on, right? Not so fast Canada*, FINANCIAL POST (Oct. 19, 2017), <http://business.financialpost.com/news/economy/if-nafta-dies-old-canada-u-s-fta-would-live-on-right-not-so-fast-canada>.

⁶⁹ *Id.*

have satisfied any legitimate objection to litigating in U.S. federal courts. Without such a change, Canada understandably was able to insist on using binational panels, free from the American courts. Nevertheless, as explained below,⁷⁰ the U.S. Constitution has included alienage jurisdiction in federal courts from the outset precisely in order to assure foreigners of a fair judicial process in U.S. courts.

II. *The Constitutionality of Chapters 10 and 14*

The Congress that enacted NAFTA ignored the fact that Chapter 19 was sold as CUSFTA's "interim" solution that would allow more time to resolve substantive AD/CVD matters.⁷¹ Nevertheless, Chapter 19, with minor changes, was carried over to NAFTA with reliance on its approval as CUSFTA's Chapter 19.⁷² Now Chapter 19 has been carried over into the USMCA as Chapter 10 with only a few changes to update for the digital age.

NAFTA's ISDS in Chapter 11 effectively subjected state legislation and final state court judgments to review under Chapter 11's ISDS. This review process has proven to be a threat to judicial independence.⁷³ When asked about a particular ISDS adjudication which exemplified the threat, a former U.S. senator who had voted for NAFTA simply pleaded ignorance: "[W]e didn't know how this

⁷⁰ *Infra* sec. III(A).

⁷¹ See United States-Canada Free Trade Agreement Hearing Before the Senate Committee on the Judiciary on the Constitutionality of Establishing a Binational Panel to Resolve Disputes in Antidumping and Countervailing Duty Cases, 100th Cong., 2d Sess. 96 (1988) (prepared statement by Ms. Jean Anderson, Chief Counsel, U.S. Dept. Of Commerce), at 71 [hereinafter Anderson Senate CUSFTA Judiciary Hearing Statement]

[T]he binational panel system is not, and is not intended to be, a model for future agreements between the United States and its other trading partners. Its workability stems from the similarity in the U.S. and Canadian legal systems. With that shared legal tradition as a basis, the panel procedure is simply an interim solution to a complex issue in an historic agreement with our largest trading partner.

⁷² See, e.g., Zachary Jacobs, *Note: One Thing is Not Like the Other: U.S. Participation in International Tribunals and Why Chapter Nineteen of NAFTA Does Not Fit*, 45 COLUM. J. TRANSNAT'L L. 868, 897 (2007) (citing to Congressional hearings on CUSFTA even when discussing Congress' doubts about the constitutionality of NAFTA).

⁷³ Liptak, *supra* note 28.

provision would play out.”⁷⁴ Had Congress inquired, any number of knowledgeable people could have explained that Chapter 11 “would play out” as a threat to judicial independence.

In the new USMCA, going forward, Canadian companies will neither be subject to, nor be able to use offensively, Chapter 14 (formerly Chapter 11). The United States has maintained the ISDS dispute settlement mechanism with regards to Mexico, presumably because American companies fear that Mexico’s new government may revive the country’s historic practice of nationalization.⁷⁵

A. Congress’ Failure to Focus on the Constitutionality of the DSMs in NAFTA

Prior to the vote on NAFTA, the House held a total of 43 committee and subcommittee hearings. The Senate held 17 committee and subcommittee hearings. Out of this total of 61 hearings, the only judiciary committee hearing in either House was one by the House Judiciary Subcommittee on International Law, Immigration, and Refugees. It addressed only immigration-related issues. A hearing in the House Ways and Means Committee briefly touched on the general issue of whether NAFTA was giving away U.S. sovereignty.⁷⁶

Congress’ hearings on NAFTA, clearly, did not address the constitutionality of Chapter 19. As carried over to Chapter 19 of NAFTA, the binational panel system was essentially the same as the dispute mechanism in the CUSFTA with a few changes.⁷⁷ The relevant committees apparently assumed they had adequately addressed

⁷⁴ *Id.*

⁷⁵ See Emily Pickrell, *Mexico’s New President Promises More Nationalistic Energy Approach*, BLOOMBERG (July 2, 2018), <https://www.bna.com/mexicos-new-president-n73014477039/>.

⁷⁶ North American Free Trade Agreement (NAFTA) and Supplemental Agreements to the NAFTA: Hearing before the House Comm. On Ways and Means and its Subcomm. On Trade, 103d Cong., 1st Sess. (1993).

⁷⁷ See Barbara Bucholtz, *Sawing Off the Third Branch: Precluding Judicial Review of Anti-Dumping and Countervailing Duty Assessments under Free Trade Agreements*, 19 MD. J. INT’L L. 175, 192–193 (1995) (explaining that NAFTA replicates the FTA except in three ways: (1) the parties had to devise a “harmonized system” within seven years, (2) parties have standing to assert that another party’s domestic law interferes with the NAFTA panel review, (3) failure to apply the appropriate standard of review is an explicit ground for an Extraordinary Challenge).

the constitutional issues when Congress considered the free trade agreement between Canada and the U.S. (CUSFTA).⁷⁸ Thus, Congress' hearings on carrying-over Chapter 19 into NAFTA focused less on the legal issues and more on the human rights, environmental, labor, and economic issues that arose with the addition of Mexico as part of the trade agreement.⁷⁹

Chapter 19 in CUSFTA was originally justified on grounds that clearly no longer applied once Mexico was included. The argument in CUSFTA was that Canada and the U.S. have similar legal systems based on the Common Law.⁸⁰ NAFTA added Mexico with a very different legal background. Moreover, despite the similarities in law between the U.S. and Canada, legal disputes between Canada and the U.S. have become much more frequent than originally anticipated.⁸¹ Changes and actual experience since CUSFTA created binational panels should make it plain that Congress cannot responsibly ignore the DSMs in USMCA.

1. Constitutional Confusion Caused by Non-Treaty, Trade Agreements

Had NAFTA been presented as a treaty, whether or not CUSFTA had been a treaty, the congressional process would have followed a different route. Assuming that the Senate would still have approved NAFTA, then the legislative process of implementing it as a new agreement would have followed.

⁷⁸ *U.S.-Canada Free-Trade Agreement: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 2 (1988) (Rep. Kastenmeier) [hereafter Kastenmeier House CUSFTA Judiciary Hearing] (asking whether the CUSFTA violated Article III and the Due Process Clause of the Constitution by failing to authorize judicial review or violated the Appointments Clause by having people reviewing the case who were not appointed by the President). A consensus among the constitutional scholars and lawyers called to testify contended the provision was constitutional. Only a couple scholars and two senators registered their dissents. Bucholtz, *supra* note 77 at 197 & nn.113 & 114.

⁷⁹ Bucholtz, *supra* note 77, at 191.

⁸⁰ *Id.* at 179; *see also* Anderson Senate CUSFTA Judiciary Hearing Statement, *supra* note 71.

⁸¹ *See* Patrick Gillespie, *America's NAFTA Nemesis: Canada, not Mexico*, CNN MONEY (Aug. 11, 2016), <http://money.cnn.com/2016/08/11/news/economy/us-canada-trade/index.html>.

As stated above,⁸² this article does not directly consider the constitutionality of using a congressional-executive agreement, rather than a treaty, to create NAFTA. Nevertheless, not using a treaty to enact NAFTA convoluted the constitutional issues – and the same issues remain for the USMCA. A treaty itself is Supreme Law of the Land. Unless a treaty is self-executing,⁸³ however, it requires implementing legislation before it has domestic effect.⁸⁴

A treaty, insofar as it is an agreement between the United States and another sovereign, cannot itself be unconstitutional. Unresolved is the issue of whether a treaty can provide Congress with power it otherwise does not possess to enact domestic law.⁸⁵ But, at least as to non-self-executing treaties, a fairly clear line separates domestic law from international treaty obligations.

The non-treaty route blurs the line between the domestic and international spheres. Non-treaty agreements are negotiated by the Executive as with a treaty, but the authority of the Executive to do so is tied to legislation and, if the agreement is approved, is accomplished as a matter of legislation.⁸⁶ Both the CUSFTA and NAFTA were followed by implementing legislation, as if they were non-self-executing treaties. As legislation, the two trade agreements and their later implementing legislation were submitted to the two houses of Congress. A treaty would have been submitted only to the Senate. The House of Representatives would have a vote only on the implementing legislation. Further blurring the distinction between treaty and legislation has been the practice of implementing so-called “fast-track” authority which requires an up-or-down vote, without amendment, in Congress. The up-or-down vote simulates the vote on a treaty in the Senate. But unlike a treaty, which requires approval by two-thirds of the senators, votes in the Senate and the House on trade “agreements” require only a majority to approve.

⁸² *Supra* Introduction.

⁸³ *See* *Medellin v. Texas*, 552 U.S. 491 (2008).

⁸⁴ *Id.*

⁸⁵ *See* *Bond v. United States*, 134 S. Ct. 2077, 2093–94 (2014) (finding that because Congress did not intend to reach local crimes, the Court did not have to make a decision as to whether the federal implementing legislation for the Convention on Chemical Weapons could properly give the federal government police powers, which are reserved for the states. The Court does indicate that such action would be a “stark intrusion into traditional state authority”).

⁸⁶ 19 U.S.C.S. § 3805 (2012).

Like other treaty-avoiding agreements, NAFTA relied on a combination of Congress' undoubted power over foreign commerce and the President's dubious, broad powers to enter non-treaty, executive agreements with other countries. The practice was invented by the Roosevelt Administration through the Reciprocal Trade Agreements Act⁸⁷ to increase presidential powers over trade⁸⁸ and to go around the Senate's Advice and Consent role, which requires a two-thirds majority for approval.⁸⁹ This novel mixing of Executive and Legislative powers has raised confusion regarding whether binational panels are operating under international law only and whether their decisions bind the United States only as a matter of international law or also as a matter of domestic law.⁹⁰

⁸⁷ 19 U.S.C.S. § 1351 (2012).

⁸⁸ See generally John A. Dearborn, *Institutionalizing Presidential Representation in Economic Policymaking: The Reciprocal Trade Agreements Act of 1934 and the Employment Act of 1946* (2017), available at <https://cpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/9/1833/files/2017/08/Dearborn-Institutionalizing-Presidential-Representation-in-Economic-Policymaking-August-2017-1ho4e3b.pdf> (“[T]he act amounted to an attempt to institutionalize presidential representation in tariff making and alter the constitutional structure.”).

⁸⁹ See Yoo, *supra* note 6, at 758.

⁹⁰ Compare *United States-Canada Free Trade Agreement: Hearing Before the Senate Comm. on the Judiciary on the Constitutionality of Establishing a Binational Panel to Resolve Disputes in Antidumping and Countervailing Duty Cases*, 100th Cong., 2d Sess. 96 (1988) (testimony by John McGinnis on behalf of the Department of Justice) [hereinafter McGinnis Senate CUSFTA Judiciary Hearing Statement]

[I]t has also been said that requiring the President to implement binational panel and committee decisions falls squarely within the historical tradition of United States reliance on international tribunals to settle claims and boundary disputes. This argument, based on traditional practice, is misplaced. While international tribunals' decisions settling claims and boundary disputes certainly have imposed obligations on the United States Government as a matter of international law, those decisions have not, in and of themselves, imposed obligations on the United States Government as a matter of domestic law, with the testimony of Professor Andreas Lowenfeld in the same hearing (“I was astonished at the position presented to you a few minutes ago by the Justice Department. The notion that an international agreement of the United States adopted by the Congress is not law is to me astonishing.”). The position stated by Mr. McGinnis was vindicated as to the treaties in *Medellin v. Texas*, 552 U.S. 491 (2008).

2. NAFTA: More than a Simple Evolution from CUSFTA

The Canada-U.S. bilateral trade agreement evolved into NAFTA through the non-treaty, trade-agreement process with almost no consideration by Congress of its institutional impact on structural constitutional issues. NAFTA (signed in 1992, approved by Congress in 1993, and effective January 1, 1994) marked the first time the U.S. participated in a multilateral trade institution. The U.S. had been a member of The General Agreement on Trade and Tariffs (GATT), signed in 1947 and effective in 1948 as a multilateral agreement, but one without institutions. The GATT came about after the post-World War II failure of countries to agree to the proposed International Trade Organization (ITO) (due primarily to the refusal of the U.S. Senate)⁹¹ at the time they were creating other United Nations-related institutions.⁹² Following NAFTA, GATT was replaced in 1995 by the World Trade Organization (WTO), which like the proposed ITO, is a permanent institution.

The U.S. Senate failed to approve the ITO because it was concerned that it represented a threat to U.S. Sovereignty.⁹³ The initial post-World War II enthusiasm for a “New World Order” had been replaced by concerns related to the Cold War. Only after the fall of the Soviet Union did calls for a “New World Order” resurface. In between the effective dates of CUSFTA (1988) and NAFTA (1994), the Soviet Union officially fell apart in 1991.

Congress failed to understand that other language in NAFTA meant that Chapter 19 constituted more than a simple carry-over from the DSM in CUSFTA. The movement from CUSFTA to

⁹¹ Ivan D. Trofimov, *The Failure of the International Trade Organization (ITO): A Policy Entrepreneurship Perspective*, 5 JOURNAL OF POLITICS AND LAW 1 (2012), available at <http://www.ccsenet.org/journal/index.php/jpl/article/view/15291/10355>.

⁹² See GEORGETOWN UNIVERSITY LAW CENTER, *From the GATT to the WTO: A Brief Overview*, guides.ll.georgetown.edu/c.php?g=363556&p=4108235 (last visited Apr. 11, 2018) (The 1944 Bretton Woods Conference created the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and laid the foundations for the International Trade Organization and the General Agreement on Tariffs and Trade).

⁹³ TRANSFORMATIONS IN GLOBAL GOVERNANCE: IMPLICATIONS FOR MULTINATIONALS AND OTHER STAKEHOLDERS 38 (Sushil Vachani ed., 2006).

NAFTA institutionalized the regional governance of trade. The binational DSM in the CUSFTA introduced what was then a novel element of trade governance. Thereafter, NAFTA innovated further in the realm of DSMs with Chapter 11. For the first time, Chapter 11 created an Investor State Dispute Settlement (ISDS) that could be applied between two developed countries, i.e., the United States and Canada. The reason for doing so, however, involved the participation of Mexico in NAFTA.⁹⁴ Then, the AD/CVD binational DSM, originally justified in the CUSFTA on the basis of the common legal systems of the US and Canada, was expanded to include the very different, civil-law based system of Mexico and the possibility of all the civil-law countries of Latin America joining through accession.

Although it did not happen, NAFTA was created with a view to incorporating all of the countries in the Western hemisphere.⁹⁵ In 1994, just as NAFTA became effective, trade ministers from most of the countries in the Americas met in Miami to discuss expanding NAFTA to a Free Trade Area of the Americas (FTAA).⁹⁶ NAFTA's text anticipated this development by including an accession clause, which would allow other countries to join NAFTA.⁹⁷ Early on, political barriers prevented the anticipated accession of Chile.⁹⁸ Since then, instead of accessions, the U.S. has been negotiating bilateral

⁹⁴ Isidro Morales, *The Governance of Global Issues Through Regionalism: NAFTA as an Interface Between Multilateral and North-South Policies* (2006), available at [project.iss.u-tokyo.ac.jp/nakagawa/members/papers/1\(5\)Morales.final.pdf](http://project.iss.u-tokyo.ac.jp/nakagawa/members/papers/1(5)Morales.final.pdf).

⁹⁵ See generally M. Jean Anderson, *Implications of NAFTA's Extension to Chile and Other Countries – A U.S. View*, 23 CAN.-U.S. L.J. 227 (1997), available at <http://scholarlycommons.law.case.edu/cuslj/vol23/iss/28>.

⁹⁶ Brandy A. Bayer, *Expansion of NAFTA: Issues and Obstacles Regarding Accession by Latin American States and Associations*, 26 GA. J. INT'L & COMP. L. 615 (1997) ("In December of 1994 the leaders of thirty-four nations of the Western Hemisphere met at the Summit of the Americas. This conference resulted in a unanimous call for the creation of a "Free Trade Area of the Americas" (FTAA) by the year 2005.").

⁹⁷ NAFTA, *supra* note 7, at art. 2204.

⁹⁸ Bayer, *supra* note 96, at 634–35.

treaties with a number of countries in Latin America.⁹⁹ The U.S. has definite advantages in bilateral trade agreements.¹⁰⁰

While the USTR, at the time, assured a member of Congress that NAFTA represented no infringement on U.S. sovereignty, he did not address the constitutional issues of the DSMs.¹⁰¹ In the short time under the CUSFTA, a bilateral treaty between two developed countries, major constitutional issues may not have been apparent to those not focused on constitutional law. The evolution of trade agreements, however, has been towards greater harmonization of law, which certainly can be a threat to sovereignty due to enforcement mechanisms such as the binational panels.

It is well to emphasize the premise upon which Chapter 19 of CUSFTA had been sold: it was to be only an “interim” solution between two countries having common-law legal systems.¹⁰² The addition of Mexico and potentially many other civil-law countries represented a significant change. Chapter 11 was added to NAFTA due to the concern about Mexico’s history of expropriations, but limiting Mexico’s sovereignty necessarily also limited U.S. sovereignty in a reciprocal way. Nevertheless, Congress gave virtually no consideration to the serious constitutional issues raised by the DSMs in NAFTA.

B. Unresolved Constitutional Issues

Relatively few cases have been filed raising constitutional questions about NAFTA. One circuit court did issue a lengthy opinion ruling that Congress constitutionally used its power over foreign commerce to enact NAFTA and did not need to enter a treaty under

⁹⁹ See Sander Levin et al, *Free Trade Agreements with Latin America: A Test of Globalization*, CARNEGIE-TSINGHUA CENTER FOR GLOBAL POLICY (Mar. 14, 2006), <http://carnegietsinghua.org/2006/03/14/free-trade-agreements-with-latin-america-test-of-globalization> (noting the United States had entered into 10 bilateral free trade agreements with Latin American countries by 2006).

¹⁰⁰ See JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000).

¹⁰¹ North American Free Trade Agreement (NAFTA) and Supplemental Agreements to the NAFTA: Hearing before the House Comm. On Ways and Means and its Subcomm. On Trade, 103d Cong., 1st Sess. (1993) (testimony by Ambassador Michael Kantor).

¹⁰² See Anderson Senate CUSFTA Judiciary Hearing Statement, *supra* note 71.

the Constitution treaty provision.¹⁰³ But, Congress has made it particularly difficult to challenge the constitutionality of the DSMs by restricting the jurisdiction over any such challenge to the U.S. Court of Appeals for the District of Columbia Court.¹⁰⁴ Several challenges have been filed, but none has resulted in a decision on the merits.¹⁰⁵

1. Chapter 14 (Formerly Chapter 11)

As already indicated, NAFTA's Chapter 11 was adopted without receiving scrutiny by Congress.¹⁰⁶ The federal courts have also not scrutinized the constitutionality of Chapter 11's DSM.¹⁰⁷ Furthermore, Chapter 11 has rarely been the subject of commentary concerning its impact on the U.S. federal system.

Specifically, consideration has not been given to the question of ultimate responsibility if an ISDS panel rules against a U.S. state. Although no such ruling has come about, if such decision did occur, the question would be one of determining ultimate responsibility. That is to say, should the U.S. government be responsible for a state's violation of NAFTA.¹⁰⁸ Under USMCA's Chapter 14, which will not apply to new investments involving Canada, such a ruling is much less likely. Nevertheless, if such a panel result should occur under USMCA's Chapter 14, serious federalism issues would arise.¹⁰⁹

On the basis of USMCA, should Congress enact further legislation that would require a violating state to pay any ruling against the

¹⁰³ *Made in the U.S.A. Found. v. United States*, 242 F.3d 1300 (11th Cir. 2001).

¹⁰⁴ 19 U.S.C. § 1516a(g)(4)(A) (2012).

¹⁰⁵ *See, e.g., Coalition for Fair Lumber Imports v. United State*, 471 F.3d 1329 (2006) (dismissing the complaint, which alleged that the binational panel of NAFTA violated the Constitution, for lack of jurisdiction).

¹⁰⁶ *See Liptak, supra* note 28.

¹⁰⁷ U.S. Federal Courts have heard NAFTA Chapter 11 cases, but have not addressed the constitutionality of Chapter 11.

¹⁰⁸ *See Healing, supra* note 26 (The United States has won all the Chapter 11 cases brought against it).

¹⁰⁹ *The Loewen Group, Inc. v. United States*, Notice of Claim, *available at* <https://www.state.gov/documents/organization/3922.pdf> (“Article 105 of NAFTA requires the United States to ensure that its state governments comply with the terms of NAFTA . . . Article 1105 of NAFTA, requires the United States to provide ‘full protection and security’ to investments of foreign investors, including ‘full protection and security’ against third party misconduct.”).

United States? How would that square with the Supreme Court's interpretation of the 11th Amendment and the residual sovereignty of the states? Interestingly, Chapter 11 posed similar problems for the federal system of Canada, about which there has been some scholarly comment¹¹⁰ – and now Canada is not bound by the ISDS going forward under the USMCA.

2. Separation of Powers and Binational Panels

The major constitutional issues addressed in congressional hearings on CUSFTA's Chapter 19 and later in scholarly commentary on NAFTA's Chapter 19 have been Article II's Appointments Clause, Article III jurisdiction, Due Process and Jury Trial rights, as well as some references to Separation of Powers.¹¹¹ The same constitutional issues exist with the USMCA's Chapter 10 because no substantive changes were made to the DSM. In a structural approach to constitutionality, Separation of Powers would rank as fundamental, with Article II (The Appointments Clause) and Article III (removal of federal court jurisdiction) being considered under the general principle of Separation of Powers. Due Process and Jury Trial rights would become moot if the binational DSM violates Article III.

Before the adoption of the Bill of Rights, Separation of Powers was understood by both the Federalists and the Antifederalists to be the fundamental protection for liberty.¹¹² Like British judges, federal judges are independent in order to administer due process and preside over cases as neutral actors. Unlike British judges, however, this independence was the necessary condition protecting Article III judges in the exercise of their authority and obligation not to enforce legislation which contravenes the Constitution.¹¹³

Since the Supreme Court ruled on the Watergate tapes in the *Nixon* case,¹¹⁴ greater attention has been given to separation of powers. The Court had handed down a number of important separation

¹¹⁰ See Rajeev Thakur, *Chapter 11 of NAFTA and the Provinces- Will the Constitutional Question Be Asked?*, 37 CAN.-U.S. L.J. 251 (2012).

¹¹¹ Bucholtz, *supra* note 77, at 197.

¹¹² See THE FEDERALIST NOS. 47, 48 (James Madison).

¹¹³ See THE FEDERALIST NO. 78 (Alexander Hamilton).

¹¹⁴ *United States v. Nixon*, 418 U.S. 683 (1974).

of powers cases, some of which bear on the Article II and III issues raised by Chapter 10.

a. Article II—The Appointments Clause

In testimony before the Senate Judiciary Committee on CUSFTA, the Justice Department representative expressed the opinion that the binational DSM did not pose a problem under Article III of the Constitution.¹¹⁵ Based on *Buckley v. Valeo*,¹¹⁶ however, DOJ thought that the binational panels, as laid out in the agreement, did pose a constitutional problem under the Appointments Clause. The decisions of the binational panels could properly bind the U.S. as a matter of international law. As a matter of domestic law, however, the binational panels could not be binding because the decision-makers were not appointed consistent with the Constitution.

If decisions of the binational panels were automatically binding as domestic law of the U.S., that would conflict with the Appointments Clause because the members of the binational panel would not have been appointed in conformity with the Appointments Clause.¹¹⁷ As a way of curing the problem, DOJ advised that the implementing legislation authorize the President to direct the appropriate agencies to enforce domestically the international obligations of the United States.¹¹⁸ The DOJ testimony suggested that the President would have to have the discretion to approve or not, but that

¹¹⁵ McGinnis Senate CUSFTA Judiciary Hearing Statement, *supra* note 90.

¹¹⁶ 424 U.S. 1 (1976) (holding, on one of the several issues in the case, that the members of the Federal Election Commission must be appointed by the President). Mr. McGinnis also cited *Bowsher v. Synar*, 478 U.S. 714 (1986) on the Appointments Clause. McGinnis Senate CUSFTA Judiciary Hearing Statement, *supra* note 90.

¹¹⁷ U.S. CONST. art II.

¹¹⁸ McGinnis Senate CUSFTA Judiciary Hearing Statement, *supra* note 90.

The President is authorized to direct the administering authority, the Commission, and the U.S. customs service, as appropriate, to take necessary and appropriate action to implement the international obligations of the U.S. under Article 1904 of the Agreement pursuant to a final decision of a binational panel or extraordinary challenge committee. Any action taken under this authority shall not be subject to judicial review, and no U.S. court shall have power to review the determinations on any question of law or fact by an action in the nature of mandamus or otherwise.

the expectation would be that he would approve virtually all of them.¹¹⁹

The Department of Justice was not proposing that binational panel members be appointed by the president. It was attempting to avoid the situation—which has in fact resulted—that binational panels composed of non-officers of the U.S. are issuing decisions which are binding domestically. Congress did not adopt the DOJ proposal or otherwise directly address the Article II problem. Instead, the implementing legislation for both CUSFTA and NAFTA provided that, in the event that NAFTA's Chapter 19 was held unconstitutional in relation to this issue, the President was authorized to adopt panel decisions as his own.¹²⁰ Congress also made it very difficult to litigate a constitutional challenge to Chapter 19.¹²¹ The constitutional problem with Chapter 19 remains in USMCA's Chapter 10.

From *Buckley* to *NLRB v. Canning*,¹²² the Supreme Court has dealt with a series of constitutional¹²³ challenges questioning Congress's power to control the Executive Branch.¹²⁴ All but *Canning* have involved attempts by Congress to limit the president's appointment or removal authority. Although the results in the cases may not be consistent, the various opinions—whether a majority, dissent, or concurrence—consistently turn on whether they do or do not emphasize the importance of the principle of separation of powers. The opinions stressing separation of powers did, or would, rule against the particular legislation.

The separation of powers issue with regards to the binational panels differs in that the president's representatives accepted the DSM and presented it to Congress. Rather than Congress attempting

¹¹⁹ *Id.*

¹²⁰ 19 U.S.C. § 1615(g)(7) (2012).

¹²¹ Jurisdiction over any constitutional challenge of the NAFTA DSMs is restricted to the U.S. Court of Appeals for the District of Columbia Court. 19 U.S.C. § 1516a(g)(4)(A) (2006).

¹²² 134 S. Ct. 2550 (2014).

¹²³ As opposed to a question about a statutory interpretation question regarding the president's power to fill vacancies. *See, e.g.*, *NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017).

¹²⁴ *Bowsher v. Synar*, 478 U.S. 714 (1986); *Morrison v. Olson*, 487 U.S. 654 (1988); *Freytag v. Comm. Of Internal Revenue*, 501 U.S. 868 (1991); *Edmond v. U.S.*, 520 U.S. 651 (1997); *Free Enterprise Fund v. Pub. Co. Accounting Oversight Control Bd.*, 561 U.S. 477 (2010).

to infringe on presidential power, the executive-legislative agreement and fast-track processes enhance the power of the president. That this novel approach was agreeable to both the president and Congress does not dispense with a separation of powers issue, however.

Concurring in *Canning*, Justice Scalia emphasized the role of separation of powers in protecting liberty. “Since the separation of powers exists for the protection of individual liberty, its vitality does not depend on whether the encroached-upon branch approves the encroachment.”¹²⁵ Among the cases Justice Scalia cited is *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*,¹²⁶ a case which provides support for the argument that NAFTA’s Chapter 19 violated the Appointments Clause.

The binational panels created a new Appointments Clause question just as *Free Enterprise Fund* had. In *Free Enterprise Fund*, the Court ruled that “dual for-cause limitations on the removal of Board members contravene the Constitution’s separation of powers.”¹²⁷ The Court has long upheld the ability of Congress to commit the initial adjudication of many matters to an Executive Branch agency and to restrict the President’s ability to remove the appointed officers. *Free Enterprise Fund*, however, refused to uphold an extension of such restrictions to an officer further removed from the president.

With the binational panels, the president neither appoints nor can remove members on the panels, whose decisions will be binding as domestic law. In *Free Enterprise Fund*, the dual delegation occurred wholly within the structure of the federal government. The binational panels involve a double-delegation which ends outside the federal government in a non-governmental binational panel.¹²⁸

¹²⁵ NLRB v. *Canning*, 134 S. Ct. at 2593 (Scalia, J., concurring) (internal citations removed) (citing *Free Enterprise Fund*, 561 U.S. at 497); *see also* *Freytag v. Commissioner*, 501 U. S. 868, 879–80 (1991); *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 276–277 (1991).

¹²⁶ 561 U. S. 477 (2010).

¹²⁷ *Id.* at 492.

¹²⁸ Chapter 19 binational panels are not part of a federal administrative agency. The agreements explicitly provide that panel members are not members of the government. NAFTA Annex 1901.2(1) (“Candidates shall not be affiliated with a Party, and in no event shall a candidate take instructions from a Party.”). What occurs is a double delegation of power. Congress delegates power to the

The Court's opinion in *Free Enterprise Fund* is narrowed to declaring the issue of dual for-cause removal a violation of separation of powers. Nevertheless, it is built on some broad language, such as the following, which is easily applied to the binational panels.

A key "constitutional means" vested in the President—perhaps the key means—was "the power of appointing, overseeing, and controlling those who execute the laws." And while a government of "opposite and rival interests" may sometimes inhibit the smooth functioning of administration, "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty" ¹²⁹

Calls to abandon those protections in light of "the era's perceived necessity," are not unusual. Nor is the argument from bureaucratic expertise limited only to the field of accounting. The failures of accounting regulation may be a "pressing national problem," but "a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse." ¹³⁰

b. Article III: Withdrawing Jurisdiction from U.S. Courts

Unlike the *Free Enterprise Fund* decision, Chapter 10's binational panels also raise Article III issues. The members of the binational panels are not appointed by the president, but they exercise adjudicative power like a federal agency. Yet, their administrative-agency-like decisions are not generally reviewable by any Article III court. ¹³¹ Private parties to a binational panel cannot challenge the conduct or the constitutionality of the panel process. Only one of the countries can file an "Extraordinary Challenge" to a particular panel. As indicated by the choice of the word "Extraordinary," this "appeal" has been extremely rare. Effectively, a private party does not,

Office of the U.S. Trade Representative to select individuals to be on the roster to serve on the NAFTA binational panels. Congress further delegated power by giving oversight of these panels to a Secretariat. United States-Canada Free Trade Agreement Implementation Act of 1988, 102 Stat. 1851 Sec. 405(e); North American Free Trade Agreement Implementation Act, 107 Stat. 2057 Sec. 105(a).

¹²⁹ *Free Enterprise Fund*, 561 U.S. at 480 (internal citations removed).

¹³⁰ *Id.* at 501 (internal citations removed).

¹³¹ NAFTA, *supra* note 7, at art. 1904.

in practice, even benefit indirectly by this rarely used appeal. Furthermore, judicial review of the results of the binational panels is generally prohibited. In an attempt to avoid the claim that Congress has violated separation of powers by precluding constitutional review, the statute limits jurisdiction over constitutional challenges to NAFTA to the U.S. Court of Appeals for the District of Columbia.¹³² The statute also restricts standing beyond the Article III requirement.¹³³

1) International versus Domestic Law

At the time of CUSFTA, the Justice Department, and others rejecting the Article III challenges to the binational panels, took the position that the history of U.S. participation in international tribunals and boundary disputes meant that there was no Article III objection to the binational panels. As the Justice Department pointed out, however, those tribunals only settled U.S. obligations as a matter of international law,¹³⁴ which was the basis for its concerns, discussed above, about the Appointments Clause.¹³⁵

Given that Congress failed to correct the Appointments Clause problem, the result is that international binational panels are making decisions that have the effect of binding domestic law in the United States and are not subject to judicial review. There is no precedent suggesting that such an arrangement can possibly comport with our Constitution.

Congress's creation of the binational panels has rightly been referred to, repeatedly, as "unique" because to require U.S. citizens to go to an international body in order to assert claims under U.S. law would previously have been unthinkable.

In CUSFTA, the political branches agreed to a power-sharing arrangement with Canada that took AD/CVD matters away from the

¹³² 19 U.S.C.A. s 1516a(g)(4)(A).

¹³³ *American Coalition for Competitive Trade v. Clinton*, 128 F.3d 761 (D.C. Cir. 1997) ("Under the NAFTA Act, 19 U.S.C.A. s 1516a(g)(4)(C) (Supp. 1997), 'an interested party' that participated in a binational review panel proceeding may commence such a constitutional challenge 'within 30 days after the date of publication in the Federal Register of notice that binational panel review has been completed.'").

¹³⁴ See McGinnis Senate CUSFTA Judiciary Hearing Statement, *supra* note 90.

¹³⁵ *Supra* Sec. II(B)(2).

jurisdiction of the CIT, an article III court. The Congress need not have made the CIT an Article III court with jurisdiction over AD/CVD cases. For a long period, AD/CVD disputes did not go to an Article III court.¹³⁶ In the past, AD/CVD matters were handled within the Executive branch.

Although it did not have to, Congress later created the CIT as an Article III court and gave jurisdiction over AD/CVD matters. When CUSFTA came along, Congress removed jurisdiction from CIT. But it did not simply legislate taking away CIT jurisdiction and, for example, returning to a previous way of handling AD/CVD matters. Instead, it sent these matters to an international body. That choice was not one that is constitutionally permissible.

2) Exceptions to Article III

The Supreme Court has recognized certain exceptions which allow Congress to commit adjudication to non-Article III courts. These fall into two general categories: So-called “public rights” legislative courts and adjuncts to Article III courts.¹³⁷ “Public rights” matters, which Congress could have handled itself without involvement of courts, are one of the classes of disputes that have been allowed to be placed in legislative courts.¹³⁸ As generally defined, a “public rights” dispute must involve the federal government as a party.¹³⁹ Accordingly, AD/CVD would fall under the public rights doctrine.

The Supreme Court’s cases on the relationship between legislative courts and Article III courts has been anything but clear and consistent. In 1982, the Supreme Court handed down the *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.* decision,¹⁴⁰ a plurality opinion which held that Congress could not assign broad adjudicative powers to non-Article III bankruptcy judges. The case ap-

¹³⁶ See Anderson Senate CUSFTA Judiciary Hearing Statement, *supra* note 71.

¹³⁷ See generally, Andrew Nolan and Richard M. Thompson, *Congressional Power to Create Federal Courts: A Legal Review*, CONGRESSIONAL RESEARCH SERVICE (Oct. 1, 2014).

¹³⁸ *Id.* at 17.

¹³⁹ *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989) (Scalia, J. concurring).

¹⁴⁰ 458 U.S. 50 (1982) (plurality opinion).

peared that it might be a landmark case, highly restrictive of exceptions to Article III jurisdiction. The Court identified only three categories of cases where it was permissible to assign disputes to non-Article III judges.¹⁴¹

Between 1982 and the CUSFTA hearings in 1988, however, a substantial majority of the Court took a much more functional approach in two cases, *Thomas v. Union Carbide Agricultural Products*¹⁴² and *Commodity Futures Trading Commission v. Schor*,¹⁴³ and refused to extend *Northern Pipeline*. At that point, the Congress may have thought the Supreme Court's jurisprudence indicated a general willingness to uphold exceptions to Article III jurisdiction that Congress considered "necessary and proper."

In 1989, after the CUSFTA hearings, Justice Brennan wrote a majority opinion seemingly giving new life to *Northern Pipeline*.¹⁴⁴ Since then, the Court has addressed Article III issues in the context of bankruptcy in two important decisions on the ability of Congress to avoid Article III courts. In *Stern v. Marshall*¹⁴⁵ (holding the Bankruptcy Court had statutory authority, but not constitutional authority) and *Wellness International Network, Ltd. v. Sharif*¹⁴⁶ (holding Article III is not violated when parties knowingly and voluntarily consent to a bankruptcy court). As the unanimous opinion in *Wellness International* began:

Congress' efforts to align the responsibilities of non-Article III judges with the boundaries set by the Constitution have not always been successful. In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, and more recently in *Stern*, this Court held that Congress violated Article III by authorizing bankruptcy judges to decide certain claims for which litigants are

¹⁴¹ *Northern Pipeline*, 458 U.S. at 64-67 (Justice Brennan noted Congress has created legislative territorial courts, military courts, and courts that adjudicate public rights).

¹⁴² 473 U.S. 568 (1985).

¹⁴³ 478 U.S. 833 (1986).

¹⁴⁴ *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989).

¹⁴⁵ 564 U.S. 462 (2011).

¹⁴⁶ 135 S. Ct. 1932 (2015).

constitutionally entitled to an Article III adjudication.¹⁴⁷

3) Exceptions to Article III Do Not Include Giving Jurisdiction to an International Body

Although Congress has broad authority in legislating on all kinds of matters, the Constitution constrains how it does so. *INS v. Chadha*,¹⁴⁸ for example, involves congressional legislation that created a deportation process for aliens and also gave the Immigration and Naturalization Service power to suspend deportations under certain circumstances. But Congress also reserved to itself a “legislative veto” which could be exercised if members of one House of Congress disagreed with a particular decision suspending a deportation. Having given the power to an Executive agency, Congress could not take away that power without going through the constitutionally mandated process for enacting and amending laws.

Consistent with Separation of Powers and Article III, Congress has power to exercise a degree of control over when and where U.S. citizens have access to federal courts. Article III leaves to Congress discretion whether to create lower federal courts and which ones.¹⁴⁹ Had Congress not created any lower federal courts, almost all litigation would have come initially through state courts. Congress has long regulated the minimum amount in controversy required to file in federal court and the ability to remove cases from state court.¹⁵⁰

The Supreme Court has also upheld the power of Congress to keep U.S. citizens out of both state and federal courts under the Federal Arbitration Act,¹⁵¹ but only if the parties “consent” in some form to binding arbitration. The Supreme Court has repeatedly rebuffed state attempts to legislate around the Federal Arbitration Act.¹⁵² Analogies between consensual arbitration and the binational

¹⁴⁷ 135 S. Ct. 1932, 1939 (2015) (internal citations removed).

¹⁴⁸ 462 U.S. 919 (1983).

¹⁴⁹ U.S. CONST. art. III.

¹⁵⁰ 28 U.S.C. § 1332 (2012).

¹⁵¹ The United States Arbitration Act, 9 U.S.C. § 1–16 (1925) (more commonly referred to as the Federal Arbitration Act).

¹⁵² See, e.g., *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

panels fail, however, because all AD/CVD challenges must go to the binational panels, regardless of the parties' consent.

In certain situations, the disputants' consent does not matter. The Court has allowed Congress to require citizens and others—without their consent—to go first through the administrative agency process. Although they are deprived (Hamburger would argue, unconstitutionally¹⁵³), of the right to jury trial, they are not completely barred from access to an Article III court because they are able to appeal to an Article III court.¹⁵⁴ The Executive can send U.S. citizens for trial in another country in which the accused is alleged to have committed a crime, but doing so is based on the Constitution's Extradition Clause,¹⁵⁵ an extradition treaty with the other country, and the right to an extradition hearing in federal court.¹⁵⁶ In none of these situations is access to at least one federal court precluded.

Neither Congress nor the President, however, can constitutionally force a U.S. citizen to submit to adjudication by a non-U.S. process of adjudication for acts occurring within the jurisdiction of the U.S. Although a criminal case, *Reid v. Covert* is strong authority for the proposition that U.S. citizens cannot be forced into a non-U.S. adjudication for actions taken under U.S. jurisdiction.¹⁵⁷

As the Customs and International Trade Association Bar stated in its submission against the binational panels,

We are not aware of any precedent where the United States has statutorily agreed to force its citizens or those entitled to the protection of its laws to go to a binational panel to construe United States laws and Federal agencies actions with the ultimate determination of those rights or obligations under United States statutes in that binational panel.¹⁵⁸

¹⁵³ Hamburger, *supra* note 45, at 154–55.

¹⁵⁴ See *Cox. v. United States*, 332 U.S. 442 (1947); see also Hamburger, *supra* note 45, at 303.

¹⁵⁵ U.S. CONST. art IV, § 2, cl. 2.

¹⁵⁶ U.S. CONST. art. IV, § 2.

¹⁵⁷ 354 U.S. 1 (1957) (finding that an agreement with a foreign nation does not confer any new jurisdiction which would be “free from the constraints of the Constitution”).

¹⁵⁸ Bucholtz, *supra* note 77, at 199.

Despite what might be termed a “flexible” view of separation of powers, the majority opinion in *Wellness International Network* provides support for the view that Congress cannot force parties into binational panels without their consent. The opinion clearly notes that consent is required for adjudication before a non-Article III court.

In sum, the cases in which this Court has found a violation of a litigant’s right to an Article III decisionmaker have involved an objecting defendant forced to litigate involuntarily before a non-Article III court. The Court has never done what Sharif and the principal dissent would have us do – hold that a litigant who has the right to an Article III court may not waive that right through his consent.¹⁵⁹

III. The Constitutional Tension Between Sovereignty and Harmonization of Trade Law

Harmonization of commercial law generally is a worthwhile endeavor. Such harmonization certainly facilitates trade. Voluntary adoption of the U.C.C. by all the states in the U.S. demonstrates that the desire for increased trade can produce a high degree of harmonization of commercial law. Due to some variations among the states, the harmonization brought about by the U.C.C. is not perfect. Moreover, state and federal courts interpret the law as adopted in each particular state, which may or may not conform to the interpretation of the same provision in other states. To achieve perfect harmonization, the U.C.C. would have to be a federal law and, therefore, subject to authoritative interpretation by the Supreme Court, which current precedent precludes.¹⁶⁰

The U.C.C. has served as a model for international model laws, including Article 9’s influence on the Organization of American

¹⁵⁹ *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1947 (2015).

¹⁶⁰ The creation of the U.S.C. as a model law for the states came about after the Supreme Court, in *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), over-ruled *Swift v. Tyson*, 41 U.S. 1 (1842), and stated that “Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.”

States model law and, in turn, Mexico's law on secured lending.¹⁶¹ This work has been led by the National Law Center for Inter-American Free Trade (NLCIFT), a private non-profit organization, which has been engaged in harmonization and trade promotion efforts since 1992.¹⁶² NLCIFT's work supported implementation of NAFTA and, later, the Central American Free Trade Agreement (CAFTA).¹⁶³ Working with private parties, the U.S. State Department, USAID, and various countries in the Americas, NLCIFT has assisted a number of countries in the Americas to draft commercial law-reform legislation. NLCIFT has also encouraged and trained private parties voluntarily to use arbitration as an alternative dispute mechanism. Most importantly, this process involves voluntary actions by the various governments; the governments do not give up their sovereign right to legislate and adjudicate.

The U.C.C. is compatible with the federal form of the United States, in which states retain residual sovereignty over much of their law. The Constitution's structure encourages, but does not itself force, harmonization. It leaves to Congress the power to decide whether and how much of commercial law to harmonize. The text of the Constitution itself (as opposed to the Court's invention of the Dormant Commerce Clause) lays down the few basic principles necessary to facilitate trade and creates the institutional process for legislating and enforcing the rules, but leaves substantive matters to the congressional process.

The Constitution modified the federal form from what we now call confederalism to federalism. Among other problems, delegates came to the Constitutional Convention to deal with disruptions in trade and commerce caused by various states. The Philadelphia Con-

¹⁶¹ See BORIS KOZOLCHYK, *COMPARATIVE COMMERCIAL CONTRACTS: LAW, CULTURE, AND ECONOMIC DEVELOPMENT* 73-75 (2014); see also D. Michael Mandig, *Secured Lending Reform in Latin America: A Practitioner's Point of View on Mexico*, 28 ARIZ. J. INT'L & COMP. L. 1 (2011).

¹⁶² NATIONAL LAW CENTER FOR INTER-AMERICAN FREE TRADE, <http://natlaw.com/> (last visited Apr. 19, 2018).

¹⁶³ The author was a member of a team of consultants, led by NLCIFT, working for USAID on the implementation of CAFTA. (Later, the Dominican Republic joined the agreement which then became known as DR-CAFTA). The author's area of responsibility for the report on the CAFTA countries related to the judiciary and alternative dispute resolution.

vention followed a year after the failure of the Annapolis Convention in 1786, which had been called to consider commercial issues. The Articles of Confederation did provide for the free movement of commerce from one state to another and provide citizens of each state the privilege of trading in other states on the same terms as citizens of those states.¹⁶⁴ Each state, however, retained its full sovereignty.¹⁶⁵ The United States then had a Congress, but no executive or federal judiciary to enforce the Articles. The structure created by the Constitution would free up the flow of trade and commerce.

A. How the Constitution Frees Commerce Among the States

The Constitution frees up the flow of commerce even without Congress passing legislation pursuant to the Commerce Clause. Article I, Section 10 does much to prevent states from interfering with the movement of commerce from one state to others.¹⁶⁶ It prohibits states from 1) manipulating money and impairing contract rights; 2) entering treaties, alliances or confederations, which would include

¹⁶⁴ ARTICLES OF CONFEDERATION OF 1781, art. IV, the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively . . .

¹⁶⁵ *Id.* at art. II (“Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”).

¹⁶⁶ U.S. CONST. art. I, § 10

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

trade agreements with each other or foreign nations; and 3) imposing imposts or duties (tariffs) on imports or exports, except as absolutely necessary for executing their inspection law and except as allowed and controlled by Congress.

Other parts of Article I, Section 10 deal with war. As discussed early in *The Federalist*,¹⁶⁷ guarding against the potential for war with other countries and between states is a major motivator for creating “a more perfect Union.”¹⁶⁸ *The Federalist* understands that commercial rivalries between countries can be a common cause for war.¹⁶⁹ A superintending power over commerce among the states benefits not only the economic well-being of the country, but provides the tax revenue for a strong Union to defend against commercial and military aggression.

The Constitution does not simply give an existing government more power; no central government existed prior to the Constitution. A treaty/confederation is not a government, as *The Federalist* explains.¹⁷⁰ For the first time, the Constitution created a government for the United States. The federal government is a power that can act directly on citizens, as long as it does so within its enumerated powers. In confederations, like our Articles of Confederation and the European Union, the central power can only act on the constituent states, not directly on citizens.¹⁷¹ Compare the difference on taxes: under the Articles, Congress could not tax directly but had to request funds from the states. For better or worse, the federal government directly imposes and collects taxes on individuals and businesses.

To move from the Confederation to a government, the Constitution added what the Articles lacked: executive power vested in a president and judicial power vested in a supreme court “and in such inferior Courts as the Congress may from time to time ordain and establish.”¹⁷² The establishment of the system of lower federal courts was controversial. Madison, who wanted lower courts to be established in the Constitution, had to compromise by leaving it to

¹⁶⁷ THE FEDERALIST NOS. 2-8.

¹⁶⁸ U.S. CONST. pmbi.

¹⁶⁹ See THE FEDERALIST NO. 4 (John Jay).

¹⁷⁰ THE FEDERALIST NO. 15 (Alexander Hamilton).

¹⁷¹ See *id.*

¹⁷² U.S. CONST. art. III.

Congress. Fortunately, the first Congress established some lower federal courts.¹⁷³

Creation of the lower federal courts, along with diversity jurisdiction, and the Privileges and Immunities Clause¹⁷⁴ was intended to protect and facilitate commerce among the states.¹⁷⁵ Some lawyers and judges have questioned the continued need for diversity jurisdiction.¹⁷⁶ They apparently think that the proper role for federal courts is to focus primarily on issues under the Bill of Rights, rather than on commercial matters which fall into federal courts simply because the parties are citizens of different states.

The Framers focused considerable attention on the conflicts among competing factions –notably those based on different economic interests such as debtors and creditors.¹⁷⁷ They had witnessed the populist passions of debtor-dominated state politics. They, therefore, designed a modern federal republic that would avoid the fatal flaws of the ancient republics.¹⁷⁸ That meant structuring the government on the pillars of separation of powers and federalism.¹⁷⁹ Issues of federalism and separation of powers involving trade and commerce were the basis for some of the most important and controversial cases of the 19th century.¹⁸⁰

Diversity jurisdiction, along with the related alienage jurisdiction,¹⁸¹ has been key to the commercial success of the United States. Access to lower federal courts, with Article III judges, has meant that out-of-state and out-of-country investors could have confidence of being judged in a neutral forum. Even with juries drawn from the

¹⁷³ An Act to Establish the Judicial Courts of the United States (more commonly called the Judiciary Act of 1789), available at <https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=196>.

¹⁷⁴ U.S. CONST. art. IV, § 2.

¹⁷⁵ Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

¹⁷⁶ See, e.g., Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L. Q. 119 (2003).

¹⁷⁷ See THE FEDERALIST NO. 10 (James Madison).

¹⁷⁸ See *id.*

¹⁷⁹ See THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

¹⁸⁰ See *John Marshall and the Bank Case: McCulloch v. Maryland*, CONSTITUTIONAL RIGHTS FOUNDATION 4 (2012), available at <http://www.crf-usa.org/images/pdf/JohnMarshallandthBankCase.pdf> (explaining the controversy surrounding the decision).

¹⁸¹ 28 U.S.C. § 1332.

local population, Article III courts minimize the opportunities for getting “home-cooked” in a state court deferential to interests of local voters. Unfortunately, some federal judges do not appreciate that their existence greatly reduces the risks of doing business throughout the United States.¹⁸²

The integrity of any country’s courts is not merely a domestic issue; it affects the attractiveness of a country to foreign investment. Affording aliens access to federal courts, however, not only facilitates trade. The lower federal courts are necessary to assure foreigners more generally that they will receive fair treatment. *The Federalist* explains the reasons, including avoiding war, why “the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.”¹⁸³

It was not long after adoption of the Constitution that equal treatment for aliens as to jurisdiction was put to a major test. The dispute ultimately produced the famous 1816 case of *Martin v. Hunter’s Lessee*,¹⁸⁴ which confirmed the authority of the Supreme Court to review final judgments of state courts on issues interpreting treaties and the Constitution. The case, however, began in 1794 as a dispute over conflicting claims to lands, arising because Virginia had enacted a statute allowing confiscation of Loyalist property. The Virginia Supreme Court upheld the confiscation, but the Supreme Court disagreed in *Fairfax Devisee v. Hunter’s Lessee* (1813).¹⁸⁵ It held that the matter fell within the terms of the Jay Treaty.

¹⁸² Investors and businesses generally decide where to invest or locate their businesses based on an assessment of the opportunities and risks of particular locations. One of those risks relates to the court system. In the U.S., certain state court systems are viewed as negative factors, but the ability to access a federal court minimizes the risk. Overall, the U.S. civil justice system is viewed as consistent with the Rule of Law.

¹⁸³ THE FEDERALIST NO. 80 (Alexander Hamilton)

The peace of the whole ought not to be left at the disposal of a part. The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury, ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, is with reason classed among the just causes of war, *it will follow, that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.* This is not less essential to the preservation of the public faith, than to the security of the public tranquility. (emphasis added).

¹⁸⁴ 14 U.S. 304 (1816).

¹⁸⁵ 11 U.S. 603 (1813).

What has generally separated the U.S. legal system from many countries has been its equal access for, and fair treatment of, foreign parties in federal court.¹⁸⁶ Foreign parties often prefer to litigate in the U.S. federal court system, rather than in their home-country courts. On the other hand, American corporations contracting with foreign parties often specify that any litigation will occur in a U.S. court or that any disputes will be resolved through arbitration. Among other reasons, corporations choose to do so due to the corruption of many court systems around the world.

B. NAFTA/USMCA and Harmonization: The Triumph of Hope over Sovereignty?

Efforts at harmonization and unification of commercial law have been developing since the nineteenth century.¹⁸⁷ The success of the United States in moving from a confederation to a federal-state Constitution to create a largely free-trade, internal market had some impact on this movement. Since the 1980's, the efforts at harmonization and unification have increased through bilateral and regional trade agreements.¹⁸⁸ They have encouraged visions of ever expanding harmonization. At least prior to recent political developments in the West, those hoping for global harmonization seemed to be riding the wave of history.

Complete harmonization of trade law, however, is an extremely complicated, and possibly futile, exercise.¹⁸⁹ Multilateral trade agreements require complex harmonization of the trade-related laws of all countries involved.¹⁹⁰ Recall that the binational panel provision was supposed to be an "interim" solution in order to allow the

¹⁸⁶ See CREDENDO, https://www.credendo.com/country_risk/united-states (last visited Dec. 19, 2017) (evaluating countries according to business risks and scoring the United States as low risk).

¹⁸⁷ JUNJI NAKAGAWA, INTERNATIONAL HARMONIZATION OF ECONOMIC REGULATION (2011).

¹⁸⁸ *Id.*

¹⁸⁹ See Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, University of Virginia School of Law Legal Studies Working Papers Series (1999), available at www.jus.unitn.it/dsg/ricerche/dottorati/allegati/1999_stephan.pdf.

¹⁹⁰ See Craig L. Jackson, *The Free Trade Agreement of the Americas and Legal Harmonization*, ASIL Insights (June 14, 1996), available at

U.S. and Canada more time to harmonize their AD/CVD laws.¹⁹¹ That harmonization on one area of law between only two countries did not occur. Instead, the interim solution of the binational panels carried forward into NAFTA and now into USMCA.

The Trade Act of 1974 authorized the President “to harmonize, reduce or eliminate barriers” which are deemed to place an undue burden on our trade with other nations.¹⁹² Harmonization of commercial law is a matter of degree, however. It need not be as comprehensive as that of the European Union, which aims at unification. Those driving ever-more comprehensive harmonization are economists and multinational corporations. Neither pay much, if any attention, to law in general or to the Constitution in particular.

Congress does not possess the power to regulate commerce *among* foreign nations. That would be a superintending power. Congress does have a superintending power to regulate commerce *among* the states. The original meaning of “to regulate” is “to make regular”¹⁹³ and “to make regular” is a synonym for “harmonize.”¹⁹⁴ Pursuant to the Commerce Clause, Congress has the power to “make regular,” i.e., to “harmonize,” commerce among the states.

At least prior to the emergence of the Administrative State, however, the degree of harmonization was always dependent on the willingness of the people, acting through their representatives in Congress, to do so. But the degree to which Congress has been willing to regularize commerce, while increasing over time, has been insufficient for those who would like Congress to preempt virtually every state law seen as a barrier to commerce.¹⁹⁵

Congress’ ability to harmonize commerce or trade with other nations depends on reciprocal consent. Accordingly, Congress’ power

<https://www.asil.org/insights/volume/1/issue/3/free-trade-agreement-americas-and-legal-harmonization>.

¹⁹¹ Braithwaite & Drahos, *supra* note 100.

¹⁹² 19 U.S.C. § 2102 (2012).

¹⁹³ Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

¹⁹⁴ See THESAURUS.PLUS, https://thesaurus.plus/related/harmonize/make_regular (last visited Apr. 10, 2018).

¹⁹⁵ The U.S. Chamber of Commerce strongly favors preemption of state laws in a number of areas of commerce. See U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *Preemption/Federalism*, www.instituteforlegalreform.com/issues/preemption-federalism (last visited Apr. 18, 2018).

with respect to international trade is to regulate commerce “with” foreign nations. That language reflects the equal status of sovereign states. Trade agreements, beginning with CUSFTA and NAFTA and now USMCA, embody provisions like Chapter 19 and Chapter 10 in order to avoid dependence on the continued willingness of each sovereign to cooperate with one or more other sovereigns.

The sovereign nations of Europe have mostly transferred power over trade to institutions of the European Union (EU). Nevertheless, they remain essentially sovereign as long as each can legally withdraw from the EU, as Britain has voted to do. Even without exercising their right to withdraw, EU countries remain sovereign as long as they control their own military forces. The EU is not a state, but a confederation created by successive treaties.

The Federalist recognizes that confederations have a certain utility for specific, limited purposes:

There is nothing absurd or impracticable in the idea of a league or alliance between independent nations for certain defined purposes precisely stated in a treaty regulating all the details of time, place, circumstance, and quantity; leaving nothing to future discretion; and depending for its execution on the good faith of the parties. Compacts of this kind exist among all civilized nations, subject to the usual vicissitudes of peace and war, of observance and non-observance, as the interests or passions of the contracting powers dictate.¹⁹⁶

As the history of the European treaties culminating in the EU and now Brexit demonstrates, the continued existence of individual, equal sovereigns prevents permanent, complete integration of a multi-state economy. Nevertheless, trade agreements have taken inspiration from the EU in moving to create permanent, superintending institutions, such as, most prominently, the World Trade Organization (WTO)—the reincarnation of the failed ITO. Without a sovereign or a superintending institution with enforcement powers, the degree of harmonization will continue to depend on the wills of the sovereigns involved.

¹⁹⁶ THE FEDERALIST NO. 15, *supra* note 170.

“The impulse to reduce diversity among the legal systems governing commerce has manifested itself for as long as people have traded across political boundaries.”¹⁹⁷ The efforts from ancient Rome, to the United States, to the European Union,¹⁹⁸ “involve the imposition of a unified body of rules by an institution with at least some sovereign powers, or the creation of coherent rules in the absence of any nation state.”¹⁹⁹

At some point, harmonization of commercial law comes into conflict with sovereignty. Beyond that point, further harmonization depends on the transfer of some sovereign powers over trade to a superintending institution, as occurred in the EU. Still, as Alan Holmer, the U.S. Trade Representative at the time, stated in his testimony on CUSFTA, “[t]here never has been, and likely never will be, perfectly free trade between any two independent sovereign countries.”²⁰⁰

C. NAFTA/USMCA’s Significance for the Regional and Global Governance of Trade

As a superintending authority, NAFTA may have appeared to be relatively mild,²⁰¹ but it launched the United States into the regional development of global governance.²⁰² Of course, CUSFTA first fa-

¹⁹⁷ Stephan *supra* note 189, at 3.

¹⁹⁸ *Id.* at 3–4.

¹⁹⁹ *Id.* at 4.

²⁰⁰ *United States-Canada Free Trade Agreement: Hearing Before the Senate Comm. on the Judiciary on the Constitutionality of Establishing a Binational Panel to Resolve Disputes in Antidumping and Countervailing Duty Cases*, 100th Cong., 2d Sess. 96 (1988) (Prepared Statement of Ambassador Alan Holmer).

²⁰¹ M. Angeles Villarreal & Ian F. Ferguson, *The North American Free Trade Agreement (NAFTA)*, CONGRESSIONAL RESEARCH SERVICE (May 24, 2017), available at <https://fas.org/sgp/crs/row/R42965.pdf> (“The net overall effect of NAFTA on the U.S. economy appears to have been relatively modest.”).

²⁰² Morales, *supra* note 94. The author’s description of the article is, in part, as follows:

The core argument of this study is that the regionalization process formalized under the North American Free Trade Agreement (NAFTA) has become a major strategy of US trade diplomacy for advancing and expanding a new regulatory framework for dealing with the pressures of globalization. Those pressures feature

cilitated this development by initiating the binational panels. Nevertheless, while CUSFTA stated that one of its objectives would be to “**lay the foundation** for further bilateral and multilateral” cooperation,”²⁰³ it contained no accession agreement. NAFTA, on the other hand, contained an accession agreement which reflected a reworded objective to “**establish a framework** for further trilateral, regional and multilateral cooperation.”²⁰⁴ USMCA has similar language.²⁰⁵

The U.S. did not follow through with its CUSFTA commitment to harmonize AD/CVD laws with Canada.²⁰⁶ The Congress that passed CUSFTA could not bind a future Congress in our constitutional system.²⁰⁷ The CUSFTA legislation did bind the federal judiciary, absent a declaration that the binational panels are unconstitutional. Although explicitly explained as not a model for future trade agreements,²⁰⁸ the binational panels became another one of those government programs that never seems to go away.

It was the hope of a prominent international law scholar that the binational panels would be a model and influence U.S. courts:

the re-organization of corporate competitive strategies, as well as a new disciplinary body for regulating market access in trade, investment and other related issues.

²⁰³ Canada-U.S. Free Trade Agreement, art. 102(e), Jan. 2, 1988 (emphasis added) [hereinafter CUSFTA].

²⁰⁴ NAFTA, *supra* note 7, at art. 102(f) (emphasis added).

²⁰⁵ USMCA preamble (“ESTABLISH a clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment.”).

²⁰⁶ Andrew Rosa, *Old Wine, New Skins: NAFTA and the Evolution of International Trade Dispute Resolution*, 15 MICH. J. INT’L L. 255 (1993).

²⁰⁷ See *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (quoting the British jurist William Blackstone: “the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it’s [sic] ordinances could bind the present parliament.”)

²⁰⁸ See Anderson Senate CUSFTA Judiciary Hearing Statement, *supra* note 71. Similarly, the binational panel system is not, and is not intended to be, a model for future agreements between the United States and its other trading partners. Its workability stems from the similarity in the U.S. and Canadian legal systems. With that shared legal tradition as a basis, the panel procedure is simply an interim solution to a complex issue in an historic agreement with our largest trading partner.

I think one can look forward to gradual harmonization of the perceptions and practices of the two nations as the body of precedent builds up in the decisions of the binational panels. I would hope, in fact, that U.S. courts in cases not covered by the panel would – and I think the legislation ought to say “should” – look at the recent opinions of the panels.²⁰⁹

NAFTA superseded CUSFTA and became “a key strategy for advancing and expanding a regulatory framework for global governance.”²¹⁰ Supposedly, the United States thereby ensured that its priorities would prevail.²¹¹ The United States’ involvement in global governance, however, has de-prioritized the Constitution.

Alan Wm. Wolf, now Deputy Director of the WTO, has described the U.S.-driven legal framework for international trade and the significance of NAFTA.²¹² He explains that the process began with the Reciprocal Trade Agreements Act of 1934²¹³ and acquired its vision in language found in the Atlantic Charter by which Roosevelt and Churchill committed their countries “to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity;” and stated their desire “to bring about the fullest collaboration between all nations in the economic field.”²¹⁴ According to Wolf,

²⁰⁹ *United States-Canada Free Trade Agreement: Hearing Before the Senate Comm. on the Judiciary on the Constitutionality of Establishing a Binational Panel to Resolve Disputes in Antidumping and Countervailing Duty Cases*, 100th Cong., 2d Sess. 96 (1988) (Testimony of Andreas Lowenfeld).

²¹⁰ Nakagawa, *supra* note 187 (discussing Isidro Morales, *supra* note 94).

²¹¹ See Morales, *supra* note 94, at 19 (“As long as the US economy keeps innovating and growing, North American integration defined according to US standards will remain legitimated and a blue print for future negotiations . . .”).

²¹² Alan Wm. Wolff, *Stressed in an Age of Populism: Recommendations for Changes in U.S. Trade Law and Policy*, INSTITUTE OF INTERNATIONAL ECONOMIC LAW (2017), available at <http://iicl.org/wp-content/uploads/2015/08/Alan-Wolff-IIEL-Issue-Brief-April-2017-Final.pdf>.

²¹³ 19 U.S.C. § 1351.

²¹⁴ Wolff, *supra* note 212, at 4 (quoting parts of the Atlantic Charter).

From these beginnings, parallel tracks continued to be taken over the next three quarters of a century -- with enactment of a number of statutory compacts between the President and the Congress loosely termed "trade negotiating authority" and in an iterative process of multilateral negotiations to construct a rules-based world trading system -- first in the Havana Charter for an International Trade Organization (the ITO, that the U.S. did not ratify), but then in the General Agreement on Tariffs and Trade (GATT) which the Executive Branch forged ahead with without the express approval of Congress until the 1970s, and finally the creation of the World Trade Organization (WTO) in the Uruguay Round in 1994.

These two elemental legal foundations, domestic statutes and multilateral rules, with the addition of some free trade agreements -- *most prominently NAFTA*, are the legal framework for America's conduct of international trade.²¹⁵

D. The Rule of Law or The Rule of Rules?

Wolf continued by emphasizing that "[t]he rule of law must govern what our government can and should do in the field of international trade."²¹⁶ He rightly said this occurs "through our interventions before administrative and policy agencies of the Executive Branch, through appearances before Congress and the International Trade Commission, before U.S. courts and international tribunals, and in the press."²¹⁷ Unfortunately, prior to the adoption of NAFTA, virtually none of that legal scrutiny was applied to the DSMs. This, despite what Wolf explained, has been the significance of NAFTA in shaping the global governance of trade.

For the U.S., the Constitution embodies our application of The Rule of Law. To violate the Constitution in pursuit of a global set of trade rules does not advance the Rule of Law. Although trade law experts may mouth the phrase "Rule of Law," too often what they

²¹⁵ *Id.* at 4–5.

²¹⁶ *Id.* at 5.

²¹⁷ *Id.*

really are promoting is the rule of rules. These are very complicated rules that allows a small number of trade-law specialists to make politically unaccountable decisions that extend the Administrative State to the global level.

The Rule of Law involves both an ideal and its actual instantiation in particular countries. The ideal—sought but never fully achieved—refers to principles of justice that restrain the exercise of governmental power. As an actual state of affairs, the Rule of Law can only exist within the bounds of a particular political body with powers to enforce the rules of law.²¹⁸

Under the Articles of Confederation, the ideal of the Rule of Law—so prominent in the Declaration of Independence—was widespread. Regardless of whether and to what extent the rule of law existed within the borders of the separate states,²¹⁹ it did not in fact exist among the whole group of states. Certainly, on matters of trade, states were not adhering to the provisions of the Articles.²²⁰ The Articles could not enforce the Rule of Law because it did not provide for executive and judicial powers to do so.

²¹⁸ See THE FEDERALIST NO. 15, *supra* note 170

Government implies the power of making laws. It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation. This penalty, whatever it may be, can only be inflicted in two ways: by the agency of the courts and ministers of justice, or by military force; by the COERCION of the magistracy, or by the COERCION of arms. The first kind can evidently apply only to men; the last kind must of necessity, be employed against bodies politic, or communities, or States. It is evident that there is no process of a court by which the observance of the laws can, in the last resort, be enforced. Sentences may be denounced against them for violations of their duty; but these sentences can only be carried into execution by the sword. In an association where the general authority is confined to the collective bodies of the communities, that compose it, every breach of the laws must involve a state of war; and military execution must become the only instrument of civil obedience. Such a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it.

²¹⁹ For a description of the lawlessness in some states, see *Plaut v. Spendthrift Farms*, 514 U.S. 211 (1995).

²²⁰ See Letter from James Madison to Thomas Jefferson (1786) in HANK EDMONDSON, ARTICLES OF CONFEDERATION AND PERPETUAL UNION (2012): The States are every day giving proofs that separate regulations are more likely to set them by the ears than to attain the common object. When Massachusetts set

Some may think that multilateral agreements are a modern development, widely used only since after World War II. While significant since World War II, the Constitution's Framers were quite familiar with such arrangements and rejected them. *Federalist 15* explains that experience shows that such arrangements fail to produce the expected benefits.

In the early part of the present century there was an epidemical rage in Europe for this species of compacts, from which the politicians of the times fondly hoped for benefits which were never realized. With a view to establishing the equilibrium of power and the peace of that part of the world, all the resources of negotiation were exhausted, and triple and quadruple alliances were formed; but they were scarcely formed before they were broken, giving an instructive but afflicting lesson to mankind, how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith, and which oppose general considerations of peace and justice to the impulse of any immediate interest or passion.²²¹

The European Union is an expansion of its 18th century predecessors. It has sought to overcome the weakness of previous confederations lacking judicial and executive powers by adding a powerful European Court of Justice and the European Commission. Still, it has been experiencing the limitations described by *The Federalist*. More recently, the EU has attempted unsuccessfully to move from a multilateral-treaty/confederation to a constitution.²²² Nevertheless,

on foot a retaliation of the policy of Great Britain, Connecticut declared her ports free. New Jersey served New York in the same way. And Delaware I am told has lately followed the example in opposition to the commercial plans of Pennsylvania. A miscarriage of this attempt to unite the states in some effectual plan will have another effect of a serious nature . . . I almost despair of success.

²²¹ THE FEDERALIST NO. 15, *supra* note 170.

²²² Andrea Broughton, *European Council Fails to Agree on a Constitutional Treaty*, EUROFOUND (Dec. 16, 2003), <https://www.eurofound.europa.eu/observatories/eurwork/articles/european-council-fails-to-agree-on-constitutional-treaty>.

as a confederation, the European Union remains inherently unstable, as demonstrated by Brexit and the bailout of Greece.²²³

NAFTA and the WTO were created around the time of the expansion and transition of the European Economic Community into the European Union. Those were heady days. Unfortunately, the creation of the EU inspired, in part, NAFTA and the WTO – and now the USMCA – to include semi-governmental features which collide with the Constitution and The Rule of Law in the United States.

CONCLUSION

Rejecting dispute mechanisms in multilateral trade agreements does not constitute opposition to free trade. Trade between and among countries is never fully free. It is a matter of degree. International trade is always managed trade-- that is managed by separate sovereigns or some international organization. The degree of freedom and the volume of trade lies within the trade agreement and the mechanism(s) for enforcing the agreement. That power lies either with each of the sovereigns or with some superintending institution.

The U.S. court experience with the so-called “dormant commerce clause” makes the point. Although often difficult to discern, a difference does exist between a state’s laws, the purpose of which are to protect in-state interests, and state laws having a legitimate, non-protectionist purpose, but which inhibit some trade from outside the state. From the viewpoint of out-of-state corporations, the non-uniformity of laws inherent in the U.S. federal system creates countless “trade barriers.” Federal courts, as the superintending institution, seem to have developed a presumption that strongly disfavors the states under the dormant commerce clause.²²⁴

²²³ See Ashley Kirk, *European Debt Crisis: It's not just Greece that's drowning in debt*, THE TELEGRAPH (Feb. 8, 2017), <http://www.telegraph.co.uk/news/0/european-debt-crisis-not-just-greece-drowning-debt/>.

²²⁴ See *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981) (Rehnquist, J., dissenting) (arguing that the Court has gone too far in the name of commerce and is intruding on states’ right to pass laws regarding the safety of their citizens. “The result in this case suggests, to paraphrase Justice Jackson, that the only state truck-length limit ‘that is valid is one which this Court has not been able to get its hands on’”).

It is not unreasonable to expect that international tribunals looking at non-tariff trade barriers will follow along a similar path. From an international perspective, the U.S. and other countries often view each other's laws that differ from their own as non-tariff "trade barriers." The 1988 Omnibus Trade and Competitiveness Act²²⁵ "eliminated the 1974 Act's distinction between tariff and non-tariff trade barriers, and with it, some of the special considerations for trade measures impacting consumer protection, employee health and safety, labor standards, and environmental standards."²²⁶ When international trade DSMs decide these issues, they are resolving matters that should be decided by U.S. courts.

It should not surprise lawmakers that many Americans have a sense that "We the People" are losing our powers of self-government in extremely complex international trade agreements. Ordinary Americans do not pretend to understand the intricacies of trade law and negotiations, as indeed few lawyers understand. They do expect their representatives to protect U.S. laws enacted through constitutional processes from being undone by international bodies.

The impasse over Chapter 10 (formerly Chapter 19) dispute resolution mechanism concerns self-governance, a term often simply equated with "Sovereignty." The two are not coequal, however. Each of the countries in USMCA has given up what might seem to be a relatively small amount of its self-governing powers. Canada and Mexico each certainly wants to preserve its own national sovereignty, especially vis-a-vis the United States. From their perspectives, on the one hand, USMCA's dispute settlement mechanism may somewhat limit the self-governing powers of each country. But on the other hand, those dispute settlement procedures easily allow parties to block access by opponents to U.S. federal courts. Canada and Mexico gain more than they give up in terms of self-governance.

In terms of U.S. self-governance, USMCA's dispute settlement mechanisms are a complete negative. Its DSMs and the interpretations that were sometimes necessary from the NAFTA Free Trade

²²⁵ Omnibus and Trade and Competitiveness Act, 102 Stat. 1107 (1988).

²²⁶ Cory Adkins & David Singh Grewal, *Two Views of International Trade in the Constitutional Order*, 94 TEX. L. REV. 1495, 1511 (2016).

Commission²²⁷ constitute supra-constitutional governing mechanisms. As such, they necessarily conflict with the Constitution. No other country in the world has as well-considered a constitution as that of the United States. The Constitution's innovative protections for trade and investment have proven to be key to U.S. economic success. Those who would transplant a few of those innovations to supra-national bodies fail to realize or ignore that the mechanism they may consider "effective" requires other elements of our Constitution in order to actually be effective.

USMCA not only allows U.S. nationals to be denied access to U.S. courts without their consent,²²⁸ it is also a far inferior substitute. It may purport to provide a neutral and fair process, but NAFTA did not and the USMCA cannot provide "independent judges."²²⁹ Without the salary and tenure protections that define what it means to be an "independent judge,"²³⁰ the unconsented-to process is offensive to the constitutional sensibilities of U.S. citizens. If aware of what the dispute settlement mechanism does, most U.S. citizens would oppose it regardless of how great the promised trade benefits.²³¹

NAFTA and the Treaty for the European Union expanded multilateralism in trade and governance.²³² Support for NAFTA and the World Trade Organization benefited from the enthusiasm, at the

²²⁷ NAFTA's Free Trade Commission is comprised of representatives from the three member countries including Canada's Minister of International Trade, the United States Trade Representative, and Mexico's Secretary of the Economy.

²²⁸ U.S. nationals can lose their right of access to any court in the U.S. if they consent to an arbitration agreement.

²²⁹ See Bucholtz, *supra* note 77 (proposing that binational panel members be granted the salary and tenure protections of Article III judges in order to make them more "independent").

²³⁰ See THE FEDERALIST NO. 78 (Alexander Hamilton).

²³¹ Senator Elizabeth Warren (D. Mass) and former Ambassador John Bolton make similar arguments in opposition to international trade agreements. Compare Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, THE WASHINGTON POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.75ab19300770, with John Bolton, *Trump, Trade and American Sovereignty*, THE WALL STREET JOURNAL (Mar. 7, 2017), <https://www.wsj.com/articles/trump-trade-and-american-sovereignty-1488931180>.

²³² See generally, Nicholas Baggaley, *Trade Liberalization under the GATT, the NAFTA and the EU*, J. OF COMPA. INT'L MGMT. (1998).

time, for a “New World Order.” The hopes inspired by the EU, however, have faded. Brexit, the wave of refugees, and the several debt crises have demonstrated that the current confederal arrangement is not a stable structure. EU enthusiasts, therefore, have been advocating greater integration and attempting - so far unsuccessfully - to create a constitution. The purpose of a constitution would be to create a state, having at least external sovereignty. Slowly, EU integrationists have been learning by experience the wisdom of the political principle laid down in *The Federalist* that confederations, useful for certain purposes, do not work as governing arrangements.²³³

The USMCA, as a multilateral agreement was almost not completed. At one point, the U.S. divided the negotiations, dealing bilaterally with Mexico without Canada. President Trump said that negotiations were going well with Mexico, but not Canada.²³⁴

Consciously or not, the Trump Administration’s strong preference for bilateral trade agreements, over multilateral ones, is constitutionally more prudent. Even better would be bilateral treaties, for reasons discussed above.²³⁵ Bilateral agreements normally do not create governing bodies. In CUSFTA, the U.S. hastily agreed to the binational panels as an interim agreement.

Opposition in the U.S. to multilateral trade agreements that include governing mechanisms is not necessarily motivated by isolationist or anti-free trade views. Admittedly, some U.S. citizens who oppose multilateral trade agreements do so for self-interested and/or isolationist reasons. General opposition, however, to any multilateral agreement which includes supranational governing institutions, such as NAFTA and the WTO, can legitimately represent a defense of U.S. self-governance under our Constitution. U.S. sovereignty, and promotion of fully free, bilateral trade are easily compatible.²³⁶

Those who work for institutionalized global governance of trade have not learned the lessons of how and why the “American Experiment” has succeeded so well. As Justice Kennedy has written, “The

²³³ See THE FEDERALIST NO. 15, *supra* note 170.

²³⁴ Don Lee, Trump Administration Nearing Deal with Mexico on revised NAFTA, but issues with Canada remain, *The Virginian Pilot* (Aug. 16, 2018), https://pilotonline.com/business/consumer/article_599976db-fea0-540aa95b-6e3e921fela0html

²³⁵ *Supra* section II(A)(1).

²³⁶ See Bolton, *supra* note 232.

Framers split the atom of sovereignty [so that] our citizens would have two political capacities, one state and one federal.”²³⁷ Few U.S. citizens are interested in having a third political capacity, which is global.

²³⁷ U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).