

Fall 9-1-1992

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Recommended Citation

William J. Davey, *The Appointments Clause And International Dispute Settlement Mechanisms: A False Conflict*, 49 Wash. & Lee L. Rev. 1315 (1992), <https://scholarlycommons.law.wlu.edu/wlulr/vol49/iss4/8>

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THE APPOINTMENTS CLAUSE AND INTERNATIONAL DISPUTE SETTLEMENT MECHANISMS: A FALSE CONFLICT

WILLIAM J. DAVEY*

The Appointments Clause¹ requires that the President and the Senate each have a role in the selection of senior federal officials. As such, it is an example of the checks and balances that characterizes the U.S. political system in which there is a separation of powers between the various branches of government. The Appointments Clause need not and should not be interpreted to impinge on the power of the United States as a nation to conduct a modern foreign trade policy.

In this comment on Mr. Morrison's article,² I wish to make essentially three points: First, the dispute settlement provisions of Chapter 19 of the United States-Canada Free Trade Agreement³ (FTA) do not violate even a strict reading of the Appointments Clause. Second, if a court deemed the constitutionality of the Chapter 19 procedures to be a close question under the Appointments Clause, there is ample precedent for finding them to be constitutional because of their connection with foreign affairs, where the Supreme Court has traditionally been less concerned with separation of powers issues. Finally, upholding these provisions is consistent with and reinforces representative democracy.

I. THE APPOINTMENTS CLAUSE AND CHAPTER 19 OF THE FREE TRADE AGREEMENT

Chapter 19 of the FTA permits a Canadian or U.S. person involved in an antidumping (AD) or countervailing duty (CVD) investigation to challenge a final decision therein by the Commerce Department or the International Trade Commission (or by the comparable Canadian authorities)

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

Id.

2. Alan B. Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1299 (1992).

3. Free Trade Agreement, Jan. 2, 1988, U.S.-Can., ch. 19, 27 I.L.M. 293, 386 [hereinafter FTA].

before a binational panel.⁴ Binational panels are composed of five individuals: two from the United States, two from Canada, with the fifth from one or the other.⁵ The first two U.S. members are normally selected by the United States Trade Representative (USTR) from a previously established roster of potential candidates, subject to a Canadian right to object to four proposed panel members. The first two Canadian members are analogously chosen. The fifth person is selected by agreement of the USTR and her Canadian counterpart.⁶

The panel so selected hears the parties' arguments in the case and decides, based upon the administrative record, whether the challenged determination by the relevant administrative agency was "in accordance with the antidumping or countervailing duty law of the importing [country]."⁷ The panel's review is intended to replace judicial review of such determinations by U.S. or Canadian courts.⁸ Its decision is final and nonappealable.⁹

In his article, Mr. Morrison argues two points: 1) the panel members "exercis[e] significant authority pursuant to the laws of the United States" and therefore under Supreme Court precedent must be appointed in accordance with the Appointments Clause;¹⁰ and 2) the panelists are not "inferior" officers under the *Morrison v. Olson*¹¹ criteria established by the Court and accordingly they must all be appointed by the President and confirmed by the Senate. Even accepting these standards arguendo, Chapter 19's procedures do not violate them.

A. Panels Exercise Authority Pursuant to the FTA, Not U.S. Law

Chapter 19 panels do not "exercis[e] significant authority pursuant to the law of the United States." The panel's authority derives exclusively from the Free Trade Agreement itself. It is the FTA, and *not* U.S. law, that provides when and how panels are to be established, what their

4. *Id.* art. 1904, at 387-90.

5. *Id.* annex 1901.2(2), (3), at 393.

6. *Id.* art. 1904, annex 1901.2(3), 387-90, 393. In the absence of such agreement, that person may be selected by the first four panelists chosen, or, if they are unable to agree, by lottery.

7. *Id.* art. 1904(2), at 387.

8. *Id.* art. 1904(1), at 387.

9. See *id.* art. 1904(9), (11), at 388. However, the decision can be "appealed" to an extraordinary challenge committee, but only on very limited grounds (misbehavior by a panelist, the panel's failure to follow a fundamental rule of procedure or on the grounds that the panel manifestly exceeded its powers, authority or jurisdiction under the FTA). See *id.* art. 1904(13), annex 1904.13, at 388-89, 395. The only such challenge to date confirms that the grounds for appeal are very limited. *In re Fresh, Chilled or Frozen Pork from Canada*, Panel No. ECC-91-1904-01 USA, 1991 FTAPD LEXIS 7, 1991 WL 153112 (Extraordinary Challenge Committee June 14, 1991).

10. Morrison, *supra* note 2, at 1302-03 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

11. 487 U.S. 654, 671-72 (1988).

functions are, what standard of review they are to apply, the time limits within which they are to complete their tasks and so on.¹² This conclusion is buttressed by a Ninth Circuit case, in which the court ruled that, for purposes of the Appointments Clause, members of a council created by an interstate compact were acting pursuant to the compact, *not* the federal statute approving the compact, and accordingly were not officers of the United States.¹³ The court reached this conclusion even though the federal statute “constrains Council policy-making, . . . and subjects some Council operations to federal law.”¹⁴

In contrast, the United States-Canada Free-Trade Agreement Implementation Act of 1988 (the Implementation Act),¹⁵ which is the only U.S. law dealing with the FTA, has no provisions dealing directly with panels. The Implementation Act’s interaction with Chapter 19 is limited to title IV of the Act. First, it amends U.S. law so that when a proper request pursuant to Chapter 19 is filed, the normally applicable provisions of U.S. law concerning judicial review of AD/CVD cases do not apply.¹⁶ These provisions have nothing to say about how panels are to operate, what law panelists are supposed to apply and so on.

Second, the Implementation Act specifies how the United States Trade Representative (USTR) is to select the list of U.S. persons eligible to serve on panels.¹⁷ The establishment of this list is merely a preparatory step. Under the Act, no duties or standards of conduct are imposed on the persons selected for inclusion on the list, no functions are specified for them and no powers are granted to them. Inclusion on the list does not guarantee that the persons named will in fact ever serve on a panel. It merely establishes a list (required by the FTA) from which panel members may be selected. Again, in these provisions, the Act says nothing about how panels are to be established, except to provide that the USTR is to exercise the U.S. Government’s selection powers under the FTA.¹⁸

In short, the Implementation Act says nothing at all about the jurisdiction of the panels, their functions and so on. Thus, it cannot be said that the panels are “exercising significant authority pursuant to the laws of the United States.” Their authority derives from the FTA.

Two additional points should be noted. First, the fact that the panels interpret U.S. law, if indeed they do that, does not mean that they exercise

12. See FTA, *supra* note 3, arts. 1904, 1909, 1910, annexes 1901.2, 1903.2, 1904.13, at 387-90, 391, 393-94, 394-95, 395.

13. *Seattle Master Builders Ass’n v. Pacific N.W. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1365 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987).

14. *Id.*

15. Pub. L. No. 100-449, 102 Stat. 1851 (1988) (codified in scattered sections of 19, 28 U.S.C.) [hereinafter Implementation Act].

16. See Implementation Act §§ 401-403, 19 U.S.C. § 1516a(a), (f), (b), 28 U.S.C. 2643(c), 1583, 19 U.S.C. 1502(b), 1514(b), 1677f, 1677 (1988). Similar conforming amendments were made in respect of liquidation of entries and protective orders and other such matters.

17. Implementation Act § 405, 102 Stat. at 1888-92.

18. Implementation Act § 405(a), 102 Stat. at 1888-92.

authority pursuant to U.S. law. Second, the fact that the United States has committed itself to follow the decisions of the panels does not mean that the panel decisions are binding in the sense that the decision of a U.S. court would be binding.

1. Interpretation of U.S. Law

The fact that a person interprets existing U.S. law and court decisions does not make that person an officer of the United States. Otherwise, foreign judges interpreting U.S. law, arbitrators and so forth would be officers of the United States and I think that no one would argue that they are. The fact that panel members, and arbitrators, etc., exercise one function of federal judges does not in any sense make them federal judges. In addition, as noted below, panel decisions are not binding in the sense that U.S. court decisions are.

Moreover, it is arguable that in reviewing U.S. cases, panels do not even apply U.S. law *per se*. Article 1904(2) of the FTA explicitly incorporates the U.S. AD/CVD laws into the agreement for purposes of panel review.¹⁹ Thus, the panels are arguably interpreting the FTA, not U.S. law. Because the panels follow procedures established under the FTA in deciding procedural matters, they are not bound at all by U.S. law. Thus, to say that they are simply doing what a U.S. court would do is inaccurate. While the distinction between following U.S. law and international law which incorporates U.S. law may seem to be a fine one, it is a clear one and an important one.

2. The Binding Nature of Panel Decisions

Under Chapter 19, the decisions issued by panels are in reality only advisory, which suggests that the panels are not *exercising power* pursuant to U.S. law. While it is true that the United States has agreed to abide by the rulings, it cannot be compelled to. To put it another way, a prevailing party in a panel decision could not get an enforceable order from the panel or a U.S. court that would direct the Commerce Department or the International Trade Decision to implement the panel ruling.²⁰ Obviously, a

19. FTA, *supra* note 3, art. 1904(2), at 387.

20. Section 401(c) of the Implementation Act (19 U.S.C. § 1516a(g)(7) (1988)) requires the appropriate administrative agency to take action not inconsistent with the decision of a panel. However, it also provides that any action taken by an agency "under this paragraph shall not be subject to judicial review, and no court of the United States shall have power or jurisdiction to review such action on any questions of law or fact by an action in the nature of mandamus or otherwise." Implementation Act § 401(c), 19 U.S.C. 1516a(g)(7)(A) (1988). Thus, an agency's decision to ignore a panel decision and implement its rejected prior decision could not be challenged. This point is driven home by section 102(c)(2) of the Act, which provides that "No person other than the United States shall . . . challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States . . . on the ground that such action or inaction is

decision by those agencies to ignore the U.S. commitment might lead to a denunciation of the FTA by Canada, but that does not change the fundamental power relationships. The panels, and those favored by their decisions, in the end cannot make the United States do anything. As such, it cannot be said that the panels exercise significant *authority* pursuant to U.S. law.

Consequently, in doing their job, the panels are not exercising authority pursuant to U.S. law. They are exercising authority under an international agreement negotiated by the President and approved by both Houses of Congress.²¹

B. U.S. Panel Roster Members Are "Inferior" Officers

There is, of course, a U.S. law connection with the panelists in that the U.S. panel members are appointed pursuant to the Implementation Act. It could be argued accordingly that even if the panel is applying an international agreement, the individual panelists are applying that agreement pursuant to the laws of the United States or Canada, depending on their nationality, because their membership on the panel derives ultimately from procedures established by the Implementation Act for the establishment of the roster of potential panelists or the analogous Canadian legislation.

If this argument were accepted, the issue would then become whether the U.S. roster of potential panelists and U.S. panel members are named in accordance with the Appointments Clause. Because the Canadian panel members would be exercising their authority pursuant to the laws of Canada, there would be no Appointments Clause issue with respect to them. As to the U.S. members of the roster and panels, since they are not appointed by the President, the question would be whether they are inferior officers

inconsistent with the Agreement." *Id.* § 102(c)(2), 102 Stat. 1853. In this connection, however, in *Fresh, Chilled or Frozen Pork from Canada*, Inv. No. 701-TA-298 (Final) (ITC Pub. 2362, Feb. 1991), the members of the International Trade Commission whose decision had been reversed by a binational panel accepted that they were bound by the panel's decision, even though they vigorously expressed their belief that the panel's decision violated the applicable provisions of the FTA.

It is worth noting that Congress provided in the first-described provision, that if it were declared unconstitutional, then the President would be authorized to accept panel decisions on behalf of the United States. *Id.* § 401(c), 19 U.S.C. 1516a(g)(7)(B) (1988). This procedure also underscores the fact that the panel's decisions are not directly applicable in the United States.

21. It is important to stress that in establishing this system, Congress has not transferred federal powers to an international agency. There is no inherent right to have federal courts review the decisions of the administrative agencies in AD/CVD cases. Accordingly, there is no problem in Congress giving review powers to an international body. See COMMITTEE ON INTERNATIONAL TRADE, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE UNITED STATES/CANADA FREE TRADE AGREEMENT: BINATIONAL REVIEW PROCEDURES FOR ANTIDUMPING AND COUNTERVAILING DUTY CASES, 21-32 (Apr. 25, 1988), reprinted in *United States-Canada Free Trade Agreement: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on Judiciary*, 100th Cong., 2d Sess. 621, 664-55 (1988) [hereinafter *Hearings*] (author, adjunct member of committee, participated in drafting report).

under the Constitution and whether the standards for appointment of inferior officers have been met.

1. Roster Members as Inferior Officers

Are the U.S. panel roster members or U.S. panel members inferior officers? As a past member of the U.S. roster and two Chapter 19 panels, I must say at the outset that it never occurred to me that I held such an august position that it should require U.S. Senate confirmation. Thus, it is hard for me to think of a panel member, let alone a roster member, as an officer of the United States. Not surprisingly, I think that the case law cited in Mr. Morrison's article supports rather than refutes my position.²²

In *Morrison v. Olson*,²³ the Supreme Court concluded that a special prosecutor was an inferior officer for four reasons. While the Court did not suggest that all four criteria had to be met for someone to be an inferior officer, U.S. roster members meet all four.

First, the Court noted that a special prosecutor was subject to removal by a cabinet officer.²⁴ This is effectively the case for U.S. roster members. The USTR, on an annual basis, is authorized to "select" the U.S. roster of potential panelists. She has complete discretion to decide not to reappoint.²⁵ The Implementation Act does not explicitly grant power to the USTR to remove persons from the roster; it is aimed principally at preventing the selection of persons who have not been discussed with specified committees of Congress.²⁶ It has long been recognized, however, that "[t]he power to remove . . . is an incident of the power to appoint."²⁷

The terms of the FTA, which Congress approved in the Act, support this conclusion. The FTA provides that each party shall select twenty-five roster members in consultation with each other and that the parties may amend the roster, again after consultations.²⁸ Since each party is responsible for its own list of roster members, the power to amend the list, which is reserved to the parties, effectively means that the USTR can remove U.S. roster members from the roster.²⁹

22. See Morrison, *supra* note 2, at 1302-07.

23. Morrison v. Olson, 487 U.S. 654, 671-72 (1988).

24. *Id.* at 671.

25. See Implementation Act § 405, 102 Stat. at 1888-92.

26. *Id.* at § 405(a)(7)(A), 102 Stat. 1891-92.

27. Myers v. United States, 272 U.S. 52, 161 (1926).

28. FTA, *supra* note 3, annex 1901.2(1), at 393 ("The Parties shall consult in developing the roster, which shall include 50 candidates. . . . The Parties . . . may amend [the roster], when necessary, after consultations").

29. Even if the USTR were found not have the power of removal, she has the practical power to prevent the appointment to a panel of a potential U.S. panelist on the roster since she chooses the two U.S. members of the panel and must agree to the choice of the fifth U.S.-Canadian member. Only if the U.S. and Canadian representatives could not agree on a fifth panelist, if the person was not disqualified by the Canadians and if the person was chosen by the other panelists or by lottery, a situation which has never occurred, could a U.S. person be chosen to serve on a panel without the concurrence of the USTR. Thus, she can effectively preclude appointment to panels, which is basically the same as having the power to remove a person from the roster of potential panelists.

Because U.S. panelists become roster members pursuant to U.S. law, it is the ability to remove them from the roster that is the key to whether the first *Morrison v. Olson* criterion is met. It is worth noting, however, that a panelist, once appointed, may be removed from a panel by the parties if they conclude that the panelist is violating the code of conduct for panelists.³⁰

The second criterion cited by *Morrison v. Olson* was that an inferior officer perform limited duties.³¹ In that case the Court found that a special prosecutor met this test, and so would a member of the roster. Unless appointed to a panel, a roster member has no duties. If appointed, the panel member's duties are limited to consideration of one case, a much more limited charge than that given to a special prosecutor. The third criterion—limited jurisdiction³²—is met for the same reasons. And so is the fourth—temporary appointment.³³ Rosters are named for one year; panel service is typically for less than one year.³⁴

Thus, if panelists are officers of the United States, they are inferior officers. This comports with common sense. The list of presidential appointees subject to Senate confirmation generally includes positions of far greater importance than that of a roster member or panelist.³⁵

2. Appointment by Head of Department

As to the other criterion of the Appointments Clause—the requirement that inferior officers be appointed by a head of department—it seems clear that a cabinet level official, such as the USTR, qualifies as a department head, even if her department is not among the largest in the government.

Consequently, the U.S. panel members are appointed in conformity with the Appointments Clause requirements for inferior officers. The Canadian members are, of course, appointed in conformity with Canadian

30. FTA, *supra* note 3, annex 1901.2(b), at 393. The Code of Conduct can be found in 54 Fed. Reg. 14,371 (1989). The *Morrison v. Olson* removal test would be met by the power to remove someone for cause, i.e., if that person violates the applicable code of conduct. The special prosecutor at issue in *Morrison v. Olson* could be removed "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 487 U.S. at 663 (quoting 28 U.S.C. § 596(a)(1) (1988)). In addition, under the relevant statute, an independent counsel had a right to seek judicial review of his removal. Nonetheless, the Court concluded that the special prosecutor was "subject to removal by a higher Executive Branch official." 487 U.S. at 671.

31. *Morrison*, 487 U.S. at 671.

32. *Id.* at 672.

33. *Id.*

34. See FTA, *supra* note 3, art. 1904(14), at 389 (requiring panel decision within 315 days of request for panel review).

35. The one initially troubling argument raised by Mr. Morrison is that the panelists could not be inferior officers because they can overrule decisions by "senior" officers since AD/CVD decisions are typically made by Presidential appointees confirmed by the Senate. See *Morrison*, *supra* note 2, at 1302. But this is not really true. As noted above, because the panel decisions are ultimately only advisory, the "senior" officers are not really overruled by panels, but by a tacit decision of the President or other higher officials not to reject the panel's decision.

law. U.S. law has no relevance to their position on the roster or panels.

In conclusion, the panels are creatures of international law—the FTA. While U.S. participation in the process is the result of the Implementation Act, the panels are not. U.S. law deals only with the process by which the United States selects its roster of potential panelists. The panels themselves do not exercise authority pursuant to the laws of the United States; they exercise authority pursuant to the FTA. To the extent that it can be argued that the U.S. panel members exercise authority pursuant to the laws of the United States, they do so only in relation to their selection to the panel roster pursuant to the Implementation Act. There is no Appointments Clause problem, however, because the U.S. panel roster is selected in accordance with the Clause's procedures for the appointment of inferior officers of the United States; they are chosen by a cabinet officer after consultation with Congress.

It is important that Congress did not try to appropriate power to itself in connection with the Implementation Act and the selection of the U.S. members of the panel roster. While it may be true that the lack of congressional aggrandizement is not definitive in Appointments Clause jurisprudence,³⁶ it is very important, especially from a policy perspective. The Appointments Clause was designed to regulate the appointments power as between the executive and the legislative branches. It was viewed that there were three choices—give the power to the executive, give it to the legislative or make them share it. Thus, the Appointments Clause was part of the checks and balances system inherent in our separation of powers.³⁷ No one was urging its inclusion in the Constitution as a way to prevent the executive and the legislative branches from taking united action to conduct U.S. foreign policy effectively, or to conclude a free trade agreement with Canada.

II. THE APPOINTMENTS CLAUSE AND FOREIGN AFFAIRS

A constitutional provision that is designed to regulate the relative powers of the executive and legislative branches should not be interpreted to impede the ability of the United States to engage in normal commercial relations with other countries for two reasons. First, international trade agreements with effective dispute settlement mechanisms are becoming more and the more the norm in international relations. Second, Supreme Court precedent supports the proposition that foreign affairs issues merit special, deferential treatment by courts.³⁸

A. The Spread of International Trade Agreements and the Need for Effective Dispute Settlement Mechanisms

The FTA is a type of agreement between countries that is becoming ever more important and common. Indeed, the United States has just

36. See generally *Morrison v. Olson*, 487 U.S. 654, 687-91 (1988).

37. See *Buckley v. Valeo*, 424 U.S. 1, 129-32.

38. See generally *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109-10 (1948).

negotiated a similar agreement with Mexico and Canada.³⁹ Many such agreements have been negotiated in recent years.⁴⁰ While some are not as detailed or far reaching as the FTA, some are more comprehensive, such as the agreement creating the European Community.⁴¹ At the same time, the scope of the basic international agreement on trade, the General Agreement on Tariffs and Trade (GATT),⁴² has greatly expanded and will expand even further if its so-called Uruguay Round of Multilateral Trade Negotiations is brought to a successful conclusion.⁴³

A fundamental part of any serious international trade agreement is an effective dispute settlement procedure.⁴⁴ In order to be effective, that procedure must be able to determine whether acts of a government violate the agreement and provide for a mechanism for enforcing those determinations; otherwise, the commitments made in the agreement will be meaningless.⁴⁵

Some trade disputes will involve the compatibility of a specific national legal provision with a trade agreement; other disputes will involve the compatibility with a trade agreement of administrative agency decisions based on national legal provisions that may on their face appear compatible with the agreement. An effective dispute settlement mechanism must be able to rule whether the challenged law or administrative decision violates the agreement. It must also be perceived to be a fair, neutral mechanism if its rulings are to be accepted. A requirement that all panel members be appointed by the President and confirmed by the Senate would compromise the neutrality and fairness of the mechanism. Such a requirement would also undoubtedly be totally unacceptable to foreign governments.

Full U.S. participation in the world economy requires that the United States be able to enter into agreements with effective dispute settlement

39. See North American Free Trade Agreement, Sept. 6, 1992, U.S.-Can.-Mex., available in LEXIS, GENFED-EXTRA Database; WL, NAFTA Database (awaiting ratification as this article went to press); 57 Fed. Reg. 43,603 (1992) (discussing NAFTA).

40. See AUGUSTO DE LA TORRE & MARGARET R. KELLY, REGIONAL TRADING ARRANGEMENTS, tables 1-4, at 8-9, 11-12 (Int'l Monetary Fund, Occasional Paper 93, 1992).

41. For a survey of the scope of the European Community, see GEORGE BERMAN ET AL., EUROPEAN COMMUNITY LAW: CASES AND MATERIALS (forthcoming 1992).

42. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 187. The currently effective text of the General Agreement can be found in volume IV of GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969) [hereinafter BISD].

43. For a brief, general overview of the GATT system and the issues under consideration in the Uruguay Round, see WILLIAM J. DAVEY, *An Overview of the General Agreement on Tariffs and Trade*, in PIERRE PESCATORE ET AL., HANDBOOK OF GATT DISPUTE SETTLEMENT 1-75 (1991).

44. The general importance of dispute settlement mechanisms in trade agreements is firmly recognized in U.S. law and policy. In the Omnibus Trade and Competitiveness Act, the first of the "principal trade negotiating objectives" of the United States in international trade negotiations was said to be "to provide for more effective and expeditious dispute settlement mechanisms and procedures." The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1101(b)(1)(A), 102 Stat. 1107 (codified at 19 U.S.C. § 2901(b)(1)(A) (1988)).

45. See generally William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51 (1987).

provisions. The reading of the Appointments Clause urged by Mr. Morrison would effectively prevent this.⁴⁶ Fortunately, there is ample Supreme Court precedent to support an alternative view of the Clause.

B. Foreign Affairs and the U.S. Constitution

The foreign affairs of the United States are basically an exclusive federal preserve.⁴⁷ Sovereignty, and hence foreign affairs powers, passed from England to the American Colonies as a collective unit and not to the individual states.⁴⁸ Indeed, given Article I, Section 10 of the Constitution,⁴⁹ there can be little doubt that the Framers intended the states to have little, if any, role in conducting foreign affairs.

The conclusion that the foreign affairs of the United States are essentially a federal concern has important ramifications. One would expect that the United States Government to have the same sort of powers in foreign affairs as the governments with which it deals. For example, Congress has the power to regulate foreign commerce.⁵⁰ One would expect that this broad grant of power, without express limitations, would allow the United States, with the concurrence of the Congress and the President, to regulate foreign commerce in the same manner as other sovereign states regulate it. Since foreign commerce by its nature implies the involvement of another sovereign, regulating it is often going to be done by international agreements. It would be an odd constitution that gave exclusive power over foreign affairs and commerce to a federal government, but then so limited its powers in that field that it could not deal as an equal with other nations.

An instructive discussion of this issue in another context can be found in the case of an entity that is not yet a complete sovereign—the European Community (EC). Its member states have granted to the EC the exclusive control of what is called the common commercial policy, which essentially means trade relations with third countries. In a case questioning the EC's

46. I realize that Mr. Morrison limits his attack on international dispute settlement to the specific provisions of Chapter 19 of the FTA, but I can envision his arguments being used to attack international dispute settlement procedures more generally. For example, GATT dispute settlement panels have found fault with U.S. administrative decisions applying U.S. AD/CVD laws. See, e.g., *Report of the GATT Panel, United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, GATT Doc. DS7/R (July 11, 1991), BIDS 38th Supp. at 30; PESCATORE ET AL., *supra* note 43, Case 83, at 591-96.

47. The acceptance of the exclusive federal role in foreign affairs should be distinguished from the ongoing dispute over the relative roles of Congress and the President in the conduct of U.S. foreign affairs. As to the latter, see generally HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: POWER SHARING AFTER THE IRAN-CONTRA AFFAIR* (Yale Univ. Press 1990).

48. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-317 (1936). See generally THOMAS M. COOLEY, *CONSTITUTIONAL LIMITATIONS* 5-9 (1868).

49. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign Power . . .").

50. *Id.* art. I, § 8, cl. 3 ("The Congress shall have Power . . . to regulate Commerce with foreign Nations . . .").

power to negotiate an international commodities agreement that dealt with both trade and development issues, the EC Court of Justice commented as follows:

[I]t is clear that a coherent commercial policy would no longer be practicable if the Community were not in a position to exercise its powers also in connexion with a category of agreements which are becoming, alongside traditional commercial agreements, one of the major factors in the regulation of international trade.

. . . It is therefore not possible to . . . restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms A "commercial policy" understood in that sense would be destined to become nugatory in the course of time.⁵¹

To cast this in U.S. terms, it would make no sense to say that Congress can regulate foreign commerce⁵², but not in the way that the rest of world is now regulating it. This is particularly the case given the broad interpretation that the Supreme Court has typically given the Necessary and Proper Clause.⁵³

All of this is not to say that a constitution might not put specific limitations on the ability of a government to engage in foreign affairs. More importantly, it is not to say that certain general principles in one nation's constitution might be given a greater prominence than in others, such that they would limit the powers of the government in question to take certain actions that other governments could take. The Bill of Rights is a perfect example of this.⁵⁴

Nonetheless, when there is no explicit control on the federal government's conduct of foreign affairs and no question of violation of basic principles such as those contained in the Bill of Rights, it would seem strange to me to insist on a hypertechnical reading of the Constitution to undercut the nation's ability to deal on equal terms with other sovereign states.

Not surprisingly, there is support in Supreme Court decisions for this position. The most explicit support is in *United States v. Curtiss-Wright Export Corp.*⁵⁵ where the Court held that a delegation of power by Congress to the President, which delegation might have been questionable under the view of delegation then prevailing on the Court, was clearly permissible

51. Case 1/78, International Agreement on Natural Rubber, 1979 E.C.R. 2871, 2911-12, 3 C.M.L.R. 639, 676 (1979).

52. U.S. CONST. art. I, § 8, cl. 3.

53. *Id.* art. I, § 8, cl. 18; see, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421-22 (1819) (discussing Congress' power with respect to national bank).

54. See *Reid v. Covert*, 354 U.S. 1 (1957) (holding right to speedy trial limited extension of military jurisdiction overseas).

55. 299 U.S. 304, 315, 324 (1936); accord *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

because of the foreign affairs aspect of the case. In other words, the Court essentially took the position that the separation of powers doctrine could and should be interpreted less strictly in a case involving foreign affairs. Because the Appointments Clause arises out of the same doctrine, there is authority for concluding that it too should be interpreted less strictly in the foreign affairs context. Delegation, appointment and separation of powers issues all relate to the internal division of power between the various branches of the federal government, not to the power of the federal government vis-à-vis other sovereign nations.

The proposition that constitutional provisions can be interpreted differently in the context of foreign affairs can be seen in other contexts as well. For example, in *Missouri v. Holland*,⁵⁶ the Court held that the United States could enter into an international agreement with Canada that regulated certain matters, specifically, migratory birds, even if those matters would not be subject to regulation by Congress pursuant to a domestic federal statute.

Somewhat analogously, the Supreme Court has applied a more rigorous test to state restrictions discriminating against foreign commerce than it has to state restrictions discriminating against interstate commerce. In *Japan Line, Ltd. v. County of Los Angeles*,⁵⁷ the Court struck down state taxation rules that would have been upheld in the domestic U.S. context. In doing so, it stated:

We may assume that, if the containers at issue here were instrumentalities of purely interstate commerce, *Complete Auto* would apply and be satisfied, and our Commerce Clause inquiry would be at an end. Appellants' containers, however, are instrumentalities of foreign commerce The premise of appellees' argument is that the Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved. This premise, we have concluded, must be rejected. When construing Congress' power to "regulate Commerce with foreign Nations," a more extensive constitutional inquiry is required.⁵⁸

Accordingly, there is ample precedent for a decision upholding the FTA dispute settlement procedure even if in the domestic context it would present an Appointments Clause problem.⁵⁹

It must be stressed that this is not a domestic power struggle issue between the Congress and the President. There is no concern in this case

56. 252 U.S. 416 (1920).

57. 441 U.S. 434 (1979).

58. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445-46 (1979).

59. There is also a powerful argument in support of this result to be made from the centuries of U.S. practice concerning international claims commissions. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (validating presidential power in Iranian claims settlements); *Hearings, supra* note 21, at 384-404 (Appendix A to a memorandum on legal issues raised by the FTA prepared for the International Trade Commission by Office of its General Counsel).

about maintaining a balance of power struck by the Framers. Both the Congress and the President are on the same side and have approved this procedure. As a consequence, the case for judicial intrusion is at its weakest.⁶⁰ Indeed, if there is a balance of powers issue here, it is to ensure that, given the fact that the states have no foreign affairs powers, the federal government has sufficient power to conduct the foreign affairs of the nation to its best advantage.

III. THE FREE TRADE AGREEMENT AND REPRESENTATIVE GOVERNMENT AND DEMOCRACY

Mr. Morrison's article makes one philosophical argument with which I disagree and that is his position that Chapter 19 of the FTA "violates principles of representative government and democracy."⁶¹ He bases this argument on the fact that under Chapter 19, private persons, the binational panelists, may overrule decisions of federal officials.

I do not understand the connection between this fact and representative democracy. Even if the President had entered into the FTA, and Chapter 19, without Congressional authorization or even acquiescence, his decision to do so would have been made by the only person elected by all U.S. citizens. In fact, the agreement was entered into with the overwhelming support by Congress, as evidenced by its adoption of the Implementation Act. The Senate adopted the Act by a vote of 83-9;⁶² the House of Representatives by a vote of 366-40.⁶³ Thus, this system was approved by almost all elected federal officials. How can the fact that the system may result in the reversal of a decision by some *unelected* federal official undermine representative democracy?

Perhaps I am overstating my disbelief. The argument that U.S. trade laws, and particularly the procedures for adopting trade agreements in Congress, undermine representative democracy has become fashionable in recent years.⁶⁴ I tend to view the "representative democracy" argument somewhat cynically, as having less to do with democratic principles than with a concern on the part of some special interest groups that their special pleading may be sacrificed to the general public interest. For example, when the issue of whether or not to approve a trade agreement is presented as a package, special interest groups may fear that their concerns may seem too parochial to persuade Congress to vote against an agreement that is in the

60. As Justice Jackson noted in an oft-quoted passage in a somewhat analogous situation: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum. . . ." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952); see *Dames & Moore v. Regan*, 453 U.S. 653 (1981).

61. See Morrison, *supra* note 2, at 1299-1300.

62. 5 Int'l Trade Rep. (BNA) 1,264 (1988).

63. *Id.* at 1,118.

64. See, e.g., WASH. POST, Apr. 22, 1992, at A18 (advertisement sponsored, inter alia, by Public Citizen, decrying "sneak attack on democracy" under guise of free trade).

overall national interest. Accordingly, they view these agreements as threatening their interests.⁶⁵

I do not remember a "representative democracy" argument as having been significant in the debates on the FTA's implementation. However, there may have been some concern on the part of some users of U.S. AD/CVD laws that in some cases binational panels would reach different decisions than would the Court of International Trade and that the panel decisions would tend to be less favorable to those seeking to restrict imports. Accordingly, some users, or, at least, their lawyers,⁶⁶ may have raised constitutional objections to the FTA at least in part to try to prevent the FTA from changing the impact of U.S. AD/CVD laws in a way that they believed they could prevent if Congress were considering the AD/CVD laws in isolation.

In any event, I view the argument about representative democracy as being more about how special interests are treated than about whether democratically elected representatives have exercised their best judgment in approving a particular trade agreement. Viewed in that light, the "representative democracy" argument offers no real counterweight to my arguments in Part II that the constitutionality of arrangements like Chapter 19 should be upheld if at all possible. The United States must be able to participate in the agreements regulating the global economy on an equal basis with other nations. Indeed, our representative democracy truly would be threatened if the citizens of this country could not have their elected representatives in the Presidency and the Congress conduct a modern foreign trade policy through conclusion of comprehensive foreign trade agreements with other countries.⁶⁷

65. This concern can be seen in a number of statements presented to Congress in connection with extending the so-called fast track authority in 1991. The extension was considered crucial for the continuation of negotiations in the Uruguay Round and on the North America Free Trade Agreement. See *generally* PRESIDENT'S REQUEST FOR EXTENSION OF FAST TRACK TRADE AGREEMENT IMPLEMENTING AUTHORITY: HEARINGS BEFORE THE HOUSE COMM. ON WAYS & MEANS, 102d Cong., 1st Sess. (1991).

66. At the House Judiciary Committee hearings, the principal opposition to Chapter 19 was advanced by Customs and International Trade Bar Association. At the outset of the statement presented on their behalf, they questioned the advisability of "rescind[ing] the more recently developed rights of U.S. industry and labor and consumer groups to [judicial] review on important trade questions." *Hearings, supra* note 21, at 184, 185 (statement of Andrew P. Vance). Since consumer groups have no such rights and labor unions seldom exercise them, the opposition would seem to be based on a concern for U.S. industries that invoke these laws.

67. It is worth noting that a powerful argument can be made that special interest groups are ultimately the greatest threat to the U.S. system of government. See *generally* MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* (1982).