

No. 08-861

In the Supreme Court of the United States

FREE ENTERPRISE FUND
AND BECKSTEAD AND WATTS, LLP, PETITIONERS

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD,
ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE COALITION
FOR FAIR LUMBER IMPORTS
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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INTEREST OF AMICUS CURIAE

The Coalition for Fair Lumber Imports (Coalition) is an alliance of large and small producers of softwood lumber from across the United States. It was formed in 1985 out of concern regarding Canadian lumber subsidies and their effects on the American lumber industry. The Coalition's aim is to address Canada's unfair trade practices involving softwood lumber, including the gross underpricing of timber used to produce that lumber. In the face of Canada's trade practices, the American lumber industry has had little choice but to assert its rights

under domestic trade laws. The Coalition's ultimate goal is to ensure full and fair competition in the American lumber market, free of the undue advantages currently enjoyed by Canadian lumber producers.*

SUMMARY OF ARGUMENT

The Coalition agrees with petitioners that, by vesting the authority to appoint members of the Public Company Accounting Oversight Board in the Securities and Exchange Commission, Congress violated the Appointments Clause. The Coalition files this brief to bring to the Court's attention another context in which Congress has acted in a manner that raises analogous, and in some respects even more serious, constitutional concerns.

Pursuant to the terms of the North American Free Trade Agreement (NAFTA), Congress implemented an alternative dispute resolution system for decisions concerning the imposition of duties on goods imported from Canada and Mexico. The Court of International Trade, an Article III tribunal, ordinarily reviews the determinations of the Department of Commerce and the International Trade Commission concerning the imposition of duties. In NAFTA, however, Congress reassigned that authority to binational panels consisting of members appointed both by the United States and by the affected foreign government. Those binational panels are required to apply (and interpret) American law. Yet their

* Pursuant to Rule 37.6, the Coalition affirms that no counsel for a party authored this brief in whole or in part, and that no person other than the Coalition, its members, or its counsel made a monetary contribution to fund its preparation or submission. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

decisions are binding and ordinarily unreviewable by any Article III court.

As a preliminary matter, to the extent that binational panels perform a judicial function, the NAFTA binational panel review system violates Article III. The panel system effectively allocates a judicial function to a non-Article III (and, indeed, non-domestic) tribunal, and then prohibits Article III courts from reviewing the actions of that tribunal. That system violates Article III under any standard, because it reserves none of the essential attributes of judicial power to Article III courts and because binational panels exercise all of the essential jurisdiction and powers that Article III courts ordinarily do. The practical effect of NAFTA is to create a two-track judicial system, under which challenges to duty determinations involving NAFTA signatories are reviewed by binational panels and challenges involving other nations are reviewed by the Court of International Trade. There is no valid justification for Congress's decision to outsource judicial authority in this manner.

To the extent that binational panels are better understood to perform an *executive* function, the NAFTA binational panel system raises Appointments Clause concerns comparable to those at issue in this case. In fact, the panel system fails the Appointments Clause at an earlier step of the analysis, because panel members need only qualify as "Officers of the United States" in order to render the system unconstitutional. In determining whether an individual constitutes an officer of the United States for Appointments Clause purposes, this Court has adopted a functional approach, focusing on whether the individual exercises significant authority pursuant to the laws of the United States. Binational panel members readily satisfy that standard, because they review the determinations of components of the Executive Branch,

apply American law, and issue binding and unreviewable decisions. A contrary view would lead to nonsensical results, because it would suggest that members of an entity with the power to review determinations that are made by principal officers would not even qualify as inferior officers themselves. That cannot be the law. And it is clear that, if panel members are officers of the United States, the panel system does not comply with the Appointments Clause's requirements, because two, and possibly three, members of each panel are appointed not by the President, a Court of Law, or a Head of Department, but rather by a foreign government.

The historical practice of submitting disputes to international arbitral panels with foreign members does not counsel in favor of a different result. There is simply no precedent either for delegating the application of American law to an international tribunal, or for reassigning to an international tribunal preexisting claims against private parties. In invalidating the Public Company Accounting Oversight Board, therefore, the Court should signal that the NAFTA panel system raises similar, and serious, constitutional concerns.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY HOLDING THAT, AS CURRENTLY CONSTITUTED, THE PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD IS CONSISTENT WITH THE APPOINTMENTS CLAUSE

The Coalition agrees with petitioners that, by vesting the authority to *remove* members of the Public Company Accounting Oversight Board (Accounting Board or Board) only in the Securities and Exchange Commission (SEC) and not directly in the President, Congress violated the separation of powers more generally. See Pet. Br. 11-43. As is relevant here, however, the Coalition

further agrees with petitioners that, by vesting the authority to *appoint* Board members in the SEC, Congress also violated the Appointments Clause more specifically. See *id.* at 43-62.

A. The Appointments Clause is one of the Constitution’s foundational provisions concerning the separation of powers, because “the President alone and unaided could not execute the laws” but “must execute them by the assistance of subordinates.” *Myers v. United States*, 272 U.S. 52, 117 (1926). The Appointments Clause was “designed to preserve political accountability relative to important Government assignments.” *Edmond v. United States*, 520 U.S. 651, 663 (1997). It provides the President with the sole authority to appoint, with the advice and consent of the Senate, all “Officers of the United States.” U.S. Const. Art. II, § 2, cl. 2. For reasons of administrative convenience, however, it carves out an exception for the appointment of “inferior Officers,” authorizing Congress to vest the appointment of those officers in, *inter alios*, the “Heads of Departments,” without any need for presidential nomination or Senate approval. *Ibid.*

B. It is undisputed that Accounting Board members are “Officers of the United States”—and, for that reason, the sole Appointments Clause issue in this case is whether they are inferior officers (and therefore can validly be appointed by SEC commissioners, at least to the extent that SEC commissioners constitute “Heads of Departments”) or whether they are principal officers (and therefore must be nominated by the President and confirmed by the Senate). As this Court has noted, “the line between ‘inferior’ and ‘principal’ officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn.” *Morrison v. Olson*, 487 U.S. 654, 671 (1988). More recently, however, the

Court explained in *Edmond* that inferior officers are “officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” 520 U.S. at 663.

Under the test of *Edmond*, Accounting Board members are principal officers, because their work is not directed and supervised by Senate-confirmed officers. The primary functions of the Board are to promulgate rules (including professional standards) for accounting firms that audit publicly traded companies, see 15 U.S.C. 7213(a)(1); to conduct investigations of any accounting firm that violates those rules (or any provision of the Sarbanes-Oxley Act or the securities laws), see 15 U.S.C. 7215(b)(1); and to impose sanctions for violations as it deems appropriate, see 15 U.S.C. 7215(c)(4).

Although SEC commissioners are responsible for appointing Accounting Board members in the first instance, see 15 U.S.C. 7211(e)(4), they do not direct or supervise the Board’s work in any meaningful sense. Perhaps most importantly, the SEC cannot dictate which accounting firms the Board should investigate or how it should perform its investigations. Instead, the SEC possesses only the authority to review the Board’s sanctions once they are imposed. See 15 U.S.C. 7217(c)(2)-(3). As to the investigations themselves, the SEC has only the limited authority to relieve the Board of its “responsibility to enforce compliance,” 15 U.S.C. 7217(d)(1), and to censure the Board for failing to engage in enforcement or for violating the Sarbanes-Oxley Act or the securities laws, see 15 U.S.C. 7217(d)(2). Although the SEC has somewhat broader authority with regard to the Board’s rulemaking functions, even that authority is not untrammelled: while the Board’s rules require SEC approval, see 15 U.S.C. 7217(b)(2), the SEC may reject the

Board's rules only if it finds that they are inconsistent with the Sarbanes-Oxley Act or the securities laws or that they are not "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. 7217(b)(3). In short, it is impossible to conclude that the Board's work is directed or supervised by SEC commissioners when "the Board has plenary statutory authority to conduct its most critical functions * * * without *any* opportunity for the SEC to prevent and affirmatively command, and to manage the ongoing conduct of, those activities." Pet. App. 96a (Kavanaugh, J., dissenting).

The lack of day-to-day oversight of the Accounting Board's activities is compounded by the fact that SEC commissioners have only narrow authority to remove the Board's members—and therefore lack the ultimate authority to demand adherence to the SEC's direction. See *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (noting that, "[o]nce an officer is appointed, it is only the authority that can remove him * * * that he must fear and, in the performance of his functions, obey"). The SEC may remove a Board member only if it determines, after notice and a hearing, that the member "has willfully violated any provision" of the Board's rules, the Sarbanes-Oxley Act, or the securities laws; "has willfully abused [his] authority"; or, "without reasonable justification or excuse, has failed to enforce compliance" with the Board's rules, the Sarbanes-Oxley Act, or the securities laws. 15 U.S.C. 7217(d)(3). Those stringent limitations on the SEC's removal power, moreover, are entirely consonant with the broader purpose of the Sarbanes-Oxley Act: namely, to create an independent regulator for the accounting industry that would not be subject to the command of the SEC (or any other component of the Executive Branch). See, *e.g.*, 148 Cong. Rec. 12,119

(2002) (statement of Sen. Gramm) (explaining that the Board was vested with “massive power, unchecked power, by design”). The limitations on the ability to remove Board members not only present an independent constitutional problem; they also illustrate why the Board, as currently constituted, is inconsistent with the Appointments Clause.

II. THE NAFTA BINATIONAL PANEL REVIEW SYSTEM PRESENTS SIMILAR SEPARATION-OF-POWERS CONCERNS, INCLUDING SIMILAR CONCERNS UNDER THE APPOINTMENTS CLAUSE

The principal purpose of this brief is to bring to the Court’s attention similar constitutional concerns raised in another context: *viz.*, by the binational panel review system instituted by the North American Free Trade Agreement. As one commentator has put it, “[n]o other law gives such sweeping powers to private citizens to perform what is, in effect, a kind of judicial or administrative review of the decisions of federal officers.” 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, 1299-1300 (1992) (A. Morrison). In particular, to the extent that NAFTA binational panels are viewed as performing an executive rather than judicial function, those panels, like the Accounting Board, are inconsistent with the Appointments Clause, because panel members are “Officers of the United States” who must be appointed in the prescribed manner. The Court’s decision in this case therefore may have implications for future challenges to the binational panel review system; indeed, in deciding this case, the Court may wish to indicate that the panel system raises serious constitutional concerns.

A. NAFTA Gives Binational Panels The Authority To Decide Questions Of American Law Without Judicial Review

1. For more than a century, Congress has provided for the imposition of duties when a domestic industry is harmed by unfairly traded foreign goods. There are two primary types of those duties: antidumping duties, which are imposed when foreign goods are being sold, or are likely to be sold, in the United States at less than their fair value, see 19 U.S.C. 1673(1), and countervailing duties, which are imposed when a foreign government provides a countervailable subsidy with regard to the imported goods in question, see 19 U.S.C. 1671(a). Both types of duties are imposed in essentially the same fashion; with regard to antidumping duties, the process operates as follows. An “interested party” (including a member of a domestic industry) may petition the Department of Commerce for the imposition of a duty. See 19 U.S.C. 1673a(b)(1). If the Commerce Department determines that the foreign goods were sold in the United States at less than their fair value, it notifies the International Trade Commission (ITC), which then determines whether the domestic industry was materially injured, threatened with injury, or materially retarded by virtue of the dumping. See 19 U.S.C. 1673(2), 1673a(c)-(d). If the ITC so determines, the Commerce Department issues an order directing U.S. Customs and Border Protection to assess a duty on the goods in an amount equal to the amount by which the goods were being undersold. See 19 U.S.C. 1673d(c)(2), 1673e(a).

An interested party may seek review of a determination by the Commerce Department or the ITC before the Court of International Trade (CIT), an Article III tribunal. See 19 U.S.C. 1516a(a)(1)-(2). A decision of the Court of International Trade, in turn, is reviewable by

the Court of Appeals for the Federal Circuit, see 28 U.S.C. 1295(a)(5), and ultimately by this Court, see 28 U.S.C. 1254(1).

2. With regard to the importation of goods from Canada and Mexico, however, the foregoing judicial review process has been displaced as a result of the North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 (NAFTA). Pursuant to the terms of NAFTA (and a predecessor free-trade agreement between the United States and Canada), Congress implemented an alternative review system for decisions concerning the imposition of duties on goods imported from Canada and Mexico. Under that system, an interested party may seek review from a binational panel, rather than the CIT. See 19 U.S.C. 1516a(g)(8)(A)(i); NAFTA Art. 1904(2), 32 I.L.M. 683. A binational panel consists of five members; each government selects two members, normally from a preestablished roster of candidates, and the fifth member is selected either by agreement of the governments or (as is the usual practice) by one of the governments chosen by lot. See NAFTA Annex 1901.2, 32 I.L.M. 687. The United States' panel members are selected by the U.S. Trade Representative, subject to peremptory challenges exercised by the foreign government. See 19 U.S.C. 3432(a)(2); NAFTA Annex 1901.2(2), 32 I.L.M. 687. Notably, when a binational panel reviews the determinations of the Commerce Department or the ITC, it applies American law, see NAFTA Art. 1904(2), 32 I.L.M. 683, and its decision is binding, see NAFTA Art. 1904(9), (15), 32 I.L.M. 683, 684.

The decision of a binational panel is ordinarily unreviewable by an Article III court. See 19 U.S.C. 1516a(g)(2). Indeed, NAFTA itself specifically prohibits the signatory countries from providing for judicial review in their domestic law. See NAFTA Art. 1904(11), 32

I.L.M. 683. Instead, either of the involved governments, but not a private party, may seek review from a binational “extraordinary challenge committee.” NAFTA Annex 1904.13(1), 32 I.L.M. 688. That committee consists of three members; each government selects one member from a list of current or former judges, and the third member is selected by lot. *Ibid.* The extraordinary challenge committee may vacate a binational panel’s decision only if (1) a member of the panel was guilty of gross misconduct or bias, the panel seriously departed from a fundamental rule of procedure, or the panel manifestly exceeded its authority, and (2) the error materially affected the panel’s decision and threatens the integrity of the review process. See NAFTA Art. 1904(13), 32 I.L.M. 683. The decision of an extraordinary challenge committee, like the decision of a binational panel, is binding and unreviewable by an Article III court. See 19 U.S.C. 1516a(g)(7)(A).

In implementing the provisions of NAFTA establishing the binational panel review system, Congress anticipated the possibility of constitutional challenges to the system. Congress thus provided that a constitutional challenge could be brought directly in the United States Court of Appeals for the District of Columbia Circuit within thirty days of notice that the binational panel had completed review of an underlying determination. See 19 U.S.C. 1516a(g)(4)(A), (C). In considering such a challenge, however, the D.C. Circuit is not permitted to consider the record of proceedings before the panel. See 19 U.S.C. 1516a(g)(4)(G). Congress additionally provided for expedited review by this Court, under its appellate jurisdiction, of any final judgment by the D.C. Circuit. See 19 U.S.C. 1516a(g)(4)(H).

3. Since the implementation of NAFTA in 1994, various parties, including the Coalition, have sought to

challenge the constitutionality of the binational panel review system, particularly in connection with the long-standing dispute between the United States and Canada concerning Canadian subsidies to its lumber industry. None of those challenges, however, has resulted in a judgment on the merits.

Most recently, in 2002, the Commerce Department determined both that Canadian softwood lumber products were being sold in the United States at less than their fair value and that the Canadian government was providing countervailable subsidies in connection with Canadian softwood lumber imports; the ITC further determined that the domestic industry was threatened with material injury by virtue of the imports. After the Commerce Department imposed duties, the Canadian government invoked the binational panel review process. A binational panel repeatedly remanded the matter to the ITC, ultimately instructing the ITC to determine that the evidence on the record did not support a finding of threat of material injury. After the ITC made such a determination under protest, the binational panel affirmed. The United States requested review of the binational panel's decision from an extraordinary challenge committee, but the committee affirmed. See *Coalition for Fair Lumber Imports v. United States*, 471 F.3d 1329, 1331-1332 (D.C. Cir. 2006) (*Coalition*).

The Coalition subsequently brought a constitutional challenge in the D.C. Circuit, claiming, *inter alia*, that NAFTA's binational panel review system violated either Article III of the Constitution or the Appointments Clause. After briefing and oral argument, the United States and Canada entered into a settlement, pursuant to which the United States agreed not to pursue any duties against the Canadian lumber industry in return for certain concessions. See *Coalition*, 471 F.3d at 1332.

The D.C. Circuit subsequently dismissed the action, on the ground that the settlement deprived it of jurisdiction to consider the Coalition's constitutional challenge. *Id.* at 1332-1333. By its terms, the settlement will remain in effect until 2013.

B. By Assigning A Judicial Function To A Non-Article III Tribunal, The NAFTA Binational Panel Review System Violates Article III Of The Constitution

The better understanding of the NAFTA binational panel review system is that binational panels perform a judicial function. That is because binational panels perform exactly the same function that the Court of International Trade performed before the implementation of NAFTA, and that the CIT continues to perform with regard to challenges to duty determinations involving imports from every other nation (and, where no party invokes the panel system, from Canada and Mexico as well). See 19 U.S.C. 1516a(a)(1)-(2). NAFTA itself recognizes that binational panels perform a judicial function, by providing that "each [signatory nation] shall *replace* judicial review of final antidumping and countervailing duty determinations with binational panel review." NAFTA Art. 1904(1), 32 I.L.M. 683. By its terms, therefore, NAFTA allocates a concededly judicial function to a non-Article III (and, indeed, non-domestic) tribunal. That unprecedented outsourcing of judicial authority cannot be reconciled with Article III of the Constitution.

1. As a preliminary matter, the NAFTA binational panel review system is constitutionally problematic not only because it assigns a judicial function to a non-Article III tribunal, but also because it prohibits Article III courts from reviewing the actions of that tribunal (except to consider constitutional challenges to the system). See 19 U.S.C. 1516a(g)(2)(B) (providing that "no court of the

United States has power or jurisdiction to review the determination [of a binational panel] on any question of law or fact”).

None of the leading cases in which this Court has considered challenges to non-Article III tribunals involved such a complete preclusion of Article III review. In *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), the Court upheld the delegation of authority to the Commodity Futures Trading Commission (CFTC) to adjudicate common-law counterclaims where the counterclaim plaintiff had waived its right to bring that claim before an Article III court; in so holding, however, the Court noted that the CFTC’s decision remained subject to judicial review (including de novo review on questions of law). See *id.* at 849, 853. Similarly, in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Court upheld a binding arbitration mechanism in the Federal Insecticide, Fungicide, and Rodenticide Act, in part on the ground that it “limits but does not preclude review of the arbitration proceeding by an Article III court.” *Id.* at 592. Finally, even in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which the Court effectively invalidated portions of the Bankruptcy Reform Act, there was Article III appellate review as of right from a non-Article III bankruptcy court. See *id.* at 55, 85-86 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in the judgment).

Here, by contrast, the NAFTA binational panel review system divests parties of *any* right to be heard in an Article III court, except on a constitutional challenge to the system—even where the determination of the binational panel was infected by fraud or misconduct. See NAFTA Art. 1904(13), 32 I.L.M. 683 (providing for review by an extraordinary challenge committee, but not

by a domestic court, in those circumstances). Because the panel system provides no Article III protection for the “personal * * * interests” of litigants challenging duty determinations, it raises serious Article III concerns on that basis alone. *Schor*, 478 U.S. at 848; see *Northern Pipeline*, 458 U.S. at 70 n.23 (plurality opinion).

2. In any event, the NAFTA binational panel review system fails the balancing test that this Court set out in *Schor* for reviewing an Article III challenge to a non-Article III tribunal. In *Schor*, the Court noted that it had “declined to adopt formalistic and unbending rules,” but had instead “weighed a number of factors,” in assessing whether a congressional action would have an impermissible effect on the constitutionally assigned role of the federal judiciary. 478 U.S. at 851. Specifically, the Court stated that it had focused on “the extent to which the essential attributes of judicial power are reserved to Article III courts,” and, conversely, “the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.” *Ibid.* (internal quotation marks and citations omitted). An analysis of those factors reveals the infirmities of the panel system.

a. Most importantly, the NAFTA binational panel review system reserves *none* of the essential attributes of judicial power to Article III courts. As discussed above (see p. 10), the panel system divests the Court of International Trade of any authority once a party seeks review from a binational panel, see 19 U.S.C. 1516a(g)(2) (A), and also divests the CIT and other Article III courts of any authority to review the binational panel’s decision

(except for constitutional challenges), see 19 U.S.C. 1516a(g)(2)(B), (g)(4)(A). The panel system therefore does not merely involve a “single deviation” from the traditional model of judicial review following agency action, *Schor*, 478 U.S. at 852; it abrogates that model altogether. The absence of any Article III review counsels heavily—and indeed decisively, see pp. 13-15, *supra*—against the panel system’s constitutionality.

b. Conversely, NAFTA binational panels exercise *all* of the essential jurisdiction and powers normally vested in Article III courts. Put simply, binational panel members “act just like the Article III judges whom they replace.” A. Morrison, *supra*, at 1301. Like the CIT in cases involving imports from other nations, a binational panel has essentially plenary authority to decide whether determinations by the Commerce Department and the ITC are “in accordance with the antidumping and countervailing duty law of [the United States]”: specifically, “the relevant statutes, legislative history, regulations, administrative practice and judicial precedents [on which] a court of [the United States] would rely” in reviewing duty determinations. NAFTA Art. 1904(2), 32 I.L.M. 683. NAFTA even lists specific statutes that binational panels must apply in cases involving duties imposed by the United States. See NAFTA Annex 1911, 32 I.L.M. 691, 692. Needless to say, the decisions of binational panels are binding on the parties involved. See NAFTA Art. 1904(9), 32 I.L.M. 683.

NAFTA thus effectively creates a two-track judicial system, under which certain challenges to duty determinations are reviewed by binational panels and other challenges are reviewed by the CIT. Under that two-track system, binational panels resolve matters of domestic law in effectively the same manner as Article III courts, but without the protections that Article III affords.

c. The origins and importance of the right adjudicated also counsel against sustaining the panel system's constitutionality. In considering that factor in *Schor*, this Court distinguished between so-called "public rights" (*i.e.*, matters that could be "conclusively determined by the Executive and Legislative branches") and "private rights" (*i.e.*, matters that were "historically the types of matters subject to resolution by Article III courts"). See 478 U.S. at 853-854 (citation omitted). At the same time, the Court made clear that "the distinction between public rights and private rights" is not "determinative for Article III purposes." *Id.* at 853.

The most that can be said about duty determinations is that they involve a hybrid form of right with a public component. On the one hand, the federal government levies duties itself, and, for that reason, this Court has suggested that the imposition of duties does not "inherently or necessarily require[] judicial determination." *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929). On the other hand, a member of a domestic industry that has been injured by unfair trade practices may petition the government for the imposition of a duty, see 19 U.S.C. 1673a(b)(1); that duty is levied on the imported goods (and is therefore effectively imposed on the producers of the goods, rather than the foreign government itself), see 19 U.S.C. 1673d(c)(1), 1673e(a)-(b); and the domestic industry directly benefits from the imposition of that duty. A proceeding concerning the imposition of a duty is therefore comparable in many respects to an ordinary commercial dispute between private parties—and, accordingly, Congress has committed the review of such proceedings to Article III courts for more than fifty years. See Act of July 14, 1956, Pub. L. No. 84-703, § 1, 70 Stat. 532 (conferring Article III status on the Customs Court, the predecessor to the CIT). The nature of

the right to be adjudicated therefore does not weigh heavily in the analysis; if anything, it too points toward a determination of unconstitutionality.

d. Finally, the concerns that drove Congress to depart from the requirements of Article III in this context are insubstantial, and there are therefore no “valid and specific legislative necessities” to support the panel system’s constitutionality. *Schor*, 478 U.S. at 855. In prior decisions, this Court has justified departures from the requirements of Article III on the ground that non-Article III tribunals have enhanced the efficiency of Article III courts, see *Peretz v. United States*, 501 U.S. 923, 934-935 (1991); reduced the backlog in those courts, see *Palmore v. United States*, 411 U.S. 389, 408-409 (1973); or possessed expertise in specialized areas of the law, see *Schor*, 478 U.S. at 855-856.

None of those justifications is applicable here. Congress had already committed review of duty determinations to an Article III court with expertise in the area—the CIT. In fact, the CIT was originally established for the specific purpose of creating a specialized court that could bring efficiency and uniformity to the review of duty determinations. See, *e.g.*, H.R. Rep. No. 1235, 96th Cong., 2d Sess., Pt. 1, at 20 (1980). The panel system does little to increase the efficiency of the CIT, because it exerts jurisdiction over claims arising from only two nations, and it potentially gives rise to disuniformity in the law, because it creates a two-track system of review.

In NAFTA, Congress agreed to surrender Article III review of duty determinations involving Canada and Mexico—and to consign that review to a non-domestic tribunal—as a condition of securing the perceived benefits of the agreement. See A. Morrison, *supra*, at 1307 (concluding that “there is little doubt that the driving force behind the change [in the law] was the Canadian

dissatisfaction with the outcome of proceedings in the United States, even after judicial review was completed”). Under the balancing framework of *Schor*, the resulting system violates Article III.

3. One additional factor demonstrates that the NAFTA binational panel review system raises particularly acute Article III concerns. A binational panel may take jurisdiction over a decision concerning the imposition of a duty at the request of any interested party, even over the objection of another party. See 19 U.S.C. 1516a(g)(8)(A)(i); NAFTA Art. 1904(2), 32 I.L.M. 683. This Court has repeatedly focused on the presence (or absence) of the consent of the parties in evaluating the constitutionality of non-Article III tribunals. See, e.g., *Schor*, 478 U.S. at 848-849; *Thomas*, 473 U.S. at 591; *Northern Pipeline*, 458 U.S. at 79 n.31. Most recently, in *Schor*, the Court noted that it had previously considered “the absence of consent to an initial adjudication before a non-Article III tribunal” to be “a significant factor in determining that Article III forbade such an adjudication,” 478 U.S. at 849, and it relied heavily on the presence of such consent as a basis for sustaining the challenged delegation of authority to the CFTC, see *id.* at 849-851.

A fortiori, where, as here, a claim can be assigned to a non-Article III tribunal even absent consent—and where that tribunal conducts not merely the “initial adjudication,” but effectively the *entire* adjudication—there is strong reason to question the constitutionality of the system. By assigning a judicial function to a non-Article III tribunal, and doing so without the consent of all of the interested parties, the NAFTA binational panel review system violates Article III.

C. To The Extent That Binational Panels Do Not Perform A Judicial Function, The NAFTA Binational Panel Review System Violates The Appointments Clause

As discussed above (see p. 13), the better understanding of the NAFTA binational panel review system is that binational panels perform a judicial function, because binational panels perform exactly the same function that the CIT performed before the implementation of NAFTA (and continues to perform with regard to other nations). Alternatively, however, binational panels could be conceived as performing an executive function, because binational panels review the decisions of the Commerce Department and the ITC and thus effectively serve in a supervisory capacity vis-à-vis those components of the Executive Branch. To the extent that the latter understanding is the better one, the panel system raises Appointments Clause concerns comparable to, if not greater than, those raised by the Accounting Board. In fact, the panel system fails the Appointments Clause at an earlier step of the analysis, because panel members qualify as “Officers of the United States.” The panel system fails to comply even with the minimal constitutional requirements for the appointment of inferior officers, because a foreign government selects some members—and, in some cases, a majority of the members—of the panels (and has the power to veto the others). Regardless of how the function performed by binational panels is characterized, therefore, the panel system is unconstitutional.

1. This Court’s leading decision on the meaning of the phrase “Officers of the United States” is *Buckley v. Valeo*, 424 U.S. 1 (1976). In earlier cases, the Court had suggested that, for purposes of determining whether an individual was an officer of the United States for pur-

poses of the Appointments Clause, the inquiry turned on the “tenure, duration, emolument, and duties” of the individual’s position. *United States v. Germaine*, 99 U.S. 508, 512 (1879). In *Buckley*, however, the Court refocused the inquiry away from the formalities of an individual’s position toward the functions that the individual actually performs. Specifically, the Court explained that the “fair import” of the phrase “Officers of the United States” was that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed by [the Appointments Clause].” *Buckley*, 424 U.S. at 126.

2. Under the standard set out in *Buckley*, members of binational panels readily qualify as “Officers of the United States.”

a. As explained above (see p. 10), the primary function of a binational panel is to review the determinations of the Department of Commerce (in the context of anti-dumping duties, as to whether foreign goods were sold in the United States at less than their fair value) and the ITC (as to whether the affected domestic industry was materially injured by virtue of the dumping). See 19 U.S.C. 1516a (g)(8)(A)(i); NAFTA Art. 1904(2), 32 I.L.M. 683. A binational panel applies (and, where necessary, interprets) American law in reviewing those determinations—and its decisions are binding and ordinarily unreviewable by any Article III judge or properly appointed officer of the United States. See 19 U.S.C. 1516a(g)(2); NAFTA Art. 1904(2), (9), (15), 32 I.L.M. 683, 684. Given the nature of those duties, there can be no serious dispute that the authority exercised by binational panel members constitutes “significant authority pursuant to the laws of the United States.” *Buckley*, 424 U.S. at 126.

Perhaps the best evidence that binational panel members exercise “significant authority pursuant to the laws of the United States” is that they exercise essentially the same authority exercised by judges of the CIT with regard to other nations. As discussed above (see p. 13), because judges of the CIT are Article III judges, the better understanding is that binational panels also perform a judicial function, in violation of Article III. To the extent that binational panels are understood to perform an executive function, however, judges of the CIT, like other Article III judges, could be said to exercise “significant authority pursuant to the laws of the United States”; indeed, as a matter of constitutional structure, Article III judges are most closely analogous to *principal* officers in the Executive Branch, who, like Article III judges, are nominated by the President and confirmed by the Senate. It necessarily follows that binational panel members exercise “significant authority pursuant to the laws of the United States” as well.

A contrary view, under which binational panel members would not qualify as officers of the United States, would lead to nonsensical results. To the extent that a binational panel is understood to perform an executive function, a binational panel effectively operates in a supervisory capacity over the Department of Commerce and the ITC, whose determinations it is reviewing. For purposes of the Appointments Clause, however, both the Secretary of Commerce (as a “Head of Department”) and the members of the ITC are superior officers who must be nominated by the President and confirmed by the Senate. Cf. 19 U.S.C. 1330(a) (establishing the appointment procedure for ITC members). It would be passing strange if the members of an entity with the power to review determinations that are themselves made by principal officers—and to issue binding orders

directing those officers to take action, see 19 U.S.C. 1516a(g)(7)(A)—would not even qualify as inferior officers for Appointments Clause purposes. Indeed, at least one commentator has suggested that it would be “unthinkable” if binational panel members were not *principal* officers for that reason, much less officers of the United States in the first place. See A. Morrison, *supra*, at 1302; cf. Jim Chen, *Appointments With Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 Wash. & Lee L. Rev. 1455, 1487 (1992) (Chen) (stating that “one hesitates to assert that an officer who can review agency decisions is ‘inferior’ ”).

b. This case itself provides further confirmation that binational panel members are officers of the United States, because the authority exercised by binational panel members is comparable to that exercised by the Accounting Board. Notably, respondents in this case have effectively conceded that Accounting Board members are “officers of the United States, rather than mere employees who are lesser functionaries.” Pet. App. 81a (Kavanaugh, J., dissenting) (internal quotation marks and citation omitted). Like members of the Accounting Board, binational panel members have broad authority within a specialized area—whether the regulation of the accounting industry, in the case of the Accounting Board, or the review of duty determinations, in the case of binational panels. Just as the Accounting Board has the authority to promulgate rules (and to impose sanctions for violations of those rules), see 15 U.S.C. 7213(a)(1), 7215(c)(4), binational panels have the authority to apply and interpret domestic law (and to uphold or overturn determinations concerning the imposition of duties), see NAFTA Art. 1904(2), (9), (15), 32 I.L.M. 683, 684. And much like the Accounting Board, which is subject only to

limited oversight by the SEC, see pp. 6-7, *supra*, binational panels are subject only to limited oversight by extraordinary challenge committees, and essentially no oversight by Article III judges or properly appointed executive officials. See, e.g., 19 U.S.C. 1516a(g)(2)(B). Regardless whether the Court decides in this case that Accounting Board members are principal or inferior officers, therefore, it is hard to fathom how binational panel members would not qualify as officers of the United States at all.

The authority exercised by binational panel members is also comparable to that exercised by other individuals whom this Court has previously held to be officers of the United States for purposes of the Appointments Clause. Most notably, binational panel members “exercise at least as much authority as special trial judges in the Tax Court,” Chen, *supra*, at 1481, whom this Court held to be officers in *Freytag v. Commissioner*, 501 U.S. 868 (1991). In so holding, the Court reasoned that special tax judges “perform more than ministerial tasks,” because they “take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders.” *Id.* at 881-882. Indeed, the Court noted, special tax judges also have the authority to render decisions on behalf of the Tax Court in certain cases by assignment of that court’s chief judge. *Id.* at 882. *A fortiori*, binational panel members—who have the authority to render binding decisions in a *whole category* of cases—exercise “substantial authority pursuant to the laws of the United States,” and thus qualify as officers of the United States, under the standard articulated in *Buckley*.

c. Even under the standard articulated in this Court’s earlier Appointments Clause cases, which placed more weight on the formalities of an individual’s position

in determining officer status, binational panel members would qualify as officers. To be sure, panel members serve for relatively limited tenures. Under NAFTA, panel members are normally chosen from a preestablished roster of candidates, see NAFTA Annex 1901.2(1)-(3), 32 I.L.M. 687; the U.S. Trade Representative prepares the United States' roster, which is updated annually, and selects the United States' panel members. See 19 U.S.C. 3432. An individual listed on the United States' roster may therefore end up serving only on a single panel—and, in fact, may never serve at all. Once an individual is named as a panel member, however, he serves until the dispute in question is resolved. And it is worth noting that, in complex cases, the resolution of a dispute can take a substantial period of time: in the dispute that gave rise to the Coalition's most recent challenge in the D.C. Circuit, it took *more than two years* before the binational panel finally overturned the ITC's initial determination on material injury. See *Coalition*, 471 F.3d at 1331-1332.

In any event, it does not follow from the fact that an individual may end up serving only on a single panel that a panel member does not qualify as an officer under the Appointments Clause. For the duration of panel service, a panel member exercises substantial authority under American law. In that respect, a panel member is no different from an independent counsel, who would typically serve for only a single investigation (and yet unquestionably qualified as an officer for Appointments Clause purposes). See *Morrison*, 487 U.S. at 671 n.12. And the fact that an individual could be placed on the roster of candidates and yet never serve as a panel member is irrelevant, because the relevant question here is whether a *panel member*, not a mere candidate for panel membership, qualifies as an "officer." Neither the relatively lim-

ited tenure of a panel member, nor any other formality attending a panel member's status, detracts from the conclusion that panel members exercise substantial authority and thus qualify as officers under the Appointments Clause.

d. Even assuming that panel members are merely inferior officers for purposes of the Appointments Clause, it is clear that the binational panel review system does not comply with the Appointments Clause's requirements. Two, and possibly three, members of each binational panel are appointed not by the President, a Court of Law, or a Head of Department, but rather by a foreign government. There is no conceivable way to reconcile that practice with the requirements of the Appointments Clause. And even as to the members of the panel who are selected by the United States, those members are chosen by the U.S. Trade Representative, see 19 U.S.C. 3432(a)(2)—and it is an open question whether the U.S. Trade Representative qualifies as a “Head of Department” with the power to appoint inferior officers. Cf. *Pet. Br.* 57-59 (discussing whether the SEC is a “Department”). The foreign government, moreover, may effectively veto those selections by exercising peremptory challenges. See NAFTA Annex 1901.2(2), 32 I.L.M. 687. To the extent that binational panels are understood to perform an executive function, therefore, the binational panel review system violates the Appointments Clause.

D. The History Of International Arbitral Panels Does Not Render The NAFTA Binational Panel Review System Constitutional

In defending the constitutionality of the NAFTA binational panel review system in prior litigation, the government primarily contended that the panel system was rendered constitutional by the United States' historical

practice of submitting disputes to international arbitral panels with foreign members. See, *e.g.*, U.S. Br. at 19-30, *Coalition, supra* (No. 05-1366). That contention lacks merit, because NAFTA binational panels differ from prior international arbitral panels in two crucial respects: first, they are required to apply American law, and second, they consider preexisting claims under domestic law against private parties.

1. Most notably, there is simply no precedent for delegating the application of American law to an international tribunal. Without exception, all of the historical international tribunals were directed or permitted to adjudicate claims with reference to other sources of law—as the ITC seemingly recognized in a memorandum submitted to Congress during hearings on the predecessor agreement to NAFTA. See *United States-Canada Free Trade Agreement: Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 334 (1988) (memorandum from Kristian Anderson, Staff Attorney, Office of the General Counsel, to the ITC). To the extent that members of international tribunals were not required to apply American law, they could not be said either to trench impermissibly upon the jurisdiction of Article III courts or to exercise substantial authority pursuant to the laws of the United States for purposes of the Appointments Clause.

The first international arbitral tribunal in which the United States participated was a commission established to decide, *inter alia*, claims by American citizens against the British government for losses sustained in connection with the taking of property by British forces during the Revolutionary War. See Treaty of Amity, Commerce, and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, Arts. 7-8, 8 Stat. 121-122 (Jay Treaty). At the time of the

treaty, foreign governments were understood to be immune from suit in American courts as a matter of grace. See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (discussing history of foreign sovereign immunity). Unsurprisingly, therefore, the treaty did not require the commission it established to decide claims by American citizens according to American law, but instead directed it to resolve those claims under generally applicable legal principles: *i.e.*, “according to the merits * * * and to justice, equity, and the laws of nations.” Jay Treaty Art. 7, 8 Stat. 121. Other treaties operated similarly: for example, Pinckney’s Treaty, which created a commission to decide claims by American citizens regarding property taken at sea by Spanish forces during Spain’s then-recent war with France, likewise directed the commission to resolve those claims “according to the merits * * * and to justice, equity, and the laws of nations,” rather than pursuant to American law. Treaty of Friendship, Limits, and Navigation, U.S.-Spain, Oct. 27, 1795, Art. 21, 8 Stat. 150.

The Iran-United States Claims Tribunal, considered by this Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), is not to the contrary. The underlying agreement establishing the tribunal did not require the tribunal to apply American law to the claims of American citizens against the Iranian government; instead, it directed the tribunal to resolve those claims “on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the [t]ribunal determines to be applicable.” Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, Art. 5, 20 I.L.M. 232. Accordingly, while the undoubted effect of

the agreement, as implemented by the President, was to foreclose American citizens from pursuing some claims in Article III courts, this Court held that the remission of those claims to the tribunal did not violate Article III. *Dames & Moore*, 453 U.S. at 684-686. The Court reasoned that, in remitting the claims, the President had merely “exercised [his] power * * * to settle claims” and, as such, had “simply effected a change in the substantive law governing the lawsuit.” *Id.* at 685. The NAFTA binational panel review system inflicts a far weightier constitutional harm, because it not only remits preexisting claims under American law to a non-Article III tribunal, but also requires that tribunal to resolve the claims by applying and interpreting American law. There is no precedent in the history of international arbitral tribunals for outsourcing the application of American law in that manner.

2. In addition, there is no precedent for the reassignment of claims to an international arbitral tribunal where the dispute involves preexisting claims under domestic law against private parties (and that, in many cases, have been initiated by other private parties). The cited examples of international arbitral tribunals all involved claims by American citizens against foreign governments. As noted above (see pp. 27-28), those claims were traditionally not cognizable in American courts, and it has long been established that those claims, like claims belonging to the United States itself, could appropriately be resolved by international agreement—and, where the parties to the agreement so agreed, by an international arbitral tribunal. See, *e.g.*, *Dames & Moore*, 453 U.S. at 679. The international agreement, in turn, would often create or define the right to recover, as well as providing the forum in which to do so—and, for that reason, the

United States often entered into such agreements with the full consent of the claimants. See *ibid.*

Here, by contrast, the NAFTA binational panel review system remits to an international tribunal the resolution of preexisting claims under domestic law against *private parties*, not just foreign governments—and it does so even where the American party that initiated the claim does not consent to the tribunal’s jurisdiction. Rather than extinguishing or modifying those claims as a substantive matter, moreover, NAFTA directs the international tribunal to adjudicate those claims under American law. In the case of antidumping duties, although a foreign government may participate in those proceedings (and may even invoke the jurisdiction of the international tribunal), it is not truly a party, even if it has an interest in the outcome, because any duty that is at issue in those proceedings does not run against the foreign government. The NAFTA binational panel system is therefore a different animal from any prior international dispute resolution system in which the United States has participated, and it accordingly presents unprecedented constitutional difficulties.

* * * * *

It is comparatively rare that Congress acts in such a way as to raise Appointments Clause concerns. When it does, however, this Court should afford the action careful scrutiny. For the reasons stated herein and at greater length by petitioners, Congress violated the Appointments Clause by vesting the authority to appoint Accounting Board members in the SEC. So too, to the extent that NAFTA binational panels are viewed as performing an executive function, Congress violated the Appointments Clause by conferring substantial authority on those panels without complying with the constitution-

ally prescribed requirements. And to the extent binational panels are better viewed as performing a judicial function, the panel system cannot be reconciled with the requirements of Article III. The Court should invalidate the Accounting Board, as presently constituted, and, in so doing, make clear that the NAFTA panel system raises similar, and serious, constitutional concerns.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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AUGUST 2009