

WHEN ENOUGH IS TOO MUCH: THE THREAT OF
LITIGATING NAFTA'S CONSTITUTIONALITY AND A
LOST CHANCE TO EXAMINE UNDUE PROCESS IN
ANTIDUMPING AND COUNTERVAILING DUTY
DETERMINATIONS

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INTRODUCTION

A fundamental truth of international trade law is that trade is seldom entirely "free." Free trade agreements, while lessening protectionist measures, stop far short of abolishing all trade barriers. Yet, trade agreements such as the North American Free Trade Agreement ("NAFTA") must create some form of consensus between member countries on how such barriers will be implemented within the context of the agreement.¹

Chapter 19 of NAFTA establishes a unique system for review of protectionist measures imposed by its member countries. Under Chapter 19's provisions, a binational panel reviews administrative determinations that an antidumping or countervailing duty ("AD/CVD") order should be imposed by one member country against another.² The panel's purpose is to ensure fairness in trade practice disputes.³ A panel applies the law of the country that seeks to impose an antidumping or countervailing duty.⁴

Panel decisions, if subsequently subject to further judicial review within a member country, would be a hollow formality. Thus, parties may only appeal a final panel decision on grounds of jurisdiction, improper procedure, or panelist misconduct to an Extraordinary Challenge Committee, as established under Chapter 19.⁵ Following this appeal, interested parties have no recourse for review of the panel's determination.⁶ Interested parties, however, may challenge the constitutionality of NAFTA itself in the

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¹ North American Free Trade Agreement, U.S.-Can.-Mex, Dec. 17, 1992, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

² *Id.* art. 1904.

³ *Id.* art. 1902.

⁴ *Id.* art. 1904.

⁵ *Id.*

⁶ *Id.*

D.C. Circuit.⁷ Because a constitutional challenge is the final remaining recourse for participants in an industry threatened with the denial of domestic market protection, parties will likely continue to raise constitutional challenges to NAFTA until courts have fully adjudicated the issues involved.

In September of 2005, the Coalition for Fair Lumber Imports (“the Coalition”), a group representing U.S. lumber producers, filed suit alleging that Chapter 19 violated the constitutional restraints of Article III and the Appointments Clause, Article II limitations on executive power, and due process guarantees.⁸ The suit stems from a 20-year controversy over alleged subsidization of the Canadian lumber industry and dumping of Canadian lumber in U.S. markets.⁹ The suit was not the first constitutional challenge raised against NAFTA, nor was it the first suit in which the Coalition brought the challenge.¹⁰ However, prior suits never resulted in a decision on the merits of the issues involved.¹¹

Ultimately, the Coalition’s recent challenge met the same fate.¹² After extensive negotiations, the governments of the U.S. and Canada reached a settlement agreement, which mandated in part that the U.S. revoke all AD/CVD orders on Canadian lumber imports.¹³ The D.C. Circuit held that the settlement deprived the court of jurisdiction to hear the Coalition’s challenge.¹⁴ The court observed that the statutory provision allowing constitutional challenges required that parties bring such challenges with regard to a specific determination.¹⁵ Finding that the settlement voided the underlying determination, the court dismissed the Coalition’s claim for lack of jurisdiction.¹⁶

This Comment does not attempt to address all of the constitutional flaws that opponents of NAFTA allege, nor to predict how the D.C. Circuit would have ruled on these issues. NAFTA’s compliance with Article III, for instance, is a complex issue that many commentators have explored.¹⁷ Instead, this Comment analyzes due process challenges to Chapter 19, con-

⁷ 19 U.S.C. § 1516a(g)(4)(A) (2006).

⁸ *Coal. for Fair Lumber Imps. v. United States*, 471 F.3d 1329, 1332 (D.C. Cir. 2006).

⁹ Brief of Petitioner at 25-26, *Fair Lumber*, 471 F.3d 1329 (No. 05-1366).

¹⁰ *See Coal. for Fair Lumber Imps. v. United States*, No. 94-1627 (D.C. Cir.) (withdrawn by voluntary motion to dismiss Jan. 5, 1995), *cited in Am. Coal. for Competitive Trade v. Clinton*, 128 F.3d 761, 764 (D.C. Cir. 1997).

¹¹ *See id.*; *see also Clinton*, 128 F.3d at 767 (dismissed for lack of standing); *Nat’l Council for Indus. Def., Inc. v. United States*, 827 F. Supp. 794, 800 (D.D.C. 1993) (dismissed for lack of jurisdiction).

¹² *Fair Lumber*, 471 F.3d at 1333.

¹³ *Id.* at 1332.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1333.

¹⁷ *See, e.g.,* Matthew Burton, *Assigning the Judicial Power to International Tribunals: NAFTA Binational Panels and Foreign Affairs Flexibility*, 88 VA. L. REV. 1529 (2002); Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833 (2007).

cluding that not only should the Coalition's due process claims have failed, but that the Court should have rejected the claims for lack of a property interest, clarifying a lingering legal ambiguity in AD/CVD determinations that is unlikely to be resolved through other adjudication.

Part I discusses the structure and process of the contested panel system and examines the particulars of the long and fiercely fought controversy over the softwood lumber trade between Canada and the U.S. Part II examines the contingent and indirect quality of the rights that petitioners may claim under U.S. AD/CVD law, concluding that they have no property interest in their claim, and therefore no entitlement to procedural due process. Part III scrutinizes the sufficiency of process under Chapter 19, arguing that the policy interests in favor of upholding NAFTA outweigh any potential inadequacy in the binational panel process. Finally, Part IV examines the reigning confusion over property interests in the courts, concluding that because courts look first to the possible statutory grounds for a decision, constitutional questions about the nature of parties' rights in AD/CVD determinations are not likely to be resolved outside the context of a constitutional challenge to NAFTA.

I. BACKGROUND

A. *U.S. Antidumping and Countervailing Duty Law*¹⁸

U.S. law provides for the imposition of duties, or import taxes, to act as a counter measure to foreign trade practices termed unfair.¹⁹ In the case of antidumping duties, importers of foreign goods sold in the U.S. below their fair value must pay a duty equal to the difference between their fair value, as determined by an administrative investigation, and the price at

¹⁸ Countervailing duty law is governed by 19 U.S.C. §§ 1671 and 1671a, while antidumping law is governed by §§ 1673 and 1673a. Recently, a court declared an identical provision in both sets of statutes, §§ 1671a(c)(4)(a) and 1673a(c)(4)(a), unconstitutional. *PS Chez Sidney v. U.S. Int'l Trade Comm'n.*, 442 F. Supp. 2d 1329 (Ct. Int'l Trade 2006). The court held that the provisions, which governed a mechanism for polling industry participants to determine if they supported an investigation, violated the First Amendment. *Id.* The provisions do not relate to the sections of AD/CVD law discussed in this article, which remain in effect except as otherwise noted.

¹⁹ Unfair trade cases are any cases that fall under AD/CVD legislation. It has been argued that the term is somewhat of a misnomer, as it lumps some valid practices together with practices involving predatory intent. *See* Michael S. Knoll, *United States Antidumping Law: The Case for Reconsideration*, 22 TEX. INT'L L.J. 265, 284-85 (1987). Antidumping measures, for example, are applied against both predatory dumping, where a foreign competitor uses below-cost pricing to gain control of the market and subsequently raises prices, and price discrimination, where it is more profitable for a producer to sell goods at a lower price in one market than to decrease production or lower prices across the board. *Id.* at 284-85, 287.

which they are sold.²⁰ The U.S. imposes countervailing duties when a foreign producer receives a subsidy from its government or another national agency.²¹ The tariff imposed is equal to the amount of the subsidy the foreign producer receives.²² In both cases, the imposition of the duty is contingent upon a showing by a domestic industry that it has suffered or is threatened with material injury, or that the imports in question effectively bar potential domestic producers from entering the market.²³

U.S. law provides that the administering authority, the Department of Commerce, oversees investigations to determine if a subsidy exists or if dumping is occurring.²⁴ Interested parties have the right to petition for an investigation.²⁵ They also have the right to submit information supporting their claim, and to view all nonconfidential information submitted in opposition.²⁶ If the Department of Commerce finds an unfair trade practice, the U.S. International Trade Commission (“ITC”) must then decide if the domestic industry shows a qualifying level of harm.²⁷ The Court of International Trade (“CIT”) may review determinations of the ITC and the Department of Commerce.²⁸ The CIT reviews these decisions to determine whether they are arbitrary, capricious, an abuse of discretion, clearly contrary to law, or unsupported by substantial evidence.²⁹ Parties may appeal decisions of the CIT in the Court of Appeals for the Federal Circuit.³⁰

²⁰ See 19 U.S.C. § 1673 (2006).

²¹ 19 U.S.C. § 1671(a) (2006).

²² *Id.*; § 1673.

²³ §§ 1671(a)(2), 1673(2).

²⁴ §§ 1671(a), 1673; 19 U.S.C. § 1677(1) (2006) (defining “administering authority”).

²⁵ Sections 1671a(b)(1) and 1673a(b)(1) allow petitions by interested parties as defined in § 1677(9)(C)-(G):

(C) a manufacturer, producer, or wholesaler in the United States of a domestic like product,
(D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product,

(E) a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States,

(F) an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) with respect to a domestic like product, and

(G) in any investigation under this subtitle involving an industry engaged in producing a processed agricultural product, as defined in paragraph (4)(E), a coalition or trade association which is representative of either—

(i) processors,

(ii) processors and producers, or

(iii) processors and growers

²⁶ 19 U.S.C. §§ 1671b(b)(3), 1673b(b)(2) (2006).

²⁷ §§ 1671b(a), 1673b(a).

²⁸ 19 U.S.C. § 1516a(a) (2006).

²⁹ § 1516a(b).

³⁰ 28 U.S.C. § 1295(a)(5) (2006).

B. *Antidumping and Countervailing Duty Determinations in the Context of NAFTA*

Originally adopted as part of the U.S.-Canada Free Trade Agreement, the binational panel system began as an intermediary step on the road to abolishing existing AD/CVD law.³¹ The imposition of duties in response to subsidies or dumping was a major concern during negotiations for NAFTA.³² The U.S., Canada, and Mexico examined various possibilities for dealing with the issue of unfair practices tariffs, including abolishing existing laws and replacing them with antitrust laws.³³ The countries ultimately adopted Chapter 19, the most conservative option in consideration.³⁴

A government may request a binational panel review on its own initiative, or at the request of any party permitted to participate in domestic determinations.³⁵ NAFTA panels are comprised of five panelists.³⁶ Each country must maintain a roster of at least twenty-five qualified citizen candidates of good repute who are familiar with international trade law.³⁷ Candidates may not be affiliated with, or guided by, their respective governments (referred to in the agreement as "parties").³⁸

Parties have thirty days from the date that a party requests panel review to appoint two panelists from their roster.³⁹ Each party has the option to challenge up to four candidates selected by the other party.⁴⁰ Should parties fail to choose panelists, or fail to refill seats vacated by a challenge from the opposing party, panelists are chosen by lot.⁴¹ The parties then have fifty-five days to agree on a fifth panelist.⁴² If the parties cannot reach an agreement, a party is chosen by lot to select the final candidate.⁴³ Panel procedure mandates at least one hearing, as well as the opportunity to sub-

³¹ Robert P. Deyling, *Free Trade Agreements and the Federal Courts: Emerging Issues*, 27 ST. MARY'S L.J. 353, 359-60 (1996).

³² Beatriz Leycegui and Mario Ruiz Cornejo, *Trading Remedies to Remedy Trade: The NAFTA Experience*, 10 SW. J.L. & TRADE AM. 1, 21-22 (2003-2004).

³³ *Id.* at 22. A third option considered in negotiations involved amending existing U.S. AD/CVD laws to reduce their protectionist effects. *Id.* at 23. The United States rejected this proposal, but NAFTA ultimately included provisions allowing each NAFTA country to challenge future amendments to the AD/CVD laws of the other NAFTA countries. *Id.*

³⁴ *Id.*

³⁵ NAFTA, *supra* note 1, art. 1904(5).

³⁶ *Id.* annex 1901.2(3).

³⁷ *Id.* annex 1901.2(1).

³⁸ *Id.*

³⁹ *Id.* annex 1901.2(2).

⁴⁰ *Id.*

⁴¹ NAFTA, *supra* note 1, annex 1901.2(2).

⁴² *Id.* annex 1901.2(3).

⁴³ *Id.*

mit written arguments and rebuttals.⁴⁴ Panelists apply the law of the country imposing the tariff, and must consider statutory law, judicial precedent, and legislative intent.⁴⁵ Absent an agreement otherwise between the parties, the panel must, within ninety days of appointing the panel's chair, submit its written decision to the parties.⁴⁶ The panel may decide to uphold a member country's decision to impose a subsidy or remand the decision to the appropriate national body for reconsideration not inconsistent with the panel determination.⁴⁷

A panel decision can only be challenged by appeal to an Extraordinary Challenge Committee on grounds of bias, misconduct, procedural violation, or overreaching authority or jurisdiction that materially affects the panel's decision.⁴⁸ In the history of NAFTA, Extraordinary Challenge Committees have reviewed only three panel decisions.⁴⁹ In each case, the U.S. brought a challenge against the panel's determination, and in each case the Extraordinary Challenge Committee affirmed the panel's decision.⁵⁰ The most recent Extraordinary Challenge Committee reviewed and affirmed the panel decision that led to the Coalition's suit.⁵¹

C. *The Softwood Lumber Dispute*

For over twenty years, domestic producers have fought to show that Canadian lumber imports receive government subsidies that call for the imposition of countervailing duties.⁵² In the U.S., timber is typically har-

⁴⁴ *Id.* annex 1903.2(1).

⁴⁵ *Id.* art. 1904(2).

⁴⁶ *Id.* annex 1903.2(2).

⁴⁷ NAFTA, *supra* note 1, art. 1904(8).

⁴⁸ *Id.* art. 1904(13).

⁴⁹ See NAFTA Chapter 19 Extraordinary Challenge Committee Decisions (USA), http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=796 (last visited Aug. 24, 2007); Decisions and Reports, http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=76 (last visited Aug. 24, 2007) (showing no Mexican or Canadian challenges).

⁵⁰ Certain Softwood Lumber Products from Canada, File No. ECC-2004-1904-01USA (U.S.-Can. Free Trade Agreement Extr'y Challenge Comm. Aug. 10, 2005), available at http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ue2004010e.pdf; Pure Magnesium from Canada, File No. ECC-2003-1904-01USA (U.S.-Can. Free Trade Agreement Extr'y Challenge Comm. Oct. 7, 2004), available at http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ue2003010e.pdf; Gray Portland Cement and Clinker from Mexico, File No. ECC-2000-1904-01USA (U.S.-Can. Free Trade Agreement Extr'y Challenge Comm. Oct 30, 2000), available at http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ue2000010e.pdf.

⁵¹ *Softwood Lumber*, File No. ECC-2004-1904-01USA.

⁵² U.S. producers first made allegations of subsidies by the Canadian government in 1982. See *Certain Softwood Products from Canada*, 48 Fed. Reg. 24,160 (Dep't of Commerce May 31, 1983).

vested off of private land,⁵³ while in Canada, most of the land used for timber harvesting is owned by the national government.⁵⁴ The Department of Commerce contends that programs licensing access to harvesting this timber, called stumpage programs, subsidize the Canadian lumber industry.⁵⁵

The U.S. and Canada litigated the conflict through two binational panels and an Extraordinary Challenge Committee under Chapter 19 of the U.S.-Canada Free Trade Agreement ("FTA"),⁵⁶ which parallels the current NAFTA Chapter 19 system.⁵⁷ The Coalition filed its first constitutional challenge to the binational panel system with the D.C. Circuit in 1994.⁵⁸ It withdrew the challenge when the U.S. and Canadian governments reached a settlement.⁵⁹ When the settlement expired in 2001, U.S. lumber producers petitioned for, and received, both antidumping and countervailing duties on Canadian lumber imports.⁶⁰

The Canadian government requested review of both measures under Chapter 19.⁶¹ Panels examining both measures repeatedly remanded the Department of Commerce's findings for further consideration. In all, the

⁵³ In 1999, over 17 billion cubic feet of timber was harvested in the U.S., James L. Howard, U.S. Dep't of Agric., U.S. Timber Trade, Production, Consumption, and Price Statistics 1965-1999, at 21 tbl.5-a (2001), available at <http://www.fpl.fs.fed.us/documnts/fplrp/fplrp595.pdf>, while only 2.9 billion board-feet of timber was harvested on National Forest lands, U.S. Dep't of Agric., Nat'l Agric. Stats. Serv., USDA-NASS Agricultural Statistics 2004, at XII-21 tbl.12-26 (2004), available at http://www.nass.usda.gov/Publications/Ag_Statistics/2004/04_ch12.pdf. A cubic foot is much larger than board-foot. See Howard, *supra*, at ii.

⁵⁴ Certain Softwood Lumber Products from Canada, File USA-CDA-2002-1904-03, at 5 (NAFTA Art. 1904 Binat. Panel Aug. 13, 2003) (final affirmative countervailing duty determination), available at http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua02030e.pdf.

⁵⁵ *Id.*

⁵⁶ Certain Softwood Lumber Products from Canada, File No. ECC-94-1904-01USA (U.S.-Can. Free Trade Agreement Extr'y Challenge Comm. Aug. 3, 1994), available at http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/FTA_Chapter_19/USA/ue94010e.pdf.

⁵⁷ Compare Free Trade Agreement, U.S.-Can., ch. 19, Jan. 2, 1988, 27 I.L.M. 386 (1988), with NAFTA, *supra* note 1, ch. 19.

⁵⁸ See *Coal. for Fair Lumber Imps. v. United States*, No. 94-1627 (D.C. Cir. 1994) (withdrawn by voluntary motion to dismiss Jan. 5, 1995), cited in *Am. Coal. for Competitive Trade v. Clinton* 128 F.3d 761 (D.C. Cir. 1997).

⁵⁹ Canadian Exports of Softwood Lumber, 61 Fed. Reg. 28,626 (Office of the U.S. Trade Rep. June 5, 1996) (notice of agreement).

⁶⁰ See *Softwood Lumber from Canada*, 66 Fed. Reg. 18,508 (Int'l Trade Comm'n Apr. 9, 2001) (instituting antidumping and countervailing duty investigations); *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 36,068 (Dep't of Commerce May 22, 2002) (notice of amended final determination and antidumping order); *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 36,070 (Dep't of Commerce May 22, 2002) (notice of amended final determination and countervailing duty order).

⁶¹ See *Certain Softwood Lumber Products from Canada*, File USA-CDA-2002-1904-03 (NAFTA Art. 1904 Binat. Panel Aug. 13, 2003) (final affirmative countervailing duty determination), available at http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua02030e.pdf.

binational panel remanded the countervailing duty determination five times,⁶² a number of remands that is unprecedented in the context of Chapter 19's review system.⁶³ The final panel upheld the eventual determination of the Department of Commerce that the subsidy was *de minimis*.⁶⁴ Such a subsidy does not qualify for statutory imposition of a countervailing duty.⁶⁵ The Canadian government also requested that the World Trade Organization ("WTO") review the tariff impositions.⁶⁶ The WTO originally agreed with the binational panel,⁶⁷ but later amended its findings and held that the tariffs were consistent with the United States' international obligations.⁶⁸ Ultimately, the WTO reversed the amended findings, stating that it could reach no conclusion on the matter.⁶⁹

When the U.S. Trade Representative ("USTR") ordered implementation of an ITC decision to impose a countervailing duty despite a finding of no material injury by the binational panel, Canadian producers successfully challenged.⁷⁰ U.S. lumber producers find themselves supported by the Department of Commerce,⁷¹ but opposed by multiple binational panel decisions.⁷²

The Canadian softwood lumber dispute provides an interesting backdrop for examining the due process concerns with Chapter 19 precisely because the facts of the highly controversial lumber disputes seem favorable to the Coalition's position. However, though the facts may seem to favor the Coalition's due process challenge, the law does not support it. Based on the nature of the Coalition's interest and the process it was afforded, its constitutional due process challenge would likely have failed.

⁶² See Certain Softwood Lumber Products from Canada, File USA-CDA-2002-1904-03 (NAFTA Art. 1904 Binat. Panel Mar. 17, 2006) (final affirmative countervailing duty determination, decision on fifth remand determination), available at http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua02035e.pdf.

⁶³ See NAFTA Chapter 19 Binational Panel Decisions, http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=380 (last visited Aug. 24, 2007) (listing all NAFTA binational panel decisions).

⁶⁴ *Softwood Lumber*, USA-CDA-2002-1904-03, at 3, 7.

⁶⁵ *Id.* at 7 (citing 19 U.S.C. § 1671).

⁶⁶ Panel Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada*, ¶ 1.2, WT/DS227/R (Mar. 22, 2004).

⁶⁷ *Id.* ¶ 8.1-.6.

⁶⁸ Panel Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, ¶¶ 8.1-.3, WT/DS277/RW (Nov. 15, 2005).

⁶⁹ Appellate Body Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, ¶¶ 162-63, WT/DS277/AB/RW (Apr. 13, 2006); see also *Tembec, Inc. v. United States*, 441 F. Supp. 2d 1302, 1306-11 (Ct. Int'l Trade 2006) (reciting the procedural history of the dispute).

⁷⁰ *Tembec*, 441 F. Supp. 2d at 1305-06.

⁷¹ See *supra* text accompanying note 55.

⁷² See *supra* notes 56, 62 and accompanying text.

II. THE INTERESTS AT STAKE: IS DUE PROCESS REQUIRED?

The Fifth Amendment prohibits a federal taking of life, liberty, or property without due process of law.⁷³ When evaluating due process claims, courts will generally assess whether the interest at issue is the kind of interest that the Due Process Clause protects before scrutinizing the sufficiency of process afforded to claimants.⁷⁴ Both domestic producers, like the Coalition's members, and importers of products subject to AD/CVD orders have claimed a right to due process under various theories of entitlement.⁷⁵

Importing challengers have argued that importers have a protected right to market access and that AD/CVD imposition constitutes a taking of their monetary property.⁷⁶ Importers have asserted that unfair trade practice tariffs are punitive in nature, and that a party is entitled to full due process before the imposition of a punishment.⁷⁷

Producers claim a property interest in AD/CVD proceedings under several different theories. The Coalition, for example, claims that the imposition of a countervailing duty is a benefit to which it is statutorily entitled.⁷⁸ The Coalition further asserts that a ruling by the Department of Commerce and the ITC creates a final judgment, which is a protected interest, and that a right to judicial appeal from that ruling creates a cause of action that constitutes a form of property.⁷⁹

A. *Inherent Rights*

The Due Process clause of the Fifth Amendment protects against the taking of certain interests by the federal government.⁸⁰ However, it does not protect every interest. Due process protections extend only to interests that qualify as property or liberty interests.⁸¹ Some argue that the liberty and

⁷³ U.S. CONST. amend. V.

⁷⁴ *Bd. of Regents v. Roth*, 408 U.S. 564, 570-71 (1972).

⁷⁵ *See, e.g., Coal. for Fair Lumber Imps. v. United States*, 471 F.3d 1329, 1333 (D.C. Cir. 2006); *PPG Indus. v. United States*, 708 F. Supp. 1327, 1327 (1989).

⁷⁶ *See, e.g., Techsnabexport, Ltd. v. United States*, 795 F. Supp. 428, 435-36 (Ct. Int'l Trade 1992); Patricia Kelmar, Note, *Binational Panels of the Canada-United States Free Trade Agreement in Action: The Constitutional Challenge Continues*, 27 GEO. WASH. J. INT'L L. & ECON. 173, 204 (1993) ("Importers have a property interest because they are subject to duties—property in the form of currency. . . . It can be argued that the right to trade fairly between nations may also be deemed a property interest.").

⁷⁷ *See, e.g., Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1381 (Fed. Cir. 2003); *C.J. Tower & Sons v. United States*, 71 F.2d 438, 442 (C.C.P.A. 1934).

⁷⁸ Brief of Petitioner at 25-26, *Fair Lumber*, 471 F.3d 1329 (No. 05-1366).

⁷⁹ *Id.*

⁸⁰ U.S. CONST. amend. V.

⁸¹ *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972).

property protections guaranteed by the Constitution are meant to encompass “all interests valued by sensible men.”⁸² Though they have extended Fifth Amendment protections well beyond the limits of what is traditionally considered property, courts have declined to adopt such a liberal interpretation, particularly in relation to business interests.⁸³

The right to conduct a profitable business free from government interference is not a fundamental right protected by notions of substantive or procedural due process.⁸⁴ The Supreme Court has ruled that “a generalized right to be secure in one’s business interests” does not qualify as a right invoking due process protections.⁸⁵ While due process protections extend to the individual assets of an enterprise, they do not cover the activities of business and profit-making.⁸⁶ Thus, a government action that infringes upon a producer’s ability to operate profitably cannot accurately be considered a deprivation of property, and government inaction (in this case, by a refusal to impose a duty against a competitor) that hinders profit-making is likewise not a deprivation.

Similarly, an importer can claim no inherent right to freedom from trade restrictions.⁸⁷ The Constitution vests sole power to regulate foreign commerce in Congress.⁸⁸ This power encompasses the ability to exclude goods and to impose tariffs.⁸⁹ Courts have long refused to recognize an importer’s right to engage in commerce that could conflict with Congress’s constitutional powers to impose restrictions on foreign trade.⁹⁰

B. *Unfair Trade Tariffs as a Penalty*

Many economists have argued that the true value of AD/CVD measures lies in their capacity as instruments of coercion for trade cooperation, not as instruments of protectionism.⁹¹ Foreign producers have argued that

⁸² *NEC Corp. v. United States*, 151 F.3d 1361, 1370 (Fed. Cir. 1998) (quoting Henry Paul Monaghan, *Of “Liberty” and “Property,”* 62 CORNELL L. REV. 405, 409 (1977)).

⁸³ *Roth*, 408 U.S. at 572.

⁸⁴ *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999).

⁸⁵ *Id.* at 672.

⁸⁶ *Id.* at 675.

⁸⁷ *Am. Ass’n of Exps. and Imps. v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985).

⁸⁸ U.S. CONST. art. I, § 8, cl. 3.

⁸⁹ *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904).

⁹⁰ *See, e.g., NEC Corp. v. United States*, 151 F.3d 1361, 1369-70 (Fed. Cir. 1998) (“As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine . . . the terms upon which a right to import may be exercised.” (quoting *Buttfield*, 192 U.S. at 493)).

⁹¹ *See James D. Reitzes, Antidumping Policy*, 34 INT’L ECON. REV., 745, 745 (1993) (“[F]irm behavior may be altered by the mere threat of antidumping enforcement.”); Alan O. Sykes, *Countervail-*

subsidies are a penalty, thereby making an AD/CVD determination a punitive adjudication in which the industry under investigation would have a due process right.⁹² Courts have long rejected this due process claim, citing the extensive efforts to ensure the amount of the duty exactly compensated for the potential harms of dumping or subsidization.⁹³ The passage of the Byrd Amendment, which distributed the proceeds from AD/CVD collections among U.S. producers with qualifying expenditures,⁹⁴ raised the question anew.⁹⁵ However, even under the system established by the Byrd Amendment, the CIT held that the function of AD/CVD measures remains essentially remedial.⁹⁶ This purpose also best captures the legislative intent behind these duties.⁹⁷

C. *Statutory Entitlement*

Based on the conclusion that unfair trade tariffs are remedial in nature,⁹⁸ the primary purpose of AD/CVD legislation is to protect domestic producers. A property right in a benefit created by statute was one of the first to be recognized in the expansion of property rights from the traditional conceptions of property to the amorphous modern concept that governs due process.⁹⁹ Once granted a government benefit by statute or explicit

ing Duty Law: An Economic Perspective, 89 COLUM. L. REV. 199, 214 (1989) (noting that the imposition of duties may improve terms of trade and deter subsidization).

⁹² See, e.g., *Huaiyin Foreign Trading Corp. v. United States*, 322 F.3d 1369, 1380 (Fed. Cir. 2003).

⁹³ E.g., *C.J. Tower & Sons v. United States*, 71 F.2d 438, 442-43 (C.C.P.A. 1934).

⁹⁴ Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1(a), 114 Stat. 1549, 19 U.S.C. § 1675c (repealed 2006).

⁹⁵ See *Huaiyin*, 322 F.3d at 1379. The amendment has since been repealed, but § 7601(b) of the Deficit Reduction Act provides for the continued distribution of duties collected through October 2007. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 154 (2006); Paul Blustein, *Senators Vote to Kill Trade Law*, WASH. POST, Dec. 22, 2005, at D1.

⁹⁶ *Huaiyin Foreign Trade Corp. v. U.S. Dep't of Commerce*, 201 F. Supp. 2d 1351, 1362-65 (Ct. Int'l Trade 2002), *aff'd*, 322 F.3d 1369.

⁹⁷ See *Huaiyin*, 322 F.3d at 1380-81 (“[T]he congressional findings supporting the Amendment underscore the statute’s continued focus on assisting domestic producers and leveling competitive conditions through the negation of the unfair advantage gained by the price difference of the imported products.”); see also E. Kwaku Andoh, *Countervailing Duties in a Not Quite Perfect World: An Economic Analysis*, 44 STAN. L. REV. 1515 (1992) (examining the history of countervailing duty legislation).

⁹⁸ *Huaiyin*, 322 F.3d at 1379.

⁹⁹ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 261-62 & n.8 (1970) (stating that welfare entitlements are “like” property and that their termination is subject to due process restraints).

bilateral understanding, a party may not be deprived of the benefit without due process of law.¹⁰⁰

However, not every benefit resulting from government policies confers an entitlement on its recipient.¹⁰¹ To simply say that domestic producers like the Coalition's members have a property interest in the imposition of a countervailing duty because they enjoy certain privileges under the governing statute is an overbroad and oversimplified interpretation of a complex rule of law.

Since the Coalition filed suit in September 2005, the nature of benefits received by domestic producers affected by NAFTA imports has changed significantly. In February 2006, Congress repealed the Byrd Amendment, but provided for the continued redistribution of duties to domestic producers through October 2007.¹⁰² In April 2006, the CIT issued a decision in *Canadian Lumber Trade Alliance v. United States* in favor of Canadian exporters who challenged the applicability of the Byrd Amendment to Mexican and Canadian exports in light of certain provisions of NAFTA.¹⁰³ Subsequently, the CIT awarded Canadian producers an injunction barring the continued distribution of revenues to their competitors.¹⁰⁴

Under the Byrd Amendment, domestic lumber producers received over \$3 million in revenue distributions in 2005 alone.¹⁰⁵ While in force, the Byrd Amendment made AD/CVD determinations a prerequisite for the conveyance of a direct benefit,¹⁰⁶ and thus analogous to an application for benefits. Absent the Amendment, producers receive only the traditional benefit from the imposition of an AD/CVD order—the opportunity to operate their businesses in a more competitively favorable market. Since the right to profit-making, and therefore the right to conduct operations in a favorable or even fair market, is not a protected property interest,¹⁰⁷ a court would have to find that a government entitlement to something that is not a property interest can in itself be a property interest to hold in favor of a claim like the Coalition's.

¹⁰⁰ Perry v. Sindermann, 408 U.S. 593, 601 (1972) (“[P]roperty’ denotes a broad range of interests that are secured by ‘existing rules or understandings.’” (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972))).

¹⁰¹ See Buzek v. County of Saunders, 972 F.2d 992, 997 (8th Cir. 1992) (holding that it was error for the lower court to “equate a right to the grievance procedures [for discharged employees] with a protected property interest in continued employment”).

¹⁰² Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 154 (2006); Blustein, *supra* note 95.

¹⁰³ *Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321, 1331 (Ct. Int'l Trade 2006).

¹⁰⁴ *Canadian Lumber Trade Alliance v. United States*, 441 F. Supp. 2d 1259 (Ct. Int'l Trade 2006).

¹⁰⁵ *Canadian Lumber*, 425 F. Supp. 2d at 1331.

¹⁰⁶ See Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1(a), 114 Stat. 1549, 19 U.S.C. § 1675c (repealed 2006).

¹⁰⁷ See *Technabexport, Ltd. v. United States*, 795 F. Supp. 428, 436 (1992).

Furthermore, the benefit that the Coalition would receive from the imposition of an antidumping or countervailing duty is an indirect benefit. Without the Byrd Amendment, the government action involved is not the giving of a benefit, but the collecting of a tax. Domestic producers only benefit indirectly from an action that is part protectionist measure and part policy tool. The Supreme Court has declined to extend due process property protections to third parties to a government action.¹⁰⁸

Not only are domestic producers not the subject of action in an AD/CVD determination, but the benefit conferred upon them is a benefit intended for the economy as a whole, thus leaving them with a questionable claim to it. Though interested parties may initiate investigations, “[p]rivate parties do not have a ‘private right’ to bring antidumping and countervailing duty claims, but rather bring such claims to further the public good by assuring fair competition in the marketplace.”¹⁰⁹ By statute, determinations affect an entire industry.¹¹⁰ Moreover, an unfair practice must threaten an entire industry before the government will impose a tariff to counteract it.¹¹¹ It is irrelevant to the final determination whether or not dumping or subsidization harms an individual producer,¹¹² because the individual producer is not the intended recipient of the benefit. Tariffs protect entire industries and the economy as a whole, not individual parties.

Finally, both importers and producers have claimed due process rights based on specific statutory provisions governing unfair trade.¹¹³ The statutes governing AD/CVD determinations require the Department of Commerce to comply with certain procedural rules that benefit interested parties.¹¹⁴ However, as discussed in Part IV of this Comment, a party’s right to have an agency comply with its own regulations does not create a property right in the interests the agency adjudicates.¹¹⁵

AD/CVD laws confer a benefit on the Coalition and other domestic producers. But that benefit is an indirect right in something intended for the

¹⁰⁸ See, e.g., *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 788 (1980) (noting “the simple distinction between government action that directly affects a citizen’s legal rights . . . and action that is directed against a third party and affects the citizen only indirectly or incidentally”).

¹⁰⁹ Ethan Boyer, *Article III, the Foreign Relations Power, and the Binational Panel System of NAFTA*, 13 INT’L TAX & BUS. LAW. 101, 134 (1996).

¹¹⁰ See 19 U.S.C. § 1671(a) (2006) (calling for duties to be imposed on entire classes of merchandise); 19 U.S.C. § 1673 (2006) (same).

¹¹¹ §§ 1671(a), 1673.

¹¹² *Id.*

¹¹³ See, e.g., *PPG Indus. v. United States*, 708 F. Supp. 1327 (Ct. Int’l Trade 1989).

¹¹⁴ *Id.* (“Congress has set out a variety of procedures which parties to countervailing duty cases are entitled to rely upon.”).

¹¹⁵ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (“The categories of substance and procedure are distinct. Were the rule otherwise, the [Due Process] Clause would be reduced to a mere tautology. ‘Property’ cannot be defined by the procedures for its deprivation any more than can life or liberty.”).

public good that cannot accurately be characterized as property. Because the Coalition cannot claim a direct property benefit, it does not have a recognizable right to due process based on statutory entitlement.

D. *A Property Right in a Judgment or a Cause of Action*

The Coalition asserts the additional claim that because its right to appeal constitutes a cause of action, the cause of action can in itself be recognized as a property right.¹¹⁶ The concept of a property right in a cause of action is consistent with Supreme Court case law.¹¹⁷ Justice Blackmun, writing on behalf of the majority in *Logan v. Zimmerman Brush Co.*, articulated this precedent.¹¹⁸ Blackmun noted that the Court “traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.”¹¹⁹ However, in the same opinion he observed that “the State remains free to . . . eliminate its statutorily created causes of action altogether—just as it can amend or terminate its welfare or employment programs,” and that “the legislative determination provides all the process that is due.”¹²⁰ Just as Congress has the power to create a statutory cause of action, it has the right to alter or abolish it.¹²¹ Even assuming that AD/CVD laws create a protected cause of action for domestic petitioners, Congress remains fully empowered to provide a separate avenue for appeal where the imports at issue originate in a free trade agreement country.¹²²

The petitions for investigation into lumber subsidies that sparked the most recent round of controversy in the lumber dispute¹²³ were all filed while the existing statute, 19 U.S.C. § 1516a(g), was in effect. The statute states clearly that, in the case of countervailing duties issued against NAFTA member countries, the power of review is vested first in the binational panel system.¹²⁴ Thus, any possible right that was legislatively conferred was also legislatively taken away, in accord with due process and by the authority of Congress.

¹¹⁶ Brief of Petitioner at 26, *Coal. for Fair Lumber Imps. v. United States*, 471 F.3d 1329 (D.C. Cir. 2006) (No. 05-1366).

¹¹⁷ See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 429.

¹²⁰ *Id.* at 432-33.

¹²¹ *Id.*

¹²² See 19 U.S.C. § 1516a(g)(2) (2006) (codifying the exclusive appellate authority of NAFTA binational panels when a party requests binational review).

¹²³ See *supra* note 60 and accompanying text.

¹²⁴ See 19 U.S.C. § 1516a(g)(2).

The same rationale can be used to address the Coalition's claim that a property interest exists in the ITC determination in its favor.¹²⁵ In the context of domestic proceedings, a final determination by the ITC is not final if the other party chooses to appeal.¹²⁶ In the same way, under the existing statutory scheme, all determinations relating to NAFTA exporters are subject to review by a binational panel, and cannot be considered final until the time for review has passed or a binational panel has issued a final determination.¹²⁷

III. CHAPTER 19 AND SUFFICIENCY OF PROCESS

Even though interested parties in AD/CVD determinations are not entitled to due process protections, a court would likely find the binational panel system sufficient to satisfy procedural due process. Due process mandates that parties receive notice of adjudication and an opportunity to be heard where adjudication potentially affects a party's protected rights.¹²⁸ Beyond these basic requirements, courts must determine the sufficiency of process by balancing the interests involved on a case-by-case basis.¹²⁹

The Supreme Court set out a three-part balancing test for determining the sufficiency of process in *Mathews v. Eldridge* that weighs the importance of the interest at stake and the potential for wrongful deprivation against the government's interest in maintaining the current process.¹³⁰ Binational panels meet the basic requirements of due process, and the interest of the government in maintaining the Chapter 19 structure outweighs the interests of domestic producers under the *Mathews* test.

A. *The Basic Requirements—Examining Claims of Inherent Bias*

Due process hinges on two central requirements: notice of the determinative adjudication and the opportunity to be heard.¹³¹ Though the Coalition's suit does not allege that Chapter 19's notice provisions were defective, the suit argues that the binational panel system denied the Coalition a

¹²⁵ See Brief of Petitioner at 26, *Coal. for Fair Lumber Imps. v. United States*, 471 F.3d 1329 (D.C. Cir. 2006) (No. 05-1366).

¹²⁶ See 19 U.S.C. § 1516a(g) (appeal provisions).

¹²⁷ See *id.*

¹²⁸ *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

¹²⁹ *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

¹³⁰ *Id.* at 335.

¹³¹ *Armstrong*, 380 U.S. at 550 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

fair hearing.¹³² The opportunity to be heard “must be granted at a meaningful time and in a meaningful manner.”¹³³ The Coalition asserts that the binational panel system violates the requirement of a meaningful hearing by failing to ensure an impartial adjudicator.¹³⁴

Challengers to the system point not only to a national protectionist bias, but also to conflicts of interest that exist due to the method of selecting panelists.¹³⁵ The Coalition alleges that panelists have a pecuniary interest in furthering the interests of industry in their country, because a panelist must be reappointed to a roster and must be chosen by parties to preside over a specific suit.¹³⁶ A panelist’s “opportunity to be appointed to future [binational panels], and to acquire the prestige associated with panel service, depends on their issuing a favorable ruling.”¹³⁷

The Coalition further argues that national bias is an inherent flaw of the binational panels.¹³⁸ The argument that national bias affects outcome in duty determinations has a great deal of merit. The inclusion of Chapter 19 was motivated in part by Canadian concerns of protectionist bias.¹³⁹ Yet, the Coalition’s assertion that outside pressure and national bias will govern panel decisions simply cannot be reconciled with the history of Chapter 19 panel determinations. The vast majority of panel decisions are unanimously made, signifying that national bias cannot be a deciding factor.¹⁴⁰ If the Coalition, a powerful lobbying organization with whom the Department of Commerce, the ITC, and the USTR have sided,¹⁴¹ does not carry sufficient weight to influence the decision of a U.S. panelist, it seems doubtful that such influence could be exerted by anyone.

Additionally, it cannot be assumed that bias can be completely abrogated even in domestic AD/CVD determinations. The Federal Circuit, in examining allegations of bias in domestic AD/CVD determinations, noted:

We would be blinding ourselves to the reality of the administrative process that Congress has created were we to hold that the mere fact that a decision maker has been involved in the development of the case . . . or indeed has taken, preliminarily, a public position on the case, is

¹³² Brief of Petitioner at 29, *Coal. for Fair Lumber Imps. v. United States*, 471 F.3d 1329 (D.C. Cir. 2006) (No. 05-1366).

¹³³ *Armstrong*, 380 U.S. at 552.

¹³⁴ Brief of Petitioner at 32-33, *Fair Lumber*, 471 F.3d 1329 (No. 05-1366).

¹³⁵ *Id.* at 29.

¹³⁶ *Id.* at 31-32.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Boyer, *supra* note 109, at 135.

¹⁴⁰ See Leycegui & Cornejo, *supra* note 32, at 34 (noting that the 86 percent of panel decisions that are unanimous provide “strong proof of the panel’s fairness and objectivity”).

¹⁴¹ See *supra* notes 70-71 and accompanying text.

enough to place the entire process under a constitutional cloud from which it cannot be shielded.¹⁴²

A court would likely find that allegations of national bias or susceptibility to political pressure, when completely unsubstantiated by evidence from panel determinations, are not sufficient to establish that impartiality is lacking in the Chapter 19 system.

B. *Determining What Process is Due—Applying Mathews to Chapter 19*

Though property interests entitle a party to receive notice of proceedings and to be heard in a meaningful way in front of an impartial adjudicator, courts must determine what process is sufficient by weighing the specific interests involved in an individual case.¹⁴³

In *Mathews v. Eldridge*, the Supreme Court scrutinized the process afforded to the plaintiff prior to the cancellation of his disability benefits.¹⁴⁴ In deciding the case, the court looked to the private interest that was subject to due process protection and the potential that existing process could lead to a wrongful deprivation of the interest.¹⁴⁵ The court weighed these factors against the government's interest in maintaining the existing system of procedural protections.¹⁴⁶

While some have questioned the scope of *Mathews*, recent Supreme Court decisions support its continuing application to a broad range of interests.¹⁴⁷ Even those who question the merits of the *Mathews* test recognize its application to property rights springing from statutory benefits as the least controversial of its uses.¹⁴⁸

1. The Limited Weight of Producers' Interests

When determining the level of due process required, courts first turn to the interest at stake. The determinative question becomes what factors courts consider in assessing the importance of a particular interest. Though

¹⁴² *NEC Corp. v. United States*, 151 F.3d 1361, 1372-73 (Fed. Cir. 1998).

¹⁴³ *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

¹⁴⁴ *Id.* at 332-33.

¹⁴⁵ *Id.* at 335.

¹⁴⁶ *Id.*

¹⁴⁷ *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 224-25 (2005) (applying *Mathews* to evaluate procedures for assigning prisoners to a high-security facility); *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (applying *Mathews* to detention of a U.S. citizen classified as an enemy combatant); *Los Angeles v. David*, 538 U.S. 715, 716-17 (2003) (applying *Mathews* to a delay in a hearing for recoupment of towing fees).

¹⁴⁸ *Hamdi*, 542 U.S. at 575-76 (Scalia, J., dissenting).

the financial magnitude of the relief sought and its widespread effects on an entire industry initially seem to tip this factor in favor of challengers, there are two judicially recognized arguments that parties like the Coalition may not have a great interest in the rights they assert. First, deprivation of a vital interest mandates more stringent procedural safeguards than merely incidental interests.¹⁴⁹ Second, parties to AD/CVD determinations participate in a hearing as, at most, applicants for a benefit, which entitles them to limited procedural benefits.¹⁵⁰

The Coalition's interest is limited because it is not a vital interest essential to meet a basic need.¹⁵¹ On one hand, the billions of dollars that domestic producers stand to lose from being unable to compete with subsidized goods seems astronomical when compared with the monetary amounts of other entitlements courts have found vital. On the other hand, the statutory entitlements on which courts tend to place the greatest importance involve basic personal needs. For example, courts have repeatedly held that welfare benefits are a protected entitlement in part because of their importance to the recipient.¹⁵² In *Mathews*, the court downplayed the importance of disability benefits when compared to welfare on the grounds that disability benefits are not need-based, and therefore do not necessarily result in severe deprivation.¹⁵³ The court has further held that even where non-need-based benefits may be essential for their recipients' subsistence, such benefits cannot be given equal weight.¹⁵⁴ In the Coalition's case, though the argument could be made that countering unfair practices will prevent a loss of jobs that may result in poverty, the benefit itself is not intended to meet a basic need.

Courts have also determined that where the denial, rather than the deprivation, of a benefit is at stake, the plaintiff's property interest is relatively weak.¹⁵⁵ The Supreme Court has never recognized the property interest of an applicant for benefits, but lower courts have found an entitlement exists to those attempting to prove their eligibility for benefits.¹⁵⁶ Chapter 19 serves as a form of administrative review for re-examining findings of eligibility. The approval of an application for a tariff imposition on goods from a NAFTA member country is not necessarily final until the time for appeal to the binational panel has passed, or until a panel has affirmed it. Because the Coalition is only entitled to the imposition of AD/CVD orders

¹⁴⁹ *Mathews*, 424 U.S. at 340-41.

¹⁵⁰ *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 590 (9th Cir. 1992).

¹⁵¹ *See Mathews*, 424 U.S. at 340-41.

¹⁵² *E.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 263-64 (1970).

¹⁵³ *Mathews*, 424 U.S. at 340-41.

¹⁵⁴ *Id.* at 341-42.

¹⁵⁵ *Derwinski*, 994 F.2d at 590 (citing *Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. 1982)).

¹⁵⁶ Megan E. Arthur, Comment, *Administrative Law—Hamby v. Neel: Claims to Applications for Benefits as Property Interests Receiving Procedural Due Process Protections*, 36 U. MEM. L. REV. 783, 792-98 (2006).

if statutory criteria are met, any interest it may have in a final determination is contingent upon a finding of eligibility. The distinction between an applicant and a recipient, although not determinative of whether a property interest exists, is that “applicants have weaker interests in government benefits than recipients” for purposes of balancing the *Mathews* factors.¹⁵⁷

2. Wrongful Deprivation: An Improbable Probability

A *Mathews* analysis also includes an assessment of the probability of wrongful deprivation.¹⁵⁸ This probability is balanced against the costs and benefits of additional or alternative process.¹⁵⁹ The Supreme Court has taken care to emphasize “that the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal costs of providing such a safeguard.”¹⁶⁰ The court has held that, because the legislative creation of procedural systems requires flexibility, there must be an “extraordinarily strong showing” of both probable error in the current system and the possibility that change will significantly reduce error.¹⁶¹

Chapter 19 preserves the Department of Commerce’s authority to conduct initial fact-finding in the situation.¹⁶² Panel opinions, while not subject to appeal, are not final in the sense that the administering authority has no further voice in the matter.¹⁶³ Administrative findings that are not upheld by the panel must be remanded to the ITC.¹⁶⁴

While Chapter 19 may not be a theoretically ideal mechanism of international dispute resolution, it is nevertheless a viable one. Domestic producers may argue that adjudication in U.S. courts provides a superior process for the imposition of duties because the panels create bias.¹⁶⁵ If protectionist bias is assumed to be so prevalent, then producers must recognize that a binational process is far superior to arguing such cases in a foreign court. Moreover, the imposition of subsidies is a zero-sum game. Protecting producers requires imposing a tariff on importers. Of the two parties involved, one inevitably faces the deprivation of a desired outcome. There-

¹⁵⁷ *Derwinski*, 994 F.2d 583, 590 (1992).

¹⁵⁸ *Mathews*, 424 U.S. at 335.

¹⁵⁹ *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 321 (1985).

¹⁶⁰ *Id.* at 320-21.

¹⁶¹ *Id.* at 326.

¹⁶² NAFTA, *supra* note 1, art. 1904.

¹⁶³ *Id.*

¹⁶⁴ *Id.* The number of remands should not be taken to indicate a procedural deficiency or flaw. The process under the traditional system of AD/CVD determinations can be similar. *See, e.g., Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1348-49 (Fed. Cir. 2006) (detailing a convoluted procedural history encompassing multiple remands).

¹⁶⁵ *See* Brief of Petitioner, *Coal. for Fair Lumber Imps. v. United States*, 471 F.3d 1329 (D.C. Cir. 2006) (No. 05-1366).

fore, it is difficult to argue that a process more favorable to the opposing party would increase the possibility of “wrongful” deprivation.

Perhaps the greatest problem in establishing the probability of wrongful deprivation, however, is that AD/CVD determinations are based not only on fact, but on methodology. It is entirely possible for two different bodies to take the same facts, correctly apply two separate but generally accepted methodologies, and arrive at different conclusions. It is difficult to argue that one is superior to, or more accurate than, another. For example, methodological differences were the central discrepancies between the Department of Commerce and the Chapter 19 panel in the softwood lumber dispute.¹⁶⁶

In light of the high burden courts place on proving a probability of wrongful deprivation, and considering the zero-sum nature and methodological debates involved in AD/CVD laws, it is very unlikely that a court would weigh this factor in favor of challengers.

3. Public and Government Interests

The governmental and public interest in Chapter 19 dominates a *Mathews* analysis of the due process debate. Chapter 19 is a cornerstone of NAFTA, and to abolish its system of review could force the renegotiation of the entire treaty.¹⁶⁷ In 2006, Canada and Mexico were the United States’ first and third largest trading partners, respectively,¹⁶⁸ and the U.S. has an obvious interest in maintaining the integrity of its trade ties. Moreover, it would threaten U.S. credibility in future trade negotiations to abandon or renegotiate Chapter 19 more than ten years into NAFTA. The government cannot unilaterally alter the Chapter 19 process without incurring significant negative consequences.

Furthermore, the Supreme Court has found a strong government interest in protecting tax administration even where such protection must be weighed against serious resulting financial hardship for an individual or entity.¹⁶⁹ Chapter 19 has the approval of both the executive and legislative branch, and represents a carefully crafted system of administering tariffs.

¹⁶⁶ See *Certain Softwood Lumber Products from Canada*, File USA-CDA-2002-1904-03 (NAFTA Art. 1904 Binat. Panel Mar. 17, 2006) (final affirmative countervailing duty determination, decision on fifth remand determination), available at http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua02035e.pdf.

¹⁶⁷ Cf. Burton, *supra* note 17, at 1564 (“[T]here is evidence that the panel system provision helped overcome an important impasse while negotiating NAFTA.”).

¹⁶⁸ U.S. Census Bureau Foreign Trade Statistics, <http://www.census.gov/foreign-trade/statistics/highlights/top/top0611.html> (last visited Aug. 24, 2007).

¹⁶⁹ *Bob Jones Univ. v. Simon*, 416 U.S. 725, 747 (1974) (citing *Cheatham v. United States*, 92 U.S. 85, 89 (1876)).

The government's interest in upholding international agreements, efficiently managing tariff administration, and maintaining ties with its closest trading partners stands out as the most significant factor in a *Mathews* analysis of Chapter 19 process. In light of the importance of this interest, the unlikely possibility that the binational panel system will result in wrongful dismissal of a producer's application for a subsidy, depriving the producer of what is, at best, a non-essential benefit, becomes relatively insignificant. It is likely that a court could find in favor of Chapter 19 based on the balance of the issues at stake.

IV. WHEN ENOUGH PROCESS IS TOO MUCH: WHY PROCEDURAL PROTECTIONS LIMIT THE FEDERAL CIRCUIT'S ABILITY TO DECIDE THE DUE PROCESS QUESTION

The property rights involved in due process protections doubtlessly remain an uncertain and evolving area of law. Courts may find it prudent to avoid complex constitutional issues when a case can be decided on other grounds.¹⁷⁰ However, parties may not challenge the decisions of a binational panel on statutory grounds. Challenges such as the Coalition's force constitutional issues to the forefront.¹⁷¹ As such, they represent a unique opportunity for judicial clarification of the ambiguity surrounding parties' rights in AD/CVD determinations.

Confusion reigns in the realm of potential property rights in remedial tariffs, and it is unlikely that courts will answer constitutional questions in the near future absent another challenge to NAFTA. The Federal Circuit, while vested with the power to hear AD/CVD disputes on appeal from the CIT,¹⁷² has not decided the issue, nor is such a decision inevitable. The Federal Circuit must often decide cases involving allegations that an agency action violated a party's right to process.¹⁷³ However, the court generally has no need to resort to constitutional questions to resolve the cases before it. An abundance of statutory grounds exist for deciding the issues involved.

Denying the existence of a protected interest is not a total denial of rights to process. Parties in Department of Commerce proceedings enjoy the protections of the Administrative Procedure Act and the provisions of statutes governing AD/CVD proceedings and the Department of Commerce.¹⁷⁴ Though the establishment of specific procedures does not in itself

¹⁷⁰ See, e.g., *NEC Corp. v. United States*, 151 F.3d 1361, 1371 (1998) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (Stevens, J., concurring)).

¹⁷¹ See *supra* note 8 and accompanying text.

¹⁷² See 28 U.S.C. § 1295(a)(5) (2006) (conferring jurisdiction to hear all appeals from the CIT).

¹⁷³ See, e.g., *Transcom v. United States*, 182 F.3d 876 (Fed. Cir. 1999); *NEC Corp.*, 151 F.3d 1361.

¹⁷⁴ See 19 U.S.C. §§ 1671, 1673 (2006); 5 U.S.C. § 706 (2006).

confer a right to a final benefit on the interested parties, it can give them a right in specific procedural protections guaranteed during an investigation to determine eligibility for that benefit.¹⁷⁵ For example, the relevant statutes provide that interested parties must receive notice of proceedings.¹⁷⁶ Due process concerns also require notice of adjudication to parties whose constitutionally protected liberty or property interests the adjudication may affect.¹⁷⁷ If the Department of Commerce fails to provide notice to an interested party, it has denied the party a right to which it has a statutory entitlement.¹⁷⁸ This statutory entitlement may create a benefit protected by due process even if the underlying dispute does not implicate property rights protected by constitutional guarantees. Therefore, a court would not need to examine the issue of whether a distinct, constitutionally grounded right to notice exists.¹⁷⁹

The Federal Circuit's holding in *NEC Corp. v. United States* shows that a court may find statutory grounds for decision even absent a specific statute.¹⁸⁰ The plaintiff importers in the case appealed the Department of Commerce's determination, alleging that prejudgment by agency officials amounted to a violation of due process.¹⁸¹ Though the court acknowledged precedential support for rejecting due process claims relating to quotas and other import restrictions,¹⁸² it also questioned whether an importer could have a property interest in the fact-finding process of an AD/CVD determination.¹⁸³ The court discussed the re-definition of property interests in the wake of *Goldberg* before adopting the CIT's determination that "there inheres in the statutory scheme created by Congress an implicit expectation that governmental decision makers will act honestly and fairly in the performance of their duties."¹⁸⁴ The court held that this statutory expectation protected parties, though it found that the allegations of prejudgment were insufficient to show any violation.¹⁸⁵

The *NEC* court noted the prudence of leaving lingering constitutional questions undecided where there was a separate statutory basis for reaching a decision.¹⁸⁶ This approach may be particularly attractive in AD/CVD dis-

¹⁷⁵ See *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992).

¹⁷⁶ 19 U.S.C. §§ 1671b(b)(3), 1673b(b)(2) (2006).

¹⁷⁷ *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

¹⁷⁸ See *Transcom*, 182 F.3d at 880.

¹⁷⁹ See *id.*

¹⁸⁰ 151 F.3d 1361.

¹⁸¹ *Id.* at 1363.

¹⁸² *Id.* at 1369-70 (citing *Buttfield v. Stranahan*, 192 U.S. 470 (1904); *Arjay Assocs., Inc. v. Bush*, 891 F.2d 894 (Fed. Cir. 1989)).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1370-71.

¹⁸⁵ *Id.* at 1376.

¹⁸⁶ *NEC Corp.*, 151 F.3d at 1371 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (Stevens, J., concurring)).

putes because statutes cover an abundance of procedural grounds.¹⁸⁷ However, confusion can arise because courts use similar language to describe procedural protections created by statute and constitutionally mandated due process protections.¹⁸⁸ Parties may have a constitutionally protected due process interest in statutory procedure without having a constitutionally protected property interest in the right being adjudicated.¹⁸⁹

In many of its decisions, the CIT appears to conflate the statutory guarantees granted to parties in AD/CVD determinations with a more general concept of due process in proceedings.¹⁹⁰ In *Techsnabexport, Ltd. v. United States*, the CIT noted that "several cases in this court . . . have recognized, without detailed explanation of the property interests involved, that due process rights stem from statutes involving imports."¹⁹¹ The Coalition's brief utilizes this ambiguity, citing cases that the *Techsnabexport* court criticized as lacking clarity to support its due process argument.¹⁹²

In *PPG Industries v. United States*, the CIT rejected the Department of Commerce's motion to supplement the administrative record after a decision based on a domestic producer's claims that adding documents to the record without providing a chance for comment violated due process.¹⁹³ The court recognized the existence of a due process right without expounding on its origin.¹⁹⁴ However, the court's entire discussion is framed in terms of procedural guarantees.¹⁹⁵ The court notes that "Congress has set out a variety of procedures which parties to countervailing duty cases are entitled to rely upon" and that "Congress has given PPG the right to participate in the proceedings in a meaningful manner *before* a final determination has been reached."¹⁹⁶ The only mention of property interests occurs in the context of a general statement on the nature of due process and as an introduction to

¹⁸⁷ See, e.g., *Transcom v. United States*, 182 F.3d 876, 880 (Fed. Cir. 1999) ("On the merits, we need not address Transcom's argument that the lack of notice of the scope of the administrative reviews violated Transcom's rights under the due process clause of the Fifth Amendment to the Constitution, because we hold that Commerce's conduct in this case violated Commerce's statutory and regulatory notice obligations in connection with the administrative reviews.").

¹⁸⁸ See *Techsnabexport, Ltd. v. United States*, 795 F. Supp. 428, 436 (Ct. Int'l Trade 1992) (discussing the ambiguous language that appears in some of the court's earlier decisions).

¹⁸⁹ *Id.*; *NEC Corp.*, 151 F.3d at 1369-70.

¹⁹⁰ See, e.g., *Kerr-McGee Chem. Corp. v. United States*, 985 F. Supp. 1166, 1179-80 (Ct. Int'l Trade 1997), *aff'd*, 185 F.3d 884 (Fed. Cir. 1999); *PPG Indus. v. United States*, 708 F. Supp. 1327, 1331-32 (Ct. Int'l Trade 1989).

¹⁹¹ *Techsnabexport*, 795 F. Supp. at 436 (citing *Koyo Seiko Co. v. United States*, 796 F. Supp. 517 (Ct. Int'l Trade 1992); *PPG Indus.*, 708 F. Supp. 1327).

¹⁹² Brief of Petitioner at 27, *Coal. for Fair Lumber Imps. v. United States*, 471 F.3d 1329 (D.C. Cir. 2006) (No. 05-1366).

¹⁹³ 708 F. Supp. at 1332-33.

¹⁹⁴ *Id.* at 1331-32.

¹⁹⁵ See *id.*

¹⁹⁶ *Id.* at 1329, 1332 n.6.

the idea of a statutory entitlement.¹⁹⁷ Furthermore, the court consistently uses statute to define the sufficiency of process.¹⁹⁸ Were the court to recognize a producer's property interest as an applicant for a benefit, the court would have to evaluate the constitutional adequacy of the process afforded, and not mere statutory compliance.¹⁹⁹

A more recent CIT decision shows a continuing use of ambiguous language.²⁰⁰ The importer plaintiffs in *Kerr-McGee Chemical Corp. v. United States* claimed the Department of Commerce denied them due process by failing to provide the plaintiffs notice and an opportunity to comment when the Department of Commerce changed a substitute good that the agency used for comparison to calculate fair value.²⁰¹ The court noted the plaintiffs had "a legitimate right of due process" but found the right had not been violated.²⁰² Yet the court never examined the source of this right. Though the Coalition would likely contend that this right springs from a property interest in the imposition of a duty,²⁰³ it seems equally plausible that the *Kerr-McGee* court found a statutory basis for a right to process.

Statutory guarantees that the Department of Commerce will follow certain procedures in determining if subsidies should be imposed should not be confused with a constitutional guarantee that tariff imposition, either as a government benefit to producers or as a government deprivation of importers, must be subject to such procedures. A property interest depends on the nature of the benefit conferred, not on the process by which it is conferred.²⁰⁴

The international nature of AD/CVD disputes and their importance in free trade negotiations exacerbate the effects of the legal ambiguity that surrounds them. Unfair practices duties are a major concern of trading partners, and international resolutions such as Chapter 19 may well constitute an integral part of future agreements.²⁰⁵ Constitutional questions about the binational system in general, and particularly the due process issue, serve to limit executive discretion in the negotiation of future agreements.²⁰⁶ A clear definition of the rights involved in unfair practices determinations would

¹⁹⁷ *Id.* at 1331.

¹⁹⁸ *Id.* at 1332.

¹⁹⁹ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

²⁰⁰ *Kerr-McGee Chem. Corp. v. United States*, 985 F. Supp. 1166 (Ct. Int'l Trade 1997), *aff'd*, 185 F.3d 884 (Fed. Cir. 1999).

²⁰¹ *Id.* at 1179.

²⁰² *Id.* at 1180.

²⁰³ See Brief of Petitioner at 25-27, *Coal. for Fair Lumber Imps. v. United States*, 471 F.3d 1329 (D.C. Cir. 2006) (No. 05-1366).

²⁰⁴ See *Loudermill*, 470 U.S. at 541.

²⁰⁵ See Jennifer Danner Riccardi, *The Failure of Chapter 19 in Design and Practice: An Opportunity for Reform*, 28 OHIO N.U. L. REV. 727, 741-42 (2002).

²⁰⁶ Burton, *supra* note 17, at 1574-75.

provide greater flexibility in future negotiations.²⁰⁷ Additionally, as binational or international bodies take on the responsibility of interpreting U.S. law or a body of international law with the potential to affect constitutional rights, it is important that such rights be clearly defined.

Offshoot litigation from the softwood lumber dispute provides an example of international adjudication that seems to increase legal ambiguity. A U.S. company operating in Canada, Pope & Talbot, sued the Canadian government for an expropriation under Chapter 11 of NAFTA in 1999.²⁰⁸ Chapter 11 is charged with providing "due process" protection to NAFTA investors faced with a government taking of business assets in another NAFTA country.²⁰⁹ Pope & Talbot argued that it possessed a property interest in unfettered market access, and the Chapter 11 tribunal agreed.²¹⁰ Though the tribunal ultimately found that no expropriation occurred,²¹¹ its holding regarding property rights in market access sets a precedent potentially at odds with existing U.S. interpretations of due process.²¹² Without strong definitions of domestic law, the internationalization of adjudication may redefine rights in a way lawmakers never intended.

International significance augments the importance of AD/CVD controversies. However, the plethora of procedural grounds on which most AD/CVD cases can be decided, as well as the confusion springing from a sometimes narrow distinction between an interest guaranteed due process under the Fifth Amendment and an interest in a specific procedure established by statute, mean that domestic cases are more likely to confuse than clarify.

CONCLUSION

Clearly, domestic industry participants have important interests at stake in Chapter 19's panel adjudications. Unfortunately for those participants who seek to challenge the panel review process, their interests are both contingent and indirect, and therefore not protected under the Fifth Amendment's Due Process Clause as judicial precedent has interpreted it. Even if a court does find that interested parties have a property right in AD/CVD determinations, Chapter 19 provides that interested parties will have a fair evidentiary hearing, reviewed by the Extraordinary Challenge Committee upon an accusation of wrongdoing. When the interest of the

²⁰⁷ See *id.* For a discussion of the justifications for expanded executive flexibility in foreign affairs and its significance in the context of the binational panel system, see Burton, *supra* note 17.

²⁰⁸ Joel C. Beauvais, *Regulatory Expropriations under NAFTA: Emerging Principles & Lingering Doubts*, 10 N.Y.U. ENVTL. L.J. 245, 269-70 (2002).

²⁰⁹ NAFTA, *supra* note 1, art. 1110.

²¹⁰ Beauvais, *supra* note 208, at 271.

²¹¹ *Id.*

²¹² See *supra* notes 85-87 and accompanying text.

government, and of industry as a whole, in continued NAFTA participation is balanced against the uncertain interest of participants in a single industry, the procedures offered by the binational panels likely constitute sufficient process.

The international nature of AD/CVD determinations magnifies the importance of the constitutional questions surrounding them. Yet, challenges to domestic process are unlikely to reach the issue of property interests. Statutory procedural guarantees provide alternate grounds for deciding such questions. Analyzing the sufficiency of a single challenged point of process provides a much simpler, more certain solution than answering an unaddressed constitutional question.

Because of the finality of Chapter 19's binational panels, parties will have incentives to challenge the constitutionality of the panel system until the viability of these challenges is no longer in question. Constitutional challenges like the Coalition's claim provide the D.C. Circuit a unique opportunity to clearly establish whether interested parties have a protected property interest in AD/CVD determinations. A definitive ruling finding no due process entitlement would increase executive discretion in forming trade negotiations and clarify rights that will likely be subject to international adjudication in the future.

Though the Coalition's challenge to NAFTA has been dismissed, questions about the nature of the rights involved in AD/CVD determinations that contributed to the suit remain. While a judicial finding that no due process right exists may further government interests, the sufficiency of process, combined with other forms of procedural protection, renders prompt resolution of the issue improbable.