

Why We Were Right and They Were Wrong

individual citizens. Therefore, the rulings supported the conclusion that Congress could indeed authorize binational panels to act as non-Article III courts and replace domestic review courts in AD/CVD disputes.

(2) *The appointments clause of Article II, Section 2*

Article II, Section 2 of the U.S. Constitution contains the appointments clause. It empowers the president to "nominate, and with the advice and consent of the Senate, to appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States." The appointments clause also provides that "Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone." The debate regarding the compatibility of Chapter 19 and the appointments clause centered on the ways that binational panelists were selected. Could persons who were not officers of the United States (i.e., not appointed under Article II) be authorized to overrule federal officers in the DOC and ITC who were properly appointed? In other words, the issue of whether Chapter 19 violated Section II hinged on the source and significance of the panelists and/or EEC members. Critics of Chapter 19 argued that Article II, Section 2 required all officers of the United States, courts, and heads of departments to be nominated and appointed by the president after receiving the Senate's approval. Moreover, they argued that the appointments clause restricted the powers of those individuals who were not appointed according to the Article II procedure. Critics pointed to the Supreme Court's ruling in *Buckley v Valeo* (1976) to justify their claims. *Buckley* held that the appointments clause had to be applied to "any appointee exercising significant authority pursuant to the laws of the United States." Because binational panels were empowered to give binding direction to U.S. agencies, critics argued that panelists did have authority under U.S. law and had to be appointed via Article II. In light of the fact that panelists were not appointed by the president on advice from the Senate, critics charged that the panel review process violated Article II, Section 2 of the Constitution.

The dispute over Article II was resolved by Articles 1904 (2) of the FTA and NAFTA. Articles 1904 (2) incorporated the trade remedy laws of Canada, Mexico, and the United States into the Agreements. Consequently, they provided that panelists were able to exercise their authority to review the determinations of domestic agencies pursuant to the international laws of the FTA and NAFTA instead of according to the domestic laws of the three countries. The concept whereby panelists who were not appointed according to the appointments clause could exercise authority under international law instead of under domestic law was upheld by the U.S. Supreme Court in *Seattle Master Builders v Pacific Northwest Electric Power and Conservation Planning Council* (1986). The Court found that a Council whose members were not presidentially appointed was constitutional despite its authority over federal agencies because the Council performed its duties pursuant to international laws. *Seattle Master Builders* therefore applied to Chapter 19 panelists, because they too, performed duties according to international laws.