

Why We Were Right and They Were Wrong

(1) *Article III and the replacement of domestic judicial review*

The debate surrounding Article III hinged on the way that Chapter 19 replaced domestic judicial review with binational panel review. Critics alleged that Chapter 19 jarred the constitutional framework of the United States because it allowed private parties to elect to substitute binational panel review for domestic judicial review of final AD/CVD/injury determinations. In other words, Chapter 19 limited the CIT's and CAFC's jurisdiction to hear challenges of final AD/CVD/injury determinations. The issue over Article III thus became one of whether Congress had the power to create "non-Article III" courts such as Chapter 19 panels, and in so doing, could limit the power of judicial review by Article III courts.⁶⁵

American courts affirmed the right of Congress to create non-Article III courts in a number of landmark decisions (e.g., *American Insurance Co. v Canter* (1828)). Based on these decisions, the issue surrounding Article III changed slightly. The issue became one of whether a Chapter 19 panel was exercising the "judicial power of the United States" set out by Article III of the Constitution, or was merely carrying out powers that Congress had delegated to it under Article I, Section 8. In this way, the Article III debate raised a separation of powers issue that distinguished different types of cases from each other because of the jurisdiction of different types of courts over them. The critical case distinction surrounding the jurisdiction of Chapter 19 panels was whether a case involved "public rights" or "private rights." The U.S. Supreme Court distinguished between public and private rights in *Northern Pipeline Construction Co. v Marathon Pipe Line Co.* (1982). The Court held that public rights cases dealt with matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," and "only to matters that historically could have been determined exclusively by those departments." The Court built on the "public rights" doctrine in *Thomas v Union Carbide Agricultural Products Co.* (1985) and *Commodity Futures Trading Commission v Schor* (1986) to determine that non-Article III courts had jurisdiction over public rights cases. Furthermore, the *Thomas* and *Schor* Courts ruled that international trade issues such as antidumping and countervailing duties fell within the "public rights doctrine" because they involved governmental actions vis-a-vis

(Winter, 1994); Stewart A. Baker, Shelly P. Battram, "The Canada-United States Free Trade Agreement," *The International Lawyer*, Vol. 23, No. 1 (Spring, 1989); Thomas A. Bark, "The Binational Panel Mechanism for Reviewing United States-Canadian Antidumping and Countervailing Duty Determinations: A Constitutional Dilemma?" *Virginia Journal of International Law*, Vol. 29 (1989).

⁶⁵ "Article III courts" are those that Congress is empowered to create in Article III, Section 1 of the U.S. Constitution. Article III judges enjoy lifetime tenure and a set salary in order that they are independent of Congress. Article III courts have jurisdiction over the cases and controversies outlined in Article III, Section 2. "Non-Article III courts" are those "tribunals inferior to the Supreme Courts" that Congress is able to create pursuant to Article I, Section 8 of the Constitution. They do not enjoy lifetime tenure and are not subject to Article III constraints.