

Why We Were Right and They Were Wrong

1995 and June 9, 1995 to suggest that Chapter 19 was an unfair, ineffective process that violated Articles II and III of the Constitution as well as the due process clause of the Fifth Amendment. The coalition suggested that binational panels had not properly applied the domestic laws of the United States nor complied with the proper standards of review in cases such as softwood lumber. The coalition therefore demanded that Chapter 19 be excluded from the FTA and NAFTA altogether. If such drastic action was not possible, the coalition insisted that Chapter 19 be substantially revised and withheld from new members of the NAFTA.¹⁹

Moreover, congressional officials have begun to bow to the most recent waves of political pressure and have raised the constitutional issue once again in spite of the fact that Congress settled the constitutional debate when it passed the FTA in 1989. Senator Craig (R-Idaho) mourned the "fate" of American softwood lumber producers because of the rulings of a number of binational panels during the 1991-1993 round of the softwood lumber dispute. He pointed to the constitutional infirmities of the Chapter 19 process to suggest that it be significantly improved. For Senator Craig, "because these rulings by non-elected, non-United States panelists are binding under the United States-Canada Free Trade Agreement, and now under the NAFTA, serious constitutional and procedural issues arise. Reform is needed to assure that future panels do not and cannot ignore U.S. law in order to protect unfair trade practices."²⁰

In addition, nine prominent senators sent a letter to the USTR on August 9, 1995 suggesting that absent outright elimination of Chapter 19 and its replacement with the dispute settlement process of the WTO, substantial attention should be given to the Chapter's reform. The nine senators argued that the three original purposes of Chapter 19 (a temporary measure, to strictly enforce conflict of interest rules, to bind panelists by U.S. law and the deferential standard of review) had not been achieved. Furthermore, the softwood lumber dispute demonstrated that the Chapter 19 process was seriously inadequate and prone to problems such as conflicts of interest and misapplication of domestic standards of review. Recalling the constitutional issues centering on the appointments clause of Article II, the process of judicial review in Article III courts, and due process, the nine senators insisted that:

Under Chapter 19, ad hoc panels of private individuals rule in place of judges on whether antidumping and countervailing duties have been imposed consistent with the domestic law of the importing country. This requires Chapter 19 panels to interpret and apply national law itself, rather than resolving disputes over the

¹⁹ Letter from Lauren R. Howard et al to USTR Mickey Kantor, April 28, 1995; Letter from Lauren R. Howard et al to Ms. Carolyn Frank, Executive Secretary, Trade Policy Staff Committee, Office of the USTR, June 9, 1995.

²⁰ Senator Craig (R-Idaho), "Subsidized Canadian Lumber," LEGI-SLATE Report for the 104th Congress, *Congressional Record*, Tuesday August 8, 1995, 11812.