

Why We Were Right and They Were Wrong

19 process had to assure litigants of an independent, impartial forum, and afford them with an adequate opportunity to present their case.¹⁶

As will be explained, administrative officials, constitutional scholars, and various representatives of the international trade bar have concluded that the Chapter 19 process does not offend Article II, Article III, or the due process clause of the Fifth Amendment. Indeed, the House Judiciary Committee which considered the constitutionality of Chapter 19 in 1989 closed the issue by approving the Chapter 19 process as sound, constitutional, and legitimate. Nevertheless, protectionist congressmen and interest groups have continued to use constitutional challenges as a smoke screen for their discontent with the Chapter 19 process. For Christenson and Gambrel, "hidden in the constitutional question is distrust over a perceived protectionist bias of the International Trade Court and the Court of Appeals for the Federal Circuit in their judicial review function."¹⁷ In other words, some American groups have continued to use constitutional arguments to foil fears that their protectionist interests could be sacrificed because negotiators of the FTA and NAFTA wished to have impartial binational panels review AD/CVD orders outside of the allegedly protectionist review courts in the United States. For example, the Coalition for Fair Lumber Imports (CFLI) argued that the Chapter 19 process was an unconstitutional ceding of American sovereignty after two binational panels and an ECC upheld Canadian stumpage practices. In 1994, the CFLI filed a suit in the District of Columbia Circuit Court of Appeals alleging that Chapter 19 of the FTA denied them due process and equal protection before the law and violated Articles II and III of the U.S. Constitution. The suit stemmed from the Extraordinary Challenge Committee's decision.¹⁸ The Coalition argued that the ECC's 3-2 decision resulted from a "gross misinterpretation of U.S. law" and implied that it was rooted in power politics. The suit was withdrawn by the Coalition on January 6, 1995 after the Canadian and American governments introduced a new consultative mechanism for softwood lumber in December of 1994.

Similarly, a coalition of American companies which had traditionally sought protection from imports under American trade remedy laws sent letters to USTR Mickey Kantor on April 28,

¹⁶ Congress responded to those who feared that Chapter 19 was not compatible with the U.S. Constitution by permitting exclusive domestic judicial review of AD/CVD determinations that involved constitutional issues. The FTA and NAFTA's implementing legislation enables a participant to challenge a final AD/CVD order on constitutional grounds before a three judge panel of the Court of Appeals for the District of Columbia Circuit.

James R. Cannon Jr., *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard's/McGraw-Hill Inc., 1994), 109-110.

¹⁷ Gordon Christenson, Kimberly Gambrel, "Constitutionality of Binational Panel Review in the Canada-U.S. Free Trade Agreement," *The International Lawyer*, Vol. 23, No. 2 (Summer, 1989), 402.

¹⁸ *United States-Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding in the Matter of Softwood Lumber Products from Canada*, ECC-94-1904-01 USA.