

Why We Were Right and They Were Wrong

Chapter 19 was also deemed compatible with the appointments clause because the American panelists were "inferior officers" and could be authorized by Congress and the president to perform their duties as a result. Panelists were not given the power to implement their decisions by Chapter 19. Instead, they were only permitted to remand AD/CVD determinations to the administrative agencies that released them. In this way, panel decisions were executed by those officials and/or agencies who were appointed under Article II. Interestingly, Congress and the executive branch anticipated a constitutional challenge on the basis of Article II. In the event that it was argued that a binational panel could not direct the DOC or ITC to implement its order, the president was authorized to direct the relevant U.S. agency to comply with the panel's order.

Finally, Chapter 19 has been recognized as constitutional because the Supreme Court has not subjected international tribunals to the requirements of the appointments clause. American courts have traditionally deferred to the president and international tribunals in the conduct of international relations. Article II gave the president the authority to conduct foreign affairs. In exercising the authority to settle trade disputes, the executive branch/president has historically taken a range of actions that affected the claims and even lawsuits of Americans. The courts have traditionally not interfered with such actions. In *Dames and Moore v Regan* (1981), the Supreme Court recognized the executive branch's ability to settle disputes by international tribunals when Congress approved. Therefore, because both the executive and legislative branches agreed to the creation of Chapter 19, the authority of the panelists over domestic tribunals was agreed to as well. Indeed, the process by which American panelists are placed onto the Chapter 19 roster requires the USTR to generate a list of potential candidates and submit it to the Senate's Finance Committee and the House Ways and Means Committee for approval. The list of panelists may only be changed in the event that the USTR and Congress so agree. In this way, the executive and legislative branches tacitly approved the panelists that would be placed on a Chapter 19 panel in the event of a dispute.

(3) *Due process, the Fifth Amendment, and Chapter 19*

The final challenge to the constitutionality of Chapter 19 revolved around the Fifth Amendment and the principle of due process. Critics of Chapter 19 feared that the constitutional rights of individuals to procedural due process would be endangered because Article III courts were replaced with binational panels. If binational panels were to survive a due process challenge, the Chapter 19 process had to assure litigants of an independent and impartial forum, and afford them an adequate opportunity to present their case.

The vast majority of legal experts who have examined the due process issue have concluded that it is moot. Binational panels did not jeopardize the constitutional right to due process for four reasons. First, binational panels were only given authority to examine final AD/CVD determinations when they applied the standards of review of the importing country. The