

Why We Were Right and They Were Wrong

determinations were reviewed for their appropriateness and legitimacy. The negotiators of Chapter 19 hoped to speed up the process of judicial review by instituting rigid timetables into the Agreement. Articles 1904 (14) of the FTA and NAFTA designated that panel review must be completed within 315 days of the date on which the request for a panel was made. Articles 1904 (14) set out strict timeframes for procedural aspects of the binational system as well.²³

Proponents of the binational panel system have pointed to Articles 1904 (14) as excellent ways to accelerate the process of judicial review. They have lauded the FTA and NAFTA for containing such explicit timelines and lamented their absence in the domestic judicial systems.²⁴ For example, the CIT is supposed to file an administrative record within 40 days of the filing of a complaint. However, the CIT routinely obtains extensions that can last up to 7 months. Consequently, parties are often unable to advance their actions while they are awaiting the filing of the administrative record. In contrast, FTA/NAFTA rules of procedure stipulate that administrative agencies must file an index of the record within five days of the date for filing of a complaint with a binational panel. Within ten days after the index is filed, each complainant must designate those items listed in the index that are considered relevant to the panel review. Thereafter, the agency has fifteen days to file the designated documents with the panel, thus making the entire process of compiling the administrative record only 30 days long.²⁵

Furthermore, proponents have suggested that the Chapter 19 process should be faster than the domestic systems because the Article 1904 rules avoid "multiple appeals," eliminate the need for motions to intervene, and do not permit applications for preliminary injunctions which can backlog or delay domestic courts.²⁶ Similarly, the Chapter 19 system should be faster than domestic

²³ The 315 day period of review must allow: (A) 30 days for the filing of the complaint; (B) 30 days for designation or certification of the administrative record and its filing with the panel; (C) 60 days for the complainant to file its brief; (D) 60 days for the respondent to file its brief; (E) 15 days for the filing of reply briefs; (F) 15 to 30 days for the panel to convene and hear oral argument; (G) 90 days for the panel to issue its written decision.

²⁴ James R. Cannon Jr., "Dispute Settlement in the Article 1904 U.S.-Canada Binational Panel Versus the Court of International Trade," Unpublished, 1990, 3-4; Homer E. Moyer Jr., "Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort," *The International Lawyer*, Vol. 27, No. 3 (Fall, 1993).

²⁵ James R. Cannon Jr., "Dispute Settlement in the Article 1904 U.S.-Canada Binational Panel Versus the Court of International Trade," Unpublished, 1990, 15-16.

²⁶ The presence of "multiple appeals" slows the CIT's process of review. Litigants before the CIT commonly file multiple appeals to ensure that they have accounted for all of the associated issues (or cross-claims) that may be raised in the review of an AD/CVD determination. Multiple appeals are necessary in the CIT process because litigants do not know whether any other parties will appeal until 30 days after the final determination. In contrast, the binational panel system avoids multiple appeals by permitting any party to join a panel review following the first request for review and by permitting any party to file a complaint. This reduces the number of cases that are