

Why We Were Right and They Were Wrong

words, agency discretion had to be based on Commerce's regulations and past practices.⁶¹

Therefore, binational panels have not created a second body of trade law because they have issued decisions that have been very similar to domestic courts. "They," the Americans critics, were wrong. Because panels have followed national jurisprudence, they have "naturally reached conclusions that have been similar to those of domestic courts."⁶² Indeed, the Chapter 19 system protects itself against the development of a second body of trade law in two ways. First, panel decisions are only binding on the involved parties and in regards to the particular issues before the panel. Panels may not bind future panels or domestic courts when confronted by similar issues. Second, the Chapter 19 system is inherently self-correcting. Panels must apply domestic AD/CVD laws, and therefore must acknowledge any changes to those laws. They must also affirm judicial precedents from higher domestic courts if they conflict with a previous panel's ruling. In other words, panels must adhere to domestic courts every time that an appellate court rules on an issue, even if the domestic court's decision was different than a previous panel's ruling. Failure to apply domestic laws, adhere to changes, or to affirm upper courts could subject a panel's decision to an ECC review.⁶³

(C) *The binational panel review process violates the U.S. Constitution*

The legitimacy of constitutional arguments is difficult to assess from the Chapter 19 experience because the majority panels have not directly examined constitutional questions. Instead, panels have focused their attention to trade issues because their purpose is to assess the compatibility of AD/CVD determinations with domestic trade remedy laws and practices. Nevertheless, the relevancy of constitutional critiques may be discussed in more general terms to evaluate the Chapter 19 system. As explained, constitutional scholars and legislative committees have concluded that the Chapter 19 process is constitutionally sound. They have maintained that the binational panel system of review does not violate Articles II and III of the U.S. Constitution or the due process clause of the Fifth Amendment.⁶⁴

⁶¹ *Binational Panel Review in the matter of Red Raspberries from Canada*, USA-89-1904-01, 19-20.

⁶² William J. Davey, *Pine and Swine: Canada-United States Trade Dispute Settlement - The FTA Experience and NAFTA Prospects* (Ottawa: Centre for Trade Policy and Law, 1996), 136-137.

⁶³ Guillermo Aguilar Alvarez et al, "NAFTA Chapter 19: Binational Panel Review of Antidumping and Countervailing Duty Determinations," in William Robson, S. Dahlia Stein (eds), *Trading Punches: Trade Remedy Laws and Disputes Under NAFTA* (Washington: National Planning Association, 1995), 35-36.

⁶⁴ Literature on the constitutionality of Chapter 19 is extensive. Informative pieces include: Gordon A. 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); Demetrios G. Metropoulos, "Constitutional Dimensions of the North American Free Trade Agreement," *Cornell International Law Journal*, Vol. 27, No. 1