

Why We Were Right and They Were Wrong

interpretation of international agreements as would normally occur in international dispute settlement mechanisms in the WTO. These panel decisions are automatically implemented without judicial or political review by accountable government officials.²¹

(4) *The binational panel system is prone to conflicts of interest*

Conflict of interest charges have stemmed from the codes of professional responsibility that are used in the Canadian and American judicial systems. The codes stipulate that "a lawyer shall not accept private employment in a manner upon the merits of which he has acted in a judicial capacity." Because many panelists are prominent trade lawyers, some have had to turn down panel appointments because of clients they have represented or areas of law they have argued. One American legal panelist had to decline from panel service four times because of potential conflicts of interests which could have impacted the issues before the panel.

Critics have alleged that slotting practicing international trade lawyers on the binational panel roster inevitably leads to conflicts of interest. Furthermore, they have charged that using a small community of legal professionals blurs the relationship between private practitioner and binational panelist. For Murphy, "despite the objective professionalism that is to be expected from panelists, it is impossible to completely separate personal experiences and views on how trade law should evolve." He has suggested that it is possible that a lawyer as a panelist in one case could argue for a similar position in a private capacity by reference to the preceding opinion in which he or she participated as a panelist. Critics have also argued that because the roster is limited to a small number of trade lawyers, clients would be likely to seek those lawyers on the service lists to gain a potential advantage.²² Finally, critics have suggested that conflicts of interest could occur if a trade litigator presented a case to an administrative agency, and then became a member of a panel that reviewed that agency.

B. *Arguments of Proponents of Chapter 19*

(1) *The Chapter 19 process will be faster than domestic judicial review*

The domestic processes of judicial review in Canada and the United States are extremely long and expensive. The average length of the American review process is 3-5 years, while the average Canadian process is 2-4 years. The lengthy processes have proved harmful to exporters in the day-to-day operation of trade because it has added to the delays when AD/CVD

²¹ Letter by Senator Max Baucus et al to USTR Mickey Kantor, August 9, 1995.

²² Christopher Murphy, "Canada-U.S. Free Trade Resolution Dispute Mechanism Panel Procedures: Will They Hold?" *The Transnational Lawyer*, Vol. 4 (1991), 599-601