

Why We Were Right and They Were Wrong

1. Arguments of Opponents and Proponents of Chapter 19

The arguments for and against Chapter 19 parallel the objectives that Canadians and Americans had during the FTA/NAFTA negotiations. Canadians wanted security, predictability, fairness, and openness, while Americans desired control over domestic trade laws and processes. In general, the arguments against Chapter 19 have come from American policy-makers who have seen the process as an intrusion on national sovereignty, as a threat to their independent decision-making ability, and as a challenge to domestic trade remedy laws. Furthermore, much of the criticism of Chapter 19 has come from the U.S. industries that are frequent users of trade remedy laws (e.g., steel, lumber, cement, textiles, semi-conductors) and likely participants in the Chapter 19 process. Much of the criticism has stemmed from unhappiness with the *Fresh, Chilled, and Frozen Pork*, *Softwood Lumber*, and *Live Swine* disputes. Not surprisingly, those cases provoked controversy because they involved the highest value of trade of any American cases that had gone before binational panels, and were the only cases in which the original CVD and injury determinations were substantially overturned.⁴ Critics have alleged that the binational panels do not adhere to the American standard of review, are beginning to create a second body of trade law, are unconstitutional, and are prone to conflicts of interest.

Conversely, arguments in support of Chapter 19 have come from Canadian policy-makers and producers who see the binational panel process as a solution to the problems they incurred in the American trade regime and system of judicial review before 1989. They have lauded binational panels for issuing more thorough, consistent, fair decisions in a much faster timeframe than domestic review courts have done in the past. The well-reasoned, detailed, timely decisions have been supported because they have helped to inject predictability and certainty into the often stormy context of North American trade.

A. Arguments of Opponents of Chapter 19

(1) *Binational panels do not apply the standards of review properly*

Articles 1904 (3) of the FTA and NAFTA stipulate that binational panels must apply the standards of review and general legal principles that an American or Canadian court would use when reviewing an administrative agency's determination.

The American standard of review is contained in Section 516 A (b)(1)(A),(B) of the *Tariff Act* of 1930 as amended. It stipulates that "a court shall hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record or otherwise not

⁴ 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), 32-33.