

Why We Were Right and They Were Wrong

Since 1989, panels have routinely applied the American standard of review correctly. They have pieced leading opinions together to apply the errors of law and substantial evidence tests appropriately. However, when doing so, panels have somewhat opened themselves to controversy because they have varied in terms of the degree of deference that should be shown to administrative agencies. Some panels have shown high degrees of deference in cases such as *Magnesium*, while others lesser degrees of deference in cases such as *Red Raspberries*, *Fresh, Chilled, and Frozen Pork*, *Live Swine*, and *Softwood Lumber*.³⁷

Cases where panels have used lesser degrees of deference have sometimes become controversial. However, even the more active panels have not overstepped their jurisdiction or authority, and have employed the same degrees of deference as the CIT and Court of Appeals for the Federal Circuit have done in the past. In *Softwood Lumber*, for example, the panel actively reviewed the DOC's affirmative CVD determination by drawing from a CIT decision in *Daweoo Electronics Co. Ltd. et al v U.S.* (1993). The panel defended its activist standard of review by suggesting that the *Daweoo* Court did not abandon the practice of deferring to administrative agencies by requiring the DOC to rely on "substantial evidence" when making a determination. Relying on *Daweoo*, the binational panel stated:

Although review under the substantial evidence standard is by definition limited, application of the standard does not result in the wholesale abdication of the Panel's authority to conduct a meaningful review of the agency's determination. Indeed, a contrary conclusion would result in the evisceration of the purpose for reviewing agency determinations, rendering the appeal process superfluous. The deference to be afforded an agency's findings and conclusions is not therefore unbounded.³⁸

In summary, the CIT has produced a "spectrum" of decisions where judicial review has ranged from deferential to rigorous. Contrary to the arguments of critics of Chapter 19 in the United States, Chapter 19 panels have fallen well within that range.³⁹ Panels have "used the latitude

³⁷ *Binational Panel Review in the matter of Pure and Alloy Magnesium from Canada*, USA-92-1904-03; *Binational Panel Review in the matter of Red Raspberries from Canada*, USA-89-1904-01; *Binational Panel Review in the matter of Fresh, Chilled, and Frozen Pork from Canada*, USA-89-1904-06; *Binational Panel Review in the matter of Live Swine from Canada*, USA-92-1904-04; *Binational Panel Review in the matter of Certain Softwood Lumber Products from Canada*, USA-1904-02.

³⁸ *Binational Panel Review in the matter of Certain Softwood Lumber Products from Canada - Decision of the Panel on Remand*, USA-92-1904-01, 16-17.

³⁹ John M. Mercury, "Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?" *Northwestern Journal of International Law and Relations*, Vol. 15, No. 3 (Spring, 1995), 595-596; William J. Davey, *Pine and Swine: Canada-United States Trade Dispute Settlement - The FTA Experience*