

Why We Were Right and They Were Wrong

reach the proper definition of "cost" under the SIMA.⁸⁹ Those three panels examined whether costs such as interest expenses, maintaining a parent entity, interest on financing obligations at the parent level, bankruptcy expenses, and pension plans were connected to the costs of production. All three panels stressed that certain costs could be used by Revenue Canada when determining normal values and margins of dumping if they were legitimately connected to the subject goods. Based on the three panel decisions, the *Corrosion Resistant Steel Sheet* panel concluded that the goal of Sections 16 and 19 of the SIMA was to find the connection between the item in question and the cost of the good under investigation. The three FTA panels implied that Revenue Canada or future FTA/NAFTA panels, "obtain as accurate a picture as possible of the costs during the relevant period so as to compare that price to the price charged to consumers in Canada." It was this "connection" test that the panel used to ensure that Revenue Canada included direct and indirect costs attributed through the appropriate distribution of general corporate expenses in the *Corrosion-Resistant Steel Sheets* case.⁹⁰

In general, there has been less variation between panels than between domestic review courts (especially the CIT). Analysts concur that it is positive that panels have referred to each other because it has helped to create consistency. By seeking consistency, panels have moved towards the ideal standard for domestic courts and agencies - panels are doing what domestic courts and agencies ought to do in the process of judicial review. Furthermore, referring to one another has been a natural and positive practice which has allowed panelists to see how other experts have treated similar issues and to ensure that domestic laws and practices were applied properly and consistently during the process of review.⁹¹

In summary, consistency, thoroughness, and predictability has been the result of the collective decision-making style of panels. Unlike domestic review courts, panels are convened to review one case in detail. Panelists therefore take the time to consult with one another to reach the best possible consensus possible. High quality decisions have also stemmed from the expertise of the panelists. Finally, the consistency of the panel decisions has flowed from the work of the

⁸⁹ *Binational Panel Review in the matter of Certain Beer originating in or exported from the United States by G. Heilman Brewing Co. Inc., Pabst Co., and the Stroh Brewery Co. for Use or Consumption in the Province of British Columbia*, CDA-91-1904-01; *Binational Panel Review in the matter of Gypsum Board originating in or exported from the United States*, CDA-93-1904-01; *Binational Panel Review in the matter of Certain Cold-Rolled Steel Sheet originating in or exported from the United States*, CDA-93-1904-08.

⁹⁰ *Binational Panel Review in the matter of Certain Corrosion Resistant Steel Sheet Products originating in or exported from the United States*, CDA-94-1904-03, 16-17.

⁹¹ Joel Robichaud, "Chapter 19 of the FTA and NAFTA: The First Seven Years of Judicial Review in Canada," (Ottawa: Unpublished, 1995), 39; 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.