

Why We Were Right and They Were Wrong

- The binational panel process is prone to conflicts of interest

Proponents of the Chapter 19 system have been usually from Canada. They have praised the alternative system of judicial review because:

- The Chapter 19 system is faster and more efficient than the Canadian and American processes of judicial review
- The Chapter 19 system increases the degree of fairness, consistency, and predictability in the bilateral trade environment
- Panel decisions are consistent with one another and allow Canadian and American producers to be more confident when exporting their goods

The purpose of the paper is to evaluate the legitimacy of each argument to understand if "they" (the Americans) were wrong, or "we" (the Canadians) were right about Chapter 19. Put another way, the paper will examine if Chapter 19 has improved the ways that AD/CVD laws have been administered in Canada and the United States as it was intended to do. The paper will be divided into three parts. Part One will review the arguments in favour of and against the binational panel process of Chapter 19. Part Two will examine a number of disputes to gauge the validity of the arguments. Because the vast majority of Chapter 19 disputes have been between Canadian and American parties under both the FTA and NAFTA, Part Two will only consider Canada-U.S. disputes in general, a number of bilateral disputes in particular, and will compare some Chapter 19 disputes with AD/CVD cases that were heard by domestic review courts. Part Three will summarize the findings of Part Two and will offer a number of modest policy implications for the future of Chapter 19.

The three parts of the paper will be used to defend the thesis that the Chapter 19 experience has confirmed that American critiques have been unfounded. The binational panel review system has been much better than what North American exporters had to endure before 1989. Panels in the Chapter 19 system of judicial review have employed the Canadian and American standards of review properly, even though they have remanded AD/CVD/injury determinations more frequently than domestic courts have done. Moreover, a second body of trade law has not emerged because panel decisions have adhered to domestic trade laws and administrative practices. The panel process has also proven to be constitutionally sound, and has not been plagued by conflicts of interest. More importantly, the Chapter 19 experience has vindicated the arguments of (Canadian) proponents. The binational panel process has proven to be faster than domestic judicial review. Binational panels have helped to make the North American trading environment more predictable and fair by issuing high quality, consistent, and timely decisions. Traders from both sides of the border have been able to assume more confidence when exporting their goods as a result.