

Why We Were Right and They Were Wrong

channels have been used simultaneously. In the United States, one ITC determination and 8 Department of Commerce determinations have been taken to panels and to the CIT. One of the DOC determinations that was appealed to both forums involved goods from Mexico, and therefore does not directly apply because this paper considers Canada-U.S. disputes only. In Canada, 2 Revenue Canada and 6 CITT determinations have been appealed to panels and the Federal Court of Appeal.⁵⁴ Second, and more importantly, the issues that were considered in those cases were rarely the same because different players and circumstances were involved.⁵⁵

Putting those two considerations aside, one can discuss the applicability of the critique regarding the creation of a second body of trade law by comparing similar issues that were discussed by panels and review courts in different cases. By doing so, it becomes clear that the critique about a second body of trade law is unsubstantiated. William Ince and Michele Sherman, counsel for Canadian parties in 8 of the first 14 American cases before Chapter 19 panels, indicated that panels have not created a second body of trade law because they have decided issues in many of the same ways that domestic review courts have done. For Ince and Sherman, panelists have not been more "independent minded" than domestic judges. They have simply set a new standard for thorough and well-reasoned opinion writing which has distinguished them from their counterparts in domestic courts of review.⁵⁶ Indeed, Department of Commerce officials indicated that with the exception of the *Pork* and *Softwood Lumber* cases, panels have decided issues and treated the Department in the same manner as the CIT has traditionally done.⁵⁷

For example, the *New Steel Rails* panel issued a decision that was similar to the CIT's finding in *Armco Inc. v United States* (1990). The *New Steel Rails* panel remanded Commerce's affirmative CVD determination because it felt that the Department's conclusion regarding loan

⁵⁴ See Appendix B for a summary of those cases.

⁵⁵ Perhaps the two notable exceptions are the cases regarding the DOC's determination on leather wearing apparel from Mexico and CITT's determination on corrosion-resistant steel. The leather wearing apparel case was appealed to the CIT initially, and then taken to a binational panel when the CIT determined it to be the more appropriate channel of judicial review. The CIT and panel examined the same issue (sufficiency of normal remedies) and decided it differently. In corrosion-resistant steel, a binational panel and the Federal Court of Appeals considered some of the same issues (causation, exclusions, cumulation) and decided them in the same way by upholding the agency's determination.

⁵⁶ Telephone conversation with Ms. Michele C. Sherman of Cameron and Hornbostel, Washington D.C., July 19, 1996; William Ince, Michele Sherman, "Observations on the Binational Panel Process under Chapter 19 of the U.S.-Canada Free Trade Agreement," Presentation to the Administrative Conference of the United States' Forum (April 23, 1991), 3.

⁵⁷ 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), 69.