

Why We Were Right and They Were Wrong

making their decisions. Instead, the Courts quickly deferred to the administrative agencies even though they had changed their policies and practices, and withheld evidence in their determinations. Consequently, it is safe to conclude that the issues did not get the kind of scrutiny that a binational panel surely would have offered them in the Chapter 19 process of review.

In addition, the high quality of panel decisions has resulted from the well-reasoned, detailed, thorough decisions that have been released. Panel decisions have been lengthy, and have offered detailed summaries of the history of the dispute, the AD/CVD determination in question, the issues at hand, the relevant standard of review, relevant court and panel decisions, and the panel's conclusions. They have provided much more analysis and information than domestic courts have generally done. For example, a CITT determination of dumped hot-rolled steel sheet was appealed to the Federal Court of Appeal by non-NAFTA parties and to a binational panel by American parties. The panel and Court addressed some of the same issues in the course of review. However, the Court either dealt with them much more summarily than the panel did or did not review them at all.⁸⁶ The *Hot-Rolled Steel Sheet* panel addressed the issues of cumulation and price suppression with respect to goods from the United States in 11 pages.⁸⁷ In *Stelco Inc. v Canada* (1995), the Federal Court of Appeal dealt with the same issues by stating that "allegations that the Tribunal failed to consider the 'cumulative' effect of dumped imports (assuming it had such an obligation) or to consider the alleged injury due to price suppression simply do not find support in the reasons given."⁸⁸ While the two review bodies reached the same decision (to uphold the CITT's injury determination), the Panel issued a much longer decision (124 pages vs the Court's 3 pages) because its members were trade experts and economists who had expertise in the field of trade remedy law. Their knowledge and experience allowed them to analyze the issues in more detail and to ask more probing questions to fully appreciate the appropriateness of the CITT's determination.

Panel decisions have also been substantively consistent with one another. Panels have not issued contradictory decisions even though they are ad hoc bodies. They have used other relevant panel decisions as persuasive arguments to support their own conclusions. The *Corrosion Resistant Steel Sheet* panel referred to three FTA panels to help it assess which items of cost Revenue Canada was to use when calculating the margin of dumping. Because there was little to guide them on the issue, the panelists examined the *Beer*, *Gypsum*, and *Cold-Rolled Steel* panels to

⁸⁶ Joel Robichaud, "Chapter 19 of the FTA and NAFTA: The First Seven Years of Judicial Review in Canada," (Ottawa: Unpublished, 1995), 37.

⁸⁷ *Binational Panel Review in the matter of Certain Flat Hot-Rolled Carbon Steel Sheet Products originating in or exported from the United States*, CDA-93-1904-07.

⁸⁸ *Stelco Inc. v Canada* (1995), F.C.J. No. 832, Court File No. A-410-93.