

Why We Were Right and They Were Wrong

for alleged errors of law and fact by the CITT.⁵²

Interestingly, a member of the CITT wrote a concurring opinion to the Determination on Remand in which she agreed with Greenberg's comments. She supported the notion that the "patently unreasonable" standard was the appropriate one to use when the Tribunal allegedly committed errors in interpreting the SIMA.⁵³

Notwithstanding those two cases, however, panels have employed the Canadian and American standards of review correctly, and have disproven the arguments of American critics. Panels have used leading opinions to guide them when applying standards such as the substantial evidence test, errors of law test, correctness test, patent reasonability test, and considerable deference. While they have acknowledged the importance of agency discretion and deference, the majority of panels have stressed the importance of reasonable, substantiated determinations that reflected record evidence. Consequently, panels have tended to use the American standard more "actively," as U.S. agencies have been remanded more than Canadian ones. Of the 16, AD/CVD cases American cases that have been reviewed by panels, the DOC has been partially remanded 9 times, and completely remanded 3 times. The ITC was remanded twice out of five panel reviews. All of Revenue Canada's AD/CVD determinations were remanded by binational panels - 1 was completely remanded and the other four were partially remanded. The CITT was remanded once, and partially remanded twice out of 10 panel reviews. Placed into percentages, American agencies have been remanded 66% of the time while Canadian agencies have been remanded at a percentage of 47%. With the exception of a number of controversial CVD cases in the United States (e.g., pork, live swine, and softwood lumber), administrative agencies in both countries have been quick to comply with panel remand orders.

(B) Binational panels and the creation of a second body of trade law

An ideal way to determine if binational panels have begun to create a second body of trade law as critics have alleged would be to compare an AD/CVD/injury determination that was appealed to both a Chapter 19 panel and to a domestic review court. Assessing whether a second body of law was generated in the two review processes could then be done by comparing the decisions. Unfortunately, this type of analysis is very difficult to undertake because of two considerations. First, there have only been a very small number of cases where the two review

⁵² Greenberg's concurring opinion in *Binational Panel Review in the matter of Certain Beer Originating in or exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Brewing Company and the Stroh Brewery Company for use or consumption in the Province of British Columbia*, CDA-91-1904-02, 41.

⁵³ Joel Robichaud, "Chapter 19 of the FTA and NAFTA: The First Seven Years of Judicial Review in Canada," (Ottawa: Unpublished, 1995), 20.