

Why We Were Right and They Were Wrong

standards of review that were used by panels were the very ones used by domestic courts, and consequently upheld the principle of due process. Second, due process was not sacrificed because American, Canadian, or Mexican parties have the option of invoking a binational panel. Panels do not have to be requested to challenge a final AD/CVD determinations. Domestic review courts may be convened in very narrow circumstances. Third, the panel process met the requirements of due process by including principles such as essentials of notice, fairness, use of the administrative record, transparency, and other general legal principles. NAFTA negotiators went to great lengths to ensure that Mexico's regime was amended to utilize these principles as Canadian and American courts did. Finally, due process was not endangered because Chapter 19 panels were impartial, apolitical forums to settle disputes. The salaries paid to panelists for their services and selection processes were affirmed as provisions that would protect binational panels from political interference, just as the salaries and tenure provisions protected domestic courts when exercising their authority.

Indeed, Chapter 19 panels have upheld the principle of due process in their decisions. For example, the *New Steel Rails* panel found that the DOC's use of "best-information-available" (BIA) did not violate the Canadian rail producer's right to due process because the complainant had been sufficiently warned of the possible use of BIA if it failed to support the information it submitted to the agency.⁶⁶ Similarly, the *Fresh, Chilled, and Frozen Pork* panel remanded an injury determination to the ITC because it had been based on inconsistent sources and inaccurate information, and thereby upheld the principle of due process. Furthermore, when reviewing the ITC's determination on remand, the panel held that the ITC had denied the complainants "fair play" and due process by including new evidence on the record without affording notice and a new hearing.⁶⁷ Finally, a panel upheld the principle of due process by demanding that the Department of Commerce give a full explanation of its methodology in the *Red Raspberries* dispute. Instead of deferring to the agency's discretion, the *Red Raspberries* panel actively rejected the DOC's statement that the agency "simply knows inadequacy when we see it," and demanded that facts be used to support the conclusion that the home market and third country sales were inadequate as a basis for determining the margin of dumping. The panel concluded that because Commerce did not provide an adequate explanation of its methodology, the panel could not apply the substantial evidence standard or principles of due process to determine the legality of the affirmative dumping determination.⁶⁸

⁶⁶ *Binational Panel Review in the matter of New Steel Rail, except light rail, from Canada*, USA-89-1904-07.

⁶⁷ *Binational Panel Review in the matter of Fresh, Chilled, and Frozen Pork from Canada*, USA-89-1904-11.

⁶⁸ *Binational Panel Review in the matter of Red Raspberries from Canada*, USA-89-1904-01, 20-24.
