Introduction

The compatibility of protectionist trade remedy laws and liberalized, free trade proved to be one of the most controversial issues of the FTA negotiations. Canadian firms had been hurt many times when exporting goods into the United States during the 1970s and 1980s. Stringent antidumping and countervailing laws were continually applied to Canadian products to shelter American producers in their home market. Canadian negotiators hoped to gain an exemption for their domestic producers from American trade remedy laws. The negotiating team proposed that domestic AD/CVD laws be harmonized after the FTA came into effect. However, the Canadian proposal was rejected. The American team insisted that U.S. trade remedy laws remain firmly in place. Turning a blind eye to the vast number of subsidy programs in their own country, American negotiators pointed to federal and provincial subsidies as evidence that Canadian products had an unfair advantage over American goods in the free trade area and would need protection in an integrated market.

The Canadian and American teams reached an impasse over dumping and countervailing issues at the eleventh hour of the FTA negotiations. While the Canadians refused to sign an agreement unless it contained effective measures to counteract American trade remedy laws, American negotiators refused to weaken their domestic laws. The solution to the impasse was Chapter 19 of the FTA. Chapter 19 created a binational mechanism to replace domestic judicial review of antidumping, countervailing, and injury determinations. In lieu of domestic courts, Chapter 19 gave binational panels the authority to evaluate whether administrative agencies applied domestic trade remedy laws correctly.[1] Panel decisions could uphold or remand AD/CVD/injury determinations for being (in)consistent with domestic trade remedy laws. Binational panels decisions were to be binding on the disputing parties in order that costly trade disputes would be settled quickly, and political controversies ended quietly. Routine appeals were not to be pursued. Panel decisions could only be appealed to Extraordinary Challenge Committees (ECCs) on the very specific grounds of Article 1904 (13) of the FTA.

The Chapter 19 compromise pleased negotiators from both countries. The Canadian team

[1] Before Chapter 19 of the FTA came into effect, the Federal Court of Appeals had exclusive jurisdiction to review AD/CVD determinations made by the Deputy Minister of Revenue Canada and injury determinations made by the Canadian International Trade Tribunal (CITT). Decisions of the Federal Court of Appeals could be reviewed by the Supreme Court of Canada. In the United States, AD/CVD determinations of the Department of Commerce-International Trade Administration (DOC) and injury determinations of the International Trade Commission (ITC) could only be reviewed by the Court of International Trade (CIT). CIT decisions could be appealed to the Court of Appeals for the Federal Circuit (CAFC), and ultimately to the Supreme Court of the United States. After Chapter 19 of the FTA came into effect, AD/CVD/injury determinations could be reviewed by either binational panels or domestic courts.