

## Why We Were Right and They Were Wrong

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trade environment. They have suggested that the use of trade law experts, the fact that panels are convened to examine one case only and take the time to examine all of the relevant cases and laws at hand should help to produce more thorough, thoughtful, reasoned decisions. Once panels have issued such decisions, the consistency and predictability of the process could increase, because panels have the benefit of domestic jurisprudence and other panel decisions when reaching their own conclusions. In addition, proponents have cited the FTA/NAFTA Secretariats as valuable resources for binational panels. The Secretariats were established to give administrative assistance to the panels. Situated in the Ottawa, Washington, and Mexico City, the Secretariats must act as an institutional memory for panelists, calling attention to similar issues before other panels, briefs, and decisions of domestic courts. The Secretariats are also required to provide information to panelists regarding relevant chapters of the FTA/NAFTA, rules of procedures, briefs, and the codes of conduct.

### (3) *The binational panel system is a fairer process of judicial review*

Both of the Canadian and American trade remedy regimes have been criticized for being unfair and subject to power politics. Exporters have complained that AD/CVD/injury determinations have been biased, and have protected the interests of national producers above all others. Because review courts have frequently deferred to administrative agencies, exporters have lamented that the process of judicial review solidified the unfairness in the trade regimes. Proponents of Chapter 19 have viewed the binational panels as mechanisms to inject fairness into the process of administering and appealing domestic trade remedy laws. Binational panels, composed of trade law experts from both sides of the border, have been upheld as solutions to the unilateral (and "unfair") domestic review processes.

## 2. Evidence To Assess The Arguments About Chapter 19

The following section will review a number of cases that have been decided by binational panels and domestic review courts to assess the validity of the arguments of opponents and proponents of Chapter 19. Were "they" wrong, or were "we" right?

### (A) *Binational panels and the appropriate standards of review*

#### (1) *Binational panels and the American standard of review*

Critics in the United States have complained that binational panels have not applied the American standard of review properly when reviewing AD/CVD determinations. For example, the ITC appealed the *Fresh, Chilled, and Frozen Pork* panel decision because the agency did not feel that the panel gave it enough deference during the process of review. A member of the ITC's legal counsel office suggested that the panel's assessment of the injury determination was correct and justified. However, the ITC objected to the "intrusive" actions of the panel; had the panel