

Why We Were Right and They Were Wrong

Frozen Pork panel's orders in its second remand determination. However, even though the majority of Commissioners reversed their two previous affirmative determinations, they did so unwillingly and accused the panel of greatly exceeding its scope of authority. Commissioners Rohr and Newquist accused the binational panel of issuing a "counterintuitive, counterfactual, and illogical, but legally binding conclusions," that illustrated, "a woeful lack of knowledge about how the U.S. countervailing duty law operates." They ended their attack by conceding to the panel's authority and stated, "we have no choice but to determine that the domestic industry is not threatened with material injury," because the panel's decision is binding on us.⁸⁰

This cavalier attitude has made American agencies hesitant and/or resistant to adhere to panel orders, and has subjected them to a constant string of remands when they are before panels.⁸¹ American agencies have tended to accept remands from the CIT more readily than from binational panels. Of the 15 cases that were decided by binational panels from 1989-1994, 3 required a remand (20%), 6 required two remands (40%), and 1 required three remands (7%) before American agencies complied with the panel's orders. In comparison, the CIT issued 132 decisions between 1989-1994. The DOC and ITC required 1 remand in 35 cases (26%) and 2 remands in 7 cases (5%).⁸²

(F) *Panel decisions are consistent, thorough, and predictable*

Proponents of the Chapter 19 process of judicial review hoped that panels would issue well-reasoned, consistent, thorough decisions that could add predictability to the administration and application of trade remedy laws in North America. Canadian producers often felt as if their case had not been reviewed thoroughly by CIT judges. Decisions were often brief and extremely deferential to administrative agencies. Furthermore, exporters in Canada were dismayed by the seeming lack of consistency, and hence uncertainty, that characterized CIT decisions. As explained, the CIT often issued different decisions on similar issues because judges sat as individuals when reviewing AD/CVD determinations. Consequently, even though Chapter 19 did not require panels to apply the decisions of previous ones, proponents hoped that panelists would look to their colleagues and begin to apply American and Canadian trade laws more consistently and thoroughly. Exporters on both sides of the border could therefore be assured of a more predictable environment that allowed them to trade confidently.

⁸⁰ United States International Trade Commission, *Fresh, Chilled, and Frozen Pork from Canada: Final Views on Second Remand* (Washington: February, 1991), 3, 17-18.

⁸¹ Interview with Tom MacDonald, Director-General of the U.S. Economic and Trade Policy Division (DFAIT), July 4, 1996.

⁸² United States General Accounting Office, *U.S.-Canada Free Trade Agreement - Factors Contributing in Appeals of Trade Remedy Cases to Binational Panels* (Washington: GAO, 1995), 74-75.