

Why We Were Right and They Were Wrong

interpretation that was effectively precluded by the statute."¹⁰

(2) *Binational panels will create a second body of trade law*

Articles 1904 (2) of the FTA and NAFTA state that binational panels must assess whether a final determination was in accordance with the AD/CVD laws of the importing country. When doing so, panels are to account for domestic trade remedy laws themselves, legislative histories, regulations, administrative practices, and judicial precedents to the extent that a domestic court would do in the process of judicial review. Article 1904 (2) was placed into the Agreements to ensure that panels would not create alternative trade laws, but would simply review the ways that domestic laws were applied by relevant administrative agencies in each country. In other words, panels were not created to develop a separate "FTA/NAFTA" body of trade law. Instead, "the very essence of the Chapter 19 process is one of ensuring that the procedural improvements adopted by Chapter 19 for the review of [AD/CVD] cases [would] be faithfully implemented but not to make substantive changes to the domestic laws."¹¹

Critics of the Chapter 19 process have feared that panels could generate an "FTA/NAFTA" specific body of trade law since the FTA came into operation. Critics have maintained that binational panels could create a second body of trade law in two ways. First, many AD/CVD proceedings involve exports from FTA/NAFTA countries and non FTA/NAFTA countries. Consequently, the determination could be appealed to a binational panel and to a domestic review court, because Canadian, American, and Mexican parties are the only ones which may avail themselves of the Chapter 19 process. Furthermore, critics have feared that binational panels could reach different conclusions than domestic review courts, and thereby generate a second body of "FTA/NAFTA" specific body of trade law. Moreover, they have worried that issues which are common to different exporters from one FTA/NAFTA country could generate a second body of law if one opted for panel review and the other did not.¹² For example, a coalition of 40 industry associations argued that the Chapter 19 system fostered "wasteful litigation" which could result in the effective repeal of American trade laws because different

¹⁰ Letter from Lauren R. Howard et al to Senator Moynihan and Senator Packwood, May 15, 1996.

¹¹ Memorandum, Opinion, and Order of the Majority, *In the Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), 16-17.

¹² 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), 80-81; Robert E. Burke, Brian F. Walsh, "NAFTA Binational Panel Review: Should it be continued, eliminated, or substantially changed," *Brook Journal of International Law*, Vol. 20, No. 3 (1995), 545-546.