

Why We Were Right and They Were Wrong

Corp. v United States (1986) and *Atcor Inc. v United States* (1987).²⁹ In *Zenith*, Judge Watson held that tax rebate issues required the DOC to conduct an elaborate econometric analysis to establish how much of a foreign tax was passed on to consumers in the foreign market and how much was actually absorbed by the manufacturer. In contrast, Judge Carmen ruled that the DOC was simply required to obtain evidence on whether the manufacturers included the tax in their home market sales in *Atcor*. Using *Zenith* and *Atcor* as examples, critics argued that different decisions on significant issues removed their confidence when exporting into the United States. They could never be sure how an administrative agency or review court would decide an issue in an AD/CVD investigation.

The American system of judicial review has also been criticized for being inconsistent and unpredictable because the CIT frequently deferred to the DOC and ITC even if their AD/CVD/injury determinations went beyond American laws or practice. In *Chevron USA Inc. v National Resource Defense Council* (1984), the CIT upheld an agency determination as within its discretion even though the determination directly violated a previously announced policy. Commentators explained *Chevron* as a case of an overworked judge. In all likelihood, the CIT judge was so overworked that he ruled "agency discretion" without fully reviewing the facts at hand.³⁰

The American system of review has also been seen as inconsistent and unpredictable because courts have approached the standards of review differently. Because the standard of review is an ambiguous concept, it is constantly evolving. American courts have created a spectrum when interpreting the standard of review. The spectrum has ranged from requiring a great deal of deference to allowing courts to be activist in the review process. It must be noted that this critique has been applied to the Canadian system of review as well. A conclusive statement on the standard of review has not emerged in Canadian jurisprudence because of the presence of the privative clause that shielded the CITT until 1994.³¹

Proponents of the binational panel system have argued that Chapter 19 should increase the consistency and predictability of the review process. A more consistent and predictable review process is valuable because it could increase the amount of confidence that exporters have in the

²⁹ *Zenith Electronics Corp v United States* 633 F. Supp 1382 (CIT, 1986); *Atcor Inc. v United States* 658 F. Supp 295 (CIT, 1987).

³⁰ Andreas Lowenfeld, "Reflections on Dispute Settlement Under the FTA: Where Do We Go From Here?" The Hyman Soloway Lecture, (Ottawa: Centre for Trade Policy and Law, May 18, 1993), 7-8.

³¹ John M. Mercury, "Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?" *Northwestern Journal of International Law and Relations*, Vol. 15, No. 3 (Spring, 1995), 573-574, 596.