NAFTA'S DOUBLE STANDARDS OF REVIEW

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Chapter 19 of the North American Free Trade Agreement ("NAFTA") replaced court review of U.S. antidumping and countervailing duties with binding review by special binational panels of trade "experts." It requires these panels to apply the same standard of review that U.S. courts use in trade remedy cases. Despite the centrality of this requirement to the Chapter 19 panel system, these panels have not adhered to this mandate. Chapter 19 panels overturn U.S. agency rulings much more often than the courts. In fact, they apply two different standards of review: exacting scrutiny where foreign producers and governments appeal, and near-absolute deference to agencies when U.S. industries appeal. In contrast, panels have shown great deference to Canadian agency determinations (which almost invariably find dumping exists) and favor Canadian industries seeking duties as often as foreign producers seeking their reduction or elimination. Previously suggested explanations—that Chapter 19 appeals involve different facts, that U.S. courts are inept, or that U.S. industries have "captured" U.S. agencies—fail to explain these phenomena. Rather, these discrepancies result from conflicting views about trade laws within the U.S. government, the relatively greater incentive of the

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Canadian government to control the Chapter 19 process through panel appointments and political action, and a procedural structure that makes it easy for panelists to override the U.S. legislative process. Proponents of free trade have, with some reason, warmly received Chapter 19. These discrepancies, however, may reduce the credibility of international dispute settlement and impede negotiations of other agreements.

INTRODUCTION

The United States and Canada, like nearly every other industrialized nation, maintain "trade remedy" laws that authorize U.S. administrative agencies to impose duties on imported goods they find to be "dumped" or subsidized.[1] Normally, agency decisions in such "trade remedy" cases can be challenged or appealed in the federal courts of each country.[2] Chapter 19 of the Canada-United States Free Trade Agreement ("CUSFTA"), now the North American Free Trade Agreement ("NAFTA"),[3] however, authorized a new type of review never previously employed: special binational panels

1. Part I *infra* discusses dumping, subsidization, and the operation of the antidumping ("AD") and countervailing duty ("CVD") laws. We employ the term "trade remedy cases" broadly to describe both administrative agency and subsequent appellate proceedings under an importing country's AD or CVD statutes. Generally, these statutes attempt to remedy the effects of certain trade practices of exporting country governments and/or private parties via the imposition of offsetting import duties. Typically, in the United States, a manufacturer files a petition with the Department of Commerce ("Commerce"). 19 U.S.C. §§ 1671a(b) (CVD), 1673a(b) (AD) (2000). The petition must claim that imports from another country have benefited from government subsidies or are being sold in the United States at prices lower than in their home market (dumping). *See* 19 U.S.C. §§ 1671a(b), 1673a(b). After a brief preliminary inquiry into the sufficiency of the petition, Commerce then may choose to conduct an investigation to determine if the petitioner's claims are valid. 19 U.S.C. §§ 1671a(c), 1673a(c). Concurrently, the U.S. International Trade Commission ("ITC") investigates whether the U.S. domestic industry has suffered injury by reason of such imports. 19 U.S.C. §§ 1671d(b) (CVD), 1673d(b) (AD). If both agencies make affirmative determinations, then Commerce calculates an offsetting duty that will be applied against the offensive import. 19 U.S.C. §§ 1671d(c) (CVD), 1673d(c) (AD). As discussed *infra* Part I, Canada applies similar procedures.

2. *See infra* Part I.

3. Technically speaking, NAFTA did not terminate CUSFTA. The latter remains in operation, as specified in North American Free Trade Agreement, U.S.-Can.-Mex., art. 103(1), 32 I.L.M. 289, 297 (1993) [hereinafter NAFTA]. However, CUSFTA provisions that are inconsistent with NAFTA are no longer in effect. *Id.* art. 103(2). For convenience, this Article will refer to NAFTA rather than the CUSFTA unless there is a particular need to distinguish the two.

appointed jointly by the governments involved to review agency decisions on trade remedy cases.[4] NAFTA requires its members to obey the decisions of these panels and prohibits domestic judicial review once one of the members requests the formation of a panel.[5] At the same time, however, Chapter 19 requires these binational panels to review agency trade remedy determinations using the same standard of review *and* substantive law as would the domestic courts they replace.[6] The U.S. and Canadian governments adopted this arrangement as a compromise, after the United States rejected Canada's demands that the CUSFTA eliminate all antidumping and countervailing duties in trade between the two countries.[7]

4. *See* NAFTA, *supra* note 3, art. 1904; Canada-United States Free-Trade Agreement, U.S.-Can., art. 1904, 27 I.L.M 293, 387 (1988) [hereinafter CUSFTA].

5. *See* NAFTA, *supra* note 3, art. 1904(1); CUSFTA, *supra* note 4, art. 1904(1). In both the United States and Canada, where an agency makes a determination following a trade remedy investigation, federal courts have jurisdiction to review the decision. 19 U.S.C. § 1516a(a) (2000); Special Import Measures Act, R.S.C. 1985, Ch. S-15, § 76 (1985) [hereinafter SIMA].

6. *See* NAFTA, *supra* note 3, art. 1904(3); CUSFTA, *supra* note 4, art. 1904(3)l; *see also* NAFTA, *Corrosion-Resistant Carbon Steel Flat Products from Canada*, at 6, USA-97-1904-03 (Jan. 20, 1999) ("The NAFTA requires that this Panel apply the standard of review that a U.S. court would apply . . . ."); NAFTA, *Certain Concrete Panels, Reinforced with Fiberglass Mesh, Originating in or Exported from the United States of America and Produced by or on Behalf of Custom Building Products, Its Successors and Assigns, for Use or Consumption in the Province of British Columbia or Alberta*, at 3, CDA-97-1904-01 (Aug. 26, 1998) ("The Panel's role is to apply domestic law including relevant administrative law and act as Canadian courts would within the limits set by NAFTA."); S. Comm. on the Judiciary, Report of the Committee on the Judiciary [hereinafter S. Jud. Report] *in* North American Free Trade Agreement Implementation Act: Joint Report, S. Rep. No. 103-189, at 126 (1993) [hereinafter S. Joint Rep.] (expressing the opinion that the inclusion of U.S. judges in the panel system "would diminish the possibility that panels and courts will develop distinct bodies of U.S. law"); S. Comm. on Finance, Report of the Committee on Finance [hereinafter S. Finance Rep.] *in* S. Joint Rep., *supra*, at 41-42 (explaining that the requirement that "binational panels . . . apply the same standard of review and general legal principles that domestic courts" employ "is the foundation of the binational panel system").

7. *See* Michael Hart, *Dumping and Free Trade Areas*, *in* ANTIDUMPING LAW AND PRACTICE 326, 336-42 (John H. Jackson & Edwin A. Vermulst eds., 1989); Juscelino F. Colares, Alternative Methods of Appellate Review in Trade Remedy Cases: Examining Results of U.S. Judicial and NAFTA Binational Review of U.S. Agency Decisions from 1989 to 2005 2 (on review) (unpublished draft, *available at* http://papers.ssrn.com/so13/papers.cfm? abstract_id=920144).

Prior studies of Chapter 19 agree that these panels overturn agency decisions more often than U.S. judges.[8] One recent study has shown that NAFTA panel review not only changes duty rates more often than U.S. court review, but also that NAFTA panels are less likely to increase rates, or to sustain existing rates, than U.S. judges.[9]

This Article reviews prior research and extends it by examining how NAFTA binational panels have examined particular claims advanced on appeal by U.S. industries seeking trade relief (petitioners) and by Canadian importers challenging duties (respondents), and compares the results of review of U.S. agency determinations with the Chapter 19 review of Canadian agency determinations. It concludes that Chapter 19 panels are applying not one but two different standards of review, neither of them specified in the agreement: extremely strict review of U.S. agency decisions favorable to U.S. petitioners seeking trade relief and virtually total deference to U.S. agency decisions adverse to U.S. petitioners.

Yet, even as binational panels systematically deviate from the standard of review in theory applicable to U.S. agency determinations, they have been quite deferential in their review of Canadian agency determinations. This has considerably weakened U.S. industries' ability and willingness to seek barriers to Canadian

8. *See generally* U.S. GENERAL ACCOUNTING OFFICE, GAO/GGD-95-175BR, U.S-CANADA FREE TRADE AGREEMENT: FACTORS CONTRIBUTING TO CONTROVERSY IN APPEALS OF TRADE REMEDY CASES TO BINATIONAL PANELS (1995) [hereinafter GAO REPORT]; JAMES R. CANNON, JR., RESOLVING DISPUTES UNDER NAFTA CHAPTER 19, chs. 13-14 (1994); Judith Goldstein, *International Law and Domestic Institutions: Reconciling North American "Unfair" Trade Laws*, 50 INT'L ORG. 541 (1996); Kent Jones, *Does NAFTA Chapter 19 Make a Difference? Dispute Settlement and the Incentive Structure of U.S./Canada Unfair Trade Petitions*, 18 CONTEMP. ECON. POL'Y 145 (2000); Michael Krauss, *The Record of the United States-Canada Binational Dispute Resolution Panels*, 6 N.Y. INT'L L. REV. 85 (1993); Andreas F. Lowenfeld, *Binational Dispute Settlement Under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal*, 24 N.Y.U. J. INT'L L. & POL. 269 (1991); Patrick Macrory, *NAFTA Chapter 19: A Successful Experiment in International Trade Dispute Resolution*, C.D. HOWE INST. COMMENT., Sept. 2002, at 1; John M. Mercury, *Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?*, 15 NW. J. INT'L L. & BUS. 525 (1995); Eric J. Pan, *Assessing the NAFTA Chapter 19 Binational Panel System: An Experiment in International Adjudication*, 40 HARV. INT'L L.J. 379 (1999); Jennifer Danner Riccardi, *The Failure of Chapter 19 in Design and Practice: An Opportunity for Reform*, 28 OHIO N.U. L. REV. 727 (2002).

9. Colares, *supra* note 7.

imports, while Canadian barriers to U.S. imports have been permitted or even encouraged.

Part I briefly explains how trade cases operate in the United States and Canada[10] and how Chapter 19 applies. Part II examines how Chapter 19 panel review has affected the outcomes of antidumping ("AD") and countervailing duty ("CVD") proceedings by U.S. agencies, and Part III compares this with the treatment of Canadian AD and CVD determinations. Part IV examines possible explanations for the observed disparities in outcomes. It particularly considers three such explanations advanced in prior studies: (1) U.S. industries have sought proportionately more tariffs on imports from Canada than on imports from non-NAFTA members, or filed more appeals; (2) U.S. judges are inexperienced or incompetent; or (3) self-serving U.S. industries have "captured" U.S. agencies and courts. It concludes that none of these explanations explains the observed outcomes. Instead, it argues that a combination of ideological, national, and structural factors explain the different applications of standards of review.

The Article does not attempt to resolve whether NAFTA panels' divergence from the ostensible standard of review is desirable or undesirable. Indeed, many U.S. trade experts consider it desirable because they argue that it reduces protectionism (at least on the U.S. side of the border).[11] The Article concludes by suggesting possible reforms but argues that Chapter 19 panels' failure or refusal[12] to adhere to the NAFTA text may undermine the credibility of international dispute settlement in trade cases, thus impeding further development of other multilateral arrangements, such as the World Trade Organization ("WTO") agreements, or the adoption of new mechanisms of dispute resolution.

10. This Article does not discuss the application of Chapter 19 to Mexico. This is partly because Mexico joined NAFTA only in 1995, so that there is less experience of the application of Chapter 19 review to Mexican decisions, and partly because Mexican practice of trade law is more distinct from Canadian and U.S. practice.

11. *See, e.g.*, CANNON, *supra* note 8, at chs. 13-14; Goldstein, *supra* note 8, at 562; Jones, *supra* note 8, at 149-50; Krauss, *supra* note 8, at 91; Lowenfeld, *supra* note 8, at 334; Macrory, *supra* note 8, at 18-19; Mercury, *supra* note 8, at 527-28; Pan, *supra* note 8, at 442-44.

12. The authors do not wish to suggest here that any particular panel has failed to adhere to the applicable standards. Many have followed the relevant law. This Article deals with aggregate outcomes. Analysis of individual cases usually serves little purpose because individual published decisions are frequently susceptible to varying interpretations and the full factual record seldom exists.

I. OPERATION OF CHAPTER 19

In both Canada and the United States, domestic producers of goods can petition their governments to impose antidumping or countervailing duties on imports of like products.[13] Dumping may occur when a foreign producer sells a product below the producer's sales price in the country of origin or below the foreign producer's cost of production, suitably adjusted.[14] Subsidies are countervailable if a foreign government provides grants, below-market rate loans, or other benefits to specific producers or industries.[15] AD or CVDs can be imposed only if the dumped or subsidized imports materially injure or threaten injury to a domestic industry.[16] In both countries, separate agencies investigate injury[17] and dumping or subsidization.[18] After they investigate, they issue "final determinations" regarding these issues.[19] One comparative

13. U.S. Department of Commerce, An Introduction to U.S. Trade Remedies, http://ia.ita.doc.gov/intro/index.html (last visited Jan. 12, 2007) [hereinafter U.S. Trade Remedies]; Canada Border Services Agency, What You Should Know About Dumping and Subsidy Investigations, http://www.cbsa.gc.ca/sima/brochure-e.html (last visited Jan. 12, 2007) [hereinafter Canada Trade Investigations].

14. 19 U.S.C. §§ 1673, 1677b(a)-(b) (2000); SIMA, *supra* note 5, §§ 3(1)(a), 30; Canada Trade Investigations, *supra* note 13; U.S. Trade Remedies, *supra* note 13.

15. 19 U.S.C. § 1677(5)-(5A); SIMA, *supra* note 5, §§ 2 (definition of "subsidy"), 3(1)(b). In theory, duties can also be imposed if establishment of a domestic industry is materially retarded, but this is rarely applied. *E.g.*, 19 U.S.C. §§ 1671(a)(2)(B), 1673(2)(B).

16. Canada Trade Investigations, *supra* note 13; U.S. Trade Remedies, *supra* note 13. There are some limited exceptions not relevant here. 19 U.S.C. §§ 1671, 1673.

17. In the United States, the ITC, and in Canada, the Canadian International Trade Tribunal ("CITT"). *See* Canada Trade Investigations, *supra* note 13; U.S. Trade Remedies, *supra* note 13. Prior to 2000, preliminary injury determinations in Canada were made by the Canada Customs and Revenue Agency, which also investigated subsidization and dumping. *See* Chad P. Bown, *Global Antidumping Database Version 1.0* 19 (World Bank Policy Research, Working Paper No. 3737, 2005), *available at* http://people.brandeis.edu/~cbown/global_ad/bown-global-ad-v1.0.pdf.

18. In the United States, the International Trade Administration of the U.S. Department of Commerce, and in Canada, the Canada Border Services Agency. Bown, *supra* note 17, at 43; Canada Trade Investigations, *supra* note 13.

19. 19 U.S.C. § 1673d. They also issue preliminary rulings during the investigation, and may later conduct "administrative reviews," "sunset reviews," or other reviews or redeterminations of the amount of duties imposed. *E.g.*, 19 U.S.C. § 1675; SIMA, *supra* note 5, §§ 56-57, 76.01-.03.

study has found little substantive difference between Canadian and U.S. AD investigation practices.[20]

Normally, any party involved, including the petitioning industry or importer, can appeal these decisions to the federal courts. In the United States, appeals are first heard by the Court of International Trade ("CIT"), an Article III[21] court with jurisdiction over customs matters.[22] The CIT reviews agency final determinations to decide whether they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law."[23] Appeals of CIT decisions go to the U.S. Court of Appeals for the Federal Circuit ("CAFC"), which has jurisdiction over various matters (e.g., patent cases) as well as customs appeals.[24] The U.S. Supreme Court has discretion to review these CAFC decisions, but virtually never does.[25]

In Canada, appeals of AD and CVD decisions are heard by the Federal Court of Appeal, which has jurisdiction to review decisions of federal boards, commissions, and other tribunals.[26] It applies a spectrum of standards of review, ranging from correctness to

20. Peter Clark, *A Comparison of the Antidumping Systems of Canada and the USA* (May 1, 1996) (study prepared for Canadian Department of Finance), *available at* http://www.sice.oas.org/geograph/north/studant1.asp#upnote1.

21. Article III of the U.S. Constitution establishes federal courts whose judges are appointed by the President, confirmed by the Senate, and serve for life terms. U.S. CONST. art III, § 1. Certain other inferior federal courts also exist, such as bankruptcy courts, whose judges have limited terms. *See* U.S. CONST. art. I, § 8 (authorizing Congress to establish inferior federal courts).

22. 19 U.S.C. § 1516a(a)(1) (2000); 28 U.S.C. § 1581 (2000).

23. 19 U.S.C. § 1516a(b)(1)(B)(i). The "substantial evidence" standard "can be translated roughly to mean 'is [the determination] unreasonable?'" Nippon Steel Corp. v. United States, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (adopting test from SSIH Equip. SA v. U.S. Int'l Trade Comm'n, 718 F.2d 365, 381 (Fed. Cir. 1983) (Nies, J., concurring)). In deciding whether an agency's decision is "not in accordance with law," a court will provide some deference to the agency's legal interpretations, upholding them unless they are "effectively precluded by the statute." PPG Indus., Inc. v. United States, 928 F.2d 1568, 1573 (Fed. Cir. 1991) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)). For certain relatively unusual types of appeal, the CIT applies an at least nominally more deferential standard of review, i.e., whether the agency decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(A), (B)(ii).

24. 28 U.S.C. § 1295(a).

25. The last instance was *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978).

26. *See* SIMA, *supra* note 5, §§ 62, 76; Federal Courts Act, R.S.C., Ch. F-7, § 28(1) (1985). In Canada, the CITT also acts as a sort of initial administrative appellate body, hearing appeals of certain dumping and subsidization decisions made by the Canada Border Services Agency. *See* SIMA, *supra* note 5, § 61.

reasonableness to patent unreasonableness.[27] Choice of which standard to apply depends on the particular situations presented.[28]

Chapter 19 requires NAFTA members to replace their systems of judicial review of AD and CVD determinations with review by binational panels in cases involving imports from other NAFTA members.[29] Each country retains its own CVD and AD law and precedents,[30] but either government, or any person with a right to appeal to a local court, can demand that any appeal be heard by a binational panel instead.[31]

A binational panel consists of five members, two appointed by the government of the importing country and two by the government of the exporting country.[32] Normally, the governments are to appoint members from standing rosters of candidates, twenty-five appointed by each NAFTA member government.[33] If the two governments cannot agree on the fifth member, they decide by lot which shall select a fifth candidate from the roster.[34] As noted *supra*, the panels are supposed to apply the same standard of review

27. These were first recognized in *Canada (Director of Investigation and Research) v. Southam, Inc.*, [1997] 1 S.C.R. 748 (Can.).

28. Which standard applies is based on a "pragmatic and functional analysis." U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, 1088 (Can.). Courts consider four factors in selecting the standard to apply: the nature of the particular issue on which review is being sought, the expertise of the decision-maker, legislative indicia (if any), and the overall statutory purpose. Pushpanathan v. Canada (Minister of Citizenship & Immigration), [1988] 1 S.C.R. 982, 1005-11 (Can.). NAFTA panels at least have typically chosen to review CITT decisions under SIMA under a reasonableness or patently unreasonable standard, except questions of jurisdiction. NAFTA, *Certain Iodinated Contrast Media Used for Radiographic Imaging, Originating in or Exported from the United States of America (Including the Commonwealth of Puerto Rico)*, at 5, CDA-USA-2000-1904-01 (Jan. 8, 2003) (reviewing questions of law for reasonableness and fact for patent unreasonableness); *see* NAFTA, *Certain Top-Mount Electric Refrigerators, Electric Household Dishwashers, and Gas or Electric Laundry Dryers, Originating in or Exported from the United States of America and Produced by, or on Behalf of White Consolidated Industries, Inc. and Whirlpool Corporation, Their Respective Affiliates, Successors, and Assigns*, at 4-6, CDA-USA-2000-1904-03 (Apr. 15, 2002) (reviewing for reasonableness on issues of fact and law); NAFTA, *Certain Hot-Rolled Carbon Steel Plate, Originating in or Exported from Mexico*, at 6, CDA-97-1904-02 (Dec. 15, 1999) (reviewing jurisdiction for correctness).

29. NAFTA, *supra* note 3, art. 1904(1).

30. NAFTA, *supra* note 3, arts. 1902(1), 1904(2).

31. NAFTA, *supra* note 3, art. 1904(5). Thus, if no party objects, it is possible to have a case involving a NAFTA member go to the federal court system instead of a Chapter 19 panel.

32. NAFTA, *supra* note 3, annex 1901.2(2).

33. NAFTA, *supra* note 3, annex 1901.2(1), (2).

34. NAFTA, *supra* note 3, annex 1901.2(3).

and substantive legal standards as would the courts of the country whose agency decision is being reviewed.[35]

Chapter 19 provides that binational panel decisions bind the parties and cannot be appealed.[36] NAFTA does allow governments to file an "extraordinary challenge" to a panel decision.[37] Each government involved then appoints one member to a three-member extraordinary challenge committee ("ECC"), and the governments decide by lot which gets to choose a third member from a roster of present and former judges.[38] Extraordinary challenge committees exist partly to ensure that NAFTA decisions remain consistent with domestic law and precedent,[39] but are permitted only in relatively extreme circumstances.[40] Only six extraordinary challenges have been completed—all involved U.S. challenges, and each declined to overrule prior panels' reversals of U.S. agency trade remedy determinations.[41]

35. *See supra* note 6.

36. NAFTA, *supra* note 3, arts. 1904(9), (11). Both the United States and Canada have passed laws stripping their courts of jurisdiction of matters decided by panels. 19 U.S.C. § 1516a(g)(2) (2000); *see* SIMA, *supra* note 5, § 77.11(6).

37. NAFTA, *supra* note 3, art. 1904(13).

38. NAFTA, *supra* note 3, annex 1904.13(1).

39. NAFTA, *Pure Magnesium from Canada*, at 8, ECC-2003-1904-01USA (Oct. 7, 2004) (noting that ECC should not permit "formation of two streams of anti-dumping and countervail duty law, one developed by binational panels and one by courts; a result that is clearly antithetical to the whole construct of Chapter 19"); *cf.* NAFTA, *Synthetic Baler Twine with a Knot Strength of 200 Lbs or Less Originating in or Exported from the United States*, at 12, CDA-94-1904-02 (Apr. 10, 1995) (noting that a binational panel should use the same standard of review as the Canadian federal court, even though binational panels are particularly expert in international law, to ensure "certainty, consistency, and predictability in decision-making" between decisions involving NAFTA and non-NAFTA members).

40. A government can file an extraordinary challenge if, for example, a panelist is guilty of "gross misconduct" or "the panel manifestly exceeded its powers, authority or jurisdiction . . . for example by failing to apply the appropriate standard of review," but even then only if such an action "materially affected the panel's decision and threatens the integrity of the binational panel review process." NAFTA, *supra* note 3, art. 1904(13).

41. NAFTA, *Certain Softwood Lumber Products From Canada,* at 67-68, ECC-2004-1904-01USA (Aug. 10, 2005); NAFTA, *Pure Magnesium from Canada*, at 11, ECC-2003-1904-01USA (Oct. 5, 2004); NAFTA, *Gray Portland Cement and Clinker from Mexico*, at 7, ECC-2000-1904-01USA (Oct. 30, 2003); NAFTA, *Certain Softwood Lumber Products from Canada*, at 52, ECC-94-1904-01USA (Aug. 3, 1994); NAFTA, *Live Swine from Canada,* at 20, ECC-93-1904-01USA (Apr. 8, 1993); NAFTA, *Fresh, Chilled, or Frozen Pork from Canada*, at 19, ECC-91-1904-01USA (June 14, 1991).

II. CHAPTER 19 BINATIONAL PANELS' APPLICATION OF THE STANDARD OF REVIEW TO U.S. AGENCY DECISIONS

Chapter 19 took effect on January 1, 1989.[42] From that date through December 31, 2005, Chapter 19 panels completed forty-two reviews of U.S. agency trade decisions resulting in panel rulings.[43] Many previous studies have noted that Chapter 19 panels have reversed U.S. agency decisions more frequently than the U.S. courts.[44] One statistical analysis of decisions through 2005 indicates at a ninety-nine percent confidence level that NAFTA binational panels are less likely to leave agency results unchanged than is U.S. court review.[45] Of the forty-two completed Chapter 19 appeals of U.S. decisions, only fourteen ultimately left the agency's finding unaffected.[46] This indicates an affirmance rate of thiry-four percent, or about half of the affirmance rate of AD and CVD determinations by the courts.[47] Chapter 19 affirmance rates are also quite low compared with the general pattern of federal court review of decisions of all U.S. agencies.[48] The trade press has also recognized

42. CUSFTA, *supra* note 4, art. 2105.

43. The NAFTA secretariat publishes almost all dispositive panel decisions at NAFTA's website, http://www.nafta-secalena.org/DefaultSite/index_e.aspx?DetailID=380. In addition to these forty-two reviews, another five cases resulted in published opinions after December 31, 2005, while other cases terminated without resulting in published decisions. *Id.*

44. *See supra* note 8 and accompanying text.

45. *See* Colares, *supra* note 7, at 26-28.

46. Appendix 2 lists the cases in which NAFTA review has left the agency's finding unaffected.

47. *Compare* Colares, *supra* note 7, at 26 (identifying a sixty-eight percent affirmance rate of U.S. agency decisions) *with* Scott Graves & Paul Teske, *State Supreme Courts and Judicial Review of Regulation*, 66 ALB. L. REV. 857, 859-60 (2003) (indicating that federal appellate and Supreme Court review of administrative decisions yielded affirmance rates of up to sixty-three percent).

48. One study found that agency determinations in the early post-*Chevron* period were affirmed in 76.7% of cases. *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law,* 1990 DUKE L.J. 984, 1008 (1991). This figure excluded affirmances after remand. In comparison, Chapter 19 binational panels affirmed without remand in only eight of the fourteen cases that ultimately left the agency's decision unaffected. This indicates an affirmance rate of less than twenty percent in terms comparable to the Schuck & Elliott study. Another study of 105 reviews of EPA decisions, specifically under the arbitrary and capricious standard, found that the agency was reversed at least in part in twenty-two percent of cases. Christopher H. Schroeder & Robert L. Glicksman, Chevron, State Farm*, and EPA in the Courts of Appeals During the 1990s*, 31 ENVTL. L. REP. 10,371, 10,392 (2001). This "seems quite high in absolute terms." Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 317 (2004). The reversal rate by NAFTA panels approximately equals the unusually high

that the level of deference is different.[49]

These overall figures, however, conflate two diverse trends. Even though NAFTA panels reverse more often *overall* than the CIT and CAFC, Chapter 19 panels less often require rate *increases* than U.S. courts do.[50] Petitioners succeeded in obtaining increased duty rates on review in only four cases, of which two produced mixed results.[51] Furthermore, in the only two unmixed rate-increase

levels seen during the Social Security Administration crisis of the early 1980s, a well-known episode when the agency allegedly defied the courts by illegally rejecting benefit applications. Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110, 1115 (1995).

49. *See, e.g.*, Nancy E. Kelly, *NAFTA's New Resolution of Panel Offers Second Appeals Option*, AM. METAL MARKET, May 21, 1996, at 14A, 15A ("Canadians, pleased with the low margins [originally assigned by the agency], are happy to have the case heard before the CIT, which they view as more deferential to U.S. agencies."); Bernard Simon, *Adaptability of NAFTA Disputes Procedure in Doubt: Mexico's Legal System Could Hinder the Introduction of a Settlement Process*, FIN. TIMES, June 15, 1992, at 4 ("[P]anels generally examine arguments more carefully than domestic US [sic] trade tribunals.").

50. *See* Colares, *supra* note 7, at 17-18, 29.

51. By "mixed results," we mean rates increased for some exporters and decreased for others after review. The mixed-rate cases are NAFTA, *Certain Corrosion-Resistant Carbon Steel Products from Canada*, USA-93-1904-03 (Oct. 31, 1994) (final AD determination) and NAFTA, *Live Swine from Canada*, USA-94-1904-01 (May 30, 1995) (6th CVD administrative review). In both of these cases, substantial victories by Canadian exporters had very small offsetting effects that favored U.S. domestic industry. In *Corrosion-Resistant Carbon Steel Flat Products*, rates decreased for all respondents, except Dofasco. Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to Length Carbon Steel Plate from Canada, 60 Fed. Reg. 49,582 (Sept. 26, 1995) (amended final determination of sales at less than fair value and AD orders). In *Live Swine*, Canadian exporters prevailed on their appeal and obtained a de minimis CVD rate on one subclass of swine (all sows and boars) and on all swine produced by one company. Live Swine from Canada, 60 Fed. Reg. 57,219, 57,220 (Nov. 14, 1995) (amended final results of administrative review in accordance with decision on remand). However, duties on other types of swine imports increased by 1/100 of a cent per kilogram, from 2.95 cents per kilogram to 2.96 cents per kilogram. *Id.*; Live Swine from Canada, 59 Fed. Reg. 12,243 (Mar. 16, 1994) (final results of CVD administrative review).

One should note that in NAFTA, *Certain Cut-to-Length Carbon Steel Plate from Canada*, at 10, USA-93-1904-04 (Oct. 31, 1994) (final AD determination), the panel granted a motion by a Canadian party to correct a calculation error, which temporarily led to a slightly increased duty rate for one exporter, IPSCO, until the panel issued a final ruling which lowered IPSCO's rate to a de minimis level, entitling it to a full refund and exemption from all duties and negating the temporarily increased rate. Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada, 60 Fed. Reg. 49,582 (Sept. 26, 1995) (amended final AD determination); Certain Cut-to-Length Carbon Steel Plate from Canada, 59 Fed. Reg. 15,373 (Apr. 1, 1994) (amended final AD determination).

cases,[52] petitioners succeeded only because the agency decided that its own decision had been wrong and asked for a "voluntary remand."[53]

In contrast, Chapter 19 panels were much more likely than the courts to cause rates to be *reduced*. Twenty-five of forty-two cases—an absolute majority—concluded with the AD or CVD duty rate being reduced, or an affirmative injury-related finding being overturned (which leads to the elimination of duties).[54] In all, nine cases resulted in orders being revoked or duties being reduced to zero for at least some importers.[55] In contrast, a study found that rates increased approximately half as often as they decreased in CIT review.[56]

This suggests that Chapter 19 panels apply two different standards of review: a stricter standard than the courts employ when a respondent importer complains of agency action, and a standard that is extremely deferential to the agency when a U.S. industry petitioner argues that the agency has erred.

The disparity is shown even more starkly by examining how Chapter 19 panels have addressed particular claims or legal arguments raised by petitioners or respondents.[57] There is no

52. NAFTA, *Porcelain-on-Steel Cookware from Mexico,* USA-97-1904-07 (Apr. 30, 1999) (9th AD administrative review); NAFTA, *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada*, USA-90-1904-01 (May 24, 1991) (AD administrative review).

53. In some instances, after reviewing a claim by a respondent or petitioner, Commerce will agree that its final determination may have erred in some respect. At that point, the court or panel is seized of jurisdiction over the proceeding, so Commerce cannot amend its determination. *See* 19 U.S.C. § 1516(a) (2000). The agency must ask the court or panel for permission to revisit the issue. The court or panel almost always grants the request. This is more like an affirmance of an agency ruling than a reversal, as the agency has reconsidered its own position. The rare instances where a court or panel rejects an agency's request for a voluntary remand and instead affirms the agency's original finding, e.g., *Porcelain-on-Steel Cookware from Mexico*, *supra* note 52, at 35-36, are more like reversals.

54. Among these, *Certain Corrosion-Resistant Carbon Steel Flat Products from Canada*, *supra* note 51, at 10-12, and *Live Swine*, *supra* note 51, at 21-22, concluded with mixed results. *See supra* note 51. Appendix 2, *infra*, lists the strictly rate-decrease cases.

55. *See* NAFTA database (on file with authors).

56. Colares, *supra* note 7, at 36 tbl.2.

57. Typically, each case that comes before a Chapter 19 panel involves a variety of claims relating to different issues. Often, both sides appeal one or more aspects of the agency's determination. Examining how Chapter 19 panels have dealt with these individual claims provides a closer look at their application of the standard of review. It also expands the data available for analysis, because a case need not have been completed to examine whether the

standard definition of a "claim,"[58] so exact quantification of outcomes is difficult, but an analysis of outcomes of different claims does reveal some striking trends.[59] This analysis, if anything, may understate the disparity between treatment of petitioners' and respondents' claims.[60]

Chapter 19 panel had remanded based on an individual claim. As of August 2006, there were five active Chapter 19 cases that had produced published opinions, along with forty-two completed cases, making a total of forty-seven available for analysis.

58. Chapter 19 rules require each person filing a complaint to specify the "allegations of errors of facts or law." NAFTA, *supra* note 3, art. 1904 R. Proc. 39(2)(b). However, complaints are not published and many issues raised in the complaint are dropped or consolidated. Panels often themselves provide a breakdown of the issues they will decide, or organize their decisions into separate sections for different claims. These provided helpful guides. However, not all panels used such an approach and they did not distinguish claims consistently.

59. This Article counts separately (1) each allegation that an agency erred in a way that could have changed the duty rate; (2) each challenge to the existence or non-existence of injury; and (3) each challenge to the scope of an order, whether restrictive (respondent) or expansive (petitioner). It does not treat as a separate claim each legal or factual argument as to *why* a particular decision was erroneous. For example, if a respondent claims that the ITC incorrectly decided that injury existed, that is counted as a single claim, even though typically there will be a variety of legal or factual arguments advanced to show why the injury determination was wrong. Claims regarding admission of evidence or due process are included, but only if the disposition of the claim appears in a published panel decision. To avoid double-counting, if a claim was renewed after an agency reached the same result on remand, it is not treated as a separate claim.

60. There are two main reasons for this. First, if each individual argument were counted, the disparity between adjudications favorable to petitioners and respondents would seem much larger, because respondents' claims are often decided favorably on multiple grounds, while virtually no Chapter 19 panel has ever decided any claim or issue favorably to petitioners.

Second, it was not always possible to trace how Commerce resolved each individual claim after remand. Until May 19, 1997, Commerce did not publish its remand redeterminations. *See* Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,330 (May 19, 1997) (noting that the public and even Commerce officials had difficulty accessing previous remand determinations). Even after Commerce commenced publication, it has often been difficult or even impossible to discern the fate of a particular claim after remand, as treatment of a particular issue may involve confidential data or be discussed in a separate unpublished decision memorandum. For example, if a court or panel directs Commerce to account for a particular cost of production, Commerce may note that it has done this in its remand determination, but the calculations in which it implements the ruling may be inaccessible and it may not be possible to discern what effect, if any, the result had on the overall duty rate. Thus, the analysis in this Article is based on whether a petitioner or respondent successfully persuaded the panel or court to remand a decision, not on whether each claim had an impact on the ultimate duty rate, scope, or injury finding

As of July 2005, there were five active Chapter 19 cases involving U.S. agency decisions that had produced published opinions, along with forty-one completed published cases, making a total of forty-six available for analysis.[61] All told, the forty-six cases resulting in published Chapter 19 decisions involved 339 separate claims.[62] Of these, 270 were by respondents,[63] which led to 119 *in*voluntary remands and seventeen voluntary remands (i.e., the agency itself requested the remand).[64] Petitioners made sixty-nine claims,[65] of which sixteen resulted in voluntary remands, and only three in *in*voluntary remands.[66]

In other words, in only three instances in Chapter 19's history have U.S. petitioners persuaded a Chapter 19 panel that an agency has made any material error that the agency had not itself admitted. Another way of putting it is that of the more than eighty published Chapter 19 opinions reviewing U.S. agency action, totaling some 5000 pages, fewer than ten pages favorably dispose of petitioners' claims against an agency.

Furthermore, these three instances meant nothing. Two came in one case, the CVD "sunset" review in *Pure Magnesium and Alloy Magnesium from Canada*.[67] In a "sunset" review, the CVD rate calculated has no effect on the amount of duties collected (and arguably is a meaningless formality).[68] In addition, although the

after the appeal's conclusion. Again, this approach may understate the disparity between petitioner and respondent results because while petitioners did obtain some remands, they did not obtain *any* contested reversals.

61. NAFTA decisions are available at NAFTA's Web site, http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=76.

62. See NAFTA database (on file with authors). Note that one NAFTA decision did not produce a published opinion.

63. *See id*.

64. *See id.*

65. *See id.*

66. *See id.*

67. NAFTA, *Pure Magnesium and Alloy Magnesium from Canada*, USA-CDA-00-1904-07 (Mar. 27, 2002).

68. The sunset review statute, 19 U.S.C. § 1675(c) (2000), requires Commerce and the ITC to review AD and CVD orders every five years to determine whether revocation of the order would be likely to lead to "continuation or recurrence" of material injury and dumping or subsidization. To do this, Commerce considers what rate of dumping or subsidization would be likely if the order were, hypothetically, to be revoked. 19 C.F.R. § 351.218(a) (2006). If Commerce finds the rate would be zero or de minimis in such circumstances, it will revoke the order. *Id.* However, if it finds that subsidization or dumping would be likely to continue or recur at above de minimis rates, it does not revise the duty rate previously calculated in the investigation or administrative review. *See* 19 U.S.C. § 1675(d)(2); 19 C.F.R. §§ 351.212, 351.218(a). Rather, it merely reports the rate expected to occur to

panel ordered a remand on the petitioner's two claims,[69] the U.S. Department of Commerce ("Commerce") then readopted its original result and the Chapter 19 panel affirmed it.[70] Thus, nothing came of petitioner's success.

The other case in which petitioners won a claim was *Certain Softwood Lumber Products from Canada*.[71] Commerce found that Canadian provincial and federal governments were subsidizing timber production, and both the petitioner and respondents appealed many aspects of the ruling.[72] In the panel's first opinion, the petitioner prevailed on one claim regarding Canadian log export restrictions.[73] This led Commerce to substantially increase the calculated subsidy rate in its first remand decision.[74] The panel subsequently held that the log export restrictions were not "specific" and hence not a countervailable subsidy.[75] The order was revoked.[76] Again, petitioner's temporary victory led nowhere.

Overall, no petitioner has ever succeeded in having a U.S. agency determination overturned, even on a single claim, as a result of a Chapter 19 proceeding. The disparity is particularly noticeable

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the ITC, which in theory considers it in making its own determination of whether injury would be likely to continue or recur. *See* 19 C.F.R. § 351.218(f)(3). However, there is no reported case in which this rate played a significant role in the ITC's determination.

69. The petitioner argued that Commerce had improperly failed to consider evidence of a new subsidy when it calculated the subsidization rate likely to continue or recur in the future, and that it had improperly reported to the ITC the higher CVD rate it had found in the investigation, rather than rates subsequently calculated in later administrative reviews. NAFTA, *Pure Magnesium and Alloy Magnesium from Canada,* at 2-3, USA-CDA-00-1904-07 (Mar. 27, 2002).

70. Pure Magnesium and Alloy Magnesium from Canada, 68 Fed. Reg. 33,920, 33,921 (June 6, 2003) (redetermination pursuant to NAFTA panel remand) (reporting same rate to ITC as previously); *Pure Magnesium from Canada*, at 2-5, USA-CDA-00-1904-06 (Oct. 15, 2002) (review of remand redetermination).

71. NAFTA, *Certain Softwood Lumber Products from Canada*, USA-92-1904-01 (May 6, 1993). This was Commerce's third investigation of Canadian softwood lumber imports.

72. *See id.* at 1.

73. Petitioner claimed that Commerce had miscalculated the benefit from a subsidy involving log export restrictions. NAFTA, *Certain Softwood Lumber Products from Canada,* at 122, USA-92-1904-01 (May 6, 1993).

74. NAFTA, *Certain Softwood Lumber Products from Canada,* at 6, USA-92-1904-01 (Dec. 17, 1993) (review of remand determination) (citing Dep't of Commerce, Int'l Trade Admin., *Determination Pursuant to Binational Panel Remand* (Sept. 17, 1993)).

75. *Id.* at 76-77.

76. *Id.* at 8.

with respect to injury determinations: NAFTA panels have forced three ITC decisions involving Canada to go from affirmative to negative since NAFTA's inception, something that U.S. courts have done only once, even though orders involving Canada are only a small fraction of the ITC's case load.[77] Appendix 1 provides a statistical analysis showing with a high degree of certainty that NAFTA panels are indeed less likely to favor petitioners' claims than respondents'.

III. CHAPTER 19 BINATIONAL PANELS' APPLICATION OF THE STANDARD OF REVIEW TO CANADIAN AGENCY DECISIONS

There have been far fewer Chapter 19 cases reviewing Canadian agency determinations regarding trade remedies, precluding statistical analysis, but some conclusions are possible. Of the twenty-four Chapter 19 reviews of Canadian duty decisions that resulted in published opinions, seventeen (or seventy-one percent) left the agency outcome unchanged.[78] No agency ruling has been disturbed since 1998.

In the seven cases where NAFTA review impacted the duty rate,[79] the impact was as likely to be upwards as downwards. In three cases, rates increased slightly.[80] In two others, duties decreased slightly.[81] In a sixth, previous deposits were refunded but

77. For example, of a total of 1887 published ITC decisions in the LEXIS ITC database between Jan. 1, 1989, and Dec. 31, 2006, mention AD or CVD, only 153 or 8.1 percent mentioned Canada, *available at* http://www.lexis.com (Legal > Area of Law By Topic > International Trade > Administrative Materials and Regulations > International Trade Commission Decisions).

78. *See* Appendix 2 (listing decisions).

79. *See* Appendix 2 (listing decisions).

80. NAFTA, *Gypsum Board Originating in or Exported from the United States of America*, CDA-93-1904-01 (Nov. 17, 1993) (increase in antidumping rate from 27.28% to 36.08%); NAFTA, *Certain Machine Tufted Carpeting Originating or Exported from the United States of America*, CDA-92-1904-01 (May 19, 1993) (increase in antidumping rate from 11.97% to 13.23%); NAFTA, *Certain Beer Originating or Exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Company, and the Stroh Brewery Company for Use or Consumption in the Province of British Columbia* , CDA 91-1904-01, (Aug. 6, 1992) (increase in average antidumping duties from 29.8% to 30.0%).

81. NAFTA, *Refined Sugar, Refined from Sugar Cane or Sugar Beets, in Granulated, Liquid and Powdered Form, Originating in or Exported from the United States of America*, CDA-95-1904-04 (Oct. 9, 1996); Telephone interview with Karen Humphries, Trade Program Directorate, Canada Border Services Agency (July, 2006) (AD rate for one producer reduced from 79% to 78%, all others unchanged); NAFTA, *Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America*, CDA-93-1904-08 (June 14, 1994); Telephone interview with Karen Humphries, Trade Program Directorate,

the government was allowed to maintain the duties prospectively,[82] and a seventh led to mixed results.[83] Thus, Chapter 19 seldom disturbs Canadian agency decisions. Moreover, even when it does so, it results in no major asymmetry between rate increases and rate decreases.

Even fewer published Canadian appellate cases involving AD or CVDs exist. In the Lexis Canadian International Trade reports database, covering decisions from 1989 through 2005, there are only twelve federal appellate or supreme court decisions addressing AD or CVDs.[84] Of these, eight dismissed the appeal and four allowed it.[85] Such reluctance to allow questioning of agency decisions highlights the high level of deference that Canadian courts extend to their agencies.[86]

These limited data provide no reason to believe that Chapter 19 panels have markedly departed from the standards of review applied by Canadian courts. Yet, the small and symmetric impact of review on duty rates and the adherence to Canadian judicial standards contrast markedly with the extreme imbalance between rate increases and rate decreases that occurs with respect to Chapter 19's review of U.S. agency decisions and the differences between Chapter 19 panel and U.S. court outcomes.

IV. REASONS FOR DISPARITIES

This Part examines possible explanations for these marked differences in outcomes between CIT and Chapter 19 reviews. First, it examines three justifications commonly proposed by the literature: (1) that no real discrepancy exists because Chapter 19

Canada Border Services Agency (July, 2006) (AD rate reduced from 8% to 7.4% on one plant and from 16.4% to 16.3% on another; weighted average unchanged).

82. NAFTA, *Machine Tufted Carpeting Originating in or Exported from the United States of America*, at 37-38, CDA 92-1904-02 (Apr. 7, 1993) (reversing a finding of actual injury, but sustaining a finding of threat of injury).

83. NAFTA, *Certain Corrosion Resistant Steel Sheet Products Originating in or Exported from the United States of America*, at 2, CDA-94-1904-03 (June 23, 1995); Canada Border Service Agency, *Remand Sheet: Certain Corrosion Resistant Steel Sheet from the United States of America* (Aug. 4, 1995), http://www.cbsa-asfc.gc.ca/sima/anti-dumping/ad1014r-e.html (AD rate for one importer increased from 8.4% to 8.5%, while rate for another decreased from 13.2% to 13.1%).

84. *Available at* www.lexis.com (Supreme Court of Canada; Federal Court Cases database; search (antidumping or countervailing duty)).

85. *Id.*

86. *Accord* GAO REPORT, *supra* note 8, at 25 ("Canadian Justice officials told [the GAO] that they believed Canadian judges deferred more to administrative authorities than their U.S. counterparts did.").

panels simply face different factual and legal circumstances; (2) that U.S. judges are inexperienced or inept; and (3) that Chapter 19 panels are correcting bias in favor of U.S. producing industries, which have "captured" both the agencies and the courts. It concludes that none of these explanations adequately explains the observed facts. It then suggests that two other explanations better account for the different outcomes: first, that Chapter 19 panelists believe that U.S. unfair trade laws are bad public policy, and thus disregard the law and are more willing to apply their personal preferences than CIT judges; and second, that the Canadian government and producing industries have "captured" the Chapter 19 process. Furthermore, these tendencies are enabled by structural characteristics of Chapter 19 that make Chapter 19 panels more likely to pursue policy goals and less likely to adhere to written legal norms compared with judicial review.

A. Justifications for Disparities Advanced by the Previous Literature

1. Different Circumstances or Different Law

Most commentators suggest that Chapter 19 panels apply thorough legal reasoning.[87] Thus, any differences between Chapter 19 and CIT review could simply reflect different circumstances and law.

For example, if U.S. agencies impose duties disproportionately on NAFTA members, then Chapter 19 panels should overturn decisions more frequently. The opposite is true, however: U.S. agencies have imposed fewer duties on NAFTA members, and U.S. industries have filed relatively fewer petitions regarding NAFTA members' goods.[88] A number of commentators have suggested that

87. *E.g.*, Robert Cassidy, *Dispute Resolution under NAFTA: A U.S. Perspective*, 23 CAN.-U.S. L.J. 147, 148 (1997); Mercury, *supra* note 8, at 527 n.13, 596 (discussing a general consensus among commentators that FTA Chapter 19 panel decisions have been of high quality).

88. According to one strong supporter of Chapter 19, "Since the creation of the NAFTA, imports from Canada and Mexico have been subject to far fewer investigations and orders than imports from other parts of the world . . . ." Macrory, *supra* note 8, at 2. For example, from 1994 through May 2002, the United States entered seven times as many AD or CVD orders against imports from the European Union ("EU") as from Canada, although import volumes from the EU were only fifteen percent greater. *Id*. at 15 & tbl.1. Those that do exist mostly originated before NAFTA, and involve low levels of duties and small volumes of trade (softwood lumber excepted). *Id*. at 2. Macrory notes that, even though Canada conducts far more trade with the United States than any other country, between 1994 and June 2002, the United States conducted

U.S. agencies in fact are more reluctant to impose duties, or impose lower duties, and more carefully justify them than in cases involving non-NAFTA countries.[89]

Another possible argument—that Chapter 19 panels appear more interventionist only because appeals of duty orders involving NAFTA members are rarer—also works the other way. Canadian appeals of U.S. decisions appear to be more frequent as a result of Chapter 19.[90] In contrast, no U.S. industry has bothered to appeal

thirteen investigations, resulting in only three orders, of which two involved softwood lumber. *Id*.

Similarly, Professor Jones compared the eight years before and after the CUSFTA and found that the number of AD petitions filed by U.S. industries against Canadian imports fell from an average of 2.8 per year to 1.6 per year, even while Canadian imports increased by five percent per year in real terms. Jones, *supra* note 8, at 148. He also found that CVD filings fell, though not as much. In Canada, annual AD filings against U.S. imports fell from an average of 5.75 per year in 1985-1988 to 3.6 per year from 1989-1997. *Id.* He also performed a regression analysis showing a strong negative correlation between the number of AD and CVD cases filed against Canada and the introduction of Chapter 19. *Id*. at 153 tbl.3, 154-55, 154 tbl.4. More precisely, he concludes that the introduction of Chapter 19 may not have deterred the filing of CVD cases as much as the demonstrated results of actual Chapter 19 decisions once those began to be released. *Id*. at 154-55. Thus, the propensity of Chapter 19 panels to rule against U.S. CVD decisions may have caught U.S. petitioners somewhat by surprise.

Professor Goldstein's analysis confirms that the relative share of trade cases against Canadian imports decreased significantly after the CUSFTA took effect. Goldstein, *supra* note 8, at 550-51. She examined the number of AD cases issued against Canadian imports and compared it to the proportion that Canadian imports comprised of all U.S. imports. This analysis would capture both any changes in the percentage of petitions filed and agency affirmative adjudications. She found that in 1987, before the CUSFTA, the Canadian ratio of AD orders to its share of U.S. imports was 0.83, and this fell to 0.33 by the end of 1990, while AD orders against products from the European Community and Japan increased by this measure. *Id*. at 551.

89. Goldstein, *supra* note 8, at 555; Macrory, *supra* note 8, at 4; Mercury, *supra* note 8, at 546; Arun Venkataraman, Note, *Binational Panels and Multilateral Negotiations: A Two-Track Approach to Limiting Contingent Protection*, 37 COLUM. J. TRANSNAT'L L. 533, 578-79 (1999). As one observer has stated, "The Chapter 19 reversal of unfair trade decisions in cases brought before it has also possibly altered the way in which U.S. government agencies administer the trade law, in anticipation of a Chapter 19 review, and the expectations of potential petitioners regarding the outcome of cases." Jones, *supra* note 8, at 150.

90. From 1989 through 2003 (the most recent year for which statistics are available) the U.S. government imposed 363 AD or CVD orders, of which 15 were issued on imports from Canada. INTERNATIONAL TRADE ADMINISTRATION, U.S. DEP'T OF COMMERCE, ANTIDUMPING INVESTIGATIONS CASE ACTIVITY (JAN. 1, 1980 - DEC. 31, 2003), http://ia.ita.doc.gov/stats/ad-1980-2003.html; INTERNATIONAL TRADE ADMINISTRATION, U.S. DEP'T OF COMMERCE, COUNTERVAILING DUTY CASE ACTIVITY (JAN. 1, 1980 - DEC. 31,

any negative final determination by U.S. agencies regarding Canadian goods since 1990, apparently considering such an appeal to be hopeless.[91]

The greater deference shown to Canadian agency decisions could result from different legal standards of review. Commentators often point out that Canadian courts themselves show greater deference to agency decisions than do U.S. courts.[92] Yet, this does not explain why Chapter 19 panels generally adhered to the high level of deference that Canadian courts employ yet applied much less deference than U.S. courts under the U.S. substantial evidence standard and the *Chevron* canon. One analysis of Chapter 19 decisions found that they "meticulously surveyed and debated conflicting propositions that exist in United States administrative law jurisprudence" to justify an "exacting and unyielding approach to judicial review," but that this same diligence "was notably absent from binational panel review of CITT determinations."[93]

Moreover, there is relatively little Canadian case law reviewing unfair trade decisions, so there is little precedent to bind Chapter 19 panels, and the standard of review of Canadian AD or CVD decisions has been quite uncertain at times during NAFTA's lifespan.[94] Panels can choose among a spectrum of different

2003), http://ia.ita.doc.gov/stats/cvd-1980-2003.html; INTERNATIONAL TRADE ADMINISTRATION, U.S. DEP'T OF COMMERCE, AD/CVD INVESTIGATIONS FEDERAL REGISTER HISTORY, http://ia.ita.doc.gov/stats/caselist.txt (last visited Aug. 8, 2006); INTERNATIONAL TRADE ADMINISTRATION, U.S. DEP'T OF COMMERCE, ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS: JAN. 01, 2000 TO CURRENT, http://ia.itc.doc.gov/stats/inv-initiations-2000-2005.html. All orders on Canadian products were appealed at some time, although not every determination has been. NAFTA SECRETARIAT, STATUS REPORT OF PANEL PROCEEDINGS, http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=10 (last visited Aug. 8, 2006).

91. *E.g.*, Live Swine from Canada, 70 Fed. Reg. 20,400 (Apr. 19, 2005); Final Negative Countervailing Duty Determination: Live Swine from Canada, 70 Fed. Reg. 12,186 (Mar. 11, 2005); Durum and Hard Red Spring Wheat from Canada, 68 Fed. Reg. 60,707 (Oct. 23, 2003); Greenhouse Tomatoes from Canada, 67 Fed. Reg. 18,634 (Apr. 16, 2002); Final Negative Countervailing Duty Determination; Live Cattle from Canada, 64 Fed. Reg. 57,040 (Oct. 22, 1999).

92. GAO REPORT, *supra* note 8, at 25; Mercury, *supra* note 8, at 553.

93. Mercury, *supra* note 8, at 553.

94. Canada changed the standard of review applicable to agency decisions in 1994, when it deleted a "privative clause" in SIMA that stated that the CITT's decisions were "final and conclusive." NAFTA, *Certain Prepared Baby Food Originating in or Exported from the United States of America*, at 7-8, CDA-USA-98-1904-01 (Nov. 17, 1999) (discussing the standard of review before the deletion of the privative clause). This increased uncertainty regarding the amount of deference applicable to CITT determinations. *See* NAFTA, *Certain*

standards of review based upon the facts before them and have chosen different standards at different times and applied these standards differently.[95] Thus, binational panels could easily have reviewed Canadian trade cases more intrusively had they wished.[96] The critical question is why they did not.

Top-Mount Electric Refrigerators, Electric Household Dishwashers, and Gas or Electric Laundry Dryers, Originating in or Exported from the United States of America and Produced by, or on Behalf of White Consolidated Industries, Inc. and Whirlpool Corporation, Their Respective Affiliates, Successors and Assigns, at 4, CDA-USA-2000-1904-03 (Apr. 15, 2002) ("The level of deference to be shown to an administrative agency on questions of law within its jurisdiction has been the subject of much discussion both in Canadian courts and in the briefs filed . . . ."); NAFTA, *Certain Concrete Panels, Reinforced with Fiberglass Mesh, Originating in or Exported from the United States of America and Produced by or on Behalf of Custom Building Products, its Successors and Assigns, for Use or Consumption in the Province of British Columbia or Alberta*, at 2, CDA-97-1904-01 (Aug. 26, 1998) (indicating that panel requested supplemental briefs from parties regarding standard of review following Supreme Court of Canada decision in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)* [1997] 2 S.C.R. 890); NAFTA, *Certain Hot-Rolled Carbon Steel Plate, Originating in or Exported from Mexico*, at 8, 16, CDA-97-1904-02 (May 19, 1999) (showing that the panel disagreed regarding application of standard of review following *Pasiechnyk*; majority accepted more lenient standard); NAFTA, *Certain Prepared Baby Food Originating in or Exported From the United States of America*, at 7-8, CDA-USA-98-1904-01 (Nov. 17, 1999) (noting divided authority among Canadian appellate courts and binational panels regarding standard of review and disagreeing with majority in *Hot-Rolled Carbon Steel Plate* case).

95. *See* NAFTA, *Certain Top-Mount Electric Refrigerators, Electric Household Dishwashers, and Gas or Electric Laundry Dryers, Originating in or Exported from the United States of America and Produced by, or on Behalf of White Consolidated Industries, Inc. and Whirlpool Corporation, Their Respective Affiliates, Successors and Assigns*, at 4-5, CDA-USA-2000-1904-03 (Apr. 15, 2002).

96. For example, the removal of the "privative" clause compelling deference to CITT determinations could have provided an excuse to impose more exacting scrutiny. *See* Mercury, *supra* note 8, at 557 (discussing that privative clause had been main reason for high level of deference). Although most panels have applied the various standards of review unanimously, where differences have emerged, Canadian Chapter 19 panelists have been particularly desirous of lenient review of Canadian agency decisions and strict review of other nations' decisions. According to Mercury, in five of seven reviews of Canadian determinations that resulted in dissents, a U.S. panelist would have overturned the Canadian agency, while in the four reviews of U.S. determinations that resulted in dissents, the Canadian dissenter would have applied stricter review. *Id.* at 539-41. In a more recent case, two Mexican Chapter 19 panelists sought to apply a more exacting standard of review to a Canadian injury decision, but the three Canadian members of the panel outvoted them. NAFTA, *Certain Hot-Rolled Carbon Steel Plate, Originating in or Exported from Mexico*, at 20-21, 37, CDA-97-1904-02 (Dec. 15, 1999).

Finally, there is a body of literature examining petitioner success rates in U.S. *agency* proceedings, seeking to identify variables correlated with chances of success. Most have examined whether political factors influence agencies, with mixed results.[97] One recent study of U.S. sunset reviews found that while the ITC seemed to treat NAFTA members like other countries, NAFTA countries unexpectedly appeared to receive somewhat higher dumping margins (although this result was not statistically significant).[98] Perhaps some unknown factor distinguishes cases involving Canada from others so that NAFTA panels reach greatly different results from the CIT simply because they are correcting for this factor. To date, however, no one has suggested what this factor might be. Until that occurs, it is impossible to prove its non-existence.

2. Inexperience or Ineptitude of U.S. Judges

A second explanation often advanced is that the CIT and CAFC judges are inexperienced in trade law and thus cannot review the agencies as effectively as Chapter 19 panels, which consist of trade experts.[99]

Again, however, the opposite is the case. Both CIT and CAFC judges have extremely high levels of experience and qualifications.[100] Although some CIT and CAFC judges have taken office with no experience with AD or CVD law, they all work full time on specialized courts where AD or CVD cases are an important part of the docket, and quickly gain experience. As the CAFC has stated,

97. *See, e.g.*, Keith B. Anderson, *Agency Discretion or Statutory Direction: Decision Making at the U.S. International Trade Commission*, 36 J.L. & ECON. 915, 928 (1993) (finding no evidence of political influence); Michael O. Moore, *An Econometric Analysis of U.S. Antidumping Sunset Review Decisions*, 142 REV. WORLD ECON. 122, 140 n.13 (2006) (arguing that while agencies mostly follow their regulations, some political considerations may influence outcome).

98. Moore, *supra* note 97, at 140, 142 tbl.4.

99. *See, e.g.*, Cassidy, *supra* note 87, at 148 ("[T]he panelists, by and large, know a great deal more about the law than do the judges who typically hear the cases."); Macrory, *supra* note 8, at 4 (finding that Canadian negotiators hoped that Chapter 19 panels "would be more alert to agency errors than the judges of the US [sic] reviewing courts, some of whom had had little more than a passing acquaintance with trade law before their appointment to the bench"); Pan, *supra* note 8, at 391 ("NAFTA binational panelists, like WTO panelists, have greater expertise than U.S. judges in international trade issues.").

100. Biographies of CIT judges are available at http://www.cit.uscourts.gov/Judges/judges.htm and biographies of CAFC judges are available at http://www.fedcir.gov/judgbios.html. Their high qualifications are not surprising, as federal judgeships are coveted jobs with unique lifetime tenure, extraordinary perquisites and benefits, and tremendous prestige.

"judges of the Court of International Trade are experts in such [trade] cases, which form most of their docket . . . ."[101] Furthermore, they are assisted by full-time law clerks and do not face the same strict deadlines as Chapter 19 panels.

In contrast, Chapter 19 panel members do not receive full-time salaries[102] and must fit their binational panel duties in with their other jobs. Their previous experience with AD or CVD law is quite mixed[103]—many have none, and some have little time to develop any as they serve only one or two times. Others have no legal training at all. Very few have any prior judicial experience, and half are attempting to apply a foreign legal system.[104]

Thus, the claim that CIT and Chapter 19 panel reviews produce different outcomes because CIT judges are incompetent has no basis. Furthermore, the implications of this theory are so far-reaching that they undermine its credibility. The U.S. system of justice relies critically on tenured federal judges. If they cannot review agency decisions as well as ad hoc panels of lawyers, academics, and others, the federal judicial system would need a dramatic overhaul.

3. Bias or Capture of U.S. Agencies

A third commonly advanced explanation for the different outcomes of CIT and Chapter 19 review is that U.S. agencies are "biased" against importers. This view is often advanced by U.S.

101. Nippon Steel Corp. v. United States, 458 F.3d 1345, 1350 (Fed. Cir. 2006). The CAFC describes itself as "generalist" court in contrast, with trade cases comprising six percent of its docket. *Id.*

102. They receive C$800 per day for any time actually spent serving on panels. North American Free Trade Agreement; Invitation for Applications for Inclusion on the Chapter 19 Roster, 69 Fed. Reg. 67,380, 67,381 (Nov. 17, 2004).

103. NAFTA panelist biographies are not published, but biographical information regarding potential panelists is often released to litigants or available on the Internet.

104. In fact, their lack of familiarity with the U.S. law—particularly U.S. administrative law—has been proposed as a contributing factor for the divergence between these two systems. Malcolm Wilkey, a retired Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, former U.S. ambassador, and former member of a NAFTA extraordinary challenge committee ("EEC"), suggested that the NAFTA system is deficient because panelists are not attuned to the relationship between courts and administrative agencies in the U.S. system. Judge Wilkey explained:

> Why do these distinguished Panel experts make this type of error? The answer is, I suggest, that they are experts in *trade law*; they are *not* experts in the field of judicial review of agency action; they do not necessarily have any familiarity whatsoever with the standards of judicial review under United States law.

NAFTA, *Certain Softwood Lumber Products from Canada*, at 64, ECC-94-1904-01USA, (Aug. 3, 1994) (Wilkey, J., dissenting).

academics and think tanks.[105] Generally, these theorists draw on a large body of theory proposing that regulated industries can "capture" the agencies that regulate them.[106] The basic theory suggests that large firms or concentrated industries have lower marginal costs of political action and higher marginal benefits than smaller or less concentrated firms, industries, or individual persons, and so can shape lawmaking or law administration to their advantage.[107] For example, if an industry with a few U.S. manufacturers sells goods to consumers, the industrial producers have the resources and motivation to lobby to block imports. The diverse consumers will have a "collective action" problem and so cannot organize as effectively. The primary evidence that U.S. agencies have been captured, a study reports, is that Commerce finds that dumping exists in ninety-seven percent of its dumping investigations.[108] This evidence is quite ambiguous, however,[109] and

105. *E.g.*, GAO REPORT, *supra* note 8, at 39; GARY HORLICK, WTO & NAFTA RULES AND DISPUTE RESOLUTION: SELECTED ESSAYS ON ANTIDUMPING, SUBSIDIES & OTHER MEASURES 15 (2003); Cassidy, *supra* note 87, at 148; Michael A. Lawrence, *Bias in the International Trade Administration: The Need for Impartial Decisionmakers in United States Antidumping Proceedings*, 26 CASE W. RES. J. INT'L L. 1, 2 (1994); Rikard Lundberg, *Deemed Liquidation: A Case for the Statutory Amendment of U.S. Customs Law Governing the Collection of Antidumping and Countervailing Duties*, 83 DENV. U. L. REV. 471, 485-86 n.82, 527 (2005); Michael O. Moore, *Antidumping Reform in the United States—A Faded Sunset*, 33 J. WORLD TRADE 1, 2 (1999); Venkataraman, *supra* note 89, at 553.

106. *E.g.*, Goldstein, *supra* note 8, at 548.

107. Daniel P. Carpenter, *Protection Without Capture: Product Approval by a Politically Responsive, Learning Regulator*, 98 AM. POL. SCI. REV. 613, 615 (2004); *see generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

108. Lawrence, *supra* note 105, at 2.

109. There are several alternative explanations for the high level of affirmative dumping findings by U.S. and Canadian agencies. Most fundamentally, a high percentage of affirmative findings may be consistent with the intent of Congress or Parliament, which enacted AD laws and exercises oversight of the relevant agencies. In that event, as discussed below, the question of whether the agency is "biased" becomes a semantic one. There are also technical explanations. For example, the U.S. Commerce Department allows potential petitioners to "pre-screen" their petitions, i.e., submit their evidence privately to officials in an informal process before filing a petition. Many petitions are never filed as a result, while those that do proceed believe they have a strong likelihood of at least some success, so that losing cases do not appear in the statistics. What this shows is that case selection pushes up the rate of affirmative AD determinations, making these statistics unrepresentative of the entire population of potential AD disputes. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 18 (1984). Additionally, petitioners presumably do not file petitions

would also imply that Canadian agencies have been just as thoroughly captured by Canadian producers, as those agencies have found that dumping exists in virtually every case.[110]

In any event, as an explanation for the behavior of Chapter 19 panels, the agency bias argument has severe difficulties. First, it does not explain why U.S. courts fail to correct this purported bias. Some have argued that the courts have been captured as well,[111] but this seems hard to believe, given that both CIT and CAFC judges enjoy lifetime tenure and other institutional protections from

unless they believe the marginal benefits exceed the marginal costs. A positive but small AD duty of a few percent or a duty imposed on only a limited subset of foreign producers may provide little or no benefit to a petitioning industry because not all of the duty will translate into increases in prices or decreases in import volumes. Rather, foreign producers may absorb duties, production may shift to countries or companies not subject to orders, or substitute products may be used. Thus, depending on industry structure, filing a petition would make no sense unless the industry is highly confident of a substantial positive margin. Filing a petition in itself imposes the burden of paying legal fees on respondents, but petitioners also must pay, and many are in financial distress by the time they have a reasonable case of injury.

110. *See* Canadian Border Services Agency, *Historical Listing*, http://www.cbsa-asfc.gc.ca/sima/historic-e.html (last visited Aug. 8, 2006) (providing outcomes of all Canadian investigations since implementation of SIMA in December 1, 1984) [hereinafter Canadian Case Historical Listing]. Apparently, the only case in which no dumping was found for any importer was *Outdoor Barbeques from China*, although one source suggests dumping occurred in that case as well. *Compare* Canadian Case Historical Listing, *supra*, (finding no dumping) *with* Bown, *supra* note 17, Canada Database (finding insignificant dumping). Some investigations found no dumping with respect to certain producers, products, or countries, and investigations were terminated with no reported result, in some cases because evidence of dumping was lacking. Bown, *supra* note 17, at 20 tbl.3.4.1, Canada Database. The same was true of U.S. cases, however. *Id.* at U.S. Database. The CITT found no injury in forty-four of 149 investigations (or thirty percent). Canadian Case Historical Listing, *supra*. This is somewhat less than the ITC, which found no injury in thirty-three percent of cases. Chad P. Bown et al., *The Pattern of U.S. Antidumping: The Path from Initial Filing to WTO Dispute Settlement*, 2 WORLD TRADE REV. 349, 361 tbl.3 (2003).

111. Judith Goldstein, *International Forces and Domestic Politics: Trade Policy and Institution Building in the United States*, *in* SHAPED BY WAR AND TRADE: INTERNATIONAL INFLUENCES ON AMERICAN POLITICAL DEVELOPMENT 211, 226 (Ira Katznelson & Martin Shefter eds., 2002); Krauss, *supra* note 8, at 91; Ann E. Penner, *Why We Were Right and They Were Wrong: An Evaluation of Chapter 19 of the FTA and NAFTA* 29 (Canadian Ministry of Foreign Affairs and International Trade Staff Policy Paper SP78A, Sept. 1996) ("They [Canadian negotiators] represented the appeals of Canadian exporters that the American process was biased in favour of producers from the United States. Foreign producers were unable to receive a fair hearing in the American process of judicial review.").

influence.[112] If the courts have been captured but panels have not, then possibly the entire U.S. judicial system should be scrapped. Second, it fails to explain why, if U.S. producers can capture the federal judiciary, the ITC, and Commerce, they cannot also capture U.S. appointments to NAFTA panels.[113] Third, it fails to explain

112. Like all Article III judges, CIT judges have lifetime tenure and guaranteed salaries under Article III of the Constitution, while an unusual statute restricts the number of CIT judges from any one political party, so capture of both political parties would be required. U.S. CONST. art. 3, § 1; 28 U.S.C. § 251(a) (2000). Anyone hoping to capture the CIT would also have to capture the judges of the CAFC as well. This would present its own difficulties, as review of trade law decisions is a smaller part of the CAFC docket than review of other cases, such as patent decisions and claims against the U.S. government. Thus, appointments to this court would tend to be made based upon considerations other than just views on trade laws, one way or another.

Professor Krauss argues that "even independent members of the judiciary tend to be products of the local practicing bar and are subject to professional and political pressures of which few arguably emanate from foreign producers (for reasons of dispersion of interests) or the mass of domestic consumers." Krauss, *supra* note 8, at 91. Yet, if U.S. producing industries can capture not only U.S. judges, but also the U.S. bar, then by the same mechanism they would have captured U.S. Chapter 19 panel appointees, virtually all of whom are lawyers. *Cf.* NAFTA, *supra* note 3, annex 1901.2(2) (requiring a majority of panelists to be lawyers in good standing). Additionally, there are far more practicing trade lawyers representing foreign producers, importers, foreign governments, and consuming industries than representing petitioning U.S. industries, if only because each trade case typically involves a single petitioner counsel while each individual respondent is represented separately. For example, in the softwood lumber cases, a single law firm represented U.S. petitioners, while over forty law firms represented the various Canadian federal and provincial governments, industry associations, and individual respondents.

113. The United States Trade Representative ("USTR"), a Presidential appointee, appoints NAFTA panel members, but the President potentially has at least as much influence over the behavior of the agencies administering the trade laws. The President appoints all the decisionmakers in charge of investigating and deciding upon AD or CVD duty rates, subject to confirmation by the Senate. The Secretary of Commerce investigates and determines AD and CVD rates, while the ITC investigates and determines injury. 19 U.S.C. §§ 1671(a), 1673, 1677(1)-(2) (2000). Unpublished internal Commerce organizational orders delegate the Commerce Secretary's authority to the Under Secretary of Commerce for International Trade, who in turn has delegated decisionmaking authority in AD or CVD investigations to the Assistant Secretary of Commerce for Import Administration. *See* NEC Corp. v. U.S. Dep't of Commerce, 978 F. Supp. 314, 319 (Ct. Int'l Trade 1997), *aff'd*, 151 F.3d 1361 (Fed. Cir. 1998) (describing working of Department of Commerce Organization Order 10-3 and Department of Commerce Organization and Function Order 41-1). The Under Secretary retains authority to make general policies regarding operation of the AD or CVD laws, but is not supposed to have any involvement in investigations or specific AD or CVD decisions. *See id.* ITC commissioners have nine-year fixed, non-renewable terms, 19 U.S.C. § 1330(b) (2000), but the President can remove at will the assistant secretary in charge of

why NAFTA panels seek to reverse the claimed capture of U.S. agencies, but not equivalent capture of Canadian agencies.

Fourth, capture theory postulates that regulated agencies capture their regulators, but the AD and CVD laws regulate importers, not U.S. industry.[114] Thus, at a minimum, capture theory would suggest that importers have the greatest motivation to capture the relevant agencies.[115] Fifth, others have suggested that the U.S. AD and CVD laws may reflect the actual preferences of a majority of U.S. citizens, who do not favor free trade as much as the policymaking elites do.[116] If so, then agency actions cannot be said to reflect capture so much as democratic decisionmaking.[117]

B. More Plausible Alternative Explanations for Differing NAFTA Standards of Review

1. Institutional Preferences

Professor Goldstein has suggested another model, based on presumed differences in preferences between the U.S. Congress and President.[118] She postulates that (1) the U.S. Congress is relatively

Import Administration and the Under Secretary in charge of AD or CVD policy. Political appointees seek promotion to other political appointments, and so have every incentive to conform to White House desires. Lower-level bureaucrats enjoy civil service protection, but the executive branch controls promotion and transfers.

114. Not only that, but a U.S. industry seeking to show injury must establish that it has encountered some degree of hardship, so it has depleted resources, while foreign importers enjoy the unqualified support of their own government. Many investigations of Canadian goods involve basic or intermediate commodities, like pork or certain types of steel, in which the downstream U.S. consuming industry may be as, or more, concentrated than the U.S. producers seeking trade barriers. According to some theories, these industries should be better able to mobilize political resources to pressure the U.S. agencies against imposing offsetting duties.

115. As noted *supra* note 109, the costs that duties impose on importers and foreign producers of goods may exceed the benefits that domestic producers derive from them, so that the former have a greater incentive to invest in political action.

116. *See generally* Chantal Thomas, *Challenges for Democracy and Trade: The Case of the United States*, 41 HARV. J. ON LEGIS. 1 (2004).

117. As the CIT has stated:

> A general allegation of bias in favor of a domestic manufacturer could probably be made in all dumping investigations; this is simply a consequence of enforcing laws intended to remedy the injury caused by less than fair value imports. The fact that domestic manufacturers stand to benefit from the imposition of antidumping duty orders does not render Commerce incapable of conducting investigations.

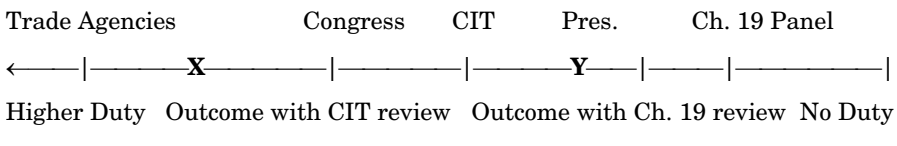
NEC Corp., 978 F. Supp. at 327 n.90.

118. Goldstein, *supra* note 8, at 548-49, 556-57.

sympathetic to duties, while the President attempts to advance the "national interest" by promoting a free trade regime; and (2) appointed bodies like the courts and NAFTA tribunals typically reflect the interests of those entities that appointed or confirmed them.[119]

Thus, she suggests that U.S. agencies would like to impose high tariffs, but the CIT will tolerate only lower duties because judges' preferences more closely reflect the President's.[120] NAFTA panels will accept only duties that are lower still because their preferences reflect a combination of the Canadian government's and the U.S. President's.[121] She illustrates the choices as follows:[122]

Chart 1: Preferences Regarding U.S. AD/CVD Duties



The outcomes under CIT review are depicted by X on the diagram—a compromise between the agency's desired rate and the CIT's—while the outcomes under Chapter 19 review are depicted by point Y.[123]

119. *Id.* at 548-49.

120. *Id*.

121. The USTR appoints all U.S. representatives on Chapter 19 rosters and panels. 19 U.S.C. § 3432(d)(1) (2000). The USTR must consult with Congress before appointing persons to rosters, but Congress has no veto power over roster membership and no role in selecting panel members. 19 U.S.C. § 3432(b)(3) & (c)(3)-(4).

122. Goldstein, *supra* note 8, at 548. Chart 1 is simplified from Professor Goldstein's original. In Chart 1, the duty rate preferred by each institution is noted as a vertical line below that institution's name.

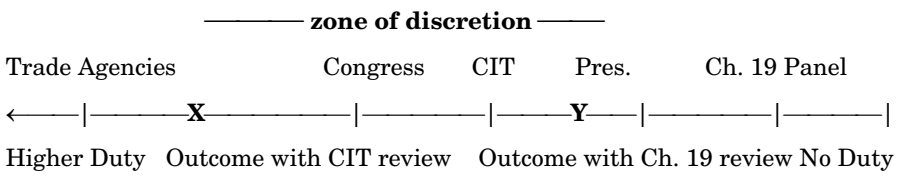
123. In this model, if the agency knows that the CIT will review its decision, it will select X. Point X lies marginally closer to the CIT's preferred duty rate than a zero duty would be. That is, given a choice between X and no duty at all, the CIT would prefer X. So, the court would presumably affirm a duty at point X if it must choose between allowing the agency's ruling to stand or ordering the agency to eliminate duties altogether. Similarly, at point Y, the rate selected is closer to the Chapter 19 panel's preference than no duty at all (although still above the panel's preference), so the panel will tolerate it.

This model assumes that appellate review is "all or nothing." This is often true of ITC decisions, but courts and Chapter 19 panels can use partial remands of AD or CVD rate decisions to move duties closer to the courts' desired levels, without reversing the orders entirely. Thus, if courts or Chapter 19 panels consider only their own preferences, one would expect to see them using partial remands to ensure ultimate outcomes more or less coincide with their own preferences, not the agency's. That indeed appears to occur in the case of

This model is consistent with the observations *supra* that Chapter 19 review results in lower duties than CIT review (which tends to reduce duties to a lesser extent), and that U.S. agencies tend to impose lower duty rates in petitions involving Canada than in cases involving other countries.

This model also implies[124] that the review standards applied by Chapter 19 panels, on average, are not consistent with U.S. law and differ from the standard applied by the U.S. courts. U.S. law gives the ITC and the Commerce Department considerable discretion and requires the courts to provide them considerable deference.[125] Thus, these agencies have some latitude to select methodologies that may result in duty rates *above* those that Congress, in the abstract, might have preferred. By imposing duty rates *lower* than Congress might have chosen, the Chapter 19 panels effectively divest the agencies of their discretion, as illustrated below.

Chart 2: Agency Zone of Discretion



As long as the agency selects an outcome that falls within this vaguely defined zone of discretion, even if above congressional

Chapter 19 review, as Chapter 19 panels usually overturn a U.S. agency's decision, almost always to reduce the duty further or eliminate it entirely. Accordingly, if the CIT or Chapter 19 panels paid no deference at all to agency decisions, observed outcomes would fall on the vertical lines below "CIT" and "Ch. 19 Panel" respectively.

124. The authors are reading this conclusion into the model and do not intend in any way to attribute it to Professor Goldstein.

125. *See, e.g.*, Thai Pineapple Pub. Co., Ltd. v. United States, 187 F.3d 1362, 1365-67 (Fed. Cir. 1999) (noting that "[a]ntidumping investigations are complex and complicated matters in which Commerce has particular expertise" and that the Department "is the 'master of the antidumping law,' and reviewing courts must accord deference to the agency in its selection and development of proper methodologies"); Smith-Corona Group v. United State*s*, 713 F.2d 1568, 1582 (Fed. Cir. 1983) (stating that the antidumping statute "reveals tremendous deference to the expertise of the [Department] in administering the antidumping law"); Tehnoimportexport, UCF America Inc. v. United States, 783 F. Supp. 1401, 1404 (Ct. Int'l Trade 1992) ("[T]he 'court may not substitute its judgment for that of the [agency] when the choice is "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*."') (quoting American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984)).

intent, U.S. law prohibits a court from interfering, still less from imposing a result below congressional intent or outside of the zone of discretion.[126]

This model might also shed some light on Chapter 19 panels' different treatment of U.S. and Canadian agencies. Canada has a parliamentary system with no nationally elected executive. Thus, possibly, its government and hence its NAFTA appointees could be more protectionist as far as Canadian imports are concerned, while being eager to eliminate U.S. trade barriers.[127]

2. Different Governmental Levels of Motivation

A second alternative explanation for the disparities involves the differences in motivations between the U.S. and Canadian governments. As described *supra*, powerful and well-integrated players with a relatively greater stake in the outcome of a regulatory process can exert a disproportionate influence on it. In the context of Chapter 19, that gives the Canadian government (and Canadian exporters and producers) more influence over the process and outcomes than the U.S. government or U.S. industry.

When it comes to cross-border trade disputes, the Canadian government has vastly greater resources than any U.S. industry and much greater motivation to act than the U.S. government. Canada has the ninth largest GDP of any country in the world at C$1.37 trillion.[128] Its government has a budget of some C$196 billion;[129]

126. Note that there could be some deviation between the intent of the Congress that enacted the law and a subsequent Congress that appointed the CIT judges and confirmed Commerce and ITC officials. If Congress became vastly more protectionist after enacting the CUSFTA, then, in theory, point Y could eventually move to the left of the agency's legitimate zone of discretion around the original Congressional intent so that a Chapter 19 panel would be legally justified in imposing results further to the right. But such an enormous shift would not be consistent with the subsequent extension of the CUSFTA to NAFTA or implementation of the WTO agreements, and a political upheaval of such scale would presumably also impact the President and, through him, appointments to Chapter 19 panels themselves.

127. This would not explain why U.S. Chapter 19 appointees would acquiesce in such decisions, but possibly U.S. panelists' relative ignorance of Canadian law makes them unable to effectively influence decisions in cases involving Canadian agency actions. In the authors' experience, U.S. lawyers tend to know less about Canadian law than Canadian lawyers know about U.S. law. Though not supported by scientific evidence, this would not be surprising given that the U.S. economy has a greater influence on Canada's economy than vice versa.

128. Statistics Canada, Gross Domestic Product, Income-Based (2005 data), http://www40.statcan.ca/l01/cst01/index.htm (search "Summary tables" for "gross domestic product;" select "7. Gross domestic product, income based") [hereinafter StatsCan GDP data]; *see also* World Bank, Total

membership in NATO, the United Nations, the G-7, the WTO, and numerous other international organizations; and an embassy and network of twenty-one consulates in the United States.[130] It uses these levers to promote its exports and employs numerous law firms, lobbyists, and public relations consultants on trade issues in the United States. Although it is much smaller than the United States in terms of population and national income, trade with the United States plays a far greater role in Canadian politics than U.S. trade with Canada plays in U.S. politics. Canada's exports to the United States account for C$369 billion, or 81% of the country's total exports and 27% of its GDP.[131] U.S. exports to Canada were US$212 billion in 2005, or just 1.7% of the U.S. GDP in 2005 of US$12.5 trillion—about 1/15 the proportionate share of economic activity.[132] Canada consistently maintains a large and growing trade surplus with the United States.[133]

Possibly no economic or foreign policy issue exceeds trade with the United States in political importance in Canada. In contrast, although the passage of the CUSFTA and NAFTA were important trade priorities of Presidents Reagan and Clinton, the ongoing administration of trade with Canada is not even a top foreign policy priority of the U.S. President, let alone a top political priority.

GDP 2005, http://devdata.worldbank.org/external/CPProfile.asp?PTYPE=CP&CCODE=CAN.

129. DEPARTMENT OF FINANCE CANADA, FISCAL REFERENCE TABLES 15 tbl.7 (2005), http://www.fin.gc.ca/frt/2005/frt05_e.pdf.

130. Department of Foreign Affairs and International Trade, Canadian Government Offices in the U.S., http://www.dfait-maeci.gc.ca/canam/washington/offices/default-en.asp (last visited Feb. 8, 2007).

131. StatsCan GDP data, *supra* note 128; Statistics Canada, Imports, Exports, and Trade Balance of Goods on a Balance-of-Payments Basis, by Country or Country Grouping (2005 data), http://www40.statcan.ca/l01/cst01/Gblec02a.htm [hereinafter StatsCan Trade Balance data].

132. U.S. Census Bureau, Trade in Goods (Imports, Exports, and Trade Balance) with Canada, http://www.census.gov/foreign-trade/balance/c1220.html (last visited Feb. 8, 2007) [hereinafter U.S.C.B. Trade in Goods]; U.S. Central Intelligence Agency, World Factbook—United States, https://www.cia.gov/cia/publications/factbook/geos/us.html#Econ (last visited Feb. 8, 2007).

133. StatsCan Trade Balance data, *supra* note 131. In 2005, Canada's trade surplus with the United States measured C$109 billion, which compensated for a C$44 billion deficit with the rest of the world. *Id.* Since 1989, when the CUSFTA was initiated, the U.S. trade deficit with Canada has expanded by 760 percent from US$9.1 billion to US$78.4 billion in 2005. U.S.C.B. Trade in Goods, *supra* note 132. This somewhat exceeds overall growth in the U.S. trade deficit during this period of 670% from US$93.1 billion in 1989 to US$716.7 billion in 2005. U.S. Census Bureau, U.S. Trade in Goods and Services – Balance of Payments ("BOP") Basis (2006), http://www.census.gov/foreign-trade/statistics/historical/gands.pdf.

Such a motivated, sovereign federal government is a "collective action" mechanism *par excellence*. While the U.S. federal government possesses much greater resources overall than its Canadian counterpart, the structure of Chapter 19 (which treats all governments equally regardless of the size of their population or economy) has neutralized these advantages.

Thus, whether or not the views of U.S. Chapter 19 panelists reflect any dissension between the U.S. executive and judicial branches, one would expect the government of Canada and its allied Canadian and U.S. industrial interests to attempt to capture the NAFTA process on an ongoing basis by exercising careful control over the appointment of Canadian panelists to ensure they support Canadian trade priorities generally and by seeking to influence the mindset of U.S. panelists by, for example, sponsoring seminars and speakers,[134] paying for advertisements and op-ed pieces on the evils of U.S. trade laws, embassy receptions, press releases, hiring lawyers and public relations firms, supporting associations of U.S. importers, and the like. This is really nothing more than the normal activities of trade officials and diplomats. The U.S. government, however, is divided on trade issues and attaches relatively little importance to them compared with other foreign affairs priorities. The expected result would be that Canadian panelists exert disproportionate and one-sided influence in Chapter 19 adjudication.

3. Ideological and Structural Features

Ideology may also play a role. A strong school in the United States has argued that U.S. trade laws are bad policy and should be abolished, as noted *supra*.[135] This view cannot be solely the result of the diplomatic efforts of Canadian or other foreign governments. It rather reflects a relatively strong belief in the United States that taxes generally are bad and government intervention in private transactions is suspect at best.[136] In Canada, in contrast, there is a greater degree of comfort with government intervention in the

134. *See, e.g.*, AMERICAN BAR ASSOCIATION, SECTION OF INTERNATIONAL LAW, SPRING MEETING 2007 at 33 (Jan. 31, 2007) (announcing a panel on "Softwood Lumber Dispute Resolution, and the Rule of Law," composed mainly of representatives of Canadian interests); ASSOCIATION OF AMERICAN LAW SCHOOLS, ANNUAL MEETING PROGRAM 16 (Jan. 2007) (describing Canadian-sponsored field trip for U.S. law professors to the Canadian Embassy to discuss "trade issues").

135. *See supra* section IV.

136. *See, e.g.*, Alan Wm. Wolff, On America's National Commercial Interest, at 2-3 (Jan. 12, 1995), *available at* http://www.dbtrade.com/publications/181929w.pdf.

economy and critiques of the Canadian trade laws are relatively rare.

So, if many U.S. academics and lawyers believe that enactment of trade laws was a failure of the legislative system to produce the optimal result for the public good, it would not in a sense be surprising to find that U.S. panelists (usually academics or lawyers) may refuse to apply the law as legislated. Indeed, a few commentators suggest that a benefit of international dispute settlement mechanisms is that they are opaque and confuse anti-trade constituencies, so that legislators can pass laws that appease protectionist interests while expecting that adjudicators will not actually apply them.[137]

Yet if so, this raises the question of why Chapter 19 panelists have been willing to discard the statutory standard of review in U.S. trade cases, while the U.S. judiciary has not. It also raises the question of why U.S. panelists have not shown equal commitment to free trade when Canadian trade barriers are involved.

In addition to the greater expected commitment by the Canadian government to influence the outcome of Chapter 19 cases discussed *supra*, a number of structural differences between judicial review and Chapter 19 review may help explain these disparities.

First, Chapter 19 applies different bodies of law to each country involved instead of creating a single body of international law applicable to all adherents to the agreement. This means that panels have no need to reconcile different standards and can treat nationals of different countries differently. The application of national law increases the temptation for panelists to disregard the standard of review when it is law not adopted by their own

137. As stated by Professor Krauss, "Clearly, the Chapter 19 binational dispute resolution panels have given U.S. politicos a safety valve through which they can claim to have done all they could for their rent-seeking constituents, all the while not substantially damaging the trade process." Krauss, *supra* note 8, at 94. In a similar vein, Professor Goldstein has warned that trade agreements "that involve[] highly precise and transparent rules can have the unintended effect of encouraging the mobilization of protectionist forces that see themselves as probable losers from an agreement." Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603, 606 (2000). This view assumes a great deal of gullibility on the part of one's domestic industries, i.e., that they will not realize that vague laws will be interpreted against them. More likely, all parties are initially uncertain about how rules will be implemented but must accept this uncertainty as part of a compromise. *See, e.g.*, Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 353 (1999) (discussing the difference between rules and standards in the WTO agreements). The purpose of this Article is to examine how Chapter 19 *has* been implemented and draw lessons for future trade agreements.

legislatures nor even universal international law. In contrast, judges have at least some tradition of deferring to the will of their national legislatures.

Second, the Chapter 19 process imposes some particular hurdles to challenges by domestic industries to rulings by their own governments. The governments choose the panelists. Panelists that rule against their own government, in favor of a petitioner, risk becoming unpopular with *both* governments involved. Similarly, only the governments can request an extraordinary challenge committee, so a petitioner that has lost a Chapter 19 challenge to its own government's ruling lacks even a limited right of appeal. Thus, panels know that any ruling against a petitioner's appeal cannot be overturned.

Third, the peremptory challenge[138] process works in Canada's favor. This is because if the U.S. government challenges a Canadian panelist selection, Canada has no limits on its alternative choices, whereas U.S. law precludes the U.S. government from deviating from its own roster, which may be exhausted when many panels are active.[139]

Fourth, CIT judges, and even more so CAFC judges, hear a broad range of cases covering a broad range of administrative law and agencies. This makes them concerned with creating a consistent body of law, and precedents decided in one class of cases may be cited in others. This may somewhat limit these courts' ability to review one agency more intrusively than others. Chapter 19 panels, in contrast, do not need to fear that their decisions will have spillover effects in other areas of law and can seek to effectuate their own policy goals with less fear of unintended consequences in other legal fields.

138. *See* NAFTA, *supra* note 3, annex 1901.2(2) (providing that each party can exclude up to four panel candidates proposed by the other party).

139. Chapter 19 itself states that the governments "normally" must choose panelists from their rosters, but does not require this. NAFTA, *supra* note 3, annex 1901.02(1). The Canadian government does, at times, appoint panel members who have never appeared on a roster. As noted *supra*, U.S. law provides that all candidates for appointment to Chapter 19 rosters of panels (other than federal judges of courts created under Article III of the U.S. Constitution) must undergo a process by which they are first appointed to preliminary candidate lists by a group of agency officials, and then the list is presented to selected congressional committees for review. 19 U.S.C. § 3432(c) (2000). The U.S. Trade Representative then presents Congress with a final candidate list each year. 19 U.S.C. § 3432(c)(4). Only persons who appeared on the appropriate final candidate list can sit on panels. 19 U.S.C. § 3432(d)(2)(A). Article III judges need not undergo this procedure, but the U.S. government has never appointed an Article III judge to a Chapter 19 panel, roster, or ECC.

Fifth, Chapter 19 panelists are primarily self-selected. Membership on a NAFTA panel carries little reward beyond the chance to influence the outcome of important cases. Persons with a strong ideological commitment may be disproportionately attracted to this sort of employment.[140]

CONCLUSION: POTENTIAL REFORMS TO CHAPTER 19 AND LESSONS FOR SUBSEQUENT INTERNATIONAL DISPUTE SETTLEMENT MECHANISMS

After more than seventeen years of operation, enough Chapter 19 panels have issued decisions to allow definite conclusions about their application of U.S. and Canadian law. This clearly shows two double standards at work: panels apply rigorous scrutiny to any U.S. agency decision that is challenged by Canadian exporters or governments, while allowing near-absolute deference to any U.S. agency decision that is challenged by U.S. industry (unless the agency admits it erred). Neither standard resembles the one applied by the U.S. courts. At the same time, Chapter 19 panels, like Canadian courts, have applied great deference to Canadian agency decisions, and when panels have disturbed Canadian decisions the intervention has been small and as likely to favor Canadian industry as importers.

These disparities are not accounted for by the usual explanations: that Chapter 19 appeals present different fact patterns than other trade cases, that the U.S. courts are inexperienced or inept, or that U.S. domestic producers have "captured" the U.S. agency process. If anything, the circumstances should suggest that Chapter 19 panels would reverse fewer agency decisions than U.S. courts and be more favorable to U.S. industries; as agencies have become particularly careful in their application of trade remedies to Canadian imports, U.S. industries file fewer petitions and appeal far fewer decisions in cases involving Canada, and Canadian respondents are more apt to appeal than most.

More likely, the disparate standards of review applied by Chapter 19 panels result from a combination of other factors: conflicting viewpoints within the U.S. government, a Canadian government highly motivated to implement its trade policies both on the import and export side, and structural factors that make

140. Ironically, the U.S. law implementing Chapter 19 requires the government to appoint judges "to the fullest extent practicable," and requires periodic reports from USTR on its efforts to achieve this. 19 U.S.C. §§ 3432(a)(2), (h). If federal judges were sitting on Chapter 19 panels, presumably the results would be more similar. But no U.S. federal judge has ever sat on a Chapter 19 panel, and no report has been filed.

Chapter 19 panels more willing to disregard the outcome of the legislative process than courts.

Whether all of this is a great success or a dismal failure depends on one's point of view. Most commentators take the former view. For the Canadian government, the outcome is certainly consistent with their objectives in accepting Chapter 19. For the many U.S. academics who have hailed the results of the Chapter 19 process, and importing and consuming industries, the partial nullification of U.S. AD and CVD law is quite desirable, and few seem troubled by parallel Canadian trade laws.

The implications for the future of international dispute settlement and trade negotiations, however, are potentially grave. The Chapter 19 process shows that international dispute settlement outcomes may not reflect the agreement's text as approved by Congress or the Presidential statements that accompanied it. This has likely made Congress less likely to approve such agreements. Despite initial hopes, NAFTA has not been extended to Chile, for example.[141] Similarly, Chapter 19 operation, coupled with the WTO Appellate Body's failure to apply the agreed-upon standards of review negotiated during the Uruguay Round,[142] may have contributed to the United States' refusal to consent to modifications to the WTO regime for trade remedy law, possibly contributing to the collapse of the Doha Round.[143]

It could be possible to modify Chapter 19 or at least structure any future dispute settlement process to make it adhere somewhat more faithfully to the standard of review. Reforms could include appointing judges to Chapter 19 panels, having panels of judges review Chapter 19 panels' decisions for consistency, educating potential U.S. panelists on the U.S. constitutional system, requiring panelists to swear to abide by U.S. law, and creating a roster of U.S. panelists willing to serve essentially full-time. None of these measures would require modifying either Chapter 19, which Canada

141. *Allgeier Rules Out Expansion of NAFTA AD, CVD Panels*, 19.20 INSIDE U.S. TRADE, May 18, 2001, at 1 (quoting Deputy USTR's promise to the Senate not to extend Chapter 19 dispute settlement to Chile).

142. For a thorough explanation of the Appellate Body's disregard of the Antidumping Agreement's standard of review and its likely repercussions for the future of trade negotiations, see Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POL'Y INT'L BUS. 109 (2002).

143. Abhijit Das, *Need to Adopt a Cautious Approach*, FIN. EXPRESS, Feb. 8, 2006, http://www.financialexpress.com/fe_full_story.php?content_id=116928 (explaining the conflict between U.S. and export-oriented economies, such as Japan, Hong Kong, China, Chile, and Korea, over the latter's desire to further curtail AD disciplines during the Doha Round of negotiations).

would presumably not accept, or even U.S. law. On the other hand, they may not be terribly effective, either. Probably the best way for Chapter 19 panels to instill greater confidence in the international dispute settlement system would be for the panels themselves to begin applying U.S. law accurately and consistently.

APPENDIX 1

Analysis of Binational Panels' Treatment of Petitioners' versus Respondents' Claims in Appeals of U.S. Agency Decisions

1. Hypothesis Testing

To verify whether NAFTA panels have treated petitioners and respondents similarly, we looked at all Chapter 19 decisions on claims by these parties. To confirm or refute the general impression that NAFTA panels have been less inclined to favor petitioner claims than respondent claims, we examined all claims under the operational definition provided *supra* in Part II, more specifically in note 54. The goal was to test the following research hypothesis:

H_1: NAFTA panels are less likely to favor petitioner claims than respondent claims

The "null hypothesis" of no difference between NAFTA panel treatment of petitioner and respondent claims helps us test whether the absolute differences reported *supra* in Part II are in fact statistically significant.[144]

2. Methodology

We present the results in two formats: (a) interpretation of the data displayed in each table, and (b) inferential statistical analysis. As far as *interpretation* is concerned, tables are interpreted or read row-by-row from left to right. "Petitioners" and "Respondents," the two categorical groups compared in each column represent the only two possible variations of the independent variable, "Party Identification." To monitor the differential impact of "Party Identification" on the dependent variable "Claim Outcome," each row will display a separate possible outcome of claim adjudication: "Win" and "Loss." Thus, as we allow the independent variable to vary, we can detect whether and how the dependent variable categories, displayed in each row, change based on their observed frequencies.[145] Empiricists will reminds us, however, that this is merely a non-statistical method of evaluating the merits of our research hypotheses. Given the format in which our data is

144. *See* HUBERT M. BLALOCK, JR., SOCIAL STATISTICS 156-58 (McGraw Hill) (1972).

145. However, to make the information in each cell comparable, each cell's absolute frequency is normalized by dividing it by its column total.

organized, we use Fisher's Exact Test to determine the existence of a relationship between the dependent and independent variables.[146]

Fisher's Exact Test also compares data from two dichotomous groups—Petitioners and Respondents—to see whether their different impact on the two categories of the dependent variable is statistically significant.[147] Once we calculate a *p* value, we compare it with the level of statistical significance.[148] If the calculated *p* value is less than this predetermined level, the null hypothesis is refuted and the research hypothesis is corroborated.[149]

146. While the χ^2 test is the most frequently used method of inferential statistical testing for two-by-two contingency tables, it may not be valid when the expected frequency in any cell is less than five. *See* THEODORE COLTON, STATISTICS IN MEDICINE 164-65 (1974). Because one cell in Table 3 had an expected frequency of 5.79, *see*, *infra,* Appendix 1, and because Fisher's Exact Test is "most useful . . . whenever the total sample size is moderate but one or more of the marginals [is] very small," BLALOCK, *supra* note 144, at 291—which is the case with the Chapter 19 part of that table—we decided to submit the data reported in all tables to Fisher's Exact Test. This test also seemed appropriate in light of the fact that the χ^2 test relies on a large sample approximation, which yields higher calculated values, thus making it easier to reject the null hypothesis of no association when actually it should not. *Id.* Conversely, Fisher's Exact Test gives a true calculated level of significance ("p value") that is always smaller than the calculated p value that is reported in a χ^2 test. C. Frank Starmer et al., *Some Reasons for Not Using the Yates Continuity Correction on 2 x 2 Contingency Tables*, 69 J. AM. STAT. ASS'N 376, 376-78 (1974). Thus, by using this test, we choose to err on the conservative side. The only drawback is that Fisher's Exact Test has no formal test statistic or critical value, so we have to derive our conclusions from comparisons between calculated probability values, not from comparisons between calculated and critical values of a test statistic. The positive trade-off is that, unlike χ^2 distribution, this test gives us *exact* rather than *approximate p* values. *See* BLALOCK, *supra* note 144, at 287.

147. In operational terms, this test holds the observed marginal frequencies constant and calculates the probability of obtaining *exactly* the same observed cell frequencies *and* any configuration more skewed. *See id*. By "more skewed," we mean any outcome, given the observed marginal frequencies, that is even less likely than the one obtained, either in the same direction (one-tailed) or in both directions (two-tailed). *Id.* at 289. Because each research hypothesis indicates the direction of the relationship and the test's two tails are not perfectly symmetrical, we conduct one-tailed tests only. *See id.* at 164.

148. The level of statistical significance represents our willingness to reject a particular hypothesis when it is actually true (type I error) so that we minimize the risk of erroneously accepting as true a hypothesis that is actually false (type II error). *See* BLALOCK, *supra* note 144, at 158-59. The level of statistical significance adopted for testing all hypotheses in this study is 0.001. This means that there is a 1 in 1000 chance of being wrong in finding that dependent and independent variables are related when random chance could be the reason for their apparent relationship.

149. *See id.* at 156-58.

3. Empirical Results and Statistical Comparison of Petitioner and Respondent Claim Success in Chapter 19 Review

a. Basic Petitioner and Respondent Claim Success and Failure Rates

The table below shows the cell frequencies we observed for each category of the dependent variable (rows) and independent variable (columns):[150]

Table 1: Claim Review Outcomes with Voluntary Remands

		Party Identification		
		Petitioner	Respondent	Row Sum
Claim Outcome	Win	19 27.54%	136 50.37%	155
	Loss	50 72.46%	134 49.63%	184
Column Sum		69	270	n = 339

Table 1's first row shows that, in Chapter 19 adjudication, petitioners win about twenty-eight percent of their claims, while respondents succeeded fifty percent of the time. Thus, in rounded figures, petitioners succeed in a little over one-quarter of their claims. Yet, respondents succeed in about half of their claims. Table 1's second row shows the same picture from a different perspective: petitioners lose in almost three out of every four claims, while respondents lose approximately half the time. These results demonstrate that varying Party Identification impacts the likelihood of a claim's success. To be precise, NAFTA review is less likely to favor petitioner claims than respondent claims.

To determine whether a statistically significant relationship exists between "Party Identification" and "Claim Outcome," we performed Fisher's Exact Test. Fisher's Exact Test requires evaluating the following probabilities:

150. Following the convention in the empirical literature, we placed "Party Identification," the independent variable, on top of the table, while placing "Claim Outcome," the dependent variable, on the left-hand side. The reader should note that because absolute totals for each category of the independent variable are not the same, we have calculated the ratio of each cell frequency with respect to its column total to make comparison possible.

$$P_{k+1} = \frac{b_k c_k}{(a_k + 1)(d_k + 1)} P_k \text{, where}$$

$$P_k = \frac{(a+b)!(c+d)!(a+c)!(b+d)!}{N!\,a!\,b!\,c!\,d!}.$$

These probabilities are based on the observed frequencies reported *supra* in the Table 1 and all other expected tables having the same marginal frequencies. This test focuses only on those probabilities that are less than or equal to P_k (one-tailed test). To obtain the calculated *p* value for each Fisher's Exact Test, we added all these probabilities (i.e., $P_k + P_{k+1} + P_{k+2} \ldots$). We tested each research hypothesis by comparing the calculated value associated with the observed table with the prespecified level of statistical significance (p = 0.001). If the calculated *p* value is less than or equal to the prespecified level, the null hypothesis of no relationship is refuted. The table below summarizes these steps.

Table 2: Fisher's Exact Test Calculation

Observed Frequencies		*Associated* p *value*		
19	136			
50	134	$P_k + P_{k+1} + P_{k+2} \ldots = 0.00046187$	<	0.001
				(Level of statistical significance)

Because we obtained a calculated *p* value (0.00046187) that is less than the prespecified level of statistical significance, we were able to corroborate the research hypothesis.

b. Sensitivity of Results to Methodology Used to Count Petitioner and Respondent Claims

Table 1's figures may be sensitive to the overall impact of agency-requested voluntary remands. Statistical testing of petitioner and respondent claim success and failure rates based on data that includes voluntary remands is troublesome because such remands are largely due to the agency itself having reconsidered its position, rather than a direct result of petitioner or respondent

requests.[151] Counting claims that overlap with agency requests for voluntary remands blurs our perception of petitioner and respondent actual wins or losses on their claims. Yet, the counting approach leading to Table 1 accepts all claims as they have been identified—the claims are unfiltered. Thus, Table 1's observed frequencies not only fail to give a more accurate picture of the overall performance of respondent and petitioner claims, they may actually produce statistical results too sensitive to the effect of voluntary remands to be reliable.

If we eliminate the voluntary remands, the difference in claim success between petitioners and respondents becomes even more striking, an indication that Table 1's figures, though not entirely representative of the actual success rate, still point in the right direction. Table 3 below shows the new observed frequencies:

Table 3: Claim Review Outcomes Without Voluntary Remands

Party Identification

		Petitioner	Respondent	Row Sum
Claim Outcome	Win	3 5.66%	119 47.04%	122
	Loss	50 94.34%	134 52.96%	184
Column Sum		53	253	n = 306

Again, the observed data shows that, in raw terms, petitioners are at least eight times less likely to prevail in their claims than respondents. Conversely, row two demonstrates that petitioners lost more than ninety-four percent of the time, while respondents lost a little over half the time. Indeed, the substantial decrease in the number of petitioner wins after removal of voluntary remands underscores just how their "success" at NAFTA depends on U.S. agency action. These results not only confirm, but also strengthen the interpretation reached with respect to Table 1.

More importantly, the new observed Table 3 frequencies yield an even lower calculated *p* value:

151. The fact that Chapter 19 panels have rarely rejected such agency requests supports this conclusion. *See* discussion *supra* Part II, specifically note 60.

Table 4: Fisher's Exact Test Calculation

Observed Frequencies		*Associated* p *value*		
3	119			
50	134	$P_k + P_{k+1} + P_{k+2} \ldots = 0.00000001$	<	0.001
				(Level of statistical significance)

Again, because the calculated *p* value (0.00000001) is less than the prespecified level of statistical significance, we can reject the null hypothesis and confirm the research hypothesis that NAFTA review is less likely to favor petitioner claims than respondent claims.

APPENDIX 2

Lists of Chapter 19 Case Outcomes

1. NAFTA review has left the outcome unaffected in the following reviews of U.S. agency decisions:

NAFTA, *Carbon and Certain Alloy Steel Wire Rod from Canada*, at 31, USA-CDA-2002-1904-09 (Aug. 12, 2004) (final injury determination); NAFTA, *Corrosion-Resistant Carbon Steel Flat Products from Canada*, at 41-42, USA-CDA-00-1904-11 (Oct. 19, 2004) (AD/CVD Sunset Review); NAFTA, *Circular Welded Non-Alloy Steel Pipe From Mexico*, at 3, USA-98-1904-05 (Nov. 19, 2002) (final AD scope determination); NAFTA, *Gray Portland Cement and Clinker from Mexico*, at 1, 31, USA-97-1904-02 (Dec. 4, 1998) (Fourth AD Administrative Review); NAFTA, *Corrosion-Resistant Carbon Steel Flat Products from Canada*, at 14, USA-97-1904-03 (June 4, 1998) (final AD determination); NAFTA, *Gray Portland Cement and Clinker from Mexico*, at 41, USA-95-1904-02 (Sept. 13, 1996) (final AD determination); NAFTA, *Color Picture Tubes from Canada*, at 7, USA-95-1904-03 (May 6, 1996) (final AD determination); NAFTA, *Corrosion-Resistant Carbon Steel Flat Products from Canada*, USA-93-1904-05 (Nov. 4, 1994) (final injury determination); NAFTA, *Magnesium from Canada*, at 31-32, USA-92-1904-05/06 (Aug. 27, 1993) (final injury determination); NAFTA, *Pure and Alloy Magnesium from Canada*, USA-92-1904-03 (Aug. 16, 1993) (final CVD determination); NAFTA, *New Steel Rail, Except Light Rail, from Canada*, USA-89-1904-08 (Aug. 30, 1990) (final AD determination); NAFTA, *New Steel Rails from Canada*, USA-89-1904-09/10 (Aug. 13, 1990) (final injury determination); NAFTA, *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada*, USA-89-1904-03 (Mar. 7, 1990) (final AD determination); NAFTA, *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada*, USA-89-1904-02 (Jan. 24, 1990) (final AD scope determination).

2. NAFTA review has caused the rate to be reduced (or duties eliminated) in the following reviews of U.S. agency decisions:

NAFTA, *Certain Durum Wheat and Hard Red Spring Wheat from Canada*, at 90-94, USA-CDA-2003-1904-05 (Mar. 10, 2005) (final CVD determination); NAFTA, *Hard Red Spring Wheat from Canada*, at 14, USA-CDA-2003-1904-06 (June 7, 2005) (final injury

determination); NAFTA, *Certain Softwood Lumber Products from Canada*, at 2-4, 7, USA-CDA-2002-1904-07 (Aug. 31, 2004) (final injury determination); NAFTA, *Pure Magnesium from Canada*, at 29, 31-33, USA-CDA-00-1904-06 (Mar. 27, 2002) (AD sunset review); NAFTA, *Pure Magnesium and Alloy Magnesium from Canada*, at 30-31, USA-CDA-00-1904-07 (Mar. 27, 2002) (CVD sunset review); NAFTA, *Gray Portland Cement and Clinker from Mexico*, at 91-92, USA-MEX-99-1904-03 (May 30, 2002) (7th AD administrative review); NAFTA, *Brass Sheet and Strip from Canada*, at 2, 48, USA-CDA-98-1904-03 (July 16, 1999) (AD administrative review); NAFTA, *Corrosion-Resistant Carbon Steel Flat Products from Canada*, at 31, USA-CDA-98-1904-01 (Mar. 20, 2001) (3rd administrative review); NAFTA, *Grey Portland Cement and Clinker from Mexico*, at 4-8, USA-97-1904-01 (June 18, 1999) (5th AD administrative review); NAFTA, *Fresh Cut Flowers from Mexico*, at 86-87, USA-95-1904-05 (Dec. 16, 1996) (final AD determination); NAFTA, *Oil Country Tubular Goods from Mexico*, at 99-100, USA-95-1904-04 (July 31, 1996) (final AD determination); NAFTA, *Porcelain-on-Steel Cookware from Mexico*, at 60, USA-95-1904-01 (Apr. 30, 1996) (5th administrative review); NAFTA, *Leather Wearing Apparel from Mexico*, at 1, USA-94-1904-02 (Oct. 20, 1995) (final CVD determination); NAFTA, *Certain Cut-to-Length Carbon Steel Plate from Canada*, at 53-54, USA-93-1904-04 (Oct. 31, 1994) (final AD determination); NAFTA, *Pure and Alloy Magnesium from Canada*, USA-92-1904-04 (Oct. 6, 1993) (final AD determination); NAFTA, *Softwood Lumber from Canada*, at 77-78, USA-92-1904-02 (July 26, 1993) (final injury determination); NAFTA, *Certain Softwood Lumber Products from Canada*, USA-92-1904-01 (May 6, 1993) (final CVD determination); NAFTA, *Live Swine from Canada*, USA-91-1904-04 (Aug. 26, 1992) (5th CVD administrative review); NAFTA, *Live Swine from Canada*, USA-91-1904-03 (May 19, 1992) (4th CVD administrative review); NAFTA, *Fresh, Chilled, or Frozen Pork from Canada*, USA-89-1904-11 (Jan. 22, 1991) (final injury determination); NAFTA, *New Steel Rail, Except Light Rail, from Canada*, at 18-21, USA-89-1904-07 (June 8, 1990) (final CVD determination); NAFTA, *Fresh, Chilled, and Frozen Pork from Canada*, USA-89-1904-06 (Sept. 28, 1990) (final CVD determination); NAFTA, *Red Raspberries from Canada*, USA-89-1904-01 (Dec. 15, 1989) (final AD determination).

3. NAFTA review has left the outcome unaffected in the following reviews of Canadian agency decisions:

NAFTA, *Certain Iodinated Contrast Media Used for Radiographic Imaging, Originating in or Exported from the United States of America*, at 21, CDA-USA-2000-1904-02 (Jan. 8, 2003)

(final injury determination.); NAFTA, *Certain Iodinated Contrast Media Used for Radiographic Imaging, Originating in or Exported from the United States of America*, at 17-18, CDA-USA-2000-1904-01 (Jan. 8, 2003) (final AD determination.); NAFTA, *Certain Refrigerators, Dishwashers and Dryers Originating in or Exported from the United States of America and Produced by, or on Behalf of, White Consolidated Industries, Inc. and Whirlpool Corporation, their Respective Affiliates, Successors and Assigns*, at 35, CDA-USA-2000-1904-04 (Jan. 16, 2002) (final injury determination); NAFTA, *Certain Top-Mount Electric Refrigerators, Electric Household Dishwashers, and Gas or Electric Laundry Dryers, Originating in or Exported from the United States of America and Produced by, or on behalf of White Consolidated Industries, Inc. and Whirlpool Corporation, Their Respective Affiliates, Successors and Assigns*, at 49, CDA-USA-2000-1904-03 (Apr. 15, 2002) (final AD determination); NAFTA, *Certain Cold-Reduced Flat Rolled Sheet Products of Carbon Steel (including high-strength low-alloy steel) Originating in or Exported from the United States of America*, at 41, CDA-USA-98-1904-02 (July 19, 2000) (final injury determination); NAFTA, *Certain Solder Joint Pressure Pipe Fittings and Solder Joint Drainage, Waste and Vent Pipe Fittings, Made of Cast Copper Alloy, Wrought Copper Alloy or Wrought Copper, Originating in or Exported from the United States of America and Produced by or on Behalf of Elkhart Products Corporation, Elkhart, Indiana, Nibco Inc., Elkhart, Indiana, and Mueller Industries, Inc., Wichita, Kansas, Their Successors and Assigns*, at 26, CDA-USA-98-1904-03 (Apr. 3, 2000) (AD sunset review); NAFTA, *Certain Prepared Baby Food Originating in or Exported from the United States of America*, at 15, CDA-USA-98-1904-01 (Nov. 17, 1999) (final injury determination); NAFTA, *Certain Hot-Rolled Carbon Steel Plate, Originating in or Exported from Mexico*, at 53-54, CDA-97-1904-02 (May 19, 1999) (final injury determination); NAFTA, *Certain Concrete Panels, Reinforced with Fiberglass Mesh, Originating in or Exported from the United States of America and Produced by or on Behalf of Custom Building Products, Its Successors and Assigns, for Use or Consumption in the Province of British Columbia or Alberta*, at 25, CDA-97-1904-01 (Aug. 26, 1998) (final injury determination); NAFTA, *Certain Malt Beverages from the United States of America*, at 25, CDA-95-1904-01 (Nov. 15, 1995) (final injury determination); NAFTA, *Certain Corrosion-Resistant Steel Sheet Products Originating in or Exported from the United States of America*, at 24, CDA-94-1904-04 (July 10, 1995) (final injury determination); NAFTA, *Synthetic Baler Twine With A Knot Strength Of 200 Lbs or less Originating in or Exported from the United States of America*, at 35, CDA-94-1904-02 (Apr. 10, 1995) (final injury determination);

NAFTA, *Certain Solder Joint Pressure Pipe Fittings and Solder Joint Drainage, Waste and Vent Pipe Fittings, Made of Cast Copper Alloy, Wrought Copper Alloy or Wrought Copper, Originating in or Exported from the United States of America*, at 25, CDA-93-1904-11 (Feb. 13, 1995) (final injury determination); NAFTA, *Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America*, at 76, CDA-93-1904-09 (July 13, 1994) (final injury determination); NAFTA, *Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate, Heat-Treated or Not, Originating in or Exported from the U.S.A.*, at 49, CDA-93-1904-06 (Dec. 20, 1994) (final injury determination); NAFTA, *Certain Beer Originating in or Exported from the United States of America by or on Behalf of G. Heileman Brewing Company Inc. and Pabst Brewing Company and the Stroh Brewery Company, Their Successors and Assigns, for Use or Consumption in the Province of British Columbia*, at 33, CDA-91-1904-02 (Aug. 26, 1992) (final injury determination); NAFTA, *Certain Dumped Integral Horsepower Induction Motors, One Horsepower to Two Hundred Horsepower Inclusive, with Exceptions Originating in or Exported from the United States of America*, at 72, CDA-90-1904-01 (Sept. 11, 1991) (final injury determination)

4. NAFTA review has caused the rate to be changed in the following reviews of Canadian agency decisions:

NAFTA, *Final Determination of Dumping Regarding Certain Refined Sugar, Refined from Sugar Cane or Sugar Beets, in Granulated, Liquid and Powdered Form, Originating in or Exported from the United States of America*, at 35-36, CDA-95-1904-04 (Oct. 9, 1996) (final AD determination); NAFTA, *Certain Corrosion Resistant Steel Sheet Products Originating in or Exported from the United States of America*, at 1,9, CDA-94-1904-03 (Nov. 2, 1995) (final AD determination); NAFTA, *The Final Determination of Dumping Made by the Deputy Minister of National Revenue, Customs and Excise, regarding Gypsum Board Originating in or Exported from the United States of America*, at 30, CDA-93-1904-01 (Nov. 17, 1993) (final AD determination); NAFTA, *Final Determination of Dumping Regarding Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America*, at 58, CDA-93-1904-08 (June 14, 1994) (final AD determination); NAFTA, *Final Determination of Dumping Made by Revenue Canada, Customs and Excise, Regarding Certain Machine Tufted Carpeting Originating in or Exported from the United States of America*, at 39, CDA-92-1904-01 (May 19, 1993) (final AD determination); NAFTA, *An Inquiry Made by the Canadian International Trade Tribunal Pursuant to Section 42 of the Special Imports Measures Act Respecting Machine Tufted Carpeting*

Originating in or Exported from the United States of America, at 37-38, CDA-92-1904-02 (Apr. 7, 1993) (final injury determination); NAFTA, *Certain Beer Originating in or Exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Company, and the Stroh Brewery Company for Use or Consumption in the Province of British Columbia*, at 73, CDA-91-1904-01 (Aug. 6, 1992) (final AD determination).