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Juscelino F. Colares

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An Empirical Examination of Product and Litigant-Specific Theories for the Divergence Between NAFTA Chapter 19 and US Judicial Review

Juscelino F. COLARES*

Empirical analysis of NAFTA panel review has shown that panels reverse US agency trade remedy determinations twice as often as US courts. Recent studies have eliminated case selection and other hypotheses as potential explanations for this divergence. In this article, Probit regressions show that case docket differences, such as type of import or litigant identity, also cannot account for this discrepancy. As NAFTA panels must apply the same law and standards of review as the US courts they replace, this divergence presents serious questions regarding US Congressional acquiescence to the operation of NAFTA panels and encourages discussion of the role or absence of popular preferences in the trade policy process (J.E.L., F 13, F 53, F 55, K 33).

I. INTRODUCTION

The trade remedy laws of the United States require the US Department of Commerce (“Commerce”) in conjunction with the US International Trade Commission (ITC) to impose duties on imported goods these agencies find to be “dumped” or subsidized. Typically, agency determinations on anti-dumping (AD) and countervailing duty (CVD) matters are subject to review by US federal courts. Chapter 19 of the Canada–United States Free Trade Agreement (CUSFTA) and its successor,¹ the North American Free Trade Agreement (NAFTA), allowed replacing review of agency decisions by national judges on trade remedy cases with review by binational panels appointed jointly by the governments involved (CUSFTA 1988, Article 1904; NAFTA 1993, Article 1904). These binational panels review agency decisions applying the same standard of review *and* substantive law as the domestic courts they replace (CUSFTA 1988, Article 1904(3); NAFTA 1993, Article 1904(3)). Chapter 19 was

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¹ Technically, NAFTA did not terminate CUSFTA, which remains in operation, as specified in NAFTA 1993, Article 103(1). CUSFTA provisions that are inconsistent with NAFTA are no longer in effect. (NAFTA 1993, Article 103(2)).

adopted as a compromise after the United States rejected Canada's demands to exempt its imports from application of US trade remedy law (Hart, 1989: pp. 335–341). Canadians believed that Chapter 19 would act as a check on what they perceived as domestic industry bias in US agencies (GAO Report, 1995: p. 3).

Anecdotal and empirical literature on Chapter 19 concludes that these panels overturn US agency decisions more often than US courts. The divergence between these two methods of review is fully discussed and explained in two prior empirical articles (Colares and Bohn, 2007; Colares, 2008). The first demonstrated that NAFTA panels reverse US agency trade-remedy determinations twice as often as US courts (Colares, 2008: pp. 183–184). The significantly higher rate of agency affirmance in US courts detected by this first study could not be explained by a Priest-Klein case selection effect (pp. 186–187). Competing hypotheses, such as bias or political capture of US courts, were refuted in a second contemporaneous article that provided a set of theoretical explanations for this disparity (Colares and Bohn, 2008). The same article posited that such discrepancies result from differences in US and Canadian institutional preferences, structural features and different governmental levels of motivation (p. 203).

The present article, the final piece of an empirical trilogy that compares NAFTA with judicial review of US agency determinations, examines whether docket features, such as litigation involving certain types of imports and differences in the kind of litigants that appear before US courts and NAFTA panels, could offer alternative explanations for the observed discrepancies between the two systems of review. Two separate sets of Probit regressions test whether (i) challenges to agency determinations that impose duties on commodities; and (ii) disputes initiated by LDCs, can account for the greater likelihood of agency affirmances in US courts. Finding that these competing hypotheses cannot account for the different observed rates of affirmance under each adjudicatory system, the article ponders whether this and other Chapter 19 asymmetries (e.g., exacting scrutiny of US agencies and nearly absolute deference to Canadian agencies) could be the result of a strategic compromise on the part of US trade policymakers.

Section II of this article briefly outlines the operation of US trade remedy law, and explains how NAFTA panels conduct review of US agency determinations. Section III examines prior literature on the divergence between US judicial and NAFTA panel outcomes. Section IV examines whether agency reversal rates under each system can be explained by type of import and/or litigant identity. A brief analysis of the implications of these results is provided in section III. While this article neither claims to resolve every competing empirical, theoretical, or normative explanation, nor asserts that NAFTA panels' divergence from the ostensible standard of review is desirable or undesirable, its results demonstrate that neither product nor litigant-based differences can explain the asymmetries between NAFTA and US judicial review.

II. OPERATION OF US TRADE REMEDY LAWS AND THE CHAPTER 19 SYSTEM

A. BASICS OF US ANTI-DUMPING AND COUNTERVAILING DUTY LAW

Congress enacted AD and CVD statutes to deter unfair trade practices by foreign countries and foreign companies trading with the United States. Typically, a US manufacturer files a petition with Commerce claiming 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) (19 U.S.C. § 1671a(b) (CVD) and 1673a(b) (AD) [2006]). Commerce makes a brief preliminary inquiry into the sufficiency of the petition, and, if statutory requirements are satisfied, conducts a full investigation (§§ 1671a(c) and 1673a(c)). The ITC conducts a contemporaneous investigation into whether the US domestic industry has suffered economic injury by reason of such imports (§ 1671d(b) (CVD) and 1673d(b) (AD)). If both agencies make affirmative determinations, Commerce calculates an offsetting duty that will be applied against the subject import (§§ 1671d(c) (CVD) and 1673d(c) (AD)).

These final determinations can only be reviewed by the US Court of International Trade (CIT), an Article III court of first resort sitting in New York City (28 U.S.C. § 1581). The US Court of Appeals for the Federal Circuit (CAFC) has exclusive appellate jurisdiction over final decisions of the CIT (§ 1295(a)(5)). The US Supreme Court has discretion to review CAFC decisions (§ 1254), though it has reviewed only a handful of AD and CVD cases in the last hundred years.²

The statutorily mandated standard of review applicable to these US agency final determinations is typically the “substantial evidence” standard (19 U.S.C. § 1516a(b)(1)(B)(i)). The relevant inquiry under this standard is whether the challenged agency determination is “unsupported by substantial evidence on the record, or otherwise not in accordance with law” (19 U.S.C. § 1516a(b)(1)(B)(i)). United States’ trade courts have interpreted this inquiry to be the equivalent of asking “is the determination unreasonable?”³ In the majority of cases, when 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”.⁴

² The last case the Court reviewed was *Zenith Radio Corp. v United States*, 437 US 443 (1978). While this review process is open to all foreign parties who wish to appeal US agency determinations before US courts, North American Free Trade member countries (Canada and Mexico) have another option in Chapter 19 panel review (NAFTA 1993, Article 1904(5)).

³ *Nippon Steel Corp. et al. v United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (internal punctuation omitted) (quoting *SSIH Equip. SA v U.S. Int’l Trade Comm’n*, 718 F.2d 365, 381 (Fed. Cir. 1983) (Nies, J., concurring)).

⁴ *PPG Indus. v United States*, 928 F.2d 1568, 1573 (Fed. Cir. 1991).

B. AGENCY REVIEW PURSUANT TO NAFTA CHAPTER 19

While the US judicial review process is open to all foreign parties who wish to appeal US agency determinations, NAFTA member countries have another option. Under Article 1904(2), NAFTA members may request that a Chapter 19 panel review “a final [AD] or [CVD] determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the [trade remedy] law of the importing Party” (NAFTA 1993, Article 1904(2)).⁵ Chapter 19, which became operative on 1 January 1989 (CUSFTA 1988, Article 2105), was largely a compromise between Canada—which had wanted a complete exemption from US trade remedy law—and the United States—which would not grant such an exemption unless Canada first agreed to a stricter, rule-based mechanism restricting subsidies (Gastle and Castel, 1995: p. 829). With Chapter 19, the two countries waived their sovereign right to have their agency determinations reviewed solely by their domestic courts, opting instead for binational panel review (NAFTA 1993, Article 1904(1)). Agency compliance with its country’s domestic trade remedy laws, as determined by these binational panels, would be the measure of each country’s compliance with its NAFTA obligations (NAFTA 1993, Article 1904(2)). Thus, parties from NAFTA countries affected by US trade remedy determinations were given the option to seek either US judicial or Chapter 19 panel review (19 U.S.C. § 1516a(a)(2); NAFTA 1993, Article 1904(5)). However, a request for the formation of a binational panel by any party who participated in the agency proceedings forecloses US court review of such determinations (19 U.S.C. § 1516a(g)(2); NAFTA 1993, Article 1904(11)).

In their review, NAFTA panels must apply “the standard of review . . . and the general legal principles that a court of the importing party otherwise would apply to” determinations of the competent agencies in the importing country (NAFTA 1993, Article 1904(3)). Therefore, NAFTA panels reviewing Commerce or ITC decisions are bound to (a) apply US trade remedy law; and (b) employ the statutorily mandated standard of review (Article 1904(3); GAO Report, 1995: p. 35). As a result, NAFTA panels must assume a level of deference similar to that extended to such agencies by the CIT and the CAFC.

Unlike the US system (28 U.S.C. §§ 1291, 1295), NAFTA affords private litigants no appeal as a matter of right from a panel decision. Only governments can file requests for “extraordinary challenges” to panel decisions (NAFTA 1993, Article 1904(13)). While Extraordinary Challenge Committees (ECCs) exist partly to ensure that NAFTA decisions follow domestic law and precedent,⁶ they are permitted only in

⁵ Because this Article is only concerned with review of US agencies’ determinations, the only relevant law and standard of review for purposes of analysis are those of the United States.

⁶ *Pure Magnesium from Canada*, No. ECC-2003-1904-01USA, at para. 29 (7 October 2004) (ECC should not permit “formation of two streams of anti-dumping and countervail (*sic.*) 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. *Synthetic Baler Twine with a Knot Strength of 200 Lbs. or Less Originating in or Exported from the United States of America*, No. CDA-94-1904-02, at 12 (10 April 1995) (binational panel should use same standard of review as Canadian federal

relatively extreme circumstances. For example, a government can request ECC review if a panelist is guilty of “gross misconduct”, or the Panel “manifestly exceeded its powers, authority or jurisdiction . . . by failing to apply the appropriate standard of review” (NAFTA 1993, Article 1904(13)). Such violations, however, only warrant an ECC reversal if the aggrieved government proves that the panel action “materially affected the panel’s decision and threaten[ed] the integrity of the binational panel review process” (Article 1904(13)). To date, no ECC has ever overruled a panel reversal of US agency trade remedy determinations.⁷

III. THE EXISTING LITERATURE ON CHAPTER 19 DIVERGENCE FROM US JUDICIAL REVIEW

Prior international trade literature has compared Chapter 19 review of US agency determinations with the adjudicatory outcomes of agency decisions by the CIT and CAFC (Cannon, 1994; GAO Report, 1995; Goldstein, 1996; Jones, 2000; Krauss, 1993; Lowenfeld, 1991; Macrory, 2002; Mercury, 1995; Pan, 1999; Riccardi, 2002). These authors have observed that Chapter 19 panels overturn agency decisions more often than US courts (Cannon, 1994; GAO Report, 1995; Goldstein, 1996; Jones, 2000; Krauss, 1993; Lowenfeld, 1991; Macrory, 2002; Mercury, 1995; Pan, 1999; Riccardi, 2002). Three particular studies analysing Chapter 19 panel review of US and Canadian agency determinations have demonstrated that Chapter 19 panels grant far more deference to Canadian decisions, and more often rule in favor of petitioners from Canada (Colares and Bohn, 2007, pp. 214–216; Jones, 2000: p. 149; Mercury, 1995, pp. 529–535, 568–572). Of these, only one utilized data spanning the entire period of Chapter 19 operation (Colares and Bohn, 2007: p. 208). The others have either relied on available data from the CUSFTA period or data from the earlier years of NAFTA.

The first empirical analysis that compared the entire history of Chapter 19 results against CIT and CAFC review found that Chapter 19 review has reversed US agency AD/CVD determinations 66 percent of the time (Colares, 2008, p. 184). By comparison, a random sample of 168 US court decisions revealed reversals in only 32 percent of cases (p. 183). This difference in reversal rates was found to be statistically significant (p. 184). The article noted that CIT and CAFC rates of agency affirmance (68 percent) are consistent with those of federal appellate courts and the Supreme Court (63 percent), suggesting that outcomes in trade cases are in line with the general pattern of judicial review of administrative cases (p. 190). Conceivably, the slight difference between affirmances by the trade courts and other federal appellate review

cont.

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).

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

might be attributed to the fact that US agency AD/CVD proceedings involve “relatively formal procedure[s] that adjudicate parties rights”⁸ (e.g., oral hearings with presence of counsel, development of detailed and contemporaneous administrative record, etc.), thus more frequently triggering *Chevron* deference.⁹

The article then demonstrated that Priest-Klein case selection arguments—such as the theory that “stronger” cases are being brought before Chapter 19—fail to account for the magnitude of reversal rates since the frequency of Canadian appeals of US agency determinations not only increased markedly following creation of the Chapter 19 system, but Canada has challenged all US AD/CVD orders on Canadian imports since 1989 (Colares, 2008: p. 186). The article also detected a decrease in US agency affirmances in cases involving Canadian goods between the years immediately preceding (59 percent from 1984 to 1988) and following the creation of the Chapter 19 dispute settlement system (34 percent from 1989 to 2005)—a period in which US law remained largely the same—which refutes the notion that Canada’s success rates in Chapter 19 adjudication are no different from those obtained when it was subject to US judicial review (p. 188).¹⁰

A follow-up article rejected several justifications for the disparities in Chapter 19 and US judicial review and examined possible explanations for such differences (Colares and Bohn, 2007). Experts commenting on the divergence between Chapter 19 and US judicial review had often claimed that differences in agency success rates resulted from inexperienced or inept US judges (Cassidy, 1997: p. 148; Macrory, 2002: p. 4; Pan, 1999: p. 391), that Chapter 19 panels merely “corrected” US judicial bias favoring US agencies (Goldstein, 2002: p. 226; Krauss, 1993: p. 91), or even asserted that no such difference existed (e.g., any disparities simply reflected differences in circumstances and law) (Cassidy, 1997: p. 148; Mercury, 1995: p. 596). This second article showed that these justifications could neither be supported by evidence comparing the experience of US judges and Chapter 19 panelists, nor by unsubstantiated allegations of US court bias (Colares and Bohn, 2007: pp. 220–221). In contrast, the same literature could not explain the 71 percent rate of Canadian agency affirmance observed in Chapter 19 review results (pp. 214–215). The article then posited and explained different rationales for such disparities in Chapter 19 outcomes, including conflicting viewpoints over trade matters within the US government, the Canadian ability to effectively influence NAFTA panel processes

⁸ *Pesquera Mares Australes LTDA v United States*, 266 F.3d 1372, 1381 (Fed. Cir. 2001) (quoting *United States v Mead Corp.*, 533 US 218, 230 (2001)). The CAFC has also held that the same high level of deference applies to Commerce’s regulations that are adopted following notice-and-comment rulemaking. *Koyo Seiko Co. v United States*, 258 F.3d 1340, 1347 (Fed. Cir. 2001).

⁹ Commerce and ITC reasonable interpretations of US trade statutes have long been afforded deference under *Chevron*. See *Georgetown Steel Corp. v United States*, 801 F.2d 1308, 1318 (Fed. Cir. 1986) (reviewing Commerce); and *Am. Lamb Co. v United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986) (reviewing ITC).

¹⁰ Accord *Certain Softwood Lumber Products from Canada*, ECC No. 94-1904-01USA (Ex. Chall. Com. 3 August 1994) (Wilkey, J., dissenting) (stating that panelists “are not experts in the field of judicial review of agency action” because “they do necessarily have any familiarity whatsoever with the standards of judicial review under United States law”).

and outcomes, and ideological and structural features of Chapter 19 review (pp. 225–233).

This second article formulated a Chapter 19 capture theory that focuses on differences in the relative importance of bilateral trade to Canada and the United States. It acknowledged that, “possibly no Canadian economic or foreign policy issue exceeds trade with the United States in political importance in Canada” (p. 229). Indeed, Canada’s exports to the United States account for 81 percent of the country’s total exports and 27 percent of its GDP.¹¹ In contrast, trade with Canada “is not even a top foreign policy priority of the [current] US President, let alone a top political priority” (p. 229). In 2005, exports to Canada were just 1.7 percent of the US GDP—about 1/15 the proportionate share of economic activity.¹² Canada has consistently maintained a large and growing trade surplus with the United States.¹³

The article then concluded that, as a motivated sovereign government, Canada constitutes the ideal environment for “collective action”, with Canadian politicians and government agencies acting in coordination with different export sectors (Colares and Bohn, 2007: p. 230). Although recognizing that the US federal government possesses much greater resources overall than its Canadian counterpart, the article suggested that the predominance of a pro-trade liberalization ideology in US political circles and the nominally egalitarian structure of Chapter 19 have neutralized these advantages (p. 230). To support the theory that Canadian interests have “captured” the Chapter 19 dispute settlement system, the article provided examples of political action, including Canada’s exercise of careful control over the appointment of its panelists, and attempts to influence the mindset of US panelists through concerted public relations campaigns (pp. 230–233).

IV. HYPOTHESES, DATA DESCRIPTION AND METHODOLOGY

A comparison among cases litigated before the two adjudicatory systems reveals that less developed countries (LDCs) initiated US court challenges anywhere between 39 percent (65 of 168 cases brought by LDCs alone) and 46 percent (77 of 168 cases brought with developed countries as co-plaintiffs) of the time, while Mexico, NAFTA’s single LDC, did so only about 24 percent of the time (10 of 41

¹¹ See *Statistics Canada, Gross Domestic Product, Income-Based* (2005 data), available at: <www40.statcan.ca/101/cst01/index.htm> (last visited 4 December 2007); *Statistics Canada, Imports, Exports, and Trade Balance of Goods on a Balance-of-Payments Basis, by Country or Country Grouping* (2005 data), available at: <www40.statcan.ca/101/cst01/index.htm> (last visited 4 December 2007). See also World Bank, *Total GDP 2005*, available at: <<http://devdata.worldbank.org/external/CPProfile.asp?PTYPE=CP&CCODE=CAN>> (last visited 4 December 2007).

¹² See US Census Bureau, *Trade in Goods (Imports, Exports, and Trade Balance) with Canada*, available at: <www.census.gov/foreign-trade/balance/c1220.html> (last visited 4 December 2007); US Central Intelligence Agency, *World Factbook—United States*, available at: <www.cia.gov/cia/publications/factbook/geos/us.html#Econ> (last visited 4 December 2007).

¹³ See *Statistics Canada, Imports, Exports, and Trade Balance of Goods on a Balance-of-Payments Basis*, as note 11 above. See also US Census Bureau, *Trade in Goods*, *ibid.*; US Census Bureau, *US Trade in Goods and Services—Balance of Payments (BOP) Basis* (2006), available at: <www.census.gov/foreign-trade/statistics/historical/gands.pdf>.

cases).¹⁴ As type of import is concerned, NAFTA involved a greater percentage of commodity-related litigation (51 percent or 21 of 41 cases) than the US court system (44 percent or 74 of 168 cases). In sum, NAFTA review has involved more commodity-related but less LDC litigation than review in the US court system.

These statistics require inquiry into whether differences in the type of merchandise and identity of the litigant—or a combination of the two—might account for the higher rate of success that agencies have achieved in one adjudicatory system over the other. One alternative causation argument, for example, posits that as commodities typically comprise the bulk of LDC exports, and LDC litigation constitutes a larger share of CIT/CAFC cases, the greater rate of agency success in this system may be linked to the fact that agencies are often litigating against adversaries with limited resources and therefore win more cases.¹⁵ This competing theory, if true, could explain why the two adjudicatory systems have significantly different rates of agency affirmance, and, thus, would ultimately weaken the Chapter 19 capture theory proposed earlier.¹⁶

A. STATEMENT OF HYPOTHESES AND SOME METHODOLOGICAL CONSIDERATIONS

As explained above, in applying US trade remedy law, Commerce and the ITC issue determinations that either establish or deny the imposition of AD/CVD remedies to imports deemed to be within the scope of their investigations. Indeed, decisions regarding duty rates or scope (Commerce) and injury (ITC) constitute the core of these agencies' determinations and are the focus of subsequent "appellate" adjudication.¹⁷

To empirically verify whether commodity-related or LDC-initiated agency challenges can explain the greater percentage of agency affirmances in the US judicial system (in comparison with NAFTA review), I looked at US agencies' AD/CVD rate, scope and injury decisions before and after court review.¹⁸ For purposes of this study, an agency "win" is either an outright affirmance by the CIT or CAFC or an affirmance

¹⁴ As I discuss below, the data on US judicial decisions comes from a random sample, not the entire population of cases in the period of study. No theoretical reason suggests the occurrence of major fluctuations in the number of LDCs in the overall population of cases. In contrast, this study examined the entire universe of Chapter 19 decisions.

¹⁵ A similar point might be made with respect to some commodity exporters in developed countries as explained in section IV.A. below.

¹⁶ Indeed, the greater frequency of commodity cases at NAFTA might not be associated with more agency wins because the majority of these commodities originate in Canada, a developed nation that has not hesitated to sponsor legal representation and public relations campaigns on behalf of its export industries. See, e.g., *Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75917 (20 December 2004) (final results of CVD administrative review) (Commerce Decision Memorandum, dated 13 December 2004, at 24–25 and 123 (Cmt. 48), and 30 and 137 (Cmt. 55)) (determining the countervailability of Canadian government litigation-related payments to Canadian trade associations engaged in the softwood lumber dispute), available at: <<http://ia.ita.doc.gov/frn/summary/canada/E4-3748-1.pdf>> (last visited 4 December 2007).

¹⁷ Technically, challenges to US agency decisions are filed as civil actions before the CIT under 28 U.S.C. § 1581. Henceforth, unless otherwise indicated, the terms "appeal" or "appellate" are used in a non-technical sense to refer to any agency challenge before US courts or NAFTA panels.

¹⁸ To facilitate the flow of text, when I use the term "rate(s)", the reader should understand that I might also be referring to decisions about the scope of an order. For substantive, not textual, reasons explained in the text below, injury determinations are also subsumed under the general label "rate" decisions.

of a determination on remand that leaves the original rate undisturbed. Conversely, a “loss” occurs whenever the rate changes as a result of review. Examining the quantifiable aspects of such decisions once judicial review is completed allows one to test the following two hypotheses:¹⁹

*H*₁: Commodity-related litigation in US courts is more likely to result in US agency affirmances than non-commodity-related litigation; and

*H*₂: LDC-initiated litigation in US courts (commodity-related or not) is more likely to result in US agency affirmances than litigation not involving LDCs.

The first hypothesis tests whether the outcome of judicial review is influenced by the type of merchandise on which an AD/CVD rate has been imposed. Assuming *ceteris paribus* conditions, if one detects statistically significant differences in agency affirmances between commodity-related and non-commodity-related litigation, one can then surmise that type of merchandise has a systematic impact on the outcome of litigation. Specifically, if litigation involves commodities—a traditional export from LDCs and from mature industries in developed countries—the argument is that agencies have a higher likelihood of success because they are litigating against plaintiffs in less dynamic sectors, possibly with fewer legal resources.

Research on intra-industry trade in the international economics sub-discipline has long recognized the frequency with which developed countries export and import the “same” commodities to each other (Grubel and Lloyd, 1975: p. 14). Such trade arises because commodities are often similar but not identical. Since some of these commodity cases involve developed countries appearing as plaintiffs or co-plaintiffs, further filtering through interaction variables is required to isolate a supposed LDC “effect” on litigation involving commodities. Alternatively, in light of the existence of non-commodity LDC cases in the US court sample (35 of 168 cases),²⁰ the second hypothesis may be viewed as a preferred method of gauging the overall impact of LDC litigation on agency success.

The second hypothesis directly tests whether the status of a litigant, as an LDC, has an impact on the outcome of judicial review. By examining whether rates remain the same as a result of litigation involving LDCs (in comparison with litigation not involving LDCs), one attempts to detect whether a particular statistically significant trend in agency affirmances (or reversals) exists. Indeed, if LDC-initiated cases are more likely to result in agency affirmances, one can then conclude that type of litigant has an effect on the outcome of litigation. Should this hypothesis be confirmed, the resource-poor argument would be vindicated, although one would no longer be looking only at commodities.

¹⁹ Technically, “[t]he hypothesis that is actually tested is . . . the *null hypothesis*”, which generally states that “there is no difference between [the two] groups [studied] or relationship between the variables . . .” (Blalock, 1979: p. 156). Accordingly, in this study, the “null” states that there is no relationship between the independent variable and the dependent variable described in each research hypothesis.

²⁰ See Tables B1 and A2 in Appendix I.

However, if neither hypothesis can account for the higher rate of agency affirmances in federal courts, then effective (rather than nominal) adherence to the *Chevron* doctrine and other principles of administrative review remain the most compelling explanation to the more deferential pattern of review in the US court system (Colares, 2008, p. 190). While it is possible that some unknown factual distinction accounts for the difference in NAFTA outcomes, to date no factor has been identified that would cause the outcome of trade appeals involving Canada and Mexico to differ from appeals involving other countries other than the earlier presented Chapter 19 capture theory. Should the above hypotheses fail, then the two rationales above—(a) different review postures; and (b) political-economic capture—would remain the most compelling explanations for Chapter 19's development of a parallel and divergent style of agency review. Still, the statistical analysis presented below can only serve to corroborate or refute the factors expressly tested within the scope of this article.

B. DATA AND METHODS

1. *Obtaining Data on US Judicial Outcomes*

To be consistent with prior methodology, I collected data covering completed results of CIT/CAFC review in the period from 1 January 1989 to 31 December 2005.²¹ These results focused on determinations made by Commerce and the ITC. The two main sources of primary data were (a) the United States Court of International Trade Reports (1989–1999),²² and (b) the websites of the CIT (1999–2005),²³ the CAFC and the Georgetown Law Library (1995–2005), which contain all decisions by these courts during the relevant period.²⁴ With respect to CIT/CAFC opinions, I looked only at trade remedy cases, discarding other types of litigation, such as appeals of Customs decisions to the CIT/CAFC and appeals of government contracts, patents, trademarks, and certain money claims against the US government to the CAFC. I also examined the effects of CAFC reversal of CIT decisions. After coding each decision, I monitored subsequent developments on remand by looking at agency redeterminations according to the Case File Number assigned at the CIT.

Because the CIT issues on average more than 120 decisions regarding trade remedy determinations each year, I developed an algorithm that allowed me to restrict

²¹ Occasional references to NAFTA binational panel results are based on data collected separately on 42 completed Chapter 19 cases reviewing US agencies' determinations during the same period of the study. Further details on the collection and coding of the NAFTA data are provided in Colares (2008), pp. 9–11.

²² *United States Court of International Trade Reports: Cases Adjudged in the United States Court of International Trade*, vols 13–23 (1989–1999).

²³ Court of International Trade website: <www.cit.uscourts.gov/slip_op/slip-op.html> (last visited 4 December 2007).

²⁴ Court of Appeals for the Federal Circuit website: <www.fedcir.gov/dailylog.html> (last visited 4 December 2007); Georgetown Law Library website: <www.ll.georgetown.edu/federal/judicial/cafed.cfm> (last visited 4 December 2007).

the size of the sample to a manageable proportion while preserving randomness. This algorithm is based on the last five digits of the “Case File Number” randomly assigned to all initial CIT case filings. If the sum of these digits divided by three yielded an integer, the case entered the sample. To allow for occasional comparisons with NAFTA results, procedural decisions, including requests for injunctions, mandamus, and motions for rehearing were dropped from the sample, since NAFTA panels do not entertain such motions (NAFTA 1993, Article 1904(12)(a)).

The initial agency “rate” was obtained either from the Federal Register notice communicating the results of the agency’s final determination or from the court’s opinion. To obtain information on rates when the CIT did not affirm, I searched the Federal Register database for information pertaining to agencies’ redeterminations on remand.²⁵ When no information could be obtained through such means, I contacted the Office of the Clerk of the CIT and requested information concerning these specific remands. This was particularly necessary for remand redeterminations issued between 1 January 1989 and 16 May 1997, because the Department of Commerce has not published its remand results for this period and in some cases may not retain them. Remand redeterminations for the relevant cases in the remaining period of the sample were obtained from Commerce’s Website.²⁶ However, because information relevant to some of these cases was proprietary, I was not granted access to their remands and could not reach a decision with respect to rates for such cases. Consequently, these cases were excluded from the sample.

Following data collection from these primary sources, each case was coded for purposes of hypothesis testing. To include ITC cases within the sample, I converted review results from injury determinations into a rate-based approach. Because of the binary nature of injury determinations in US trade remedy law, final judicial or NAFTA review of affirmative injury determinations can result in either affirmance or revocation of the underlying AD/CVD duty order (19 U.S.C. §§ 1671(a) and 1673). Therefore, an affirmance of an affirmative injury determination was coded as a decision that does not alter the rate, while a final decision vacating or calling for the revocation of a prior affirmative injury determination on remand means that the rate is in effect reduced (i.e., the rate actually disappears) as a result of the order being revoked. Accordingly, final affirmance of a negative injury determination was interpreted as a decision that leaves the rate unchanged (i.e., the rate remains at zero as no order imposing offsetting duties exists), while a court or panel-mandated remand that subsequently resulted in the ITC issuance of an affirmative injury redetermination does count as a change in rates, since duty rates will necessarily be imposed, and rates will change from zero upwards.

²⁵ Federal Register Database, available at: <www.gpoaccess.gov/fr/index.html> (last visited 4 December 2007).

²⁶ See ITA website: <<http://ia.ita.doc.gov/remands>> (last visited 4 December 2007).

To test whether the binary independent variables—namely, commodity or non-commodity litigation and litigant identity (i.e., LDC-initiated versus non-LDC-initiated litigation)—have a statistically significant impact on the binary dependent variable, “rate status after review”, all decisions were coded in conformity with each variable’s categories. For coding purposes, commodities were distinguished from non-commodities based upon the *MIT Dictionary of Modern Economics*’ definition of commodity. Specifically, a merchandise qualifies as a commodity if it is (i) a “raw foodstuff or material”; (ii) “widely traded internationally in organized markets” (*MIT Dictionary*, 1983: p. 68).²⁷ With regard to litigants’ status, with the exception of Mexico, countries were classified as LDCs if they were neither OECD members nor former members of the Soviet communist bloc. A litigant’s status as an LDC or non-LDC was determined as of the date it filed its challenge with the adjudicating body.

2. *Probit Regressions and Fisher’s Exact Tests*

To the extent that both hypotheses involved binary response variables, the assumptions of ordinary least squares (OLS) estimation are violated and require another method of estimation (Gujarati, 2003: p. 594). Each of the US judicial review models tested was fitted by maximum likelihood (ML) regression.²⁸ However, when cross-tabulations between binary predictors and binary outcome variables revealed the presence of empty or small cells and because the small-sample behavior of ML estimators is “largely unknown”, Probit regression results were supplemented with Fisher’s Exact Tests (Gujarati, 2003: p. 608, n. 30).

C. RESULTS

1. *First Hypothesis: Commodity-related Litigation in US Courts is More Likely to Result in US Agency Affirmances Than Non-commodity-related Litigation*

To test this hypothesis, I looked at whether the rates prevailing following the completion of all review remained the same or changed (upwards or downwards)

²⁷ This definition proved to be the most operationally accurate definition available, as alternative definitions were overbroad and thus unworkable. See, e.g., John Eatwell *et al.* (eds), *The New Palgrave: A Dictionary of Economics* (London: Macmillan, 1996), quoting *The Oxford English Dictionary*’s definition of commodity as “a thing produced for use or sale, an article of commerce, an object of trade”.

²⁸ ML estimation produces parameters that have the greatest likelihood, hence the label “maximum likelihood”, of obtaining the observed sample results, assuming the assumptions of the model are satisfied. (Long and Freese, 2006: p. 76). Because all models tested had a single regressor, “X”, they can be generally described by the following equation:

$$\Pr(Y=1|X)=\Phi(B_0+B_1X_1),$$

where Φ is the cumulative standard normal distribution function (with zero mean and unit (= 1) variance) (Gujarati, 2003: p. 608 n. 30).

depending on the type of product involved in the litigation.²⁹ Among the 94 non-commodity-related cases in the sample, 62 percent (58 cases) resulted in no change in the agency-determined rate after review, while 38 percent (36 cases) resulted in a different rate. In contrast, among the 74 cases involving commodities, 76 percent (56 cases) did not change the rate imposed by the agency. Significantly, commodity-related cases led to changes in the originally assigned agency rate 24 percent (18 cases) of the time.³⁰ Initially, these raw results seem to suggest that the change from non-commodity to commodity-based litigation leads to an increase, albeit small, in the probability of rates remaining the same (i.e., agency affirmances). However, these differences are not statistically significant ($p = 0.67$, two-tailed test).

Table 1 reports the results of Probit regressions that test the influence of different pure and interaction commodity-based variables on the outcome variable, “rate Status after review”. The models that produced results included all cases in the sample. Unlike the purely descriptive analysis of percentages, these models show that commodity-based challenges are not more likely to result in agency wins. None of these models or their regressors was statistically significant at the 0.05 probability level.

Remarkably, the model that came closest to statistical significance featured “commodity-related litigation” as its unfiltered regressor. Subsequent refinements designed to capture the interaction of commodity-related litigation with the presence of LDCs (allegedly, the agencies’ “weakest” opponents), multiple country litigation, or litigation involving LDCs and developed countries appearing as co-plaintiffs resulted either in statistically insignificant models (and regressors) or failed to run altogether. Yet, if one adopted a 0.10 p -value and thus “found” a commodity “effect”, one would still have to acknowledge the statistical insignificance of the model that directly tests the relationship between the commodity interaction with LDC participation and agency affirmances (i.e., the *cmdtldc* model). The realization that a putative commodity effect is sensitive to a model specification that also takes into account the presence of “weaker” litigants has profound effects for the argument that commodity cases in US courts are “easier” cases (for US agencies) because they often involve LDC participation. Once the link between commodity litigation and LDC participation is broken, commodity-related litigation can no longer be invoked as a competing explanation for the disparity between US judicial and NAFTA review.

Moreover, except for one interaction variable, “Commodity Given Multiple Country Litigation” ($p = 0.031$), Fisher’s Exact Tests performed on cross-tabulations between the independent variables above and “Rate Status after Review” produced no

²⁹ That is, rates established in the Department’s original final determinations constitute the baseline for rate comparisons throughout this study. For a number of reasons, not all relevant cases were included in the reported number of observations. An otherwise relevant case was excluded where either (a) the final disposition on review did not occur before 31 December 2005; (b) the information regarding rates after remand was not available, as explained above in IV.B.1; or (c) the final disposition of a case, though occurring at a later year, was recorded earlier (to avoid the risk of double-counting).

³⁰ See Table A1 in Appendix I.

TABLE 1: MODELS OF RATE OUTCOMES AFTER JUDICIAL REVIEW

	N	Likelihood Ratio (p-value)	Pseudo R2
<i>Probit Regressors based on Commodity-Related Litigation:</i>			
commodity-related litigation (“cmdt”) 0.206 (0.054)	168	3.76 (0.052)	0.018
cmdt given LDC participation in litigation (“cmdtldc”) 0.241 (0.178)	168	1.85 (0.174)	0.009
cmdt given multiple country participation in litigation (“cmdtmc”) — (—)	158	— (—)	—
cmdt given less developed and developed country participation in litigation (“cmdtldcdc”) — (—)	161	— (—)	—

Notes: Variable standard errors are presented below variables. Variable and model p-values are represented in parentheses. The models were estimated by using the “probit” command in Stata (v.9.2). The two last models produced did not run, so no results are reported. Their regressors were dropped because one cell (cmdtmc/rate change and cmdtldcdc/rate change) had zero cases.

statistically significant results (all tables are reported in Appendix I).³¹ As Table A3 shows, no commodity case involving multiple country-plaintiffs resulted in changes to the agency-imposed rate (i.e., all 10 cases resulted in agency affirmances). Although statistically significant, the impact of commodity cases involving multiple country-plaintiffs on the likelihood of rate changes occurs in a direction opposite to that postulated by the research hypothesis. Specifically, one would expect that the appearance of multiple countries as plaintiffs in commodity cases would lead to more, not less, rate changes than in cases when there is but one country litigating against the agency. Presumably, countries challenging an agency determination increase their chances of success when they pool their resources. Yet, of these 10 commodity/multiple country cases, seven involved the participation of developed countries—the supposedly “stronger” litigants—as co-plaintiffs with LDCs, without any success in changing the agency-set rates.³² Thus, the notion that commodity-exporting LDCs

³¹ For cmdt, $p = 0.067$. For cmdtldc, $p = 0.252$. For cmdtldcdc, $p = 0.098$. See Tables A1, A2 and A4.

³² See *US Steel et al. v United States et al.*, 873 F. Supp. 673 (Ct. Int'l Trade 1994) (Case File No. 93-09-00564-INJ); *Kem-Liebers USA Inc. v United States et al.*, 19 C.I.T. 87 (Ct. Int'l Trade 1995) (Case File No. 93-09-00552); *British Steel PLC v United States et al.*, 27 F. Supp. 2d 209 (Ct. Int'l Trade 1998) (Case File No. 93-09-00558-CVD; Case File No. 93-09-00570-CVD); *Acciai Speciali Temi SpA et al. v United States et al.*, 118 F. Supp. 2d 1298 (Ct. Int'l Trade 2000) (Case File No. 99-06-00363); *Titanium Metals Corporation v United States et al.*, 155

tend to fare worse in litigation—already refuted in the hypothesis testing the relationship between Commodity Given LDC Participation in Litigation and Rate Status ($p = 0.252$)—is subject to another qualification: litigating with commodity-exporting developed countries does not affect an LDC’s chance of success against the agency.

These results indicate that US judicial review of US agency-determined AD/CVD rates is not affected by the type of merchandise subject to litigation. The effect of interactions between commodity litigation and type and/or quantity of litigants also failed to produce statistically significant results. Similarly, no relevant commodity-based Probit model or regressor³³ was significant when tested with Chapter 19 review data.³⁴ However, because the population of disputes adjudicated before the Chapter 19 system is small (41 cases), preferential reliance was placed on Fisher’s Exact Tests over Probit regression results (Long, 1997: p. 54). All cross-tabulations between commodity-based independent variables and Rate Status produced statistically insignificant results.³⁵

That commodity-related litigation does not correlate with outcomes arising from either adjudicatory system indicates that the demonstrated differences between results under these two systems are attributable to some other cause. Whether the greater rate of agency affirmances under the US system (i.e., 68 percent v 34 percent at NAFTA) can be explained by the greater amount of LDC-initiated litigation—regardless of type of merchandise—is examined below.

2. *Second Hypothesis: LDC-initiated Litigation in US Courts is More Likely to Result in US Agency Affirmances Than Litigation Not Involving LDCs*

LDCs challenged US agency AD/CVD determinations in at least 39 percent of the cases in the random sample (65 of 168 cases). This proportion increases to 46 percent if one counts cases brought by LDCs with developed countries as co-plaintiffs. Because the Chapter 19 system has reviewed a lower proportion of LDC-initiated cases (24% percent) this difference can be argued as a potential source of the discrepancy in agency wins before the two adjudicatory systems. This hypothesis directly tests whether the greater frequency of LDC challenges in US court adjudication can explain the higher rate of US agency affirmances.

cont.

F. Supp. 2d 750 (Ct. Int’l Trade 2001) (Case File No. 98-09-02847); *Nucor Corp. et al. v United States et al.*, 318 F. Supp. 2d 1207 (Ct. Int’l Trade 2004) (Case File No. 02-00612). Case File Numbers are indicated here for purposes of illustrating the algorithm used to randomly select cases for the US court sample.

³³ Regressions using commodity/multiple county-interaction regressors could not be tested in the NAFTA dataset, because, to date, no Chapter 19 panel has heard a challenge involving more than one NAFTA complaining country.

³⁴ Regressing “Rate Status” first against *cmdt* and then against *cmdtldc* (i.e., the interaction variable) produced statistically insignificant models (likelihood ratio/*p-value*) = 2.07/(0.151) and 0.08/(0.771)) and regressors (*s.e./p-value*) = 0.411/(0.154) and 0.607/(0.770)).

³⁵ For *cmdt*, $p = 0.197$. For *cmdtldc*, $p = 1.000$. See Tables A5 and A6. Table A7 is discussed below in section IV.D.

As in the first hypothesis, Probit regression results were supplemented with Fisher's Exact Tests. I looked at whether the rates prevailing upon the completion of all review remained the same or changed (upwards or downwards) depending on the type of plaintiff involved in the litigation. Among the 91 cases in the sample that did not involve the participation of LDCs, 69 percent (63 cases) resulted in no change in the agency-determined rate after review, while 31 percent (28 cases) resulted in a different rate. In contrast, when LDCs participated in litigation (77 cases), rates remained the same 66 percent of the time (51 cases). LDC-sponsored challenges produced changes to original agency rates in 34 percent of the cases (26 cases). In relative percentages, the participation of LDCs in litigation produced only a slight variation in case outcomes. Remarkably, disputes involving LDCs resulted in more rate changes (i.e., agency reversals) than litigation in which no LDC participated.

That cases involving LDCs have more often led to rate changes could be attributed to a "pooling effect", a result of LDC litigants combining their legal resources amongst themselves and/or with more developed countries. Table 2 reports Probit regression results testing the influence of different pure and interaction LDC-based regressors on the outcome variable, "Rate Status". These models show that, regardless of their composition, adjudications involving LDCs are not more likely to result in agency wins. None of these models or their regressors were statistically significant.

TABLE 2: MODELS OF RATE OUTCOMES AFTER JUDICIAL REVIEW

	N	Likelihood Ratio (p-value)	Pseudo R2
<i>Probit Regressors based on LDC-Initiated Litigation:</i>			
LDC participation ("ldcpart") 0.202 (0.679)	168	0.17 (0.679)	0.001
LDC participation given multiple country litigation ("ldcmc") 0.384 (0.284)	168	1.20 (0.273)	0.006
LDC-only litigation ("ldconly") 0.206 (0.476)	168	0.51 0.002	(0.476)
LDC-appearing-alone cases ("ldcalone") 0.207 (0.295)	168	1.10 (0.295)	0.005
LDC participation given developed country involvement in litigation ("ldcdc") 0.407 (0.578)	168	0.32 (0.575)	0.002

Notes: Variable standard errors are presented below variables. Variable and model p-values are represented in parentheses. The models were estimated by using the "probit" command in Stata (v.9.2).

Fisher's Exact Tests performed on cross-tabulations between the independent variables and "Rate Status" also failed to produce statistically significant results (all tables are reported in Appendix I).³⁶ Examining the interaction between LDC involvement in litigation and other potential factors, such as the pooling effect when (a) LDCs co-litigate; or (b) they co-litigate with developed countries, reveals that LDCs did not necessarily increase their chances of success through multi-party litigation. In fact, LDCs were most successful in changing the US agency-assigned rate when litigating as lone plaintiffs (37 percent of cases).³⁷ Notably, lone-LDC plaintiffs won a greater percentage of challenges than developed countries (31 percent of cases).³⁸

The failure to detect statistically significant results in these tests indicates that US judicial review outcomes are not affected by the type of litigant challenging US agencies. The lack of statistical significance also occurred in tests performed on data from all Chapter 19 decisions. Regressing "Rate Status" against "ldcpart" failed to produce a statistically significant model.³⁹ As explained earlier, when analyzing the NAFTA sample, I preferred to rely on Fisher's Exact Tests.⁴⁰ Tabulating type of litigant and Rate Status also failed to produce statistically significant results.⁴¹

As in the first hypothesis, the set of tests used to detect whether the alleged causal factor (i.e., type of litigant) impacts final outcomes yielded negative results in both US court and Chapter 19 litigation. These results demonstrate that LDC involvement in litigation cannot be the source of the observed differences in agency affirmance rates between the two adjudicatory systems.

D. DOES THE POLITICAL SALIENCE OF CERTAIN COMMODITY CASES ACCOUNT FOR NAFTA'S HIGHER RATE OF AGENCY REVERSAL?

Conceivably, one could argue that a dispute resolution system predicated on free trade exists to correct the potential political "tilt" of certain agency investigations. Under this view, the political relevancy of certain "big" commodity disputes, such as *Softwood Lumber*, *Pork* and *Wheat*, might explain why US agencies were reversed frequently at NAFTA. Generally, such agency bias allegations are based on insights deriving from the theory of agency capture. This theory proposes that large firms or concentrated industries, as is typical in the commodity sector, are especially prone to rent-seeking behavior as they face low marginal costs of political action and are able to extract high marginal benefits from filing requests for trade remedies (Carpenter, 2004: p. 615; Olson, 2005: p. 1965). As a result of their pursuit, trade-remedy adjudication at

³⁶ For ldcpart, $p = 0.741$. For ldemc, $p = 0.391$. For ldonly, $p = 0.501$. For ldalone, $p = 0.309$. For ldcde, $p = 0.753$. See Tables B1–B5.

³⁷ Compare Table B4 with Tables B1–B3 and B5.

³⁸ See Tables B1 and B4.

³⁹ Model's likelihood ratio/(p -value) = $0.10/(0.749)$. Regressor's s.e./ p -value = $0.476/(0.750)$.

⁴⁰ See section IV.C.1. (quoting Long).

⁴¹ For cmdt, $p = 0.197$. For cmdtdc, $p = 1.000$. See Tables A5 and A6.

the agency level has been described as being dominated by political considerations. (Finger, 1993a: p. viii).

However, as an explanation for the behavior of Chapter 19 panels, the agency bias argument has flaws. It does not explain, for instance, why US courts applying the same law as NAFTA panels have not reversed these allegedly biased agency decisions, unless, of course, one is prepared to assume that US courts are equally biased. To postulate that US courts have failed to correct such bias because they themselves have been captured is problematic. Both CIT and CAFC judges have lifetime appointment and enjoy other institutional prerogatives that shelter them from influence (US Constitution Article 3, § 1). An unusual statute restricts the number of CIT judges from any one political party, so capture of both political parties would be required (28 U.S.C. § 251(a)). Furthermore, anyone hoping to capture the CIT would also have to capture the judges of the CAFC. This would be quite unlikely as judicial review of trade cases constitutes only a small portion of the CAFC docket, which also includes patent decisions and claims against the US government (Colares and Bohn, 2007: p. 224, n. 112).

The bias hypothesis also fails to explain why, despite (allegedly) capturing the federal agencies and the federal judiciary, such politically powerful rent-seeking industries have failed to capture US appointments to NAFTA panels to ensure the preservation of their success at the agency level. The United States Trade Representative (USTR), a Presidential appointee, appoints NAFTA panel members. The lower-level bureaucrats, serving at Commerce and the ITC who are allegedly captured by domestic producers, enjoy civil service protection. While the executive branch certainly controls promotions and transfers of these lower-level bureaucrats, a cabinet-level appointee such as the USTR has every incentive to conform to White House desires, as political appointees often seek to maintain their posts or gain promotion to other political appointments. Thus, it seems quite implausible that politically savvy domestic producers would concentrate their lobbying efforts on lifetime-tenured bureaucrats and judges while neglecting to capture the much more “political” panelist appointment process.

Moreover, if US companies can mobilize politically to obtain trade protection from the US government, it is at least equally plausible that foreign companies in alliance with US import-consuming industries are also able to engage in similar rent-seeking efforts, since the costs that duties imposed on them may exceed the benefits that domestic producers derive from them.⁴² Indeed, many investigations of commodities, such as *Softwood Lumber*, *Pork* and *Wheat*, involve at least as concentrated downstream US consuming industries as they involve US producers seeking trade barriers. As members of large or more concentrated industries, foreign

⁴² While a petitioning US industry must independently incur litigation costs associated with prosecuting a trade investigation and must also demonstrate that it has encountered some degree of hardship in order to prevail at the injury stage, a foreign respondent often enjoys the unqualified support of its government.

and domestic importing interests may actually present better candidates for collective action.

Proponents of the bias theory point to Commerce's detection of subsidization or dumping in "nine times out of ten" cases and the ITC's finding of injury in 63 percent of the cases as proof of bias (Finger, 1993b: p. 247). Another study puts Commerce's rate of affirmative determinations on dumping at 97 percent (Lawrence, 1994: p. 2). None of these studies, however, addresses case selection as a potential explanation for these results. For example, they ignore that Commerce provides potential petitioners with an opportunity to submit their evidence privately to officials in an informal prescreening process before proceeding to file a petition (Colares and Bohn, 2007: p. 222, n. 109). This informal review process constitutes the classic selection device, since it eliminates weaker cases (see Priest and Klein, 1984: p. 18). The main result is to render the pool of filed petitions a non-random selection of cases; a process that makes statistics based on final agency determinations unrepresentative of the entire population of potential disputes.

In any event, a final judgment on whether US agencies are "biased" might be influenced by differences in interpretation of the law. For example, even under the assumption that case selection is not a problem, a high percentage of affirmative findings might be supported if such findings are consistent with the intent of Congress, the authority that enacts trade remedy statutes and has vast oversight capabilities over such agencies. However, if agencies impose duties on imports more often than the controlling statute permits or Congress intended, it would make sense to consider these agencies as "biased". The question of whether agencies in their discretion in interpreting and administering the law have been faithful to the intent of the trade remedy statutes lies outside the scope of this article. Yet, at a minimum, one must recognize that high plaintiff or defendant success rates do not necessarily demonstrate bias nor indicate that the laws being applied are irrelevant or meaningless.

Regardless of one's subjective views on the agency bias debate, whether NAFTA's high rate of agency reversal is a response to politically biased agency decision making remains an important empirical question. If NAFTA's overall high rate of agency reversal is sensitive to the removal of some of the most politically salient cases from its docket, then this study's finding that US judicial/NAFTA docket distinctions lack statistical significance and thus cannot account for the difference between the two system's rates of agency reversal adds very little. Worse, it misses a much more important alternative explanation.

To determine if the results are sensitive to alleged political bias at the agency level, I eliminated all NAFTA decisions on challenges to agency duties on *Canadian Softwood Lumber, Pork and Wheat* (seven cases)⁴³ from the population of disputes adjudicated

⁴³ See, e.g., *Hard Red Spring Wheat from Canada*, Panel No. USA-CDA-2003-1904-06 (NAFTA Panel 7 June 2005) (final injury determ.); *Certain Durum Wheat and Hard Red Spring Wheat from Canada*, Panel No. USA-CDA-2003-1904-05 (NAFTA Panel 10 March 2005) (final CVD determ.); *Certain Softwood Lumber Products from Canada*, Panel No. USA-CDA-2002-1904-07 (NAFTA Panel 5 September 2003) (threat of injury determ.);

before the Chapter 19 system.⁴⁴ Given the small size of the population of cases (41 cases), eliminating about 17 percent of such cases provides a rigorous test. Moreover, this is justified not only because every challenge to a US agency final determination on *Canadian Softwood Lumber, Pork and Wheat* has resulted in a reversal by NAFTA dispute settlement, but also because these cases are reputed among the most politically “tilted” agency decisions ever adjudicated by NAFTA.

A comparison of Tables A5 (including all NAFTA cases) and A7 (excluding the seven mentioned cases) shows that removing these politically salient commodity cases resulted in no major shift in the general NAFTA decisional pattern.⁴⁵ In raw percentage terms, the complete dataset shows commodity cases being reversed 76 percent of the time, with the percentage of reversals dropping to 64 percent after removal of these seven cases.⁴⁶ Notably, this is still more than double the rate of agency reversal in US courts in similar commodity cases (24 percent).⁴⁷ Application of Fisher’s Exact Tests on the restricted sample cross-tabulation produced statistically insignificant results, indicating no statistical difference between decisions on commodity and non-commodity cases.⁴⁸ Likewise, a difference of proportions test indicated that the difference between the percentage of commodity case reversals in the population and the restricted sample is not statistically significant.⁴⁹ Thus, the decisional pattern emerging from the limited sample of NAFTA cases is not distinguishable from that emerging from the entire population of cases that includes the most politically sensitive commodity cases. In sum, if NAFTA dispute settlement were reacting to political bias in commodity cases, it certainly did not appear to be deciding non-commodity cases differently. With this alternative capture theory eliminated, this study’s focus on docket differences as the last major potential explanation for the disparity between the two adjudicatory systems is vindicated.

V. SOME THEORETICAL IMPLICATIONS

Because docket differences between Chapter 19 panels and US courts cannot account for their divergent pattern of decisions, a couple of theoretical points are in order. Section III outlined compelling though troubling rationales for the manner in

cont.

Softwood Lumber Products from Canada, Panel No. USA-92-1904-02 (FTA Panel 26 July 1993) (final injury determ.); *Certain Softwood Lumber Products from Canada*, Panel No. USA-92-1904-01 (FTA Panel 6 May 1993) (final CVD determ.); *Fresh, Chilled, and Frozen Pork from Canada*, Panel No. USA-89-1904-06 (FTA Panel 28 September 1990) (final CVD determ.); *Fresh, Chilled, and Frozen Pork from Canada*, Panel No. USA-89-1904-11 (FTA Panel 24 August 1990) (final injury determ.).

⁴⁴ Appendix II, item 1 provides a list of all reversals by Chapter 19 panels during the period of the study. Items 2 and 3, respectively, list all NAFTA reversals and affirmances of US agency determinations involving commodities.

⁴⁵ See Appendix I.

⁴⁶ Compare Tables A5 and A7.

⁴⁷ Compare Tables A7 and A1.

⁴⁸ For cmdt, $p = 0.728$. See Table A7.

⁴⁹ $z = -1.045$, $p = 0.05$.

which the Chapter 19 binational review system has operated. That discussion also explains why at least two NAFTA signatories would find it desirable to create and maintain such an asymmetric system—even absent the sort of alternative explanations discredited in this article. At one extreme, one may interpret these justifications—as most public-choice-minded scholars do—as a result of US politicians’ strategic preferences. Specifically, legislative majorities in the US may prefer a system that clearly does not adhere to its mandate to apply US law if this system allows US politicians to distance themselves from politically unsavory, yet economically “efficient” solutions. Indeed, it has become common in the economic and political science literature (Carter, 2002: p. 1; Cobb, 2007; Feinberg and Kaplan, 1993: pp. 153–154; Prusa, 2005: p. 696; Evenett, 2006: pp. 1–3, 6) to welcome the tendency of NAFTA proceedings to reverse US agencies because they serve (allegedly) as an appropriate check on US “protectionism”.⁵⁰

If that is the case, the divergence could be depicted as the result of the operation of two systems, one that has strictly followed a legal code (US court review), the other having faithfully executed a *sub rosa* political code (Chapter 19 review). Under this scenario, the divergence is less likely to be corrected in the future. Despite its cynicism, this option may not seem as extreme a strategy as the label suggests. True, Chapter 19’s routine agency reversals act as constant reminders to the informed trade constituencies (e.g., domestic industry, importers, labor unions) that, despite assurances of impartiality, NAFTA dispute settlement is focused on keeping the US market open regardless of illegal dumping or subsidization by foreign companies and governments. Yet, a more blunt approach under an FTA, which could achieve similar results, would be the gradual implementation of Canadian and Mexican exemptions from US trade remedy laws. However, the US has rejected this option before, largely due to congressional opposition (Gastle and Castel, 1995: p. 829). This suggests that by endorsing the creation of a bypass to US judicial proceedings, politicians may have instead chosen a less extreme, though still strategically-motivated position: retaining political cover in the language expressed by Chapter 19 (despite its potential adverse consequences to US agency decisions), while refusing to formally exempt Canada and Mexico from application of US AD/CVD laws.

This approach is not without its shortcomings, however. While it might give due credit to the US political equipoise on free trade and thus explain US tacit acquiescence to Canada’s capture of the Chapter 19 system, it does not explain the great deference Chapter 19 has shown to Canadian agency determinations—which almost invariably finds dumping exists (Colares and Bohn, 2007: p. 202). A combination of free-trade

⁵⁰ The perception of the United States and its agencies as protectionist disregards the fact that during 1980–2005, trade remedy investigations covered 0.33 percent of US imports (by value), and affirmative findings applied to only 0.18 percent. See US International Trade Commission, Import Injury Investigations Case Statistics (FY 1980–2005) 1 (2006) (public version), available at <www.usitc.gov/trade_remedy/Report-10-06-PUB.pdf> (last visited 4 December 2007). That the United States would keep a low average tariff rate on dutiable imports of 4.8 percent (1.6 percent if duty free imports are included) only to then arbitrarily impose offsetting tariffs as an exercise in protectionism is hard to fathom. (Jackson *et al.*, 2002: p. 6).

ideology and political savvy on the part of US politicians could not support a system that undermines (some) US export interests by favoring Canadian agencies.

Assuming this is a price Congress and the Executive are ready to pay in light of the overall NAFTA bargain, there remains one major complication. A system that reverses US agency determinations almost twice as often as its domestic courts, with little to zero chance of a successful appeal,⁵¹ would constitute a serious challenge to democratic governance if its decisions fail to reflect popular preferences (Thomas, 2004: p. 14). Indeed, if voters are unable to manifest their preferences to direct politicians toward their trade policy positions and thus cannot effectively express their disapproval of NAFTA (or WTO) decisions, trade policy in the United States can be seen as “primarily the domain of minority economic interest groups” (p. 14). Alternatively, if the US public is content with trade policy and its views coincide with the results of NAFTA adjudication no such democratic void would exist (Hudec, 1993: p. 316).

VI. CONCLUSION

Theoretical and policy considerations aside, the results from both sets of tests examining the first and second hypotheses indicate that competing arguments, such as litigation over a particular type of product or the greater frequency of litigation involving LDCs before US courts, simply cannot explain the difference in outcomes from the two systems of review. Of course, the statistical failure of these competing explanations cannot offer positive proof that the two prior studies were correct in their skeptical view of NAFTA adjudication. They can, however, bolster confidence in their results by eliminating two additional competing hypotheses (Colares, 2008; Colares and Bohn, 2007).

Overall, empirical analysis of US judicial and Chapter 19 review of US agency trade remedy determinations has revealed some important asymmetries. That these adjudicatory systems have applied the same substantive law in such a different manner naturally leads to questions about the role of intrinsic differences among cases being heard under both systems. Indeed, if docket differences could explain the divergence, an argument could be made that the observed asymmetries can find legal support under the same substantive law. Notwithstanding one’s perception of these asymmetries as desirable or otherwise, it is clear, as demonstrated here, that no competing product or litigant specific explanation can account for these discrepancies.

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⁵¹ See discussion at section II.B. and note 7.

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APPENDIX I

TABLE A1: CIT/CAFC

		No	Yes	Total
<i>Rate Status After Review</i>	Same	58 61.70%	56 75.68%	114
	Change	36 38.30%	18 24.32%	54
Total		94	74	n = 168

Fisher’s Exact Test Calculation

Observed Frequencies		Associated p value	
58	56	$P_k + P_{k+1} + P_{k+2} \dots = 0.067$	> 0.05 (Level of statistical significance)
36	18		

TABLE A2: CIT/CAFC

Commodity Given LDC Litigation

		No	Yes	Total
<i>Rate Status After Review</i>	Same	82 65.08%	32 76.19%	114
	Change	44 34.92%	10 23.81%	54
Total		126	42	n = 168

Fisher’s Exact Test Calculation

Observed Frequencies		Associated p value	
82	32	$P_k + P_{k+1} + P_{k+2} \dots = 0.252$	> 0.05 (Level of statistical significance)
44	10		

TABLE A3: CIT/CAFC

DRAFT OF DEC. 20, 2007

Commodity Given Multiple Country Litigation

		No	Yes	Total
<i>Rate Status After Review</i>	Same	104 65.82%	10 100.00%	114
	Change	54 34.18%	0 0.00%	54
Total		158	10	n = 168

Fisher's Exact Test Calculation

Observed Frequencies	Associated p value	
104 10		
54 0	$P_k + P_{k+1} + P_{k+2} \dots = 0.031$	< 0.05 (Level of statistical significance)

TABLE A4: CIT/CAFC

Commodity Given LDC Participation in Litigation with Developed Country

		No	Yes	Total
<i>Rate Status After Review</i>	Same	107 66.46%	7 100.00%	114
	Change	54 33.54%	0 0.00%	54
Total		161	7	n = 168

Fisher's Exact Test Calculation

Observed Frequencies	Associated p value	
107 7		
54 0	$P_k + P_{k+1} + P_{k+2} \dots = 0.098$	> 0.05 (Level of statistical significance)

TABLE A5: NAFTA

Commodity

		No	Yes	Total
<i>Rate Status After Review</i>	Same	9 45.00%	5 23.81%	14
	Change	11 55.00%	16 76.19%	27
Total		20	21	n = 41

Fisher's Exact Test Calculation

Observed Frequencies		Associated p value	
9	5	$P_k + P_{k+1} + P_{k+2} \dots = 0.197$	> 0.05 (Level of statistical significance)
11	16		

TABLE A6: NAFTA

Commodity Given LDC Litigation

		No	Yes	Total
<i>Rate Status After Review</i>	Same	12 33.33%	2 40.00%	14
	Change	24 66.67%	3 60.00%	27
Total		36	5	n = 41

Fisher's Exact Test Calculation

Observed Frequencies		Associated p value	
12	2	$P_k + P_{k+1} + P_{k+2} \dots = 1.000$	> 0.05 (Level of statistical significance)
24	3		

TABLE A7: NAFTA EXCLUDING LUMBER, PORK AND WHEAT DISPUTES

		No	Yes	Total
<i>Rate Status After Review</i>	Same	9 45.00%	5 35.71%	14
	Change	11 55.00%	9 64.29%	20
Total		20	14	n = 34

Fisher's Exact Test Calculation

Observed Frequencies		Associated p value	
9	5	$P_k + P_{k+1} + P_{k+2} \dots = 0.728$	> 0.05 (Level of statistical significance)
11	9		

TABLE B1: CIT/CAFC

LDC in Litigation

		No	Yes	Total
<i>Rate Status After Review</i>	Same	63 69.23%	51 66.23%	114
	Change	28 30.77%	26 33.77%	54
Total		91	77	n = 168

Fisher's Exact Test Calculation

Observed Frequencies		Associated p value	
63	51	$P_k + P_{k+1} + P_{k+2} \dots = 0.741$	> 0.05 (Level of statistical significance)
28	26		

TABLE B2: CIT/CAFC

		No	Yes	Total
<i>Rate Status After Review</i>	Same	102 66.67%	12 80.00%	114
	Change	51 33.33%	3 20.00%	54
Total		153	15	n = 168

Fisher's Exact Test Calculation

Observed Frequencies		Associated p value	
102	12	$P_k + P_{k+1} + P_{k+2} \dots = 0.391$	> 0.05 (Level of statistical significance)
51	3		

TABLE B3: CIT/CAFC

LDC-Only Cases

		No	Yes	Total
<i>Rate Status After Review</i>	Same	72 69.90%	42 64.62%	114
	Change	31 30.10%	23 35.38%	54
Total		103	65	n = 168

Fisher's Exact Test Calculation

Observed Frequencies		Associated p value	
72	42	$P_k + P_{k+1} + P_{k+2} \dots = 0.501$	> 0.05 (Level of statistical significance)
31	23		

TABLE B4: CIT/CAFC

LDC-Appearing-Alone Cases

		No	Yes	Total
<i>Rate Status After Review</i>	Same	75 70.75%	39 62.90%	114
	Change	31 29.25%	23 37.10%	54
Total		106	62	n = 168

Fisher's Exact Test Calculation

Observed Frequencies	Associated p value	
75 39		
31 23	$P_k + P_{k+1} + P_{k+2} \dots = 0.309$	> 0.05

(Level of statistical significance)

TABLE B5: CIT/CAFC

Involvement in Litigation

		No	Yes	Total
<i>Rate Status After Review</i>	Same	105 67.31%	9 75.00%	114
	Change	51 32.69%	3 25.00%	54
Total		156	12	n = 168

Fisher's Exact Test Calculation

Observed Frequencies	Associated p value	
105 9		
51 3	$P_k + P_{k+1} + P_{k+2} \dots = 0.753$	> 0.05

(Level of statistical significance)

APPENDIX II

1. NAFTA Review Reversed the following US Agency Determinations (27 of 41 reviews):

Hard Red Spring Wheat from Canada, Panel No. USA-CDA-2003-1904-06 (NAFTA Panel June 7, 2005) (final injury determ.); *Certain Durum Wheat and Hard Red Spring Wheat from Canada*, Panel No. USA-CDA-2003-1904-05 (NAFTA Panel Mar. 10, 2005) (final CVD determ.); *Certain Softwood Lumber Products from Canada*, Panel No. USA-CDA-2002-1904-07 (NAFTA Panel Sept. 5, 2003) (threat of injury determ.); *Pure Magnesium from Canada*, Panel No. USA-CDA-2000-1904-06 (NAFTA Panel Mar. 27, 2002) (AD sunset review); *Gray Portland Cement and Cement Clinker from Mexico*, Panel No. USA-MEX-99-1904-03 (NAFTA Panel May 30, 2002) (7th AD admin. rev.); *Pure Magnesium and Alloy Magnesium from Canada*, Panel No. USA-CDA-2000-1904-07 (NAFTA Panel Mar. 27, 2002) (CVD sunset review); *Corrosion-Resistant Carbon Steel Flat Products from Mexico*, Panel No. USA-CDA-98-1904-01 (NAFTA Panel Mar. 20, 2001) (3d AD admin. rev.); *Brass Sheet and Strip from Canada*, Panel No. USA-CDA-98-1904-03 (NAFTA Panel July 16, 1999) (AD admin. rev.); *Gray Portland Cement and Clinker from Mexico*, Panel No. USA-97-1904-01 (NAFTA Panel June 18, 1999) (5th AD admin. rev.); *Porcelain-on-Steel Cookware from Mexico*, Panel No. USA-97-1904-07 (NAFTA Panel Apr. 30, 1999); *Fresh Cut Flowers from Mexico*, Panel No. USA-95-1904-05 (NAFTA Panel Dec. 12, 1996) (final AD determ.); *Oil Country Tubular Goods from Mexico*, Panel No. USA-95-1904-04 (NAFTA Panel July 31, 1996) (final AD determ.); *Porcelain-on-Steel Cookware from Mexico*, Panel No. USA-95-1904-01 (NAFTA Panel Apr. 30, 1996) (5th AD admin. rev.); *Leather Wearing Apparel from Mexico*, Panel No. USA-94-1904-02 (NAFTA Panel Oct. 20, 1995) (final CVD determ.); *Live Swine from Canada*, Panel No. USA-94-1904-01 (NAFTA Panel May 30, 1995) (6th AD admin. rev.); *Certain Corrosion-Resistant Carbon steel Flat Products from Canada*, Panel No. USA-93-1904-03 (FTA Panel Oct. 31, 1994) (final AD determ.); *Certain Cut-to-Length Carbon Steel Plate from Canada*, Panel No. USA-93-1904-04 (FTA Panel Oct. 31, 1994) (final AD determ.); *Pure and Alloy Magnesium from Canada*, Panel No. USA-92-1904-04 (FTA Panel Oct. 6, 1993) (final AD determ.); *Certain Softwood Lumber Products from Canada*, Panel No. USA-92-1904-02 (FTA Panel July 26, 1993) (final injury determ.); *Certain Softwood Lumber Products from Canada*, Panel No. USA-92-1904-01 (FTA Panel May 6, 1993) (final CVD determ.); *Live Swine from Canada*, Panel No. USA-91-1904-04 (FTA Panel Aug. 26, 1992) (5th CVD admin. rev.); *Live Swine from Canada*, Panel No. USA-91-1904-03 (FTA Panel May 19, 1992) (4th CVD admin. rev.); *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada*, Panel No. USA-90-1904-01 (FTA Panel May 24, 1991) (final AD determ.); *Fresh, Chilled, and Frozen Pork from Canada*, Panel No. USA-89-1904-06 (FTA Panel Sept. 28, 1990) (final CVD determ.); *Fresh, Chilled, and Frozen Pork from Canada*, Panel No. USA-89-1904-11 (FTA Panel Aug. 24, 1990) (final

injury determ.); *New Steel Rail, Except Light Rail, from Canada*, Panel No. USA-89-1904-07 (FTA Panel June 30, 1990) (final CVD determ.); *Red Raspberries from Canada*, Panel No. USA-89-1904-01 (FTA Panel Dec. 15, 1989) (final AD determ.).

2. NAFTA Review Reversed the following US Agency Determinations Involving Commodities (16 of 27 reversals):
Duram and Hard Red Spring Wheat (June 7, 2005); *Duram Wheat* (Mar. 10, 2005); *Softwood Lumber* (Sept. 5, 2003); *Pure Magnesium* (Mar. 27, 2002); *Pure Magnesium and Alloy Magnesium* (Mar. 27, 2002); *Gray Portland Cement and Cement Clinker* (May 30, 2002); *Brass Sheet and Strip* (July 16, 1999); *Gray Portland Cement and Clinker* (June 18, 1999); *Fresh Cut Flowers* (Dec. 16, 1996); *Certain Cut-to-Length Carbon Steel Plate* (Oct. 31, 1994); *Pure and Alloy Magnesium* (Oct. 6, 1993); *Lumber* (July 26, 1993); *Softwood Lumber* (May 6, 1993); *Fresh, Chilled, and Frozen Pork* (Sept. 28, 1990); *Fresh, Chilled, and Frozen Pork* (Aug. 24, 1990); *Red Raspberries* (Dec. 15, 1989). (4th Administrative Review)
3. NAFTA Review Affirmed the following US Agency Determinations Involving Commodities (5 of 14 affirmances):
Carbon and Certain Alloy Steel Wire Rod from Canada, Panel No. USA-CDA-2002-1904-09 (NAFTA Panel Aug. 12, 2004) (final injury determ.); *Gray Portland Cement and Clinker from Mexico*, Panel No. USA-97-1904-02 (NAFTA Panel Dec. 4, 1998) (4th AD admin. rev.); *Gray Portland Cement and Cement Clinker from Mexico*, Panel No. USA-95-1904-02 (NAFTA Panel Sep. 13, 1996) (3d AD admin. rev.); *Pure and Alloy Magnesium from Canada*, Panel No. USA-92-1904-03 (FTA Panel Dec. 14, 1993) (final CVD determ.); *Pure and Alloy Magnesium from Canada*, Panel No. USA-92-1904-05/06 (FTA Panel Jan. 27, 1994) (final injury determ.).

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