Canadian Centre for Policy Alternatives
October 2018

Saving NAFTA Chapter 19

Was it worth it?

Scott Sinclair

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ISBN 978-1-77125-426-7

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ABOUT THE AUTHORS

Scott Sinclair is a senior research fellow with the Canadian Centre for Policy Alternatives, where he directs the centre's Trade and Investment Research Project. Prior to joining CCPA, Scott was a senior trade policy advisor with the government of British Columbia.

ACKNOWLEDGMENTS

The author wishes to gratefully acknowledge the assistance of Ali Houssein and Jameel Lodhi (from Osgoode Law School's International & Transnational Law Intensive Program) who provided research assistance. Hadrian Mertins-Kirkwood assisted with the charts and figures. Stephen McBride and Bruce Campbell provided helpful comments on a previous draft. Thanks to Gary Schneider and Stuart Trew for editing, Alyssa O'Dell, Stuart Trew, and Katie Raso for communications and Tim Scarth for layout. Any remaining errors are the author's alone.

Saving NAFTA Chapter 19: Was it worth it?

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Was it worth it?

Introduction

The Chapter 19 dispute settlement mechanism played a prominent, perhaps outsized role in the end game of the NAFTA renegotiations. Throughout the talks the Trump administration pressed for its elimination. In its determined, ultimately successful, efforts to save Chapter 19, the Canadian government has made costly concessions to other U.S. demands. Extending monopoly protections for brand-name medicines, eroding supply management for dairy farmers, and failing to escape from unjustified U.S. national security safeguard tariffs on steel and aluminum are just a few of the important trade-offs in the proposed deal.

The little-known Chapter 19 dispute settlement process deserves closer scrutiny. Simply presuming major concessions were justified to save it begs key questions. How effective has it been in providing trade relief for Canadian exporters confronted with U.S. trade remedy actions? What are the alternatives if it were to disappear? For all the controversy surrounding the mechanism, there has been surprisingly little empirical analysis of its effectiveness.

This report seeks to fill that gap by evaluating Chapter 19 outcomes in all cases brought by Canadian exporters against the U.S. trade authorities.

Given Canada's vigorous championing of this process, the results are surprisingly mixed. This report explores whether Canada's efforts to hold onto Chapter 19 at all costs were warranted.

It examines how Chapter 19 has been used since NAFTA was implemented in 1994, reviews general results for all three parties to the agreement and assesses how Canadian exporters have fared using this process to contest U.S. trade remedies against their products.

By evaluating the experience of Canadian exporters in using this tool, the public will be in a better position to assess Chapter 19's worth, decide whether and how strongly it should have been defended, and to weigh its benefits against the costs of the other concessions extracted from Canada in the renegotiated, and now retitled, United States Mexico Canada Agreement (USMCA).

History and background

The binational panel review process in Chapter 19 of the North American Free Trade Agreement (NAFTA) was limited from the outset.

When Brian Mulroney's Progressive Conservative government negotiated the Canada–U.S. Free Trade Agreement (CUSFTA) in the mid-1980s, the overriding objective was to get Canada exempted from U.S. trade remedy actions. U.S. countervailing duty and anti-dumping actions had repeatedly targeted Canadian exports, most notably softwood lumber. The Conservatives, and business supporters, argued that the continuing threat of arbitrary and unpredictable U.S. trade remedy actions made it impossible for North American trade to be truly free or durable.

The Mulroney government, however, failed in its effort to gain an exemption from U.S. trade remedy laws. Even after Canada's chief negotiator Simon Reisman walked out of the talks in frustration, the U.S. continued to rebuff Canada's demands. Finally, with the last-minute intervention of James Baker, then U.S. treasury secretary, Canada was offered a compromise — a binational panel process to review the consistency of U.S. trade remedy rulings with U.S. law.

This process, set out in Chapter 19 of CUSFTA and later incorporated into NAFTA, fell far short of the full exemption sought by Canada. Under Chapter 19's terms, U.S. trade remedy laws would continue to apply fully to Canadian exports and the U.S. could amend its trade laws without Canadian consent.[1] In addition, if a new U.S. trade law or amendment notified and named Canada it would apply to Canadian industries and products. The mandate of Chapter 19 panels was strictly limited to reviewing whether

the investigating authorities of the importing country applied its own trade remedy laws correctly.

As a face-saving gesture toward Canada, CUSFTA called for the creation of a working group mandated to "seek to develop a substitute system of rules for dealing with unfair pricing and government subsidization" (CUSFTA Articles 1906 and 1907). This provision maintained the pretense that a more satisfactory resolution of Canada's concerns about the impact of U.S. trade remedy laws might be forthcoming, but such faint hopes were soon dashed. The working group never met and never issued a report.[2]

During NAFTA negotiations in the mid-1990s, the U.S. called for the binational panel review process to be eliminated. When the dust settled, Chapter 19 was incorporated, with only minor changes, into the North American agreement, with the expectation it would now cover Mexico.[3] As before, the concessions made by Canada and Mexico in areas of vital U.S. corporate interest — such as investment protection, energy and agriculture — made accommodating Chapter 19 palatable to the U.S. This dispute settlement process is unique to CUSFTA and NAFTA and has not been included in other U.S. trade agreements.

Despite Chapter's 19's structural limitations, hopes among Canadian exporters that it might curb the negative impacts arising from the unilateral or arbitrary application of U.S. trade remedy laws have, to a modest extent, been realized. As will be discussed further, Chapter 19 panels have sided with Canadian complainants in a dozen cases, helping them obtain relief from U.S. anti-dumping or countervailing duties.

This success, however modest, has raised the hackles of certain U.S. industry groups, trade authorities and politicians, including the current president and many of his senior trade officials. United States Trade Representative (USTR) Robert Lighthizer has condemned the binational panel review process as an infringement on U.S. sovereignty.

The Trump administration carried that idea through to the 11th hour of the NAFTA renegotiations — as a justification for eliminating Chapter 19. This demand was opposed, and even portrayed as a deal-breaker, by the Canadian government and corporate sector, who managed to maintain the dispute process in the new USMCA.

What is NAFTA Chapter 19 and how does it work?

The Chapter 19 process is one of NAFTA's three main dispute settlement mechanisms. The second is NAFTA's controversial investor–state dispute

settlement mechanism (ISDS) in Chapter 11, which allows foreign investors to challenge government policy measures that run afoul of the treaty's broadly worded investment protections. Canada is the most sued party under NAFTA Chapter 11, having faced numerous lawsuits by U.S. investors against federal and provincial environmental and resource regulations.[4]

The third mechanism is the Chapter 20 state-to-state dispute settlement process, which is used to settle general disputes between governments where one party alleges that another is not complying with their obligations under the agreement. The Chapter 20 process has rarely been used, with only three rulings in NAFTA's history.[5]

NAFTA Chapter 19 involves disputes over the application of trade remedy laws. Such laws are designed to counter the impacts of unfairly traded goods — products that have either been improperly subsidized or dumped (sold at below fair value) in export markets. Trade remedy laws are permissible, but governed under multilateral trade rules (see Annex 1: Countervailing and Anti-dumping Duties). NAFTA Chapter 19 allows an exporter to request that an independent binational panel review the anti-dumping and countervailing duty rulings made by trade authorities of the importing country.

As previously noted, the mandate of a NAFTA Chapter 19 panel is to review whether a trade agency's decision was "in accordance with the anti-dumping or countervailing duty law of the importing Party" (Article 1904.2). The panel can either affirm a final ruling or remand it (send it back) to the administering trade authority for "action not inconsistent with the panel's ruling" (Article 1904.8).

The Chapter 19 process can only be invoked to review *final* determinations of the trade authorities in the importing country. So, for example, Canadian exporters can challenge final determinations of subsidy or dumping by the U.S. Department of Commerce, a final determination of injury by the U.S. International Trade Commission or final decisions related to the regular reviews of ongoing countervailing or anti-dumping orders. This means that by the time a Chapter 19 panel makes its decision, preliminary countervailing or anti-dumping duties may have already been in place for some time and some trade disruption may have already occurred.

Chapter 19 has been described as a hybrid dispute settlement mechanism, because while it is composed of *international* adjudicators, these panels apply *domestic* law.[6] The binational review process replaces judicial review through the courts of the importing party. The NAFTA panel is required to apply the same standard of review and legal principles used in the domestic courts of the respondent country.

As with domestic courts of appeal, Chapter 19 panels are obliged to afford a high degree of deference to the decisions of domestic authorities. Chapter 19 panels cannot consider new evidence, revisit the merits of the case or question the fairness of the trade remedy laws themselves.

The binational panel rulings, however, have legal force. They are binding on the domestic agencies that made the ruling under review. Essentially, they are equivalent to a ruling of a federal appeal court (e.g., the U.S. Court of International Trade or the Canadian Federal Court of Appeal). This contrasts with World Trade Organization (WTO) panel rulings, which are not directly applicable under domestic law. If a member government fails to comply with a WTO ruling, the ruling must be enforced through trade sanctions.

The binational panels are comprised of international trade law experts (usually lawyers) selected from a roster of nominees maintained by each NAFTA party. Two members are selected from the roster of the importing country and two members from the roster of the complainant's country. A fifth member, the chair, is selected by agreement of the two involved governments (Annex 1901.2).

The U.S. insisted on an added layer of review, known as the Extraordinary Challenge Committee (ECC). These committees, composed of judges or former judges, can review cases where a NAFTA party alleges a panel has manifestly exceeded its authority or violated fundamental principles of due process. For an extraordinary challenge to succeed, the ECC must be convinced that the panel decision threatens the integrity of the panel process (Article 1904.13.b). There have been only three extraordinary challenges under NAFTA. In each case the ECC has upheld the Chapter 19 panel decision, albeit with serious caveats in certain instances.

Key trends

General figures on Chapter 19 disputes

Since the implementation of NAFTA in 1994, there have 154 complaints filed under the Chapter 19 binational panel review process (see *Figure 1*). This makes Chapter 19 the most frequently utilized NAFTA dispute settlement process.[7]

Many of these individual complaints relate to a smaller number of underlying trade disputes. A complainant involved in a countervailing duty or anti-dumping dispute will frequently challenge both the final determination on dumping or subsidization as well as the final decision on injury.

FIGURE 1 Running total of all complaints broken down by respondent country

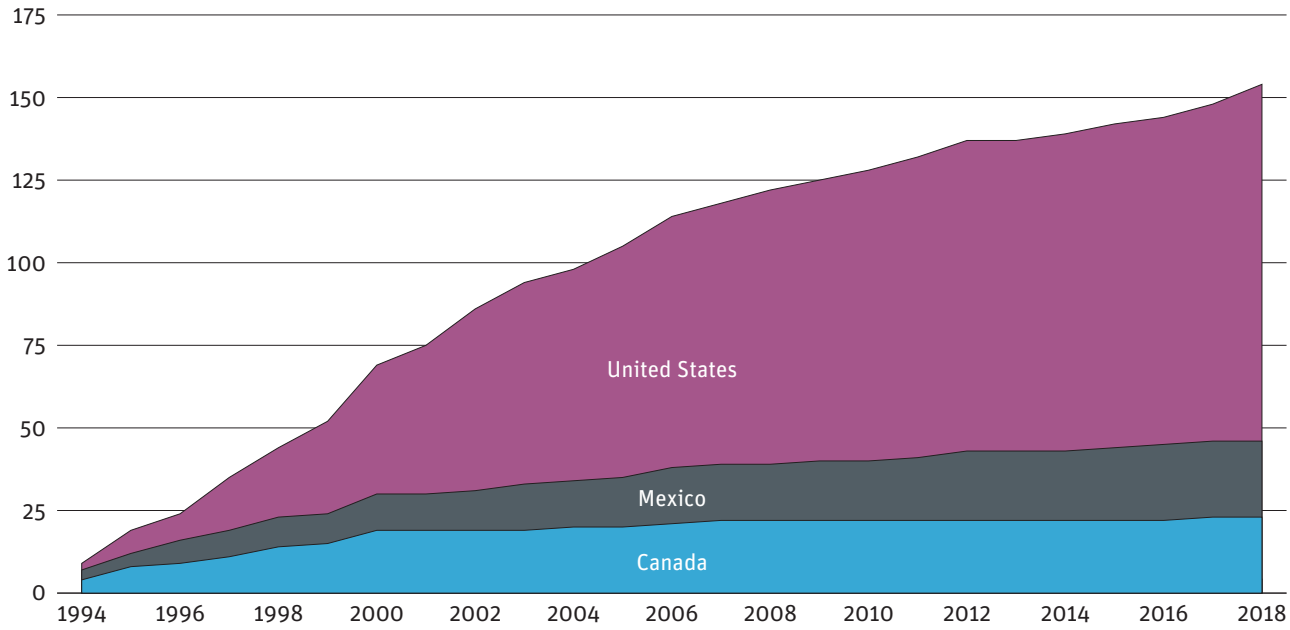


FIGURE 2 Number of Chapter 19 reviews requested over time

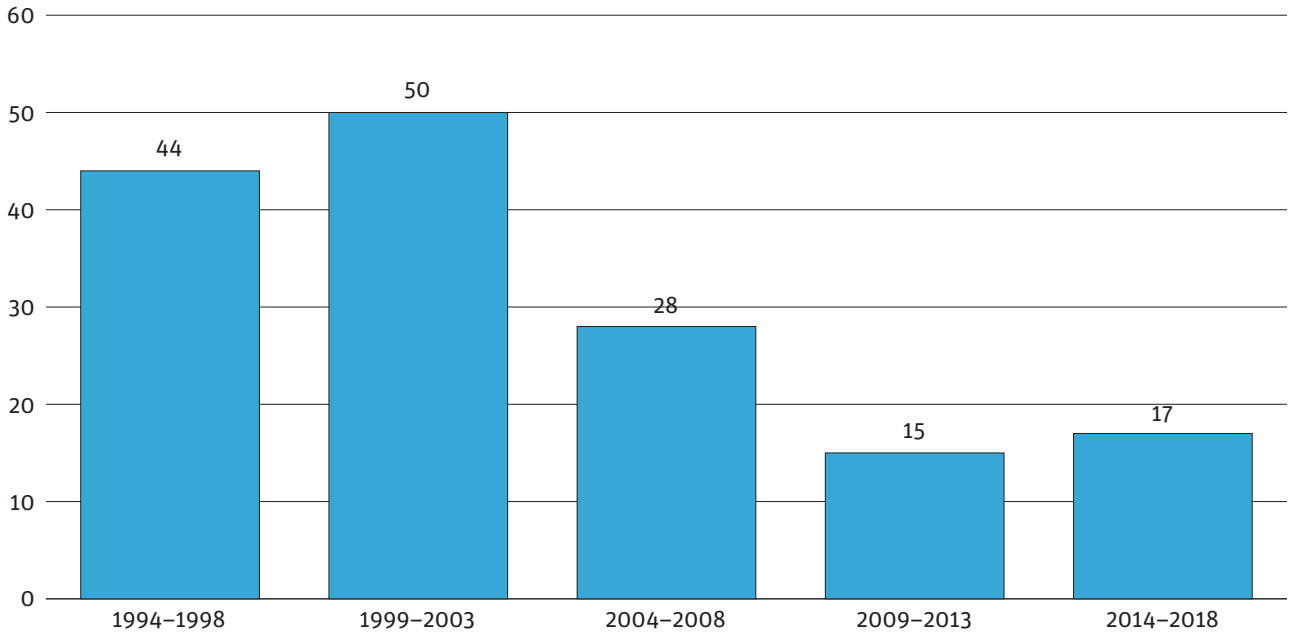
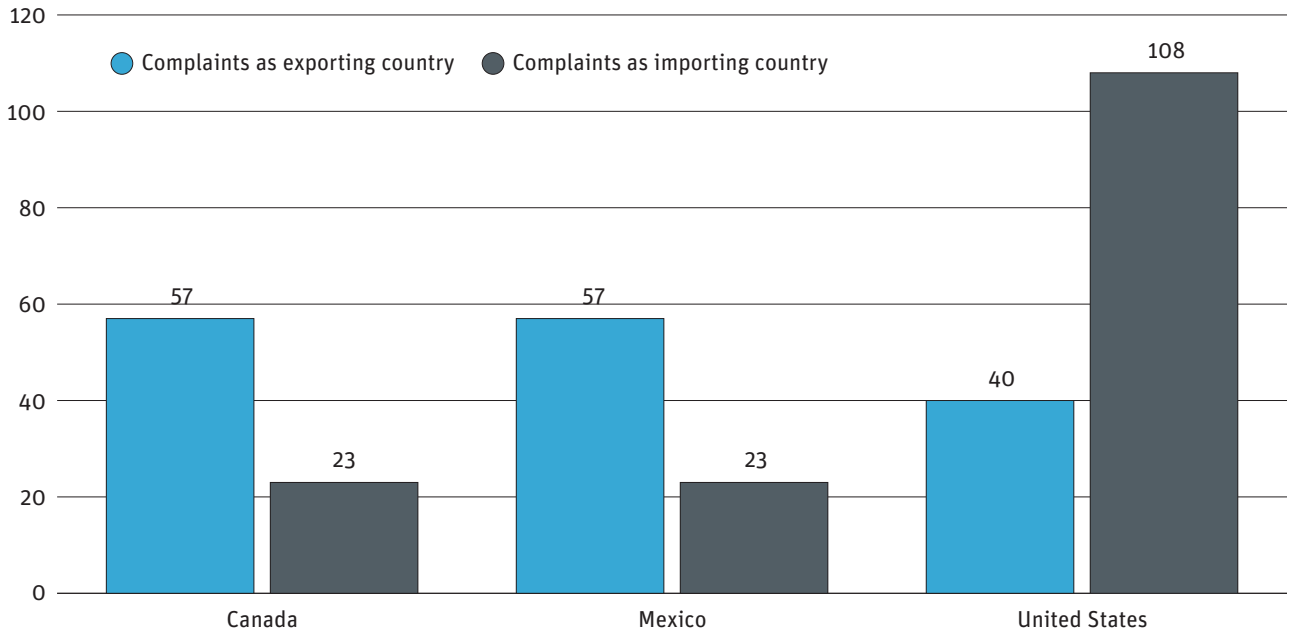


FIGURE 3 Chapter 19 Complaints by country



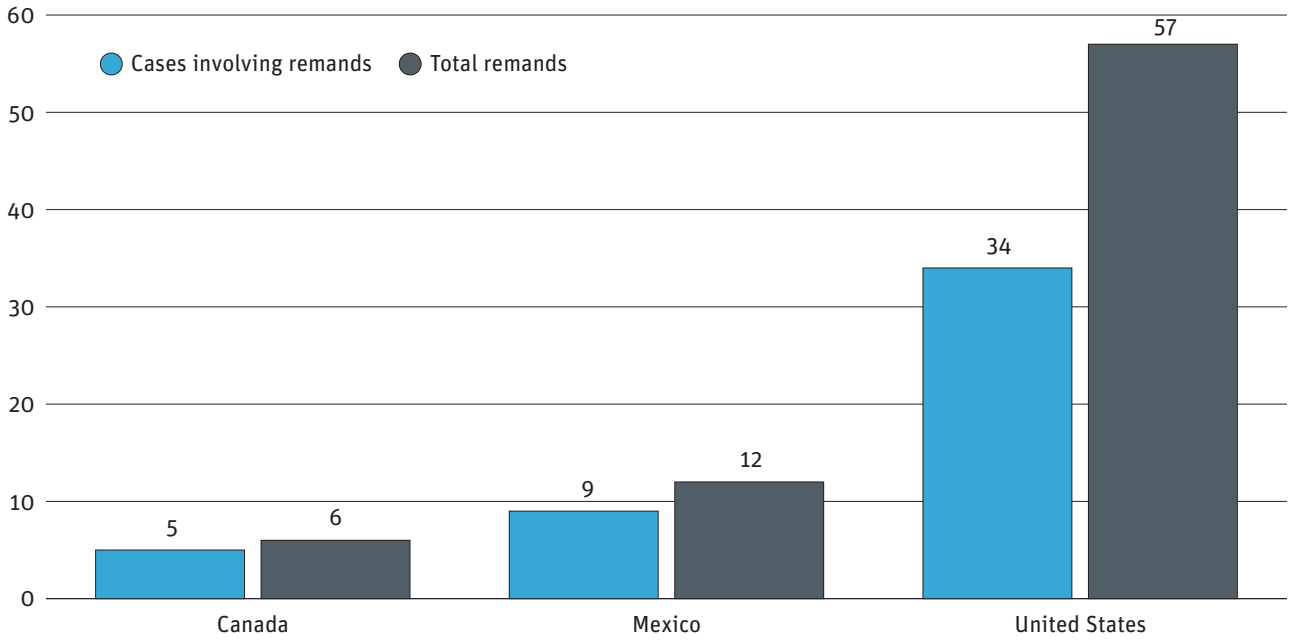
For example, in the 1995 dispute over Canadian anti-dumping duties on corrosion-resistant steel, the U.S. complainants unsuccessfully challenged both the Canadian Department of National Revenue's final determination that dumping had occurred and the Canadian International Trade Tribunal's affirmative finding of injury.[8] Typically, separate panels are constituted to hear each complaint, even those that relate to the same underlying trade dispute.

The Chapter 19 process was heavily utilized in the early years of NAFTA. *Figure 2* shows that the number of complaints has fallen over time. This drop coincides with a general decline in the frequency of recourse by NAFTA parties to countervailing duty and anti-dumping actions.

But as the recent resurgence of U.S. trade remedy cases under the Trump administration attests, the use of trade remedy actions tends to ebb and flow depending on the broader economic and political context. The increasing recourse to trade remedy actions by the U.S. will likely be accompanied by a rise in the number and frequency of binational panel reviews, possibly reversing the downward trend that has occurred since 2000.

As *Figure 3* shows, over 70% of total complaints (108 of 154) have involved challenges to decisions by the U.S. trade authorities. The Canadian and Mexican trade authorities have been the respondents in 23 cases each

FIGURE 4 Cases involving remands, by respondent country



(15% of total complaints). This distribution is not surprising and, if anything, the ratio of complaints against the U.S. is lower than expected considering the relative size of the three economies and the higher trade dependence of both Canada and Mexico on the U.S. market.

As previously noted, Chapter 19 panels have the authority to either affirm the investigating authority's determination or remand it, in whole or in part. As *Figure 4* indicates, Chapter 19 panels have been quite active in exercising their authority to remand. Thirty-one per cent of complaints (48 out of 154) have resulted in at least one remand by the panel. The total number of remands (75) is even higher, since many complaints have involved multiple remands.

Breaking this down by respondent country, the Canadian trade authorities have faced remands in five cases. One of these cases had a second remand, bringing the total up to six. The Mexican trade authorities have faced remands in nine cases, with a total of 12 when including multiple remands. Decisions by U.S. trade authorities were remanded in 34 separate Chapter 19 cases. Including multiple remands, the U.S. trade authorities have experienced 57 remands in total.

These figures may help explain the U.S. authorities' animosity toward NAFTA Chapter 19, particularly when contrasted with the Canadian experience. The U.S. investigating authorities faced remands in 31% of complaints against them versus 26% for Canada. Moreover, the total number of remands experienced by the U.S. authorities, compared to complaints, is proportionately higher. Total remands are equivalent to 53% of complaints against the U.S. (57/108) compared to 26% for Canada (6/23).

Notably, over half of all Chapter 19 complaints (81 or 53%) were terminated. Complaints may be terminated or withdrawn for a variety of reasons. Some are terminated because the challenged measures are withdrawn or overturned by the trade authorities in the importing country.

For example, in 2018, Bombardier Inc., Canada and Quebec initiated two Chapter 19 complaints against the U.S. Department of Commerce rulings that Bombardier's mid-sized aircraft were subsidized and sold at less than fair value (dumped) in the U.S. market. The threatened duties never materialized because in January 2018 the U.S. International Trade Commission (USITC) ruled unanimously that the U.S. industry (specifically Boeing) was not injured by the alleged subsidies or dumping, ending the threat of punitive duties. In May 2018, the two Chapter 19 panel proceedings were terminated.[9]

In other instances, cases may be terminated because the exporter voluntarily withdraws its complaint or the underlying trade dispute is settled through negotiation (as during the Softwood Lumber IV disputes).

Delays in panel decisions

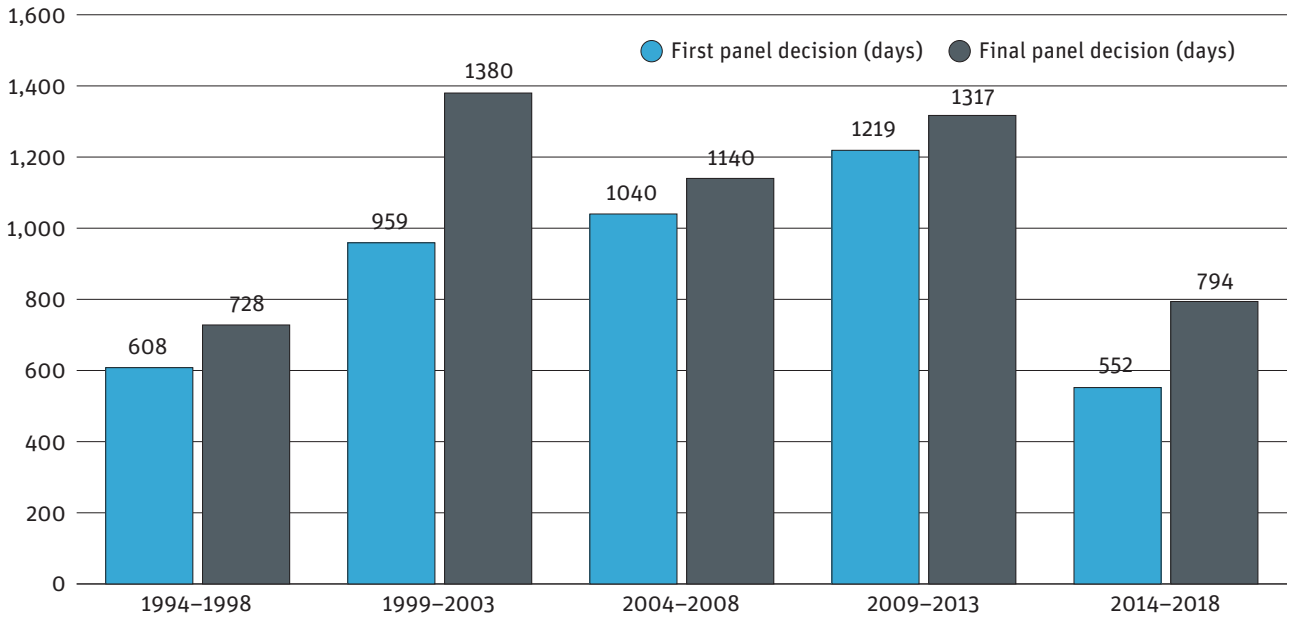
One of the expected benefits of NAFTA Chapter 19 panel reviews was the ability for Canadian exporters to resolve bilateral trade disputes in a timely manner. Significant delays have steadily eroded this presumed advantage over proceeding through the U.S. courts.

Chapter 19 calls for final panel decisions to be made "within 315 days of the date on which a request for a panel is made" (Article 1904.14). It also sets out detailed time frames for each stage of the panel proceedings.

These time limits have consistently been exceeded, as *Figure 5* illustrates. Between 1994 and 1998 it took an average of 608 days to reach a first panel decision. After that, the time taken to reach a first decision rose steadily, peaking at an average of 1,219 days in the period from 2009 to 2013.

As *Figure 6* shows, cases involving Canada as respondent have taken, on average, considerably less time than Chapter 19 panels reviewing U.S. or Mexican decisions. Cases involving Mexico as respondent were subject to the

FIGURE 5 Average duration of cases until a decision is reached, by time period

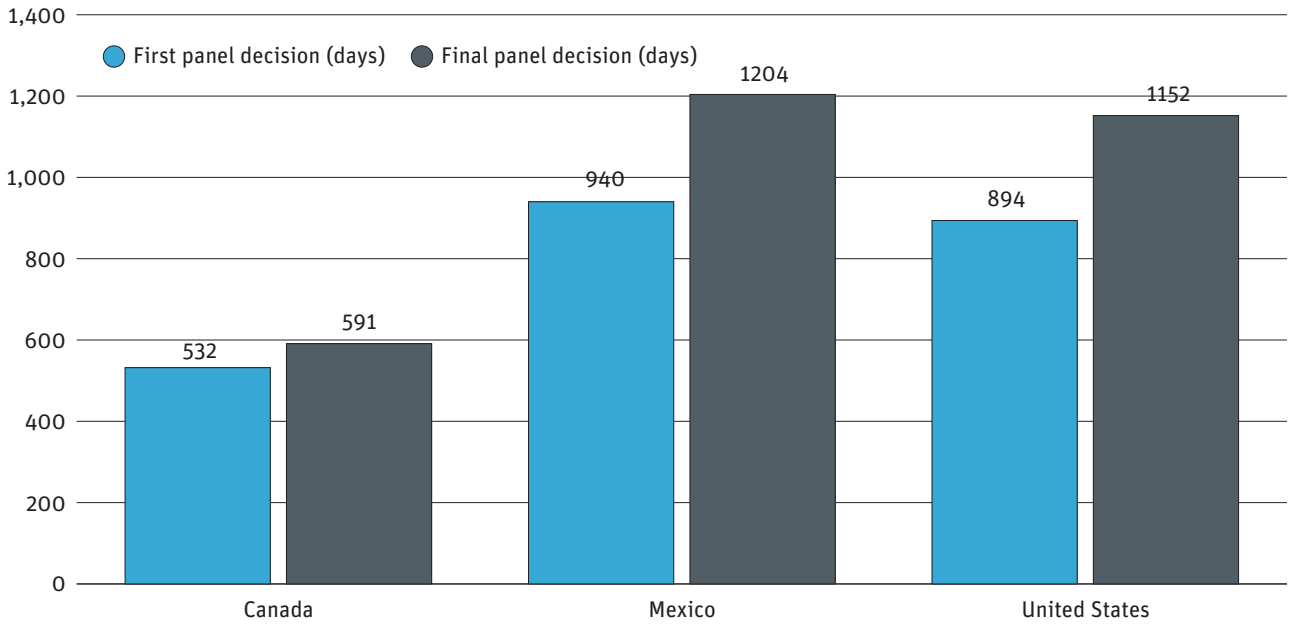


longest delays. But in cases against all three countries, first panel decisions have been rendered long after the prescribed 315-day deadline has passed.

The light blue bars in figures 5 and 6 represent the time elapsed between the filing of a complaint and a first panel decision. Cases involving remands, or multiple remands (represented by the dark blue bars), have, of course, taken longer to conclude. As *Figure 6* shows, cases involving challenges to the Mexican and U.S. trade authorities have taken considerably longer to conclude than those involving Canadian authorities. The average time elapsed between the initial complaint and the final panel decision was 1,204 days for complaints against the Mexican authorities, 1,152 days for cases involving the U.S. trade authorities and 591 days for challenges involving the Canadian investigating agencies.

In one of the most extreme examples, involving the 2002 Canadian challenge to U.S. anti-dumping duties on softwood lumber, over four and a half years (1,740 days) elapsed between the initial request for the panel and the final panel decision. This was due to multiple remands and foot-dragging by U.S. trade authorities. The binational panel review process was terminated as the result of a negotiated settlement, the Softwood Lumber Agreement (SLA) of September 2006.

FIGURE 6 Average duration of cases until a decision is reached, by respondent country



The Chapter 19 process is arguably no speedier, and in some cases slower, than recourse through the U.S. Court of International Trade (CIT). Over the years, there have been various proposals to fix these delays, such as "putting time limits on formation of a panel by the Parties, with a default of appointment of panelists from [a] Roster...by the Secretariat."[10] But no reforms have been agreed to and, over time, the problem of delays has grown.

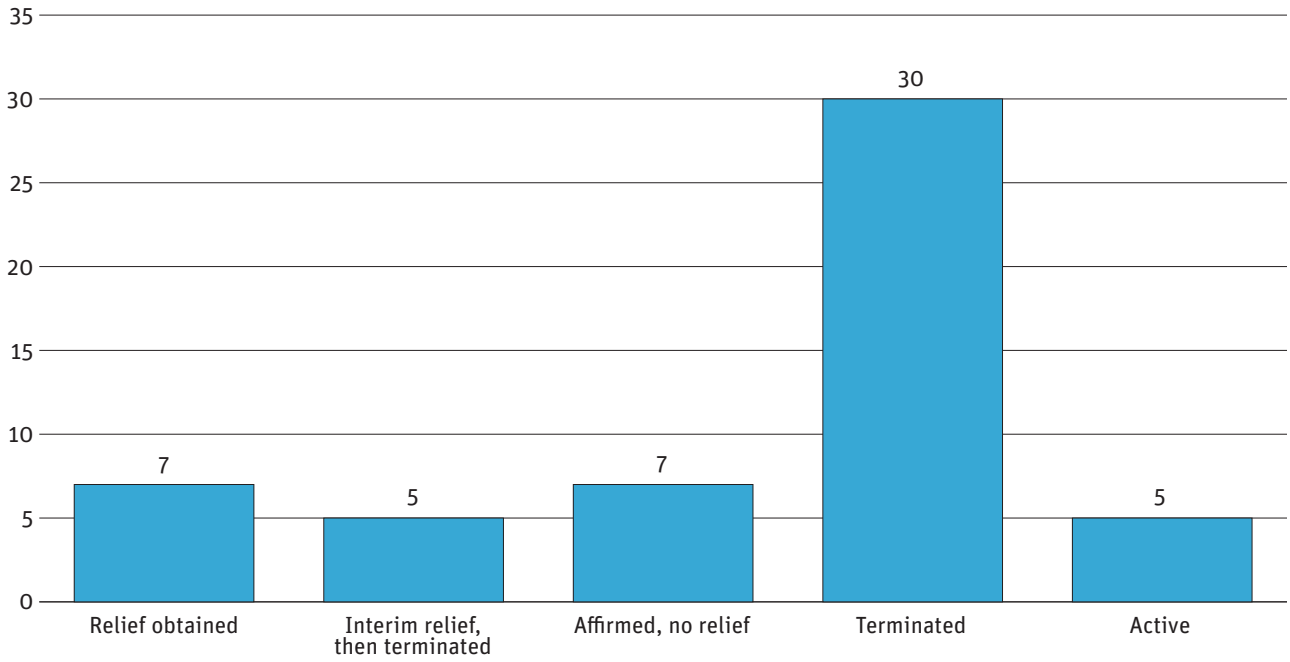
How Canadian exporters have fared using Chapter 19 against the U.S.

While the number and frequency of remands is a useful gauge of the impact of Chapter 19 panels, it is insufficient for assessing the effectiveness of the dispute settlement process in providing actual trade relief to complainants.

It is much more useful to assess the final outcomes. At the end of the day, did the Chapter 19 panel process result in trade relief for the complainant, in the form of reduced duties or the revocation of the challenged trade remedy measure (e.g., by reversing an adverse injury ruling)?

This section evaluates such outcomes in cases where Canadian complainants have invoked the Chapter 19 process to challenge the decisions of U.S.

FIGURE 7 Canadian complaints against U.S. trade authorities, by outcome



trade authorities. Attaining more secure access to the U.S. market was the primary motivation for Canada's insistence on this dispute settlement process. Accordingly, whether and to what extent Chapter 19 has been helpful in providing trade relief to Canadian exporters facing U.S. trade remedy actions is the key test of its effectiveness.

Since January 1, 1994, Canadian exporters have lodged 54 complaints against decisions of the U.S. trade authorities. They have challenged an array of final determinations that include countervailing duty and anti-dumping orders by the U.S. Department of Commerce, final injury rulings of the U.S. International Trade Commission, and the annual and five-year (sunset) reviews of existing CVD and AD orders.

Figure 7 breaks down these complaints by outcome. Notably, 56% of the complaints (30 out of 54) were terminated without any panel decision being rendered, and in many cases without a panel being formed. Most of these 30 complaints were terminated by joint consent after a domestic decision by the U.S. trade authorities ended the countervailing duty or anti-dumping actions against the Canadian product, rendering the Chapter 19 complaint unnecessary or moot.

Five cases are active. The remaining 19 Canadian complaints have involved at least one Chapter 19 panel decision. These cases are briefly described and summarized in *Table 1*, appended to this report.[11]

As *Figure 7* illustrates, in seven of these 19 cases the binational panel ultimately affirmed the final determination of the U.S. investigating authorities, providing no trade relief to the Canadian complainants. Five Canadian complaints are currently active, with no decision having yet been made.

The remaining 12 cases, which involved at least one remand by the Chapter 19 panel, ended in some form of trade relief for the Canadian exporter. This group of cases can be termed Canadian successes, but with certain qualifications.

In seven of these 12 cases, the challenged U.S. trade measures were ultimately rescinded or the level of punitive duties reduced, resulting in trade relief for the Canadian industry. Those seven disputes represent clear successes for Canadian exporters. In each instance, the U.S. investigating authorities ultimately complied with the remand instructions of the Chapter 19 panel, providing relief to the Canadian complainants by either reducing the level of punitive duties or removing the disputed duty or measure.

Several of these decisions benefitted important Canadian export industries (see *Figures 8 and 9*) including magnesium, steel and wheat. Others involved rather minor trade issues or administrative matters.[12] All of these seven complaints date back to the 1990s or early 2000s, with the latest initiated in 2003.[13]

The remaining five complaints in this group of 12 provided interim relief, but were terminated after the Chapter 19 panel had made at least one remand decision favouring the Canadian complainants. These five disputes were subsequently terminated for reasons unrelated to the Chapter 19 panel process.

It could be argued that that such "wins" should simply be categorized as "terminated." But for the purposes of this report, a panel ruling in favour of a Canadian exporter — even if subsequent developments rendered that interim decision moot and terminated the panel process — is treated as providing relief and categorized as "interim relief, then terminated."

Three of these "relief, then terminated" complaints pertained to softwood lumber and were terminated by joint consent under the terms of the 2006 SLA. Even though the Chapter 19 processes involved unreasonable delays and overt intransigence by the U.S. trade authorities that bordered on contempt, many Canadian industry and government insiders argue that Chapter 19 strengthened Canada's hand in negotiating the SLA, which restricted Can-

FIGURE 8 Canadian complaints against U.S. by industry and outcome

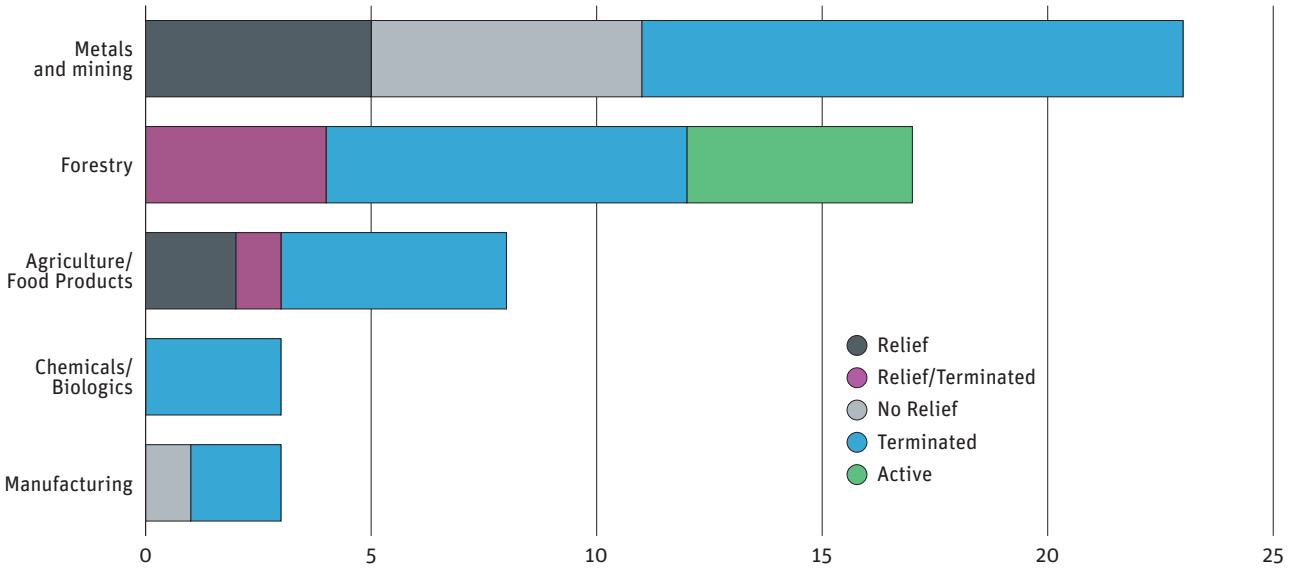
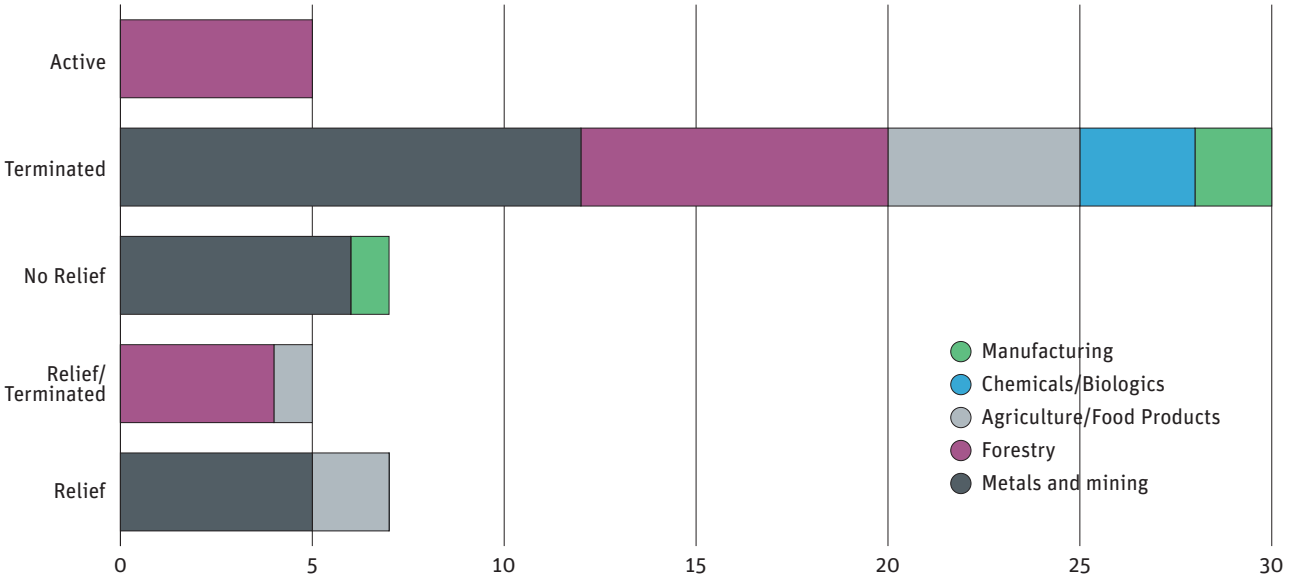


FIGURE 9 Canadian complaints against U.S. by outcome and industry



adian softwood exports to the U.S. market in return for the end of litigation and the return of most of the duties collected by the U.S. trade authorities.

The repeated remands in the Chapter 19 softwood lumber complaints resulted in U.S. countervailing duties being reduced and, after protracted proceedings, reversal of the USITC's finding of injury. Accordingly, these three terminated softwood lumber complaints (where panel rulings had been made in favour of Canadian exporters) are categorized as providing relief, even though they were subsequently terminated by negotiation.

The fourth "relief, then terminated" case involved a 2005 dispute over hard red spring wheat. After an interim ruling in Canada's favour, the complaint was later withdrawn after the USITC ruled that there was no injury, making the Chapter 19 proceedings unnecessary.

In the final case, involving a 2017 challenge to U.S. countervailing duties on supercalendered (i.e., glossy) paper, Canadian exporters won a favourable Chapter 19 panel. However, after the panel decision, the U.S. trade remedy action was ended by a unanimous USITC ruling that there was no injury to the U.S. industry. The Chapter 19 complaint therefore became unnecessary and was terminated by joint consent of the complainants and the U.S. trade authorities.

In total, over nearly 25 years, Canadian exporters have successfully obtained trade relief in 12 NAFTA Chapter 19 cases against the U.S. trade authorities.

Conclusion

At one level, it is easy to understand why the Canadian government took a firm stand in defending the Chapter 19 dispute settlement mechanism against U.S. demands for its elimination. As a parliamentary committee observed in 2005, the Chapter 19 process "was the bare minimum Canada would accept in the negotiations for the original Canada–United States Free Trade Agreement and without [it] Canada would not have signed the FTA."[14]

Moreover, Canada had already "paid" for NAFTA Chapter 19 by conceding to past U.S. demands around foreign investment review, energy independence and restrictive intellectual property rules. By forcing Canada to pay again to preserve the dispute settlement mechanism, the Trump administration was clearly acting in bad faith.

Yet Chapter 19's almost iconic status in Canada, especially among longtime NAFTA supporters and past negotiators, should not escape empirical

scrutiny. This avowed crowning achievement of NAFTA was always flawed. Chapter 19's binational review panels did not achieve Canada's sought-after exemption from the application of domestic trade remedy laws. As recent events have driven home, Canada remains highly vulnerable to arbitrary U.S. trade remedy and safeguard actions.

Chapter 19 has also proven incapable of resolving major trade disputes such as softwood lumber. After protracted litigation and repeated obstruction by U.S trade authorities of panel decisions that favoured Canadian exporters, Canada's government and forest industry still felt compelled to agree to a negotiated settlement. While the binational panel decisions perhaps strengthened Canada's negotiating position, the SLA — which ended litigation only after Canada agreed to limit lumber exports to the U.S. — was hardly a clear-cut Canadian victory.

As already emphasized, a Chapter 19 dispute panel's mandate is simply to review the consistency of a trade remedy determination with the importing country's own laws. Furthermore, binational panels are legally obliged to give considerable deference and leeway to the domestic investigating authorities in their application of those laws.

Despite these limits, Chapter 19 has modestly benefitted Canadian exporters. Over the last quarter-century, Canadian exporters have succeeded in getting trade relief in 12 cases. While seven of these cases were clean wins attributable to the Chapter 19 process, the last of these occurred nearly 15 years ago. In the five other cases, Canadian exporters won interim relief from the panel decisions, but the trade disputes were ultimately resolved independently of the Chapter 19 panel process.

In addition to these caveats about Chapter 19's effectiveness it must be noted that if the Chapter 19 process did not exist, Canadian exporters and governments would not have been defenceless against adverse U.S. trade remedy decisions. All involved parties to a trade remedy case, regardless of nationality, have access to the U.S. court system. It is impossible to know for sure, but in some cases the Court of International Trade (CIT) might have ruled in Canada's favour.

Despite concerns about home bias, the CIT has the same authority as a panel to remand an incorrect decision. In both venues the mandate is to ensure that U.S. trade remedy laws are followed. There are also advantages to winning at the CIT over prevailing in the binational panel system. CIT rulings set binding legal precedents while panel rulings do not, leaving Canadian exporters to refight the same issues in future cases.[15] Also, we have

seen binational panel timelines stretch out over the years to the point that they are likely no faster than going to the CIT.

This brings us to the issue of Canada's red lines in the NAFTA renegotiation. While the Chapter 19 process has sometimes helped Canadian exporters, it was problematic from the beginning and has diminished in effectiveness over time. Remands have been fairly frequent, but effective trade relief less so.

Importantly, Chapter 19 provides no defence against the latest rash of U.S. safeguard actions involving steel, aluminum and potentially autos and uranium. Addressing these Section 232 tariffs, which are based on specious national security grounds, is a more immediate and probably higher priority than protecting NAFTA's Chapter 19.

The wisdom of Canada's hardline defence of this dispute settlement mechanism is questionable for other reasons that have become more clear since the release of the USMCA text in early October. The Canadian government should arguably have quit fighting the last war over NAFTA Chapter 19, especially if this could have resulted in progress in other key areas under negotiation.

Is it possible, for instance, that giving ground on Chapter 19 might have helped Canada fight off potentially costly concessions around restrictive intellectual property rights related to data protection for medicines and extended copyright? Might there have been a way to better protect Canada's embattled dairy farmers, and the supply-managed sectors generally, who will be significantly affected by additional U.S. quotas for dairy, poultry and eggs?[16] We may never know.

But in deciding whether saving NAFTA Chapter 19 was worth it, it is important to keep its benefits in perspective — and judge it on its record rather than its reputation.

Annex 1

What are countervailing and anti-dumping duties?

INTERNATIONAL TRADE RULES permit governments to apply special duties to offset the effect of foreign subsidization or dumping of imported goods.

The general provisions governing the permissible application of countervailing duties against subsidized goods are spelled out in the WTO Subsidies Agreement. Foreign government subsidies that directly or indirectly confer benefits on specific products or industries can be penalized with countervailing duties, provided that the subsidized foreign goods are causing, or threaten to cause, material injury to a rival domestic industry.

Multilateral trade rules also allow countries to protect themselves against dumping. Dumping refers to selling goods in a foreign market at less than the price they are sold in the domestic market of the exporting country, or at less than the cost of production. The general provisions defining dumping and the permissible application of anti-dumping duties are found in the WTO Anti-Dumping Agreements.

Over the years, Canadian goods have been a frequent target of U.S. countervailing duty and anti-dumping actions. The recurring softwood lumber wars are the most high-profile example. But Canadian steel, aluminum, paper products, livestock and chemicals have also been regular targets.

The domestic process for pursuing a countervailing duty or anti-dumping case is similar in all three NAFTA countries. The procedures, as governed by WTO rules, are two-track. A request from a domestic industry (or in the

U.S. a trade union) triggers an investigation regarding whether subsidization or dumping has occurred. After a preliminary finding of either dumping or subsidization, parallel proceedings address the question of whether this alleged subsidization or dumping has caused (or threatens) material injury to the affected domestic industry. For final countervailing or antidumping duties to be applied, both findings must be affirmative (i.e. there must be a positive finding of both subsidization or dumping and injury to a domestic industry). Duties are frequently applied on a preliminary basis, while the investigation proceeds.

In Canada the body which determines whether subsidization or dumping has occurred is a branch of the Department of National Revenue, while decisions regarding injury are made by the Canadian International Trade Tribunal. In the U.S. the corresponding trade authorities are the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (USITC). In Mexico both these investigative functions are administered by the Secretariat of Economy (SECOFI).

TABLE 1 Decided complaints against the United States by Canadian exporters

Date Filed	Complainant	Dispute Name	Case Number	Issue	Decision
03/30/1994	**P. Quintaine & Son, Ltd., Earl Baxter Trucking LQ, Pryme Pork, Ltd., Canadian Pork Council**	Live Swine from Canada	USA-CDA-1994-1904-01	Complainants challenged the Department of Commerce (DOC)'s decision, in an administrative review of a long-running countervailing (CV) duty order, to revoke its separate treatment of old sows and boars (used for ground meat) and weanlings, which the DOC had previously ruled did not benefit from the Canadian programs being countervailed and therefore had been exempted from CV duties. Upon remand, the panel instructed the DOC to reinstate the separate classes and to calculate separate CV duty rates for each class. The DOC complied, providing relief to the complainants.	Remand, with relief On May 30, 1995, the panel unanimously affirmed in part and remanded in part the DOC's final determination. The final panel order affirming the determination on remand was issued on September 27, 1995.
06/24/1995	**Mitsubishi Electronics Industries, Inc.**	Color Picture Tubes from Canada	USA-CDA-1995-1904-03	DOC regulations stipulate that anti-dumping (AD) orders will be revoked after five years unless an interested party has requested an administrative review or objected to the order's revocation. Since no administrative review was requested, a 1998 AD order on colour picture tubes from Canada was due to expire in January 2003. The DOC, however, did not publish a notice of intent to revoke the AD order until nearly two years later in December 1994, at which time several U.S. unions objected. Having received an objection, the DOC did not revoke the AD order. The complainant, *Mitsubishi Electronics Canada,* argued that the AD order should have expired in January 2003 despite the DOC's failure to publish a timely notice.	Affirmed, no relief On May 6, 1996, the panel unanimously affirmed, with one concurring opinion, the DOC's final determination.

Date Filed	Complainant	Dispute Name	Case Number	Issue	Decision
05/12/1997	**Stelco, Inc.**	Corrosion-Resistant Carbon Steel Flat Products from Canada (I)	USA-CDA-1997-1904-03	Stelco complained that in its second administrative review of a 1993 anti-dumping order, the DOC had inflated Stelco's cost of production by incorrectly estimating costs incurred by a Stelco affiliate, incorrectly calculating interest costs, and by making two clerical errors. After the first remand the DOC corrected the clerical errors and recalculated the interest costs but refused to change its method of estimating costs incurred by Stelco's affiliate. After the second remand, the DOC reluctantly complied with the panel's direction to change its treatment of transfer costs attributed to Stelco's affiliate. While complying in this instance, the DOC asserted it would apply its own interpretation in future administrative reviews.	Remand, with relief On June 4, 1998, the panel unanimously remanded the DOC's determination. On January 20, 1999, the panel unanimously remanded the DOC's determination on remand. On September 13, 1999, the panel unanimously affirmed the second determination on remand.
10/04/1998	**Stelco, Inc.**	Corrosion-Resistant Carbon Steel Flat Products from Canada (II)	USA-CDA-1998-1904-01	Stelco complained that in its third administrative review of the 1993 dumping order, the DOC inflated Stelco's cost of production by incorrectly estimating costs incurred by two Stelco affiliates. The DOC reverted to using the unadjusted transfer price, disregarding the previous NAFTA panel's ruling that this method was unlawful. Upon remand, the panel directed the DOC to adjust its method of calculating the transfer price to reflect annual rebates paid to Stelco by its affiliates. The panel also directed the DOC to recalculate Stelco's interest costs and to correct a clerical error. The DOC complied, resulting in reduced AD duties on Stelco.	Remand, with relief On March 20, 2001, the majority panel, with one concurring in part and dissenting in part opinion, remanded the DOC's determination. The final panel order affirming the determination on remand was issued on August 24, 2001.
07/15/1998	**Wolverine Tube (Canada) Inc.**	Brass Sheet and Strip from Canada	USA-CDA-1998-1904-03	In its annual (for 1996) administrative review of a 1987 AD order, the DOC calculated Wolverine's dumping margins using a simple average cost of production. Wolverine argued that the DOC should have used a weighted average (by product), as is its normal practice. The DOC acknowledged its error and supported a remand to correct its mistake.	Remand, with relief The Panel unanimously affirmed in part and remanded in part the DOC's determination. The final panel order affirming the determination on remand was issued on November 5, 1999. The DOC recalculated the dumping margin using a weighted average. The revised margin was found to be *de minimis*, nullifying the AD order for the period under review.

Date Filed	Complainant	Dispute Name	Case Number	Issue	Decision
08/4/2000	**Norsk Hydro Canada, Inc., Government of Québec**	Pure Magnesium from Canada (I)	USA-CDA-2000-1904-06	In the final results of its mandatory five-year (sunset) review of a 1992 antidumping order concerning pure magnesium from Canada, the DOC determined that revoking the order would likely lead to continuation or recurrence of dumping, at margins of 21% ad valorem. The Quebec government and Norsk Hydro (NHI) jointly requested a panel review of the final results on the basis that the DOC had: 1) misapplied the law in finding that dumping was likely if the order were lifted; 2) erred in failing to consider "other factors" that might have reduced NHI's exports of pure magnesium to the U.S. after the 1992 AD order; 3) erred in assigning a 21% anti-dumping margin; and 4) erred in assigning a dumping margin of 21% to all other producers (besides Norsk). Despite several remands directing them to consider whether the shift in NHI's product mix from pure to alloy magnesium had reduced the threat of dumping, the DOC insisted that a reconsideration was not warranted, refused to reopen the record to allow new evidence, and argued that any such reconsideration would not change their view that dumping was likely to resume. Finally, the U.S. requested an Extraordinary Challenge Committee (ECC) to review the panel's decisions. On October 5, 2004, the ECC ruled that the panel had "manifestly exceeded" its powers by failing to apply the correct standard of review, but that the panel's misconduct did not threaten the integrity of the binational review process. The ECC affirmed the panel's final ruling and the DOC subsequently revoked the AD order, effective Aug. 1, 2000.	Remand, with relief On March 27, 2002, the panel unanimously affirmed the DOC's determinations on points 1 and 4, while remanding the DOC's determinations on points 2 and 3. On October 15, 2002, the panel remanded the DOC's first determination on remand, ordering the DOC to reconsider its ruling. On April 28, 2003, the panel remanded the DOC's second determination on remand, with rarely-used instructions to revoke the AD order. On June 24, 2003, the panel amended its April 28, 2003 decision by replacing its instructions to revoke the AD order with instructions to the DOC to take action "not inconsistent" with the panel's decision. On August 14, 2003, the panel affirmed the DOC's third determination on remand. On October 7, 2004, an Extraordinary Challenge Committee (USA-CDA-2003-1904-01ECC) dismissed a U.S. challenge and affirmed the final remand opinion of the panel.
08/4/2000	**Government of Québec (GOQ)**	Pure Magnesium and Alloy Magnesium from Canada (II)	USA-CDA-2000-1904-07	In the final results of the sunset review of its 1992 CV duty order, the DOC initially determined that a countervailable subsidy was likely to continue or recur if the duty order was revoked. It assigned a 1.84% subsidy rate to Norsk Hydro (the investigated company) and a higher rate of 7.34% to all other companies. GOQ challenged the DOC ruling on various grounds, including that the "all others" rate was erroneous and contrary to U.S. law.	Remand, with relief In its first remand, the panel dismissed most aspects of the GOQ challenge, but remanded to enable the DOC to consider and explain its reasoning in setting the "all others" rate. In its second remand, the panel ordered the DOC to remove the "all others" rate. The DOC complied.

Date Filed	Complainant	Dispute Name	Case Number	Issue	Decision
08/25/2000	**Government of Canada, Government of Québec, Norsk Hydro Canada, Inc.**	Magnesium from Canada (III)	USA-CDA-2000-1904-09	The U.S. International Trade Commission (USITC), in its five-year sunset review, determined that revoking the AD and CV duty orders would likely result in material injury to the U.S. industry. The complainants challenged this finding on various grounds, including that the USITC did not conduct a proper price-volume analysis showing that potential injury would result directly from the revocation of the orders, and not from other factors such as third-party imports.	Remand, no relief After two remands instructing the USITC to further examine and clarify several key points regarding price, volume and substitutability, the panel majority (with two members dissenting) ultimately affirmed the USITC ruling that revocation of the AD and CV duty orders on Canadian products would likely result in material injury to the U.S. industry.
12/28/2000	**ArcelorMittal Dofasco**	Corrosion-Resistant Carbon Steel Flat Products from Canada (III)	USA-CDA-2000-1904-11	In its final results of the mandatory five-year (sunset) review of a long-standing (1993) AD order, the USITC ruled that the lifting of the AD order would likely materially injure the U.S. industry. The Canadian complainants objected to the grouping of Canadian exports with those of five other steel-producing countries, and pointed to the health of the U.S. industry and lack of spare capacity in Canada as evidence that the U.S. industry was not threated by Canadian exports.	Remand, no relief The panel, with one dissent, remanded the final determination to the USITC for further explanation on the issues of cumulation and the alleged vulnerability of the U.S. industry. After the first remand, the panel, again with one dissent, fully affirmed the USITC determination on remand.
04/2/2002	**Various Canadian Governments, various provincial lumber associations, various Canadian lumber mills**	Certain Softwood Lumber Products from Canada (dumping)	USA-CDA-2002-1904-02	Upon expiry of the memorandum of understanding in 2001, the DOC self-initiated an investigation of Canadian lumber mills (*Softwood Lumber IV*). The DOC determined that Canadian companies were selling at less than fair value in the U.S. market.	Remand, interim relief, later terminated Even after three panel remands, many general, company-specific and scope issues related to the DOC's positive dumping determinations remained unresolved. Ultimately, the panel proceedings were rendered moot by the 2006 Softwood Lumber Agreement (SLA).
04/2/2002	**Various Canadian governments, various provincial lumber associations, various Canadian lumber firms**	Certain Softwood Lumber Products from Canada (countervailing duties)	USA-CDA-2002-1904-03	Upon expiry of the memorandum of understanding in 2001, DOC self-initiated an investigation of whether Canadian softwood lumber producers were receiving countervailable subsidies, principally related to provincial "stumpage fees," the fees paid by firms or individuals for the right to harvest timber from Crown land, and log export restraints. DOC subsequently imposed CV duties on softwood lumber from Canada (excluding the four Atlantic provinces).	Remand, interim relief, later terminated The panel remanded on the basis that the DOC had not properly determined the benefit flowing from stumpage, directing the DOC to recalculate that benefit. After protracted proceedings involving five remands, the DOC, while strongly objecting, complied with the panel's directions, reducing the CV duty margin to a *de minimus* level. The DOC, however, did not revoke the CV duty order, nor refund duties collected, pending an ECC review requested by the U.S. government. The panel proceedings were rendered moot, and the U.S. request for the ECC review was withdrawn, under the terms of the SLA.

Date Filed	Complainant	Dispute Name	Case Number	Issue	Decision
05/22/2002	**Various Canadian Governments, various provincial lumber associations, various Canadian lumber mills**	Certain Softwood Lumber Products from Canada (injury)	USA-CDA-2002-1904-07	As part of the *Softwood Lumber IV* dispute, the Canadian governments and lumber mills challenged the DOC's finding of material injury, arguing that Canadian lumber products are for the most part complementary to, rather than substitutive for, U.S. lumber products.	Remand, interim relief, later terminated After three panel remands, the USITC reluctantly concurred that the U.S. industry was not materially injured. The U.S. government then filed an extraordinary challenge, but the ECC rejected the U.S. government's extraordinary challenge and affirmed the panel's rulings. Despite this, the U.S. did not refund collected duties, nor revoke the CV and AD duty orders, until the 2006 SLA was signed. The SLA terminated all outstanding *Softwood Lumber IV* panels.
11/27/2002	**Ivaco Inc.**	Carbon and Certain Alloy Steel Wire Rod from Canada I	USA-CDA-2002-1904-09	In an anti-dumping and countervailing duty investigation involving steel wire rod, a Canadian exporter alleged several errors in the USITC's investigative procedures and legal justification for its finding that subsidized and less-than-fair-value imports from Canada were materially injuring the U.S. industry.	Remand, no relief After a remand requesting further clarification and explanation of the USITC's reasoning on three issues, the panel unanimously affirmed the agency's final injury determination.
05/23/2003	**Magnola Metallurgy Inc., Government of Quebec**	Alloy Magnesium from Canada	USA-CDA-2003-1904-02	Magnola (a subsidiary of Noranda) challenged the DOC's determination that benefits the firm had received under a Quebec provincial training program constituted a countervailable subsidy.	Affirmed, no relief The panel unanimously affirmed the DOC on most issues and, by a majority, affirmed the DOC's finding that the provincial training program provided disproportionate, specific benefits to Magnola and was therefore countervailable.
03/10/2003	**Governments of Canada, Saskatchewan and Alberta,the Canadian Wheat Board**	Certain Durum Wheat and Hard Red Spring Wheat	USA-CDA-2003-1904-05	The Canadian parties challenged the DOC's determination that various Canadian programs related to 1) financial guarantees provided to grain farmers and 2) the provision of railcars for transporting grain were countervailable. The DOC calculated a net subsidy rate of 4.49% covering the year 2001-2002.	Remand, interim relief, later terminated The panel ruled that the DOC's findings related to the financial guarantees were not in accordance with U.S. law and remanded them for further consideration. The panel affirmed the DOC's ruling that the rail transportation programs provided countervailable benefits. The panel was terminated after the USITC, upon remand, ruled that Canadian imports of hard red spring wheat and durum posed no injury or threat of injury to the U.S. grain industry (see below).

Date Filed	Complainant	Dispute Name	Case Number	Issue	Decision
11/24/2003	**Canadian Wheat Board, the North American Millers' Association**	Hard Red Spring (HRS) Wheat from Canada	USA-CDA-2003-1904-06	In a 2003 ruling, the USITC ruled that no U.S. industry was materially injured or threatened with material injury by reason of imports of durum wheat from Canada, but that the U.S. grain industry was materially injured by reason of imports of Canadian HRS wheat. Subsequently, the DOC issued an AD and CV duty order on imports of HRS wheat from Canada (5.26% countervailing duty and 8.86% weighted average dumping margin). The complainants challenged the injury ruling, alleging generally that the USITC's final injury determination was unsupported by substantial evidence.	Remand, with relief The panel majority agreed that the USITC had not adequately demonstrated material harm to the U.S. industry and remanded the decision. On subsequent determination, the USITC held that the U.S. industry was not at risk of injury, resulting in the revocation of the AD and CV duty orders.
06/6/2008	**Ivaco Rolling Mills 2004 L.P., Sivaco Wire Group 2004, L.P.**	Carbon and Certain Alloy Steel Wire Rod from Canada II	USA-CDA-2008-1904-02	In its fourth annual administrative review of a 2002 AD order against Canadian steel wire rod, the DOC decided not to revoke the AD order against Ivaco. In making this determination, the DOC utilized a controversial "zeroing" method, which had been discontinued in AD investigations (but not administrative reviews) after being ruled inconsistent with the WTO Antidumping Agreement.	Remand, no relief After one remand requiring further explanation of the DOC's reasoning, the panel unanimously affirmed the DOC's final determination on the basis that the zeroing methodology was, in the context of the administrative review, in accordance with U.S. law.
01/16/2009	**Ivaco Rolling Mills 2004 L.P., Sivaco Wire Group 2004, L.P.**	Carbon and Certain Alloy Steel Wire Rod from Canada III	USA-CDA-2009-1904-01	Ivaco challenged the results of the fifth administrative review on similar grounds to those it put forward in the previous case involving the fourth administrative review.	Affirmed, no relief The Panel unanimously affirmed the DOC's final determination.
11/18/2015	**Governments of Canada, Nova Scotia, Ontario, Quebec and British Columbia, Port Hawkesbury Paper LP, Resolute FP Canada, Inc., Resolute FP US, Inc., Irving Paper, Ltd., Catalyst Paper Corp.**	Supercalendered Paper from Canada	USA-CDA-2015-1904-01	In response to a petition by the Coalition for Fair Paper Imports, the DOC began an investigation into Canadian manufacturers of supercalendered (SC) paper. The DOC found that various Canadian governments were providing subsidies to paper manufacturers through low stumpage fees to harvest timber from public lands, various federal and provincial subsidy programs and other forms of assistance. Two Canadian companies, Resolute FP Paper and Port Hawksebury Paper were the principal targets of the investigation, but the DOC also initially applied an "all others rate" to SC paper from other Canadian producers.	Remand, interim relief, later terminated In April 2017, the Panel remanded various issues related to DOC's methodology for calculating subsidies; its finding that a NS mill had benefited from preferential electricity rates; and issues related to Resolute's takeover of an idle mill that had allegedly received benefits under the previous ownership. The panel affirmed DOC's final determination in all other respects. In July 2018, in response to request from the principal U,S. petitioner in the CV case, the DOC revoked the CV duty order and ordered the return of collected duties to the Canadian firms. On September 12, 2018, the USITC ruled unanimously that imports of SC paper from Canada posed no injury or threat of injury to a U.S. industry, ending the threat of CV duties.

Notes

1 Scott Sinclair. "NAFTA and U.S. Trade Policy: Implications for Canada and Mexico." Ricardo Grinspun and Maxwell Cameron, eds. *The Political Economy of North American Free Trade.* (McGill-Queens University Press, 1993). 226–27.

2 Stephen J. Powell. "Expanding the NAFTA Chapter 19 Dispute Settlement System: A Way to Declaw Trade Remedy Laws in a Free Trade Area of the Americas?" 16 *Law & Bus. Rev. Am.* 217 (2010), p. 220. available at http://scholarship.law.ufl.edu/facultypub/361.

3 In one significant change, the extraordinary challenge procedure was "expanded to permit a challenge in a case where a panel has failed to apply the appropriate standard of review (Article 1904 (13))." Michael J. Trebilcock and Robert Howse. *The Regulation of International Trade*. 1995. p. 405

4 Scott Sinclair. "Canada's Track Record Under NAFTA Chapter 11: North American Investor-State Disputes to January 2018." Canadian Centre for Policy Alternatives. January 2018. https://www.policyalternatives.ca/nafta2018.

5 Canada has said it will initiate a NAFTA Chapter 20 dispute over the Trump administration's Section 232 safeguard actions against steel and aluminum.

6 Stephen McBride. (2012). "The Scope and Limits of a Public–Private Hybrid: Dispute Settlement under NAFTA Chapter 19." *New Political Economy.* 17:2. 117–135. http://dx.doi.org/10.1080/13563467.2010.540321.

7 As of January 1, 2018, there were 85 notices of intent filed under NAFTA Chapter 11 (Sinclair, CCPA, 2018).

8 Regarding the finding and calculation of dumping, the review panel (in June 1995) upheld most aspects of the DNR's decision while remanding several matters for further consideration. Ultimately (in December 1995) the panel upheld all aspects of the DNR's decision. The separate panel reviewing the finding of injury unanimously affirmed the CITT ruling. In an unusual twist, the Chapter 19 panel reviewing the injury determination was also tasked with examining two Canadian steel companies' complaints that the CITT had incorrectly excluded a certain type of U.S. galvanized steel from its dumping inquiry. The tribunal also affirmed the CITT's decision on this matter.

9 U.S. Federal Register. "Notices." Vol. 83, No. 94. May 15, 2018. pp. 22442–3.

10 Powell, 2010, p. 228.

11 The table groups some complaints together where they pertain to the same underlying trade dispute.

12 For example, in the 1998 Brass Sheet and Brass Strip case (USA-CDA-1998-1904-03), the U.S. Department of Commerce acknowledged that they had made an administrative error in calculating dumping margins and supported the panel's remand in order to provide them with the opportunity to correct their mistake.

13 Hard Red Spring Wheat (USA-CDA-2003-1904-06).

14 "Dispute Settlement in the NAFTA: Fixing an Agreement under Siege," *Report of the Standing Committee on Foreign Affairs and International Trade*, May 2005. http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1856888&Language=e&Mode=1&Parl=38&Ses=1.

15 U.S. authorities have, in several cases, openly rejected the interpretation given to U.S. trade laws by a Chapter 19 panel. See, for example, Live Swine (USA-CDA-1994-1904-01) and Corrosion-Resistant Carbon Steel Flat Products (USA-CDA-1997-1904-03) at NAFTA Secretariat, "Decisions and Reports: NAFTA Chapter 19 Article 1904." https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports.

16 On the dairy issue, see Scott Sinclair, "Should Canada scrap its supply management system? No," *Toronto Star*, July 10, 2018. https://www.thestar.com/opinion/contributors/thebigdebate/2018/07/10/should-canada-scrap-its-supply-management-system-no.html; for more on the cultural trade-off, see Tom Walkom, "Playing culture card good politics for Trudeau," *Toronto Star*, September 6, 2018. https://www.thestar.com/opinion/star-columnists/2018/09/06/playing-culture-card-good-politics-for-trudeau.html.

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