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Briefing Report to Congressional Requesters

June 1995

U.S.-CANADA FREE TRADE AGREEMENT

Factors Contributing to Controversy in Appeals of Trade Remedy Cases to Binational Panels

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The Honorable Bob Packwood
Chairman
The Honorable Daniel Patrick Moynihan
Ranking Minority Member
Committee on Finance
United States Senate

The U.S.-Canada Free Trade Agreement (FTA) took effect in 1989, creating the world's largest free trade area at that time. FTA also established various means, including binational review panels, to settle disputes over unresolved trade issues between the two countries. One of these issues was the proper use of national trade remedy laws that combat unfair trade practices. Some decisions by binational panels that reviewed U.S. government agency antidumping (AD) and countervailing duty (CVD) determinations caused public controversy and created trade tensions between the two countries.

As requested, we (1) summarized U.S. and Canadian expectations for the binational panel process, (2) developed a statistical overview of panel activity and decisions, (3) identified and analyzed the participants' views on points of satisfaction and dissatisfaction with the panel process, and (4) identified some other factors that may have contributed to the controversy over the binational panel process in general.

We provided a briefing to Committee staff on June 7, 1995. This report summarizes the substance of that briefing.

Background

Under U.S. AD/CVD laws, private parties can petition the government to determine whether a U.S. industry is materially injured or threatened with material injury by reason of dumped or subsidized imports. In parallel administrative processes, the Department of Commerce determines whether dumping or subsidization exists, and the International Trade Commission (ITC) determines whether a U.S. industry is materially injured or threatened with material injury as a result. Affirmative findings by both agencies can result in the U.S. Customs Service collecting a duty on the imports. Dissatisfied parties can appeal Commerce and ITC determinations to the U.S. Court of International Trade (CIT), then to the Court of Appeals

for the Federal Circuit (CAFC), and finally may petition for certiorari to the Supreme Court.[1]

If the merchandise imported into the United States was from Canada, and vice versa, chapter 19 of FTA provided an alternative to domestic judicial review of agency determinations. Any private party could choose the option of a review by a five-member panel composed of trade experts from Canada and the United States rather than appeal to a national court. These binational panels were to base their decisions on the domestic laws of the country whose agency made the determination under review. FTA established a 315-day guideline for panels to issue a final decision from the date a panel was requested. Also, panels had the option of referring the case back to the agency on remand for further information or consideration in light of the panel's analysis of the record. Then, the agency was to respond to the remand, and the process was to continue, sometimes with more remands. Further, either government could request that a three-member Extraordinary Challenge Committee (ECC) review a panel decision. ECCs could affirm, remand, or vacate a panel's decision on the basis of criteria in FTA chapter 19.

The United States and Canada extended the FTA binational panel provisions to include Mexico on January 1, 1994, and made the panel process permanent under the North American Free Trade Agreement (NAFTA). Although NAFTA binational panel provisions were essentially the same as FTA's, U.S. and Canadian negotiators sought some improvements. The changes in NAFTA included encouraging the use of judges as panelists, lengthening the time limits for ECC proceedings, and adding language to clarify the ECC's role.

Results in Brief

The binational panel process was the result of a compromise between U.S. and Canadian negotiators who could not agree about harmonizing U.S. and Canadian trade remedy laws in FTA. Canada questioned the need for trade laws in a free trade area and, therefore, sought to limit the use of U.S. trade laws against Canadian exports. On the other hand, the United States wanted to end Canadian subsidies and to keep the use of U.S. trade laws intact. Under the compromise, binational panels were given the authority to review U.S. and Canadian agency AD/CVD final determinations. In conducting such reviews, panels were required to apply the appropriate

[1]Canadian law provides for a process very similar to the U.S. process. For example, Revenue Canada determines the extent of any dumping or subsidization and the Canadian International Trade Tribunal (CITT) determines whether Canadian industry has been, is, or will be injured. These determinations can be reviewed by the Federal Court of Canada.

standards of review and the general legal principles that a court of the importing country would otherwise apply. (See briefing section I.)

In compromising, U.S. and Canadian negotiators had common goals for the panel process. These goals were to protect sovereignty, create trade benefits, reduce political tension, and provide a fair and expeditious review process. However, their expectations of how the panel process would accomplish each of these goals differed. For example, on one hand, Canadian negotiators expected that the panel process would address the complaints of Canadian producers that U.S. political pressures disposed U.S. agency officials to side with U.S. industry complainants. They also expected that the new forum would make panel review speedier, less costly, and more rigorous than CIT review of U.S. agency actions. On the other hand, U.S. negotiators expected that quicker resolution of AD/CVD issues would minimize unnecessary bilateral trade friction, while reliance on U.S. trade law meant that the panel review would be comparable to CIT review. Thus, the panel process was a compromise that left the underlying concerns about the use of trade remedy laws unresolved. (See briefing section II.)

We developed a statistical overview of the panel process to see if any patterns emerged. Since the panel process began in 1989, through September 1994, there have been 49 panel reviews of Canadian and U.S. agency determinations. Of 23 completed cases, 15 were reviews of U.S. agency determinations. Panels reviewed about the same proportion of Commerce and ITC determinations. Three of the 15 completed panel decisions were reviewed by an ECC. The small number of completed cases made it difficult to identify any patterns in the way in which panels operated. (See briefing section III.)

Some participants with whom we spoke expressed satisfaction with the binational panels' work. For example, they thought that (1) the process was faster than that of traditional judicial review, (2) the procedures administered by the U.S. and Canadian Secretaries operated smoothly,[2] (3) the panelists demonstrated an expertise in considering the facts of the cases, and (4) the panelists gave a thorough and in-depth review of the cases.

However, other participants had concerns about the panel process, especially with regard to three panel decisions that the United States

[2]Under the FTA and NAFTA, each country has a national Secretariat that administers the binational panel process and facilitates the panels' work.

subsequently challenged under ECC procedures. These concerns included: (1) whether panels had properly interpreted U.S. law or had improperly substituted their judgment for the U.S. agencies'; (2) whether the panels had made excessive use of remands; (3) whether there was a separate U.S. AD/CVD case law emerging from the panels that would apply only to Canada; (4) whether the apparent discord between panelists and agency officials in some cases, or (5) the conflict of interest allegations against certain panelists, affected the panel process; and (6) what the proper role for ECC review should be. We analyzed the issues raised by these various participants. The evidence was inconclusive. The information we developed could be used both to support some participants' views and to challenge those of others. Further, these diverse views may simply reflect the fact that the underlying country concerns about the use of U.S. and Canadian trade remedy laws remain unresolved. (See briefing section IV.)

During our work, we noted that there were significant differences between the behavioral characteristics of the binational panel process and the U.S. judicial system that it replaces. We cannot say in any particular case that these different characteristics produced judgments different from those of a U.S. court.[3] However, some panel behavior may have conflicted with some participants' expectations of how the panel process should have worked. Thus, these differences may have added to the controversy over certain panel decisions. (See briefing section V.)

Scope and Methodology

To understand participants' expectations for the binational panel process, we reviewed U.S. and Canadian government reports, legislative documents, and testimony, all from the late 1980s; and we interviewed former U.S. and Canadian negotiators.

To identify participant's views about the binational panel process, we interviewed (1) U.S. and Canadian government officials; (2) private sector lawyers, some representing U.S. industries petitioning for trade protection and others representing Canadian respondents opposing them; and (3) U.S. and Canadian panelists who reviewed cases. Since it was our intention to determine the range of views about the panel process, we interviewed a sample of participants who, in our judgment, represented both U.S. and Canadian parties and who had broad experience, having taken part in two or more panel cases. Therefore, our sample was not randomly selected and the weight of any individual view cannot be

[3]The results of any particular case can only be interpreted subjectively, and we have no basis to challenge a panel's exercise of its authority to make the necessary normative judgments.

compared to any other. We also augmented these interviews by reviewing scholarly literature assessing the panel process.

To provide a statistical overview of the process and to analyze participants' views, we used data from the (1) U.S. and Canadian FTA Secretariats,[4] (2) Canadian Department of Justice, (3) U.S. Trade Representative (USTR), (4) ITC, and (5) Department of Commerce. We analyzed data from the beginning of the FTA binational panel process on January 1, 1989, to September 30, 1994, and did not include FTA panel cases completed after that date. To gather information, we read the opinions written by completed FTA binational panels on U.S. agency determinations, but we did not assess the panels' legal reasoning. We used information in documents and reports produced by the U.S. Secretariat to analyze the characteristics of panels reviewing U.S. agency decisions. In particular, we focused on panelists' backgrounds, types of U.S. agency decisions appealed, patterns of panel decisionmaking, and length of panel cases. USTR and the Canadian Department of Justice provided information on the occupations and educational backgrounds of the panelists on FTA panels who reviewed U.S. agency determinations. Comparisons of appeal rates, remand rates, and average completion times between reviews completed by CIT and the panels included our analysis of data provided by Commerce and CIT; we did not verify the accuracy of the information in their data bases. ITC provided the import values of the commodities associated with the completed panel reviews of U.S. agency decisions, but we did not verify them. Due to data limitations, we did not evaluate the statistical relationship between the outcomes and the characteristics of the panel cases. All of our work helped us identify factors that may have contributed to the controversy over the panel process.

We did our work in Washington, D.C., and Ottawa, Canada, between January 1994 and February 1995 in accordance with generally accepted government auditing standards.

We requested comments on a draft of this report from (1) the U.S. Secretary of the NAFTA Secretariat, (2) the Assistant Secretary of Commerce for Import Administration, (3) the International Trade Commission, (4) the Senior Counsel and Negotiator, Office of the U.S. Trade Representative, and (5) the Minister Counsellor of the Canadian Embassy, or any of their designees. The comments are discussed below and incorporated in the report where appropriate.

[4]Under NAFTA, these names were changed to the U.S. and Canadian sections of the NAFTA Secretariat.

U.S. Agency and Canadian Government Comments

The U.S. Secretary of the NAFTA Secretariat gave us oral comments on our draft report on May 11, 1995. He generally agreed with the accuracy of the information and analysis in our report and had a few comments, generally of an editorial nature, which we incorporated where appropriate.

On May 18, 1995, various ITC staff and commissioners provided oral or written comments on our draft report, which were coordinated through the ITC Office of the General Counsel. Reviewers suggested various changes to ensure that our characterization of AD/CVD law, including injury determinations, was technically precise with regard to current practice, and we incorporated these changes where appropriate. We clarified our discussion in briefing section IV concerning panel judgment in response to one reviewer's concern that our statement "panels cited U.S. case law in their decisions" implied that panels had thus properly applied U.S. law. Another ITC reviewer was concerned that our presentation in briefing section IV of data on panel remands and dissents and the nationality of the panel majority could lead to misunderstandings or inaccurate conclusions; therefore, we added language to help the reader interpret the data and some notes to better explain our analysis.

We received oral comments from USTR's Office of the General Counsel on May 19, 1995. USTR officials disagreed strongly with the Canadian view that the affiliation of the U.S. Secretariat with Commerce threatened the U.S. Secretary's independence and may have signaled that the panel process was a low U.S. priority; however, they did not disagree with the information we presented. Otherwise, USTR officials said they had no major concerns about our analysis, but they made various suggestions to improve the clarity of the draft report, including statements about U.S. negotiating expectations, U.S. ECC challenges of certain panel decisions, and the differences between panels and CIT. We incorporated their suggestions where appropriate.

The Office of the Chief Counsel for Import Administration provided oral comments on May 17, 1995, including those from the Office of the Assistant Secretary of Commerce for Import Administration. Although they had concerns about some participants' views of Commerce's role in the panel process, most comments related to making language in our draft report technically consistent with AD/CVD law and practice, as well as FTA, NAFTA and related U.S. negotiating expectations. We made changes throughout the draft report, on the basis of their comments.

The Minister Counsellor of the Canadian Embassy provided the Government of Canada's comments to us in his letter of May 24, 1995. He later stated that the Government of Canada holds the view that the Chapter 19 binational process is a "unique and successful process of settling trade disputes in both countries that has worked effectively." While not disagreeing with our analysis, he suggested clarifications to certain language in the report, including statements made by Canadian officials and corrections to factual statements. Some of the proposed amendments reiterated Canadian government concerns that the actions of U.S. agencies and political pressures had caused controversy over certain panel cases, and we incorporated these concerns where appropriate. We made various factual corrections to the draft and added notes to better present data and clarify our analysis.

As agreed with you, unless you announce the contents of this briefing report earlier, we plan no further distribution of this report until 30 days from its issue date. At that time, we will send copies to other interested congressional committees, U.S. and Canadian government officials, and other interested parties. We will also make copies available to others on request.

The major contributors to this briefing report are listed in appendix IV. Please contact me at (202) 512-4812 if you have any questions concerning this report.

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Contents

Briefing Section IV Participant Views

Abbreviations

AD	Antidumping
CAFC	U.S. Court of Appeals for the Federal Circuit
CVD	Countervailing duty
CIT	U.S. Court of International Trade
CITT	Canadian International Trade Tribunal
ECC	Extraordinary Challenge Committee
FTA	U.S.-Canada Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
ITC	U.S. International Trade Commission
NAFTA	North American Free Trade Agreement
USTR	Office of the U.S. Trade Representative
WTO	World Trade Organization

Background

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Briefing Objectives

- Provide background on the binational panel process
- Summarize U.S. and Canadian expectations
- Develop statistical overview of panel activity and decisions

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Briefing Objectives

(continued)

- Present participants' views
- Identify factors that may have contributed to concerns

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Genesis of the Free Trade Agreement (FTA) Binational Panel Process

FTA negotiations stalemated over trade remedy issues

- Canada wanted to limit the use of U.S. trade laws against its exports
- United States wanted to keep its trade laws intact and discipline Canadian subsidies

Binational panel compromise left these fundamental differences unresolved

Genesis of the FTA Binational Panel Process

An official from the Department of Commerce testified before the Senate Judiciary Committee in 1988 that Canadians feared the trade-liberalizing benefits of FTA could be undercut by what they viewed as arbitrary administration of U.S. trade remedy laws. The Canadians' views stemmed partly from the outcome of a U.S. countervailing duty (CVD) case concerning Canadian softwood lumber. Thus, a major Canadian objective in the negotiations was to devise a new approach to replace these trade remedy laws. U.S. negotiators were unwilling to exempt Canada from U.S. CVD law and sought to ensure strong, enforceable discipline over Canadian subsidies. Despite intense negotiations, it proved impossible for the two sides to reach agreement on disciplines and new approaches to combat unfair trade practices.

U.S. and Canadian officials told us that these issues were so important that Canadian acceptance of the entire FTA was at risk, and that Canadian negotiators at one time had walked out of the talks. A novel compromise was reached, however. In chapter 19 of FTA, which was signed on January 2, 1988, the two governments agreed to retain existing national trade remedy laws and procedures, but they also agreed that final agency decisions under these laws could be reviewed by independent binational panels, rather than by national courts. The two governments created the panel procedure as an interim mechanism that preserved private rights to relief from unfair trade practices,[1] but allowed quick resolution of bilateral trade remedy issues.

[1]Meanwhile, other sections of chapter 19 created two further obligations. First, the two countries were to create a working group to seek to develop more effective rules and disciplines concerning the use of government subsidies and a substitute system of rules for dealing with unfair pricing and government subsidization. Second, they were obligated to notify the other party of any intended changes to antidumping (AD) or CVD laws and enter into consultations, if requested. Then, the other party could request that a panel review whether these changes conformed to FTA or applicable General Agreement on Tariffs and Trade (GATT) rules. If such a panel found the changes did not conform to FTA or GATT rules, the other party would have the right to make comparable changes to its own laws or terminate the agreement if no satisfactory solution were achieved through further consultations.

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Categories of Trade Remedy Actions

Parties can seek

- Antidumping (AD) duties to offset the unfair price of imports sold at less than fair market value (i.e., dumping)
- Countervailing duties (CVD) to offset foreign subsidies provided for the manufacture, production, or export of particular goods

Categories of Trade Remedy Actions

Chapter 19 of FTA covers two categories of U.S. trade remedy actions—AD and CVD. Dumping is generally considered to be the sale of an exported product at a price lower than that charged for the same or a like product in the "home" market of the exporter. U.S. AD laws seek to combat this practice, which is recognized as a form of unfair price discrimination that can potentially harm the importing nation's competing industries. AD duties are special customs duties imposed to offset the price difference between the U.S. price and the foreign market value of imported merchandise that is materially injuring U.S. industry.

Subsidies lower a producer's costs or increase its revenues. This may allow a producer to sell his or her products at a lower price than that of the competition. Subsidies to firms that produce or sell internationally traded products can distort international trade flows. CVD laws seek to address the adverse effects that subsidized imports can cause. CVDs are special customs duties imposed to offset subsidies provided for the manufacture, production, or export of a particular good. The principal U.S. statutory provisions related to AD and CVD are contained in subtitle IV, Title 19 of the U.S. Code.

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Agency Determinations in Applying U.S. Trade Remedy Laws

- Commerce determines whether imports are dumped or subsidized
- The International Trade Commission (ITC) determines whether a U.S. industry is materially injured or threatened with material injury by reason of the dumped or subsidized imports

Agency Determinations in Applying U.S. Trade Remedy Laws

Under U.S. AD/CVD law, private parties can petition Commerce on behalf of a U.S. industry to determine whether an industry is materially injured or threatened with material injury by reason of dumped or subsidized imports. Commerce may also self-initiate an AD/CVD investigation.

In an AD investigation, Commerce is to determine whether sales are at "less than fair value" by calculating the difference between the foreign market value of the product and the U.S. price. Depending on the circumstances, foreign market value is derived from sales in the exporting country, sales in a third country, or a constructed value based on a formula set forth in the statute that uses production costs and profit margins. In a CVD investigation, Commerce is to determine whether a country is providing a subsidy, either directly or indirectly. A subsidy is countervailable if it is tied to an industry's export performance or provided to a specific industry or group of industries.

ITC is an independent, quasi-judicial federal agency with broad investigatory powers in matters of trade. It has six commissioners, whom the President appoints with Senate confirmation for 9-year terms. They vote to decide whether a U.S. industry is materially injured or threatened with material injury by reason of criteria specified in 19 U.S.C. 1677.

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Agency Determinations in Applying U.S. Trade Remedy Laws

(continued)

- If dumping or a subsidy and injury exist, Commerce calculates the amount of duties on each importer
- Commerce may review an outstanding AD or CVD order annually in an "administrative review"

Agency Determinations in Applying U.S. Trade Remedy Laws (Cont.)

If Commerce determines that dumping or a countervailable subsidy exists, it can calculate duties (AD or CVD) on each importer, provided that ITC finds that a U.S. industry was materially injured or threatened with material injury. In uncomplicated cases, a final AD determination is to be made within 280 days, or 205 days in CVD cases, after the date on which the petition was filed, as provided for in federal regulation.

If requested, Commerce is required to conduct an administrative review of its outstanding AD/CVD orders on an annual basis. In essence, this is a repetition of the AD or CVD investigation to assess the actual amount of duties due on the previous year's imports. Duties may be refunded or additional duties collected if the margins changed.

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Appeals of U.S. Agency Trade Remedy Determinations

Private parties can appeal U.S. agency determinations to

- appropriate national courts or
- a binational panel under chapter 19 of FTA

Private parties who are dissatisfied with U.S. agency determinations may appeal to a U.S. court. If the imported merchandise was from Canada, under chapter 19 of FTA, the dissatisfied private parties (on either side) have the option of replacing domestic judicial review of AD/CVD determinations with review by a binational panel.

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U.S. Courts Involved in the Appeals Process

Parties may appeal

- AD, CVD, and injury determinations to the U.S. Court of International Trade (CIT)
- CIT decisions to the Court of Appeals for the Federal Circuit (CAFC)
- CAFC decisions by petitioning the Supreme Court

For example, foreign exporters or U.S. producers may appeal U.S. agency determinations to the U.S. Court of International Trade (CIT), then to the U.S. Court of Appeals for the Federal Circuit (CAFC), and finally may petition for certiorari to the Supreme Court.

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Canadian Law Provides for a Similar Trade Remedy System

- Revenue Canada makes AD/CVD determinations
- Canadian International Trade Tribunal (CITT) makes injury determinations
- Dissatisfied parties can appeal to the Federal Court of Canada or FTA panel
  - FTA implementation expanded the right to appeal Revenue Canada determinations

The principal Canadian agencies responsible for AD, CVD, and injury determinations are the Department of National Revenue, Customs, Excise and Taxation (Revenue Canada); and the Canadian International Trade Tribunal.

Under the Canadian Special Import Measures Act, the Deputy Minister of National Revenue is charged with the administrative activities associated with investigations. The Anti-dumping and Countervailing Division of Revenue Canada has been assigned this function. Like Commerce, if

Revenue Canada's investigation establishes that an import is being dumped or subsidized, it calculates the margin of dumping or amount of subsidy for each importer. Revenue Canada levies duties on the imported goods equal to either the margin of dumping or the amount of subsidy.

Like the United States' ITC, CITT makes injury determinations. CITT is an independent quasi-judicial body that reports to the Canadian Parliament through the Minister of Finance. CITT is composed of nine full-time members who serve up to 5-year terms. Under Canadian law, CITT conducts inquiries and makes findings on whether the importation of goods that Revenue Canada has found to be dumped or subsidized is causing or likely to cause "material injury" to the Canadian production of such goods.

Parties dissatisfied with Canadian agency determinations can appeal to the Federal Court of Canada or to an FTA binational panel, if applicable. Canadian legislation implementing FTA expanded the rights of all dissatisfied parties to seek judicial review of Canadian trade remedy determinations; before FTA, Revenue Canada's dumping and subsidy calculations were not generally appealable, according to Canadian officials.

The two countries' trade remedy laws were similar, and this was seen as very important to the success of the binational panel process. However, differences in the legal traditions of the two countries also existed. For example, in contrast to U.S. judges, Canadian judges can only make limited use of a statute's legislative history for interpreting ambiguous provisions, according to a Canadian legal scholar. Also, Canadian Justice officials told us that they believed Canadian judges deferred more to administrative authorities than their U.S. counterparts did.

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FTA Binational Panel Process: Rules and Requirements

Quasi-judicial process established

- secretary from each country is to administer the process
- five-member panel is to be selected for each case from U.S. and Canadian rosters of candidates
- review is to be based on national law of the importing country

FTA established rules about the practices and composition of the quasi-judicial panels. FTA provided a fixed schedule for parties to file briefs, to give oral arguments, and for panels to issue written decisions. To ensure panel decisions were fair and impartial, FTA provided for creating rules of conduct. Each country also provided the necessary resources to administer the process and designated a secretary to act as the principal administrator of the legal process and the panels' work.

FTA provided that the United States and Canada develop a 50-person roster of candidates to serve as panelists, with each country appointing 25 individuals not affiliated with either government.[2] These individuals must be citizens of the United States or Canada; be of good character, high standing and repute; and be chosen on the basis of their objectivity, reliability, sound judgment, and general familiarity with international trade law. Within 30 days of a request for a panel to review a final agency determination, each government is to appoint two candidates to a 5-member panel, normally from the roster. According to U.S. Trade Representative (USTR) officials, the fifth candidate is chosen by the governments. The nationality of each panel's majority alternates, including panels considering related injury and AD or CVD cases. Each government has the right to exercise four peremptory challenges to disqualify candidates from being appointed to a particular panel. A majority of the members and the chair (who is chosen by the panel members) of each panel must be lawyers because of the panels' quasi-judicial function.

Panels vote to decide what action to take on the basis of their review. Panels can decide to affirm a final agency determination and reject the claims of the parties making the appeal. Alternatively, panels can decide to send a determination back to an agency, known as a "remand," for a particular action. Unlike CIT, panels cannot reverse an agency decision. While individual panelists can dissent from an opinion written by the majority, a few panelists told us that they seek consensus among all panel members in any decision.

[2]Judges are not considered to be "affiliated" with a government and can be appointed as panel members.

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FTA Binational Panel Process: ECC Review

(continued)

Governments may ask that a panel decision be reviewed by an Extraordinary Challenge Committee (ECC)

- ECC composed of three current or retired U.S. and Canadian judges
- ECC review is to be based on FTA criteria

FTA Binational Panel Process: ECC Review

Under FTA, dissatisfied parties cannot appeal panel decisions to their domestic courts. However, a government can request review by an ECC. The three-member committee is chosen from a 10-person roster, half of which is made up of judges or former judges of a U.S. federal court, and the other half of judges or former judges from a court of superior jurisdiction of Canada. Each government selects one committee member; those two select the third; and then all three select a chairman.

The standard used for ECC review is different from that employed in the usual judicial review by a U.S. appeals court. An ECC is to determine whether (1) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest; the panel seriously departed from a fundamental rule of procedure; or the panel manifestly exceeded its powers, authority, or jurisdiction and (2) whether such an action materially affected the panel's decision and threatened the integrity of the binational panel review process. ECC decisions to affirm, remand, or vacate a panel decision are binding on the parties.

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Why the Panel Process is Unique

- Binational panels review domestic agency determinations
- Review is to be based on domestic law, not international rules of trade as in GATT- WTO
- Private parties can request panels through governments
- Private parties can represent themselves before an international appeals body

FTA dispute settlement provisions are different from those found in the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), which provides a forum for governments to settle disputes arising from their international obligations. In GATT/WTO, the "law" being interpreted by the international dispute settlement body is based upon an international agreement.[3]

[3]For example, a WTO dispute settlement body might review whether U.S. AD/CVD law conflicts with GATT. Under FTA chapter 19, a binational panel reviews a government agency's actions on the basis of the panel's interpretation of that nation's laws.

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Who Are the U.S. and Canadian Panel Participants?

- Domestic producer petitioning for relief from allegedly unfair imports
- Foreign producer, exporter, and/or domestic importer seeking to avoid duties
- Domestic agency making determination
- Foreign government (defending its programs in CVD cases)

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The Standard of Review Used by Both U.S. Courts and Binational Panels

Under the U.S. AD and CVD law, judicial and panel review is limited to whether the U.S. agency's final determination is

unsupported by substantial evidence on the record, or otherwise not in accordance with law.

19 U.S.C. 1516a(b)(1)(B) - 1988

The Standard of Review Used by Both U.S. Courts and Binational Panels Reviewing Final U.S. Agency Determinations

As reviewing authorities, U.S. courts are obligated to ensure that an agency's determination is based on substantial evidence in the record and is otherwise in accordance with law. This "substantial evidence" standard generally requires the reviewing authority to accord deference to an agency's factual findings, its statutory interpretations, and the methodologies it used. Therefore, the reviewing authority may not reweigh the evidence or displace the agency's choice between two conflicting but reasonable views, thereby substituting its judgment for that of the agency.

In accordance with paragraph two, article 1904 of FTA, when reviewing a final U.S. AD or CVD determination, a binational panel must apply the same standard of review and "general legal principles" as would the U.S. CIT and the U.S. CAFC.

According to FTA, a decision of a panel is binding on the United States and Canada, with respect to the particular administrative determination reviewed by the panel. An FTA panel decision would not serve as precedent for other U.S. or Canadian cases or judicial review procedures when there is no panel review—for example, in challenges to AD/CVD determinations involving imports from countries other than Canada (or those from Canada when the parties chose to appeal to a national court.)

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Judgmental Nature of the Standard of Review

What constitutes substantial evidence is a subjective determination based on the facts and available information in each case

- Different judges and panels apply the standard differently
- Therefore, judging the merits of any decision or comparing panel decisions to court decisions is problematic

Judgmental Nature of the Standard of Review

Determining what constitutes substantial evidence involves subjective judgment and is the subject of ongoing debate in U.S. administrative law. Questions regarding the application of the standard, such as how much evidence is required to support an agency decision, involve the discretion of the reviewing court or panel. The criteria that have been articulated by appellate courts for the application of the standard have not necessarily provided clear guidance for individual cases.

Consequently, comparing the panels' treatment of the substantial evidence standard with that of CIT is difficult because different judges themselves have applied the standard differently. Some participants told us that they see CIT judges apply the standard of review in a range of ways—that is, not uniformly. In the judicial process, the boundaries for CIT judges applying the standard of review are established through review of these decisions by higher courts, namely CAFC. However, under FTA, while an ECC can review a panel decision, the standard for this subsequent review is different.

Expectations for the Panel Process

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U.S. & Canadian Officials: Different Expectations for the Panel Process

Common goal: Protect sovereignty

- Canadian expectation: Maintain the Canadian government's capacity to pursue certain economic programs
- U.S. expectation: Maintain U.S. companies' rights to obtain relief from unfair Canadian imports through U.S. trade remedy laws

U.S. and Canadian negotiators both sought to protect their sovereignty, create trade benefits, reduce political pressure surrounding trade remedies, and provide a fair and expeditious review. Nevertheless, U.S. and Canadian officials had different expectations for the process they established.

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U.S. & Canadian Officials: Different Expectations for the Panel Process

Common goal: Create trade benefits

- Canadian expectation: Prevent perceived abuse of U.S. trade remedy laws and thus ensure U.S. market access for Canadian firms
- U.S. expectation: Enhance the rights of U.S. exporters in Canada, since judicial review of Canadian agency determinations would be expanded

Anticipated U.S. and Canadian trade benefits to be gained from the panel process differed. Former negotiators said that the focus of this new binational panel provision was on U.S. trade remedy laws. Although Canadians had pursued AD cases against U.S. exporters under Canadian trade remedy laws, the negotiators told us these had not generated nearly as much controversy.

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U.S. & Canadian Officials: Different Expectations for the Panel Process

Common goal: Reduce political pressure

- Canadian expectation: Address the complaints of Canadian producers that U.S. political pressures disposed U.S. agency officials to side with complainants

- U.S. expectation: Allow quick resolution of AD and CVD disputes before bilateral trade friction grew

Although U.S. and Canadian officials reached agreement on the details of the panel process—panels would (1) give the appearance of greater objectivity, (2) be less politicized, and (3) be quicker (and therefore less costly) than the judicial review process—they emphasized different aspects when describing their agreement publicly during their legislative approval processes. However, U.S. officials believed that panel decisions would be no different from U.S. court decisions. The United States emphasized that panels would employ the same standard of review and same general legal principals as national courts and could

GAO

U.S. & Canadian Officials: Different Expectations for the Panel Process

Common goal: Provide a fair and expeditious review

- Canadian expectation: Make review of U.S. agency determinations faster and more rigorous than CIT review
- U.S. expectation: Yield results consistent with CIT because of reliance on U.S. law

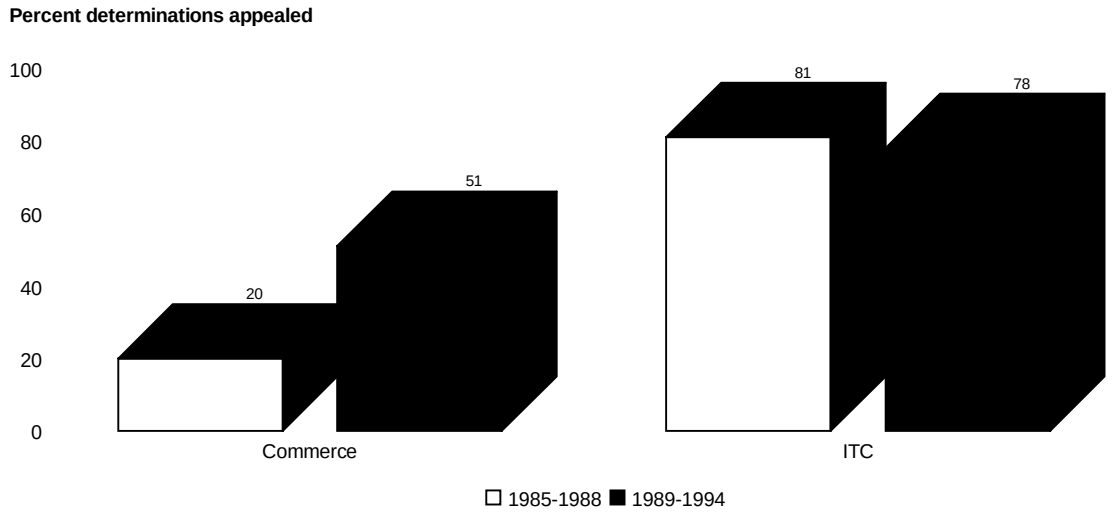
not substitute their judgment for that of the agencies'. However, Canadian officials emphasized their belief that panelists' expert opinions would improve oversight of U.S. agency actions, and that panels would not be as deferential as the U.S. courts were. Panels were seen as an improvement because Canadians believed that CIT was "passive" in its review of U.S. agency actions, and that politics, not the law, guided agency determinations.

Statistical Overview of Binational Panel Activity and Decisions (January 1989-September 1994)

GAO

Appeals of U.S. Agency Determinations on Canadian Imports

Since FTA, appeals of Commerce determinations to the panels and CIT rose from 20% to 51%. ITC's remained near 80%.



Source: GAO analysis of data from Commerce, ITC, and U.S. Secretariat.

Appeals of U.S. Agency Determinations on Canadian Imports Since FTA

Appeals of U.S. agency determinations concerning Canadian imports have increased overall since FTA took effect. In practice, most, but not all, of these appeals have gone to panels rather than to CIT. From January 1989 to September 1994, Commerce issued 51 AD and CVD determinations regarding Canadian products, including administrative reviews,[4] of which 26 were appealed. Twenty-four of these 26 Commerce determinations were appealed to a panel, and 2 to CIT. Before FTA, from 1985 through 1988, Commerce issued 41 determinations, of which 8 were appealed to CIT.

During the same period, ITC issued 18 injury determinations, of which 14 were appealed by dissatisfied parties. Seven were appealed to a panel. Of the seven appealed to CIT, three involved preliminary ITC determinations, which technically cannot be reviewed by a panel. (Only final agency determinations are appealable under FTA). In the other four cases, neither U.S. nor Canadian parties sent the cases to a panel. Before FTA, from 1985 through 1988, ITC issued 16 determinations, of which 13 were appealed to CIT.

[4]Commerce data on number of appealable determinations (used as base) does not include a relatively small number of scope determinations, unlike data for determinations that were actually appealed.

GAO

What Has Been the Volume of FTA Binational Panel Activity?

There have been 49 panel reviews of agency determinations since FTA began

Of these

- 21 were reviews of Canadian agency determinations
- 28 were reviews of U.S. agency determinations

Note 1: Consolidated appeals of two agency determinations were counted as one panel review.

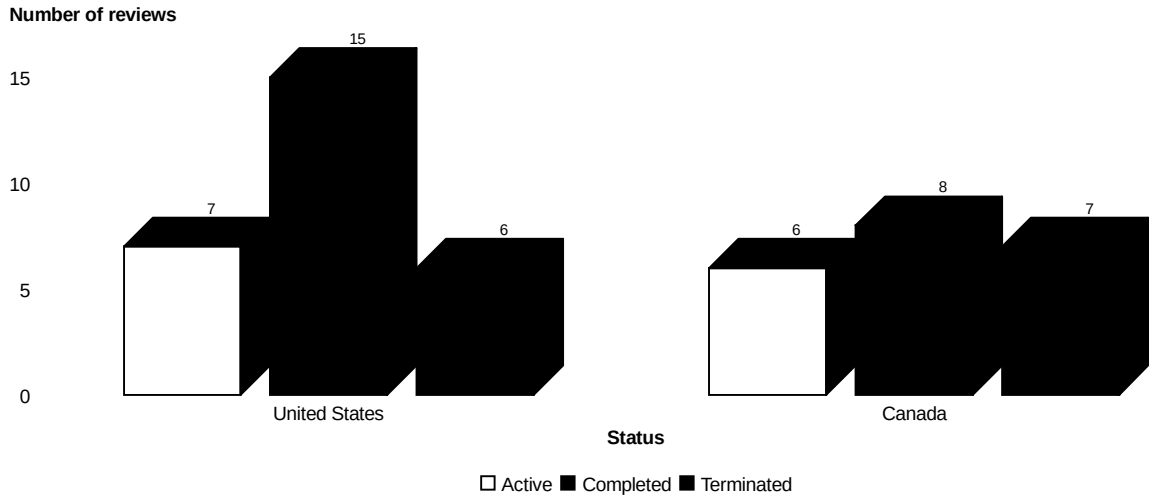
Note 2: Five of the 49 panel reviews of U.S. and Canadian agency determinations were initiated by U.S. or Canadian parties under NAFTA, rather than FTA.

Source: GAO analysis of information from U.S. Secretariat.

GAO

What Was the Status of These Binational Panel Reviews?

Panels completed nearly twice as many reviews of U.S. agency determinations as of Canadian agency determinations

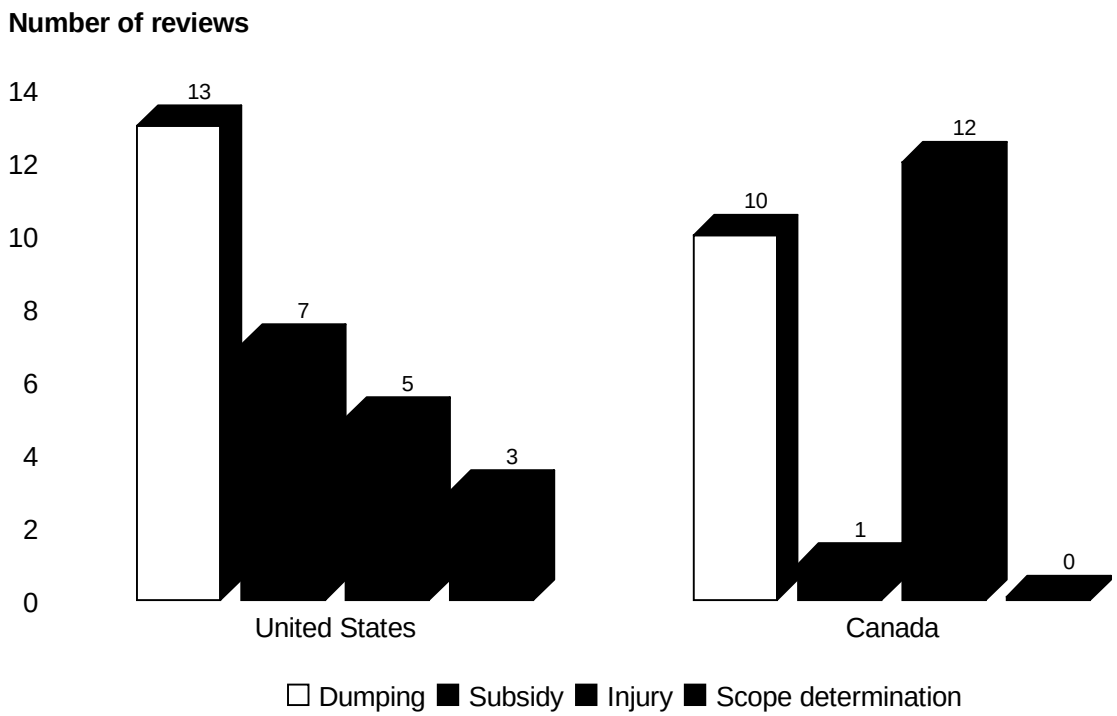


Note: Terminated refers to those reviews concluded without a decision on the merits.

Source: GAO analysis of information from U.S. Secretariat.

GAO

What Was the Distribution of the Types of Panel Reviews?



Note 1: One Canadian determination was both AD and CVD, another was both AD and injury. These were counted as one case in each respective category.

Note 2: In a scope determination, Commerce rules on whether particular imports are to be covered by an AD or CVD order.

Source: GAO analysis of data from U.S. Secretariat.

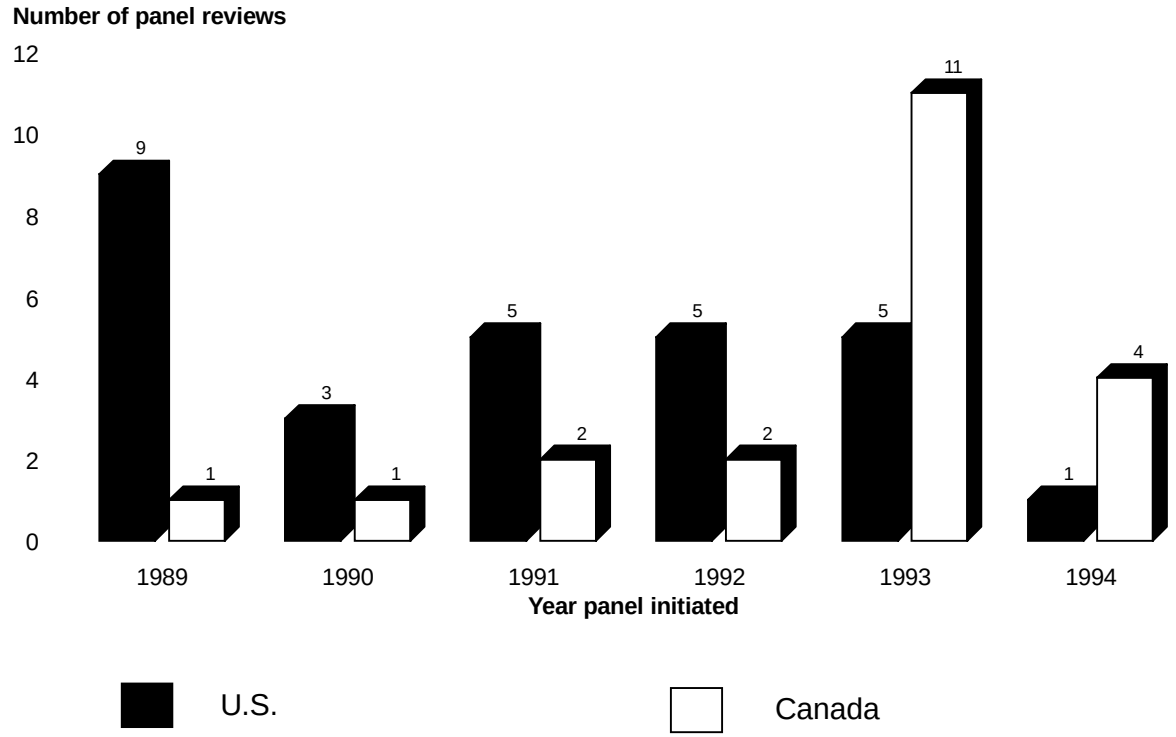
GAO

Was There a Trend in Binational Panel Activity Over Time?

- Initial surge of reviews of U.S. agency determinations initiated in 1989
- Large number of reviews of Canadian agency determinations initiated in 1993
- 23 completed panel reviews of U.S. and Canadian agency determinations by September 1994

GAO

Was There a Trend in Binational Panel Activity Over Time? (continued)



Note: Consolidated appeals of two agency determinations were counted as one panel review.

Source: GAO analysis of information from U.S. Secretariat.

GAO

Who Has Appealed U.S. Agency Determinations to Binational Panels?

Of the 28 reviews of U.S. agency determinations

- Canadian parties alone appealed 23
- Both U.S. and Canadian parties appealed 5
- No U.S. agency determinations were appealed by U.S. parties alone

Canadian parties subject to an AD or CVD order may appeal the U.S. agency's determination to have the duties on their U.S. exports reduced or eliminated (as may the U.S. importers with similar interests). Similarly, the U.S. parties seeking AD or CVD protection may appeal a negative determination to have it reversed, or an affirmative determination to have the duties increased. Although both Canadian and U.S. parties could appeal the same affirmative determination, they would be seeking opposite changes.

GAO

Who Has Appealed Canadian Agency Determinations to Binational Panels?

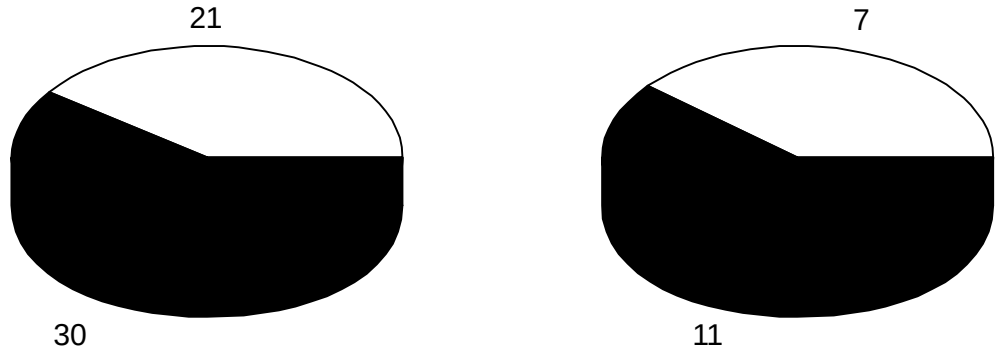
Of 21 reviews of Canadian agency determinations

- U.S. parties alone appealed 16
- Both U.S. and Canadian parties appealed 3
- Canadian parties alone appealed 2

GAO

Frequency of Panel Review of Commerce and ITC Determinations

Panels reviewed about the same proportion of Commerce and ITC determinations



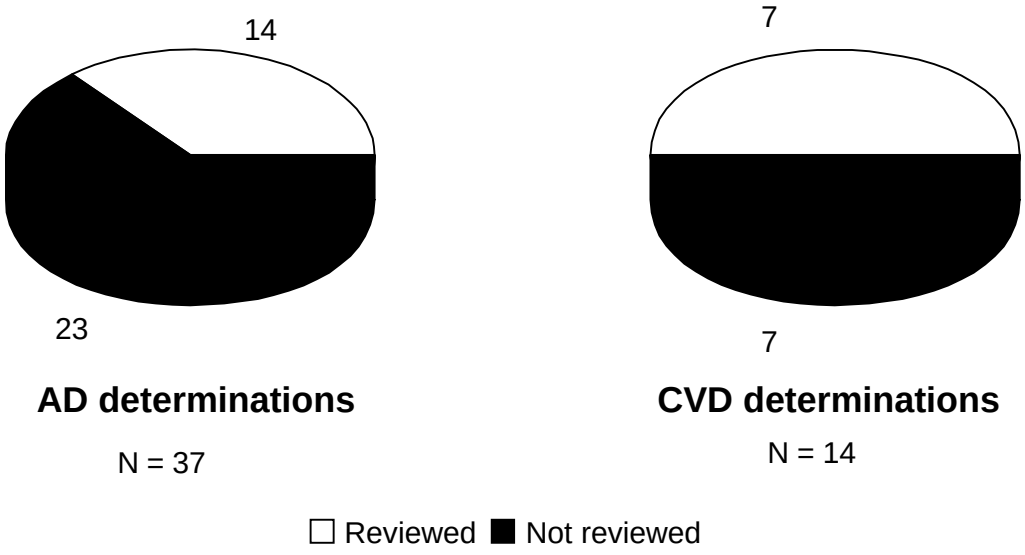
Note: Three scope determinations are not included. Only 13 of 18 ITC determinations were appealable to panels.

Source: GAO analysis of Commerce and ITC data.

GAO

Frequency of Panel Review of Commerce AD or CVD Determinations

Panels reviewed a smaller proportion of AD cases than of CVD cases



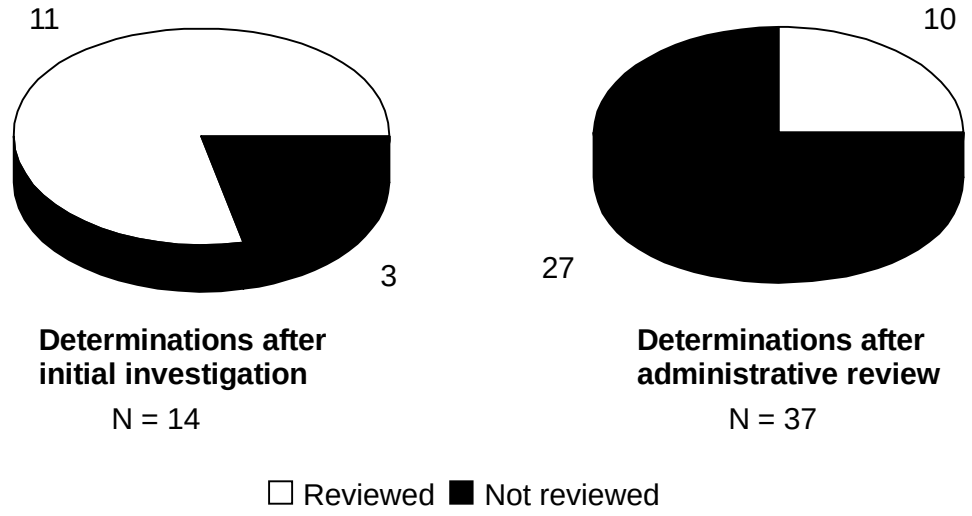
Note: Three Commerce scope determinations and all ITC injury determinations not included.

Source: GAO analysis of Commerce data.

GAO

Frequency of Panel Review of Commerce Final Determinations

Panels reviewed a greater proportion of determinations made after initial investigations



Note: Three Commerce scope determinations and all ITC injury determinations not included.

Source: GAO analysis of Commerce data.

GAO

What Types of Decisions Have Panels Produced?

As a result of panel decisions, U.S. agencies

- Were affirmed (made no changes)
- Lowered duties
- Increased duties
- Reversed injury determinations
- Redefined commodities

Note: See appendix I.

Source: GAO analysis of Commerce information.

GAO

Three Panel Decisions on U.S. Agency Determinations Reviewed by an ECC

- Pork (ITC injury determination)
- Live swine (Commerce administrative review of a CVD order)
- Softwood lumber (Commerce CVD determination)
- No Canadian cases were reviewed by ECC

USTR officials told us they had received requests from dissatisfied U.S. parties to call for ECC reviews of four panel decisions. USTR pursued challenges of three panel reviews and denied a request to challenge a panel review of Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada (USA-89-1904-03),[5] in which the panel affirmed a Commerce administrative review of an AD order. (See app. II.)

[5]The panel consolidated this case with USA-89-1904-05.

Participant Views

GAO

Areas of Satisfaction With the Binational Panel Process

Some participants thought

1. the process was faster than that of traditional judicial review
2. procedures administered by the U.S. and Canadian Secretaries operated smoothly

GAO

Areas of Satisfaction With the Binational Panel Process

(continued)

3. panelists demonstrated expertise when considering the facts of the cases

4. panelists gave a thorough and in-depth review

GAO

1. Have Appeals to Panels Been Completed Faster Than Those to CIT?

Binational panel cases were on average completed faster than cases at CIT

- Binational panels took 502 days to complete
- CIT cases, in contrast, took 734 days to complete

Note: Includes CIT and binational panel cases completed between 1990 and September 1994. (There were no binational panel cases completed before 1990.)

Source: GAO analysis of data from U.S. Secretariat and CIT.

1. Have the Appeals to Panels Been Faster Than Those to CIT?

The panel process was designed to provide more rapid review than was typical in U.S. or Canadian courts. FTA (article 1904, paragraph 14) established a 315-day guideline for panels to issue a final decision from the date a panel was requested. The 315-day guideline does not include the time when the panels are suspended, according to the U.S. secretary.

We found that, on average, the panel process for U.S. cases has been faster than that of CIT appeals. To quantify the total time to resolve the case, we measured time in terms of calendar days. Binational panels took 502 days[6] on average to complete cases that were not reviewed by ECC. As of September 1994, only two panels had exceeded 2 calendar years. In contrast, CIT took 734 days on average to complete cases (from all countries) not appealed to CAFC, from 1990 through September 1994.

[6]Using a simple standard of a 5-day work week, we found that panels averaged 358 business days.

GAO

1. Have Appeals to Panels Been Completed Faster Than those to CIT?

(continued)
The difference in average completion times was even larger for those cases appealed to a higher body

- Panel cases reviewed by ECCs took 683 days to complete
- CIT cases appealed to CAFC took 1,210 days to complete

Source: GAO analysis of data from U.S. Secretariat and CIT.

1. Have the Appeals to Panels Been Faster Than Those to CIT? (Cont.)

We also compared the time it took to complete binational panel and CIT cases that were reviewed at a higher level. ECCs are to be established within 15 days of a request from a government, and ECC review has a 30-day guideline under FTA.[7] Those three binational panel cases reviewed by ECC took an average of 683 calendar days from the time the panel was first initiated to the completion of the ECC. CIT cases (from all countries) reviewed by CAFC upon further appeal averaged 1,210 calendar days to complete from 1990 through September 1994. We found that subsequent CAFC review added a significant amount of time to the U.S. judicial process. Thus, the most significant factor affecting the greater expediency of the binational panel process appeared to be the reductions in the time spent on subsequent review.

[7]NAFTA changed the guideline for ECC review to 90 days.

GAO

2. Panel Procedures and FTA Secretaries

- U.S. and Canadian officials thought the process generally worked well
- The panel's quasi-judicial procedures have been modified with experience
- Certain panel procedures represented improvements relative to U.S. judicial procedures
- Panelists expressed satisfaction with how the secretaries facilitated their work

GAO

2. Canadian Concerns About the U.S. Secretariat

The U.S. FTA Secretariat is affiliated with Commerce. The Canadian FTA Secretariat is an independent agency

- Canadians said the placement of the U.S. Secretariat could threaten the office's independence
- Canadians were concerned that this may indicate that the binational panel process is a low U.S. priority

Canadian officials expressed concern about the affiliation of the U.S. Secretariat with Commerce. Commerce provides funding and office space to the Secretariat. Canadian officials indicated that because Commerce decisions are reviewed by the panels and because Commerce controls the Secretariat's resources, an appearance of bias existed. This situation also suggested to them that the panel process may be a low U.S. government priority. Commerce officials told us that a recent reorganization within Commerce had elevated the level of the Secretariat.

GAO

3. Training of Panelists Reviewing U.S. Agency Determinations

Most U.S. and Canadian panelists had law degrees

- 100 percent of U.S. Panelists
- 79 percent of Canadian Panelists

Source: Information from USTR and Canadian Department of Justice.

GAO 3. Occupations of Panelists Reviewing U.S. Agency Determinations

Canadian panelists were drawn from a greater variety of occupations than were U.S. panelists

- Over 20 percent of the Canadian panelists included professors of political science, economists, and international trade consultants
- U.S. panelists were almost all either practitioners or professors of law

Note: Based on the number of panelist positions, in all panels initiated through September 1994.

Source: Information from USTR and Canadian Department of Justice.

GAO 3. Experience of Panelists Reviewing U.S. Agency Determinations

Number of times a panelist served on different binational panels

- Thirteen out of 43 (30 percent) U.S. panelists had served on more than one panel
- Fourteen out of 37 (38 percent) Canadian panelists had served on more than one panel

Source: Information from USTR and Canadian Department of Justice.

GAO

4. Panels Gave a Thorough and In-Depth Review

Some participants said that panels

- wrote longer and more detailed opinions,
- held long hearings,
- were more probing and far-ranging in their questions, and
- reviewed the facts of a case more carefully than CIT usually would

GAO

Six Areas of Participant Concern About the Binational Panel Process

1. Panel judgment
2. Remands
3. Separate case law emerging
4. Apparent discord among participants
5. Conflict of interest allegations against panelists
6. Proper role for ECC review

U.S. officials testified in June 1994 that they generally supported the panel process, but were disappointed with the outcomes in a few cases. Canadian officials told us they considered the process to have worked effectively despite a few contentious cases. They expressed concerns about certain aspects of the process, such as conflict of interest and ECC issues. Some other participants told us that their greatest concerns about the panel process resulted from the three cases that went to ECC. Trade frictions increased between the two countries over these

GAO

Greatest Participant Concerns About Three Panel Cases That Went to ECC

These three cases were different because they involved

- long-standing U.S.-Canadian trade disputes predating FTA
- public attention through coverage by media and scrutiny by elected officials
- greater economic interests than in other cases

three cases. The fact that all three panels and ECCs involved Canadian majorities may have added to the controversy. Furthermore, the panel and ECC votes regarding the softwood lumber CVD case split along national lines, with the U.S. ECC judge issuing a strong dissent. Some participants thought that these cases were more controversial because they involved agricultural products with many producers in price sensitive markets. They said that other panel decisions were relatively noncontroversial.

GAO

Three Cases Involved Industries With the Highest Value of Imports

Softwood lumber [a] (1990)	$2,873
Pork [a] (1988)	353
Live swine [a] (1983)	75

[a]Commodities with cases involved in an ECC.

Note: Values represent imports in the year under ITC investigation. Products listed represent all those considered in completed panel reviews.

Source: ITC.

GAO

1. Views of Panel Judgment Varied Widely

Some participants said that

- Panels did not properly interpret U.S. law, were biased, were not "deferential" enough, and improperly substituted their judgment for that of the U.S. agencies

While others said that

- Panels did properly interpret U.S. law and are needed to critically review U.S. agency determinations for errors

Some participants believed that panels sometimes have faced more extreme arguments to defer to U.S. agency judgment than U.S. courts would have. If extreme deference were given, this could impair any party's ability to get an effective review of an agency determination by a panel.

GAO

1. U.S. Government Allegations Regarding Panel Judgment

In arguments to ECCs, U.S. officials alleged that some panels substituted their own judgment for that of the agencies, and thus

- exceeded their authority under FTA
- used procedures that conflicted with fundamental U.S. principles of law

ECCs ruled against USTR challenges

Canadian officials said they considered that the U.S. government had been influenced by political pressures from U.S. industry to initiate ECC review. They pointed out that subsequent ECC decisions did not uphold the U.S. government's challenges.

GAO

1. The Difficulties in Assessing the Validity of These Allegations

- We found that panels cited to U.S. case law authorities; however, this does not mean U.S. law was properly applied
- The authority to make the judgments required on the basis of the evidence in the record rests with the panel
- Thus, we are not in a position to say whether panels properly applied U.S. law

GAO

2. Remands

Remand: When a court or panel sends a determination back to an agency for further action

Remands can ask U.S. agencies to

- explain decisions
- provide more information
- make corrections

GAO

2. Participant Concerns About Panel Remands Varied

Some participants said that panel remands

- made more demands on U.S. agencies than did CIT
- directed U.S. agencies to take a particular action, instead of letting the agencies decide changes themselves
- were issued more than once in some cases, which perhaps unnecessarily lengthened the process

GAO

2. The Number of Remands

On average, panels remanded in a greater proportion of cases than did CIT

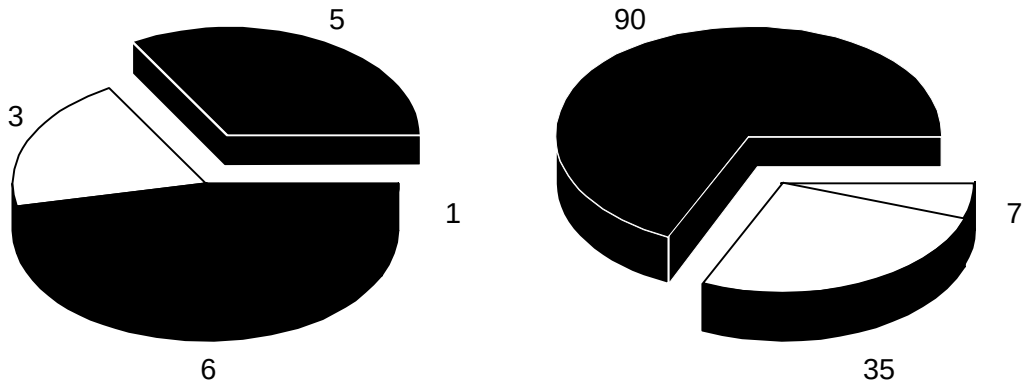
- Panels issued remands in two-thirds of their cases
- CIT issued remands in about one-third of its cases

Note: Data includes cases filed and completed January 1989 to September 1994. CIT data includes all countries.

Source: GAO analysis of data from U.S. Secretariat and CIT.

GAO

2. Binational Panels Remanded More Frequently Than Did CIT



Note: Data includes cases filed and completed January 1989 to September 1994. CIT data includes all countries.

Source: GAO analysis of data from U.S. Secretariat and CIT.

GAO

2. Observations About the Number and Nature of Remands

Panel practice is still evolving

- practice, not statutory requirements, established the number of remands for CIT
- relatively few completed panel cases compared to completed CIT cases
- both CIT and panel remands have varied from asking for information to directing an action

2. Observations About the Number and Nature of Panel Remands

Many remands that panels issued either instructed the agency to provide further explanation or to reconsider the agency determination in light of the panels' decision. For example, in Fresh, Chilled and Frozen Pork from Canada (USA-89-1904-06), a panel concluded that Commerce had not articulated clear standards and explanations in determining that a certain Canadian income stabilization program was countervailable. It therefore remanded to Commerce for further explanation and reconsideration. On the other hand, there were instances when a panel remanded with directions that required an agency to reach a particular conclusion or finding. For example, in Red Raspberries from Canada (USA-89-1904-01), the panel determined that Commerce had failed to provide an adequate explanation of why it had rejected using certain home market sales as the basis for determining fair value in its dumping calculations. The panel remanded with instructions that Commerce use these home market sales in the relevant calculations.

GAO

2. Did Multiple Remands Lengthen the Time to Settle FTA Disputes?

Greater number of remands appeared to lengthen time to complete a case

Number of remands	Average days to complete	Number of cases
3	959	1
2	599	6
1	452	3
0	378	5

Source: GAO analysis of data from U.S. Secretariat.

GAO

2. Did Panel Composition Affect Panel Remands?

Panels with Canadian majorities remanded to U.S. agencies more often

- Canadian majorities remanded to U.S. agencies in 8 out of 9 cases
- U.S. majorities remanded to U.S. agencies in 2 out of 6 cases

Source: GAO analysis of 15 completed binational panel reviews of U.S. agency determinations.

While panels with Canadian and U.S. majorities differed in how often they sent decisions back to the agencies during the process, this does not mean that they necessarily came to different decisions. It merely indicates that their interactions with the agencies were different. Canadian officials noted that, in cases involving remands from Canadian majorities, six of the eight panels were unanimous in voting to remand. They said this indicates that nationality was not an issue in these remand decisions.

GAO

3. Concerns That a Separate Case Law May Be Emerging

Indicators include the number of decisions citing other panel decisions

Of 15 cases

- other panels were cited in 10

Of these 10 cases

- a few panels cited other panel decisions frequently

Source: GAO analysis of 15 completed binational panel reviews of U.S. agency determinations.

3. Concerns That a Separate Case Law May Be Emerging

Under FTA, panels are supposed to be guided only by U.S. statutes and court decisions. Instead, if panels followed the decisions of previous panels, there is a danger that they would be creating a separate case law for reviews of determinations concerning imports from Canada (as opposed to other countries).

One indicator of a separate case law emerging for cases going to panels might be the number of legal citations to other panel decisions. A large number of such citations might suggest that panel decisions were having an influence on subsequent cases. However, the issue of whether the binational panel process is resulting in a separate case law outside the scope and control of the U.S. judicial system is a complex question; it cannot be completely answered by merely examining the number of these citations.

GAO

3. The Nature of Citations Varied

We cannot judge whether a separate case law is emerging with respect to Canadian imports

- Some citations were simple historical references
- Some were used to rely on the reasoning in previous panel decisions, which the panel considered persuasive but not legally binding

3. The Nature of Citations Varied

We found that panels did cite previous panels in their decisions on particular issues in some cases.[8] However, the purpose of such references sometimes was merely to familiarize the reader with the history of the dispute or to illustrate the functioning of the panel process. In other instances, a panel cited other panel cases to rely on the reasoning in a previous decision that the present panel considered to be "persuasive" though not legally "binding."[9] For example, in the opinion on Commerce's softwood lumber CVD determination, the panel adopted an interpretation of a rule under FTA similar to that used by a previous panel, and stated

> "The panel has taken a purposive approach to interpreting CFTA Rule 7(a) as was done by the panel in New Steel Rail, except Light Rail from Canada. . . . While this Panel is not bound by previous binational panel decisions, it may be guided by such decisions."

While some may be concerned that a separate body of law is emerging for Canada since the binational panels are a new entity, one participant told us that it is inevitable that panels will create a separate body of law. Panels decide upon new legal and factual issues with each case they review. However, he believed that this was not a problem in that it did not mean that panels were "making stuff up." Instead, like any court, panels analyze the facts and apply the law.

[8]Interestingly, we also found that participants (including U.S. government agencies) sometimes cited previous panel decisions in presenting their arguments.

[9]The U.S. Statement of Administrative Action accompanying the FTA implementing legislation did indicate that courts may look to panel decisions for their intrinsic persuasiveness.

GAO 4. Varied Concerns That Discord Among Participants Affected Outcomes

Some participants said

- Panelists approached issues with a bias for particular outcomes
- Commerce and ITC were recalcitrant when responding to panel decisions
- Commerce and ITC, in answer to some remands, used language that was considered disrespectful of the panels

GAO

4. Most Panel Decisions Have Been Unanimous

In 5 of the 15 panel cases reviewing U.S. agency determinations, one or more panelists dissented from a panel opinion

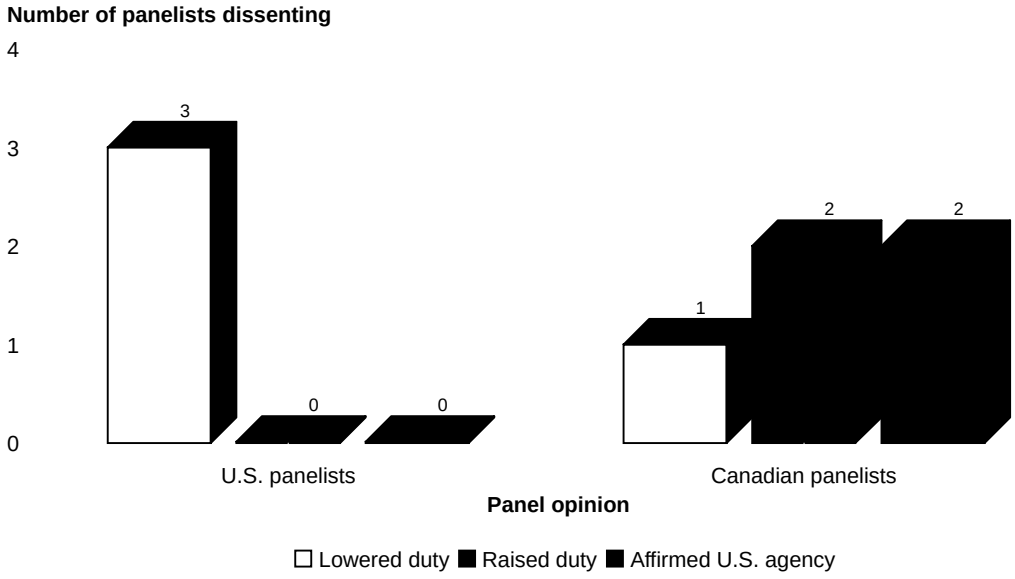
- Most of these dissents were partial dissents from the final panel opinion
- While 8 panelists dissented in 5 cases, voting split along national lines in only one case

Source: GAO analysis of 15 completed cases of U.S. agency determinations.

GAO

4. Nationality and Nature of Dissent

U.S. panelists have only dissented on panels whose opinions have led to lower U.S. duties



Source: GAO analysis of 15 completed binational panel reviews of U.S. agency determinations.

GAO

5. Participant Concerns Over Conflict of Interest Allegations Varied

Some participants said

- Canadian panelists were susceptible to the appearance of conflict because their small trade bar meant a greater chance they or their firms represent an interested party
- Aggressive use of conflict of interest rules against panelists might hamper efforts to get good panelists to serve in the future

GAO

5. U.S. Government Challenge of Softwood Lumber CVD Panel Decision

- USTR alleged that two members of the panel materially violated the FTA rules of conduct by failing to disclose information that revealed at least "the appearance of partiality and, in one case, that constituted a serious conflict of interest" indicating they should have withdrawn
- ECC ruled against USTR challenge

GAO

5. Were Withdrawals of Panelists Common?

- One-third of the panels reviewing U.S. agency determinations had panelists withdraw before the case was completed
- Most panelists withdrew because of potential conflicts
- Half of the panelists who withdrew were from the United States

Source: GAO analysis of 15 completed binational panel reviews of U.S. agency determinations.

GAO

5. How Did Panelist Withdrawals Affect the Panel Process?

Panelist withdrawals appeared to lengthen the time it took a panel to complete a case

- Panels with withdrawals took an average of 690 days[a] to complete a case
- Panels without withdrawals took an average of 435 days to complete a case

[a]Does not include time spent under ECC review.

Source: GAO analysis of 15 completed binational panel reviews of U.S. agency determinations.

GAO

5. Observations About Panelists' Conflict of Interest

- Participants had different beliefs about what should be considered a conflict for a panelist
- Panel rules and the rules of conduct had been modified over time, but
- U.S. and Canadian officials and some panel participants believed that future negotiations should include further discussion of this issue

GAO

6. Participant Concerns Over the Proper Role of ECCs

Some participants thought that

- ECCs allowed panel decisions that were inconsistent with U.S. law, creating a separate trade law for Canadian cases
- USTR requested too many ECC reviews, treating them like ordinary appeals

ECCs ruled against the U.S. government's challenges of the pork, live swine, and softwood lumber panel decisions, respectively. Some parties were concerned that the ECCs had interpreted their role narrowly and did not provide the kind of examination some participants believed these panel decisions warranted. The fact that all three ECCs had Canadian majorities may have added to the controversy about their decisions to affirm the panels. On the other hand, some parties were concerned because they believed the U.S. government should not have requested these reviews in the first place, since overuse of the process could transform the ECC into

an ordinary appeal mechanism. The contrast between the majority and the dissenting opinion written for the ECC softwood lumber decision illustrated the concerns over the ECC role. For example, in dismissing the U.S. challenge, ECC member Judge Morgan wrote of the ECC:

"Its jurisdiction is restricted to the correction of an 'aberrant panel decision' and any 'aberrant behavior of panelists' that would threaten the integrity of the binational panel system when such action is unwarranted. . . The exceptional nature of an extraordinary challenge was accentuated by the drafters of the FTA. . . ."

While in a dissent, Judge Wilkie stated that

"Canada considers other matters, normally thought of as the grist for court decisions, none of an ECC's business. . . and, Given the obvious errors on the merits in our Binational Panel 3-2 Decision and the unfortunate violations of the Code of Conduct, I fear that my colleagues, by this Decision, have tied down the safety valve."

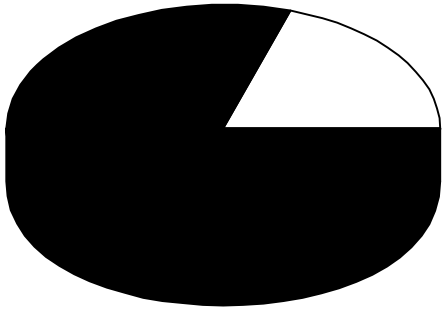
Justice Hart wrote in his majority opinion:

"It is unfortunate that the decision in this matter has not been unanimous because there is always a chance that it will be interpreted as a decision based on national interest when the two Canadian members of the Committee form a majority and the American member files a dissent. We are however all judges of long experience and since the issue before us is one of first impression a sincere difference of opinion should not be unexpected."

GAO

6. How Frequently Were Panel and CIT Decisions Reviewed?

Panels had 20 percent of their decisions reviewed by ECC



3 Reviewed by ECC

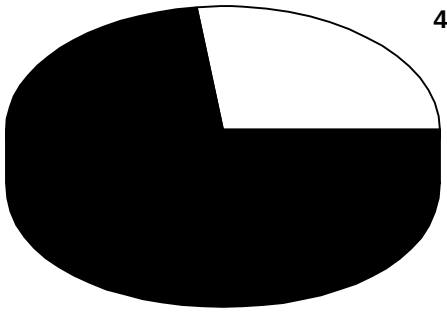
12 Not reviewed by ECC

Source: GAO analysis of information from U.S. Secretariat.

GAO

6. How Frequently Were Panel and CIT Decisions Reviewed?

CIT had 27 percent of its decisions reviewed by CAFC



43 **Reviewed by CAFC**

115 Not reviewed by CAFC

Note: CIT cases for all countries completed January 1990 to September 1994; therefore, some cases were appealed earlier.

Source: GAO analysis of CIT data.

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6. Observations About the Role of ECCs

ECC was not designed to be an ordinary appeal mechanism

- However, officials never agreed on its role in reviewing panel decisions
- New language in the subsequent North American Free Trade Agreement (NAFTA) did not resolve differences over ECC role

6. Observations About the Role of ECCs

According to U.S. and Canadian officials, ECC review of a panel's decision was meant to have a higher threshold than appellate review of a CIT decision by CAFC. Nevertheless, participants, including the two governments, disagreed over the interpretation of the ECC standard and where that threshold should be. As a result, the United States and Canada later took the opportunity to "clarify" the ECC role as part of their subsequent NAFTA negotiations. The final NAFTA text incorporated all the U.S. and Canadian FTA chapter 19 provisions and extended them to Mexico, but added some clarifying language.[10]

However, based on our review of U.S. and Canadian government documents, we believe that the new language in NAFTA regarding ECC did not resolve the fundamental difference between the parties on this issue. While U.S. and Canadian officials agreed that the new NAFTA language "made explicit what was implicit in the FTA," they unfortunately did not agree on what was implicit in the agreement. The U.S. officials characterized this as a significant change, while Canadian officials characterized it as a nonsubstantive change. Thus, it seems that U.S. officials expected future ECCs to be less narrow in reviewing panel decisions, and Canadian officials expected future ECCs to continue to interpret their role narrowly.

[10]The CFTA ECC standard of review was amended by NAFTA by stating that an ECC is to determine whether "the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, for example by failing to apply the appropriate standard of review. . . ." (GAO underlining indicates new text in Article 1904.13(a)(iii).)

Other Factors That May Have Contributed to Participant Concerns

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Binational Panels Are Different From U.S. Courts

Panel composition and practice is somewhat different than that of a court

Differences can

- conflict with the expectations of some participants and
- add to any controversy over panel decisions

Effect of NAFTA changes to panel process unknown--no completed cases

Binational Panels Behave Differently From U.S. Courts

While panels perform the same function and are charged with applying the same legal standard of review as CIT, they are different in their composition and in their practices. Participants in the panel process had opposite views about whether some panel decisions were in keeping with or contrary to what CIT would have decided. Furthermore, participants noted procedural differences between the panel process and the judicial process. (See app. III)

These differences could add to the controversy over the process because they are not what some U.S. participants are used to encountering in the U.S. system. For example, several participants noted that panels and panelists were easier targets for criticism than courts and judges were. This is because panelists served ad hoc, were otherwise colleagues of the other participants, may have represented clients on similar issues before the administering agencies, and did not have the same stature as judges. Some suggested that permanent panelists may be needed in the future, while others thought that the private parties should have a role in selecting panelists. In updating FTA binational panel provisions during NAFTA negotiations, U.S. officials sought to encourage a more judicial character in panels by adding a "requirement that the United States include judges and former judges on the panelist rosters to the fullest extent practicable. . ."

Completed U.S. FTA Binational Panel Reviews Through September 1994

Case identification	Commodity	Type of determination	ITC import value ($millions)
USA-89-1904-01	Red Raspberries	Dumping	$8.3
USA-89-1904-02	Replacement parts for self-propelled bituminous paving equipment	Scope	NA
USA-89-1904-03	Replacement parts for self-propelled bituminous paving equipment	Dumping	NA
USA-89-1904-06	Fresh, chilled or frozen pork	Subsidy	352.5
USA-89-1904-07	New steel rail, except light rail	Subsidy	7
USA-89-1904-08	New steel rail, except light rail	Dumping	7
USA-89-1904-10	New steel rail	Injury	7
USA-89-1904-11	Fresh, chilled or frozen pork	Injury	352.5
USA-90-1904-01	Replacement parts for self-propelled bituminous paving equipment	Dumping	NA
USA-91-1904-03	Live swine	Subsidy	75
USA-91-1904-04	Live swine	Subsidy	75
USA-92-1904-01	Certain softwood lumber products	Subsidy	2873
USA-92-1904-03	Pure and alloy magnesium	Subsidy	53
USA-92-1904-04	Pure and alloy magnesium	Dumping	53
USA-92-1904-06	Magnesium	Injury	53

Nationality of			Number of panelists with law degrees	Number of remands	Total time to complete (days)	Unanimous decisions	Effects of panel decisions
Parties initiating appeal	Panel majority	Panel chairman					
Canadian	Canadian	Canadian	4	2	461	Yes	Duty lowered from 2.59 percent to 0.11 percent, and 3.67 percent to none
Canadian and US	USA	USA	5	0	347	Yes	Agency affirmed
Canadian and US	USA	USA	5	0	348	Yes	Agency affirmed
Canadian	USA	USA	4	2	682	Yes	Duty lowered from 8 cents to 3 cents per kilo
Canadian	Canadian	USA	4	1	338	Yes	Duty lowered from 112.34 percent to 94.57 percent
Canadian	USA	USA	5	0	395	No	Agency affirmed
Canadian	Canadian	USA	4	0	346	No	Agency affirmed
Canadian	Canadian	Canadian	4	2	612	Yes	ITC reversed injury determination
Canadian and US	Canadian	Canadian	5	3	959	No	Duty raised from 9.47 percent to 17.97 percent
Canadian	Canadian	USA	4	2	641	No	Duty lowered from Can$0.0047/lb. to Can$0.0004/lb. (slaughter sows and boars), Can$0.0449/lb. to Can$0.0051/lb. (other live swine) and Can$0.0005/lb. (weanlings: new category)
Canadian	Canadian	Canadian	4	2	675	Yes	Duty lowered from Can$0.0049/lb. to Can$0.0045/lb. (sows and boars), and Can$0.0932/lb. to Can$0.927/lb. (other)
Canadian and US	Canadian	Canadian	5	2	797	No	Duty lowered from 6.51 to none
Canadian	Canadian	Canadian	5	1	522	Yes	Agency affirmed
Canadian	USA	Canadian	4	0	455	Yes	Duty lowered from 31.33 percent to 21.00 percent
Canadian	USA	USA	5	1	496	Yes	Commodities redefined, affirmed injury

Source: GAO analysis of information from U.S. Secretariat, USTR, ITC.

Completed ECC Reviews of Panel Decisions

ECC case identification	Panel decision reviewed	Requested by	Majority	Chairman	Dissent	ECC decision
ECC 91-1904-01	USA-89-1904-11 (Pork injury)	U.S. government	Canadian	US	No	Affirmed panel
ECC 93-1904-01	USA-91-1904-03 (Live Swine CVD)	U.S. government	Canadian	US	No	Affirmed panel
ECC 94-1904-01	USA-92-1904-01 (Lumber CVD)	U.S. government	Canadian	US	Yes	Affirmed panel

Source: GAO analysis of information from U.S. Secretariat.

Differences Between Panels and CIT

Panel characteristics	CIT characteristics	Comments
A novel institution established in 1989 by international agreement.	CIT established by Congress in 1980, replacing U.S. Customs Court.	The panel process is newer and has less institutional experience.
Panelists' participation is ad hoc, and they have other occupations.	Judges are appointed for life and have no other employment.	Panelists and judges have different experience working with the law.
Panels are binational, with either a U.S. or Canadian three person majority.	All CIT judges are U.S. citizens.	Foreign panelists may be less familiar with the law upon which they base their judgment.
Each panel considers one case at a time.	Each judge considers many cases simultaneously.	Panels and judges have different workloads and they must focus their attentions differently.
Commerce and ITC represent themselves when defending their determinations.	The U.S. Department of Justice represents Commerce in all U.S. courts. ITC represents itself.	Some participants noted differences in how Commerce and Department of Justice lawyers defended Commerce determinations, since Commerce is operationally involved with the cases.
Cases proceed according to a fixed schedule, with a 315-day guideline.	Cases proceed according to a flexible schedule, without a deadline.	The panel's review process is more compressed. .
Decisions are made by a group of five people seeking consensus and are only subject to review under extraordinary circumstances.	Decisions are made by one individual and are subject to subsequent judicial review.	Decisionmaking dynamics are different between the two systems.

Source: GAO interviews with panel participants, CIT, and U.S. Secretariat.

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