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**"THE STANDARD OF REVIEW UNDER THE NORTH AMERICAN FREE TRADE
AGREEMENT CHAPTER 19: A COMPARATIVE STUDY WITH PARTICULAR
EMPHASIS ON THE LAW OF MEXICO"**

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ABSTRACT

On January 1 1994, the North American Free Trade Agreement (NAFTA) entered into by and between Mexico, Canada and the United States, came into force. Chapter 19 of NAFTA addresses the Review and Dispute Settlement in Antidumping and Countervailing Duty Matters. Furthermore, article 1904 of NAFTA, addresses issues related to the Review of Final Antidumping and Countervailing Duty Determinations. The said article stipulates that an involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party. The object of such review is to determine whether the determination was in accordance with the antidumping or countervailing duty law of the importing Party. In order to review such determination, the panel shall apply the *standard of review* set out in Annex 1911 of NAFTA, and the general legal principles that a court of the importing Party otherwise would apply to review a determination of the competent investigating authority.

Since these kinds of regulations are quite new in the Mexican legal system, the interpretation of the standard of review, has raised a lot of discussion among several panelists, governmental authorities and authors. Therefore, this paper will focus on the application and interpretation of the standard of review under NAFTA chapter 19, mainly by Mexican authorities.

RÉSUMÉ

Le 1er janvier 1994, l'Accord de libre-échange nord-américain ("ALÉNA") auquel participent le Mexique, le Canada et les États-Unis, est entré en vigueur. Le Chapitre 19 de l'ALÉNA prévoit l'Examen et le règlement des différends en matière de droits antidumping et compensateurs. Plus particulièrement, l'article 1904 de l'ALÉNA contient les dispositions liées à l'examen des déterminations finales en matière de droits antidumping et compensateurs. Cet article stipule "qu'une des Parties en cause pourra demander qu'un groupe spécial examine, sur la base du dossier administratif, toute détermination finale en matière de droits antidumping ou de droits compensateurs rendue par un organisme d'enquête compétent d'une Partie importatrice, afin d'établir si la détermination en question est conforme à la législation sur les droits antidumping ou les droits compensateurs de la Partie importatrice". Afin d'examiner une telle détermination, le groupe spécial appliquera les *critères d'examen* établis à l'annexe 1911 de l'ALÉNA, ainsi que les principes juridiques généraux qu'un tribunal de la Partie importatrice appliquerait à l'examen d'une détermination de l'organisme d'enquête compétent.

Étant donné que ce genre de réglementation constitue une nouveauté pour le système légal du Mexique, l'interprétation et l'application des critères d'examen ont soulevé de nombreuses discussions parmi plusieurs des membres des groupes spéciaux, les autorités gouvernementales et les auteurs. C'est pourquoi cette étude portera principalement sur l'application et l'interprétation des critères d'examen prévus au chapitre 19 de l'ALÉNA par les autorités mexicaines.

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INTRODUCTION

On January 1, 1994, the North American Free Trade Agreement (NAFTA) entered into force between Mexico, United States and Canada¹. Chapter 19 of NAFTA addresses the issues of Review and Dispute Settlement in Antidumping and Countervailing Duties Matters. Furthermore, NAFTA's article 1904, addresses issues related to the Review of Final Antidumping or Countervailing Duty Determinations. This article provides that an involved Party may request that a panel review a final Antidumping or Countervailing Duty Determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the Antidumping or Countervailing Duty law of the importing Party. In order to review this determination, the panel shall apply the standard of review set out in Annex 1911 of NAFTA, and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

This paper is focused upon the application of the standard of review set out in Annex 1911 of NAFTA by binational panels, with respect to the review of determinations issued by the competent Mexican authority. The first part

¹*North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, Dec 17, 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 605 (effective Jan. 1, 1994) [hereinafter *NAFTA*].

describes how Chapter 19 came about, and what Chapter 19 provides by way of antecedents of binational panels in Mexico.

The second part describes the Mexican Antidumping and Countervailing Duty legal framework, as well as describing the Antidumping and Countervailing Duty investigations, the binational panel review of Secretaria de Comercio y Fomento Industrial (SECOFI) determinations, and the Mexican constitutional challenges to Chapter 19 binational panels. It also contains an analysis of the powers of the binational panels in terms of NAFTA Chapter 19.

The third part describes the application of the standard of review applicable to Mexican, United States and Canadian determinations. Since this paper is focused upon the review of binational panels in Mexico, it includes an analysis and comments on the nine cases challenged to date before the Mexican Secretariat.

PART 1

"THE NAFTA CHAPTER 19"

1.1. OVERVIEW

Chapter 19 of the North American Free Trade Agreement (hereinafter "NAFTA") addresses the issues of *Review and Dispute Settlement in Antidumping and Countervailing Duty Matters*.

Over the last fifteen or twenty years, many countries have had to recognize the crucial role that dispute settlement plays for any treaty system. It is particularly crucial for a treaty system designed to address today's myriad and complex economic questions of international relations. Dispute settlement procedures assist in making rules effective.²

The first international procedures to deal with disputes between countries concerning the application of Antidumping Duty (AD) and Countervailing Duty (CVD) rules are found in the General Agreement on Tariffs and Trade

(GATT)³. They provide the general mechanism for dispute resolution of all disputes between the Contracting Parties when the actions of one Party are alleged to "nullify or impair" GATT benefits. The 1979 GATT Antidumping and Subsidies Code established specific procedures for the resolution of disputes concerning whether the application of AD or CVD measures.⁴

The three NAFTA Parties, each had experience with dispute resolution regarding either AD or CVD disputes under GATT.⁵ The binational panel procedure contained in NAFTA's Chapter 19, however, is a unique mechanism which goes well beyond the GATT model for dispute resolution, or the *Draft Treaty on a Third-Party Settlement of Disputes* offered by the Canadian and United States' bars.⁶ There is nothing like it in other trade agreements, since it has replaced judicial review of national administrative action in AD and CVD cases with review by a panel of non-governmental international trade experts, including nationals and non-nationals.⁷

² Steven P. Croley & John H. Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Governments" (1996) 90 American Law Journal of International Law, at 193. [hereinafter *WTO Dispute Procedures*].

³GATT, *Agreement on Interpretation and Application of Article VI of the General Agreement on Tariffs and Trade* (Geneva, Apr. 12, 1979), H Doc. No. 154, 96th Cong. At Sess 309. [hereinafter GATT] See articles XXII and XIII.

⁴GATT, *supra* note 3, and GATT, *Agreement on Interpretation and Application of Article V, XVI and XXIII of the General Agreement on Tariffs and Trade* (Geneva, Apr.12, 1979), H Doc. No. 153, 96th Cong., 1st Sess. 257.

⁵ James R. Cannon Jr. *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard's/McGraw-Hill, Inc., 1994.) at 7-8 [hereinafter *Resolving Disputes*].

⁶ *Draft Treaty on a Third-Party Settlement of Disputes*, United States and Canada, art. 8(1), September 20, 1979, reprinted in American Bar Assn and Canadian Bar Assn, *Settlement of International Disputes Between Canada and the USA*, XXV.

Before NAFTA, the basic agreements governing the commercial relations between Mexico the United States and Canada were the GATT, and the GATT *Antidumping Code*. This was supplemented by Canada and the United States by entering into a Free Trade Agreement (FTA) in 1989⁸. Likewise, in 1990, Mexico requested the United States to go beyond the GATT in trade relations with Mexico because of the volume of their bilateral trade and the aggressive nature of Mexican policies that were not adequately covered by the GATT. Therefore, Mexico proposed to the United States the negotiation of a free trade agreement. In many ways, the proposed free trade agreement would continue the process under the FTA. Furthermore, shortly before joining the GATT in 1986, Mexico made major changes in its trade laws, establishing subsidy/CVD and AD laws similar to those applied by the United States and Canada.⁹

Notably in the context of bilateral and trilateral negotiations, before 1985, Mexico applied a weaker injury test in subsidy and AD cases than that required by GATT. This attracted some attention from GATT Contracting Parties at the time of the Mexican accession to the same in 1986. Likewise, when Mexico signed the GATT *Antidumping Code*¹⁰, unlike most other GATT members, it gave the code treaty status due to the Mexican Constitutional

⁷ William J. Davey, *Pine & Swine Canada – United States trade dispute settlement: The FTA experience and NAFTA prospects*, (Ontario: The Centre for Trade Policy and Law, 1996) at 89 [hereinafter *Pine & Swine*].

⁸ United States-Canada Free Trade Agreement, Jan 2, 1988, 27 I.L.M. 281 (1988), [hereinafter FTA].

⁹ Morici Peter *Trade Talks with Mexico: a time for realism* (Washington, D.C.: NPA Committee on Changing International Realities, 1991) at 37 [hereinafter *Trade Talks*].

¹⁰ Diario Oficial de la Federacion, December 4, 1987. [hereinafter *D.O.*].

Law¹¹. The aforesaid gives the code equal standing with domestic law in the Mexican legal system setting an interesting precedent for the NAFTA negotiations regarding politically sensitive issues such as investment.¹²

1.2. UNITED STATES AGREEMENTS WITH MEXICO PRIOR TO NAFTA.

In 1985, the United States and Mexico entered into an *Understanding on Subsidies and CVD*.¹³ Essentially, the United States agreed to apply an injury test in subsidy / CVD investigations. Mexico also agreed (i) to eliminate certain of its then active tax rebate programs for exports and the subsidy elements of its export financing programs, and (ii) to phase out energy and basic petrochemical pricing practices that had the purpose or effect of subsidizing exports.¹⁴

In 1987 the *United States-Mexico Framework Understandings* was signed.¹⁵ This agreement established the first formal framework for management of bilateral commercial relations between both countries. It established a mechanism for the two countries to consult on trade issues, resolve disputes and reduce trade barriers. In addition, it initiated discussions on a number of contentious areas, such as textiles, agriculture, steel, intellectual property,

¹¹ See section 2.4 of this paper on this issue.

¹² See article 133 of the Constitución Política de los Estados Unidos Mexicanos.

¹³ USITC, "Review of Trade and Investment Measures by Mexico" USITC Report No. 2275 (April 1990).

¹⁴ USITC, "Review of Trade and Investment Measures by Mexico" USITC Report No. 2275 (April 1990), 4 at 18.

¹⁵ D.O., December 8, 1987.

services, and the application of U.S. trade laws. These resulted in sectoral agreements that increased Mexican access to the U.S. market for apparels and steel, and increased U.S. access to the Mexican market for alcoholic beverages.¹⁶ Furthermore, the U.S. and Mexico signed the understanding regarding *Trade and Investment Facilitation Talks* (TIFT)¹⁷ in 1989, which went beyond the 1987 agreement. This TIFT mandated a comprehensive negotiation process and joint study groups to provide facts and data for this process. However the TIFT were overtaken by efforts to prepare for the bilateral free trade negotiations that led to the NAFTA.

1.3. CANADIAN AGREEMENTS WITH MEXICO PRIOR TO NAFTA

Until Mexico joined the GATT, the principal agreements governing trade between Canada and Mexico were their *Trade Agreement of 1946*¹⁸ and an *Agreement on Industrial and Energy Cooperation of 1980*.¹⁹ On the occasion of Prime Minister Mulroney's visit to Mexico in March 1990, the two countries entered into an *Agreement on a Trade and Investment Consultation System*, which was similar to the U.S. – Mexican framework agreement.²⁰

¹⁶ *Trade Talks*, *supra* note 9 at 38.

¹⁷ D.O., July 16, 1989. See also Government of Mexico, Office of the President, *Toward Mexico – U.S. Free Trade Agreement* (1990), at 28; and Government of Mexico, *The Mexican Agenda* (1990) at 40.

¹⁸ D.O., April 16, 1946. See also Government of Mexico, Office of the President, *Toward Mexico – U.S. Free Trade Agreement* (1990), at 28; and Government of Mexico, *The Mexican Agenda* (1990) at 40.

¹⁹ D.O., May 27, 1980. See also *supra* note 18

1.4. HOW DID CHAPTER 19 COME ABOUT?

The circumstances leading to the creation of Chapter 19 of NAFTA had to do with trade in the early to mid-80's between the U.S. and Canada particularly, but also more generally under the GATT. Mr. Brian Mulroney was the Prime Minister of Canada and Ronald Reagan was the President of the U.S. Due to the trade disputes between the U.S. and Canada, and many other factors, Mr. Mulroney proposed the negotiation of a free trade agreement.²¹

Since several attempts to negotiate a free-trade agreement between the U.S. and Canada already failed, Mr. Mulroney's new proposal was a courageous one. Negotiations began in 1986. They were conducted under a fast-track negotiating authority approved by the U.S. Congress. Under the U.S. Statute, notification of the intent to negotiate a trade agreement had to go to Congress under the Fast-Track authority by midnight of September 30, 1987.²²

One of Canada's principal goals during the free trade agreement (FTA) and NAFTA negotiations was to secure a ruled-based mechanism to resolve trade disputes with the U.S. Massive American protectionism had hurt Canadian exporters too many times during the '80's. American producers and policy makers rallied under the banner of "fair trade", and relied extensively on

²⁰ *Trade Talks*, *supra* note 9, at 39.

²¹ James Holbein "The Administration of Chapter 19 Binational Proceedings under NAFTA" (1997) 5 U.S.-Mex. L.J. 57 [hereinafter *Chapter 19 Binational Proceedings*]. See also Minister of Supply and

domestic trade remedy laws to shield themselves from foreign competition. Thus, Canadians looked to the free trade negotiations as a source of help in order to try to fight against “protectionism” in the administration of AD and CVD laws.²³ Likewise, one of the goals of the U.S. in that negotiation was to eliminate Canadian domestic subsidies, due to the fact that Canada provided substantial provincial and federal government subsidization.²⁴

The compatibility of protectionist trade remedy laws, and liberalized trade proved to be one of the most controversial issues of the FTA negotiations. The Canadian negotiating team proposed that domestic AD/CVD laws be abolished or harmonized after the FTA came into effect. However the Canadian proposal was rejected²⁵. The American team insisted that U.S. trade remedy laws remain firmly in place. Turning a blind eye to the vast number of subsidy programs in their own country, American negotiators pointed to federal and provincial subsidies as evidence that Canadian products had an unfair advantage over American goods in a free trade area and would need protection from Canadian subsidies in an integrated market.²⁶

Services, Report of the Royal Commission on the Economic Union and Development Prospects in Canada (1985) [hereinafter the *McDonald Commission Report on the Canadian Economy*].

²² Trade Act of 1974, 19 U.S.C. s. 2112 (b) (1) (1993).

²³ Ann Penner & Norman Robertson Fellow “Why we were right and they were wrong. An evaluation of Chapter 19 of the FTA and NAFTA” (1996) 05, *Department of Foreign Affairs and International Trade of Canada*. 2-5 [hereinafter *An evaluation of Chapter 19 of the FTA and NAFTA*].

²⁴ *Chapter 19 Binational Proceedings*, *supra* note 21 at 58.

²⁵ *Resolving Disputes*, *supra* note 5 at 140, 141.

²⁶ *An evaluation of Chapter 19 of the FTA and NAFTA*, *supra* note 23 at 4.

The Canadian and American teams reached an impasse over dumping and CVD issues. While Canadians refused to sign an agreement unless it contained effective measures to counteract U.S. trade remedy laws, the U.S. team refused to weaken their domestic laws. Two weeks before the deadline for the expiration of the Fast-Track negotiating authority, the Canadians walked out of the negotiations. The FTA needed to provide something for the Canadians to show their public that they were benefiting from, eliminating or getting a special exemption or waiver, for Canada from the application of U.S. unfair trade laws. The solution to the impasse became Chapter 19 of the FTA.

Chapter 19 created a binational mechanism to replace domestic judicial review of final AD, CVD and injury determinations, and decisions determining the existence of dumping or subsidies. In lieu of domestic courts, Chapter 19 gave binational panels, at the request of private parties, the authority to determine whether administrative agencies applied domestic remedy laws correctly. Panel decisions could uphold or remand AD/CVD/injury determinations for being inconsistent with domestic trade remedy laws. Binational panel decisions were to be binding on the private disputing parties in order that costly trade disputes would be settled quickly, and political controversies ended quietly. Routine appeals were not to be pursued. Panel decisions could only be appealed to Extraordinary Challenge Committees on

the very specific grounds of article 1904 (13) of the FTA by governments only.²⁷

The Chapter 19 compromise pleased negotiators from both countries. The Canadian team appreciated the binational character of Chapter 19, and hoped that the strict deadlines would inject fairness, consistency, and predictability into the resolution of dumping and countervail disputes. The Americans supported the Chapter 19 compromise because it left domestic trade remedy laws in place and under the control of Congress.²⁸

1.5. BINATIONAL PANELS AND MEXICO.

When Mexico, Canada and the U.S. initiated NAFTA negotiations, they confronted the same issues in connection with the AD and CVD laws. The U.S. was equally concerned with Mexico's use of AD and CVD remedies. Due to the lack of transparency of the Mexican remedies, from the U.S. perspective, Mexican laws prejudiced some U.S. exporters. The U.S. General Accounting Office (GAO) performed a study of comparative antidumping practices in November 1990, which reported that practitioners perceived Mexico's AD law to be "vague and open to use as a protectionist device."²⁹ The GAO report also indicated that Mexico's AD laws were criticized for their

²⁷ Ibid.

²⁸ Ibid., at 5.

²⁹ United States General Accounting Office, *International Trade, Comparison of U.S. and Foreign Antidumping Practices*, GAO/NSIAD-91-59, at 22 (Nov 1990).

lack of transparency, including lack of notification to the parties, exchange of information between the parties, and the opportunity to hold meetings.³⁰ It is important to mention the fact that Mexican procedures were unlike those used in Canada and the U.S., and this was seen as an impediment to extension of the Chapter 19 binational panel process to that country.³¹

When NAFTA negotiations were initiated, Mexican officials emphasized the objective of an AD and CVD dispute mechanism similar to that under the FTA. It is important to mention that from the U.S. perspective, the FTA binational panel process was intended to be temporary (5-7 years)³². Moreover, the U.S. desired substantial changes in Mexico's AD and CVD laws, which many argued were unsuited to the Chapter 19, procedure because Chapter 19 rested on the similar AD and CVD laws and procedures that existed in Canada and the U.S.³³

Several U.S. interests opposed the extension of Chapter 19 to Mexico. The U.S. charged Mexico with maintaining an unfair AD and CVD regime, lacking due process, and also argued that Chapter 19 was intended from the outset to be only temporary, pending negotiation of subsidy disciplines and a

³⁰ Ibid.

³¹ Peter F. McLaughlin, "Mexico's Antidumping and Countervailing Duty Laws: Amendable to a Free Trade Agreement?" (1992) 23 Law & Poly Intl. Bus at 1009.

³² *Resolving Disputes*, supra note 5 at 139-140.

³³ Ibid., at 158-159.

substitute competition policy to replace dumping laws.³⁴ Likewise, some Mexican policy-makers noted that the binational panel review process would violate Mexican constitutional law, necessitating some legislative reform to circumvent the constitutional issues.³⁵ Therefore, from the outset, extension of Chapter 19 to Mexico was controversial.³⁶

Moreover, it is important to note that Mexico has a civil law system. NAFTA'S binational panel review process had been derived from a pre-existing trade agreement negotiated by two predominantly common law countries.³⁷ The Chapter 19 structure was predicated upon the concept of judicial review, a concept that has been highly developed in American and Canadian administrative law jurisprudence. In Mexico, however, the law of judicial review was not so well developed, even though that a perusal of article 238 of the Federal Fiscal Code of Mexico reveals civil law concepts similar to those found in the applicable United States and Canadian standards of review.^{38, 39}

In July 1992, progress in the overall NAFTA negotiations was evident. With respect to the fate of panel reviews, as the negotiations proceeded, the

³⁴ Forum, "Binational Dispute Resolution Procedures Under the Canada – United States Free Trade Agreement. Experiences to Date and Portents for the Future: Washington, D.C., April 23, 1991", (1991) 341 NYU J Intl Law & Policy at 412-32.

³⁵ "NAFTA Panel review May Rise Mexican Constitutional Issues, Adviser Says" (1992) 9 Intl. Trade Rep. (BNA) at 683.

³⁶ *Resolving Disputes*, *supra* note 5 at 159.

³⁷ In Canada, Quebec adheres to the civil law, and in the United States, Louisiana maintains some elements of civil law.

³⁸ Thomas, J.C., and Lopez Ayllon, S., "NAFTA Dispute Settlement and Mexico: Interpreting Treaties and Reconciling Common and Civil Law Systems in a Free Trade Area" (1995) 33, Canadian Yearbook of Intl. Law, at 79 [hereinafter *NAFTA Dispute Settlement and Mexico*].

³⁹ This issue is discussed more in detail further on in part three.

obstacles were gradually eliminated. Confronted with the inability to reach a consensus on subsidization, and a stalled Uruguay Round, U.S. negotiators indicated their willingness to apply Chapter 19 to Mexico, in return for Mexico's commitment to make various procedural changes to its law.⁴⁰

Another factor was the failure of the Uruguay Round negotiations to conclude by the time that NAFTA had to be completed. The U.S. was reluctant to concede to changes in its AD and CVD laws with respect to Canada and Mexico that would result in weaker protection than was allowed on a multilateral basis under the GATT. Likewise, without assurance that the dispute resolution procedure offered by the GATT would be improved, it was not practical for the NAFTA negotiators to eliminate Chapter 19 and send the disputes to the GATT.⁴¹

On the other hand, since December 1991, it had been clear that the GATT Uruguay Round would compel Mexico to adopt some form of procedural rules to ensure greater transparency.⁴² Therefore, it was not difficult for Mexico to meet the U.S. demands for changing its domestic laws. Accordingly, Mexico was admitted to Chapter 19. Moreover, the U.S. obtained several procedural reforms to Chapter 19, including express recognition that violation of the standard of review could be grounds for an Extraordinary Challenge and

⁴⁰ "U.S. Prepared to Accept Chapter 19 Dispute Settlement with Mexico" (July 10, 1992) 10 Inside US Trade at 3. It is important to mention that upon NAFTA conclusion, Mexico enacted and/or amended several laws, such as the Foreign Trade Law, Foreign Investment Law, Competition Law, etc.

⁴¹ *Resolving Disputes*, *supra* note 5 at 169.

extension of the time permitted for extraordinary committees to do their work.⁴³

Finally, the NAFTA negotiators decided to extend Chapter 19 to Mexico in 1993. Moreover, during the NAFTA talks, even though that Canada wanted to abolish FTA Chapter 19 to replace it with competition laws, a key objective of the Canadian and Mexican teams was to build on the strengths of Chapter 19 of the FTA, and to secure an effective, rule-based dispute settlement mechanism in the trilateral agreement. Canada and Mexico worked together to promote the importance of rules in North American trade to ensure that their producers were not placed at the mercy of the American trade remedy regime which favored American interests above all others. Both countries had fallen victim to the rising tide of American protectionism too many times during the 1970s and 1980s. In spite of some resistance from the Americans, the Canadian and Mexican efforts were successful.⁴⁴

Essentially, the binational panel process of the NAFTA was the same as the one in Chapter 19 of the FTA. The only notable exceptions are: the safeguard mechanism of Article 1905,⁴⁵ the abolition of the FTA's five to seven year working group on dumping and CVD,⁴⁶ the NAFTA's insistence that the

⁴²*The GATT Uruguay Round: A Negotiating History (1986-1992)*, Antidumping 1691 (T.P. Stewart ed Kluwer Law & Taxn Publ. 1993).

⁴³*Resolving Disputes*, *supra* note 5 at 170.

⁴⁴*An evaluation of Chapter 19 of the FTA and NAFTA*, *supra* note 23 at 5.

⁴⁵*NAFTA*, *supra* note 1, art. 1905(1)

⁴⁶*FTA*, *supra* note 8.

majority of panelists be lawyers or judges,⁴⁷ the grounds for establishing an Extraordinary Challenge Committee (ECC),⁴⁸ and the time that the ECC may take to issue a decision.⁴⁹

1.6. WHAT DOES CHAPTER 19 PROVIDE?

The panel process set forth in Chapter 19 of the NAFTA replaces the FTA Chapter 19 with a very similar set of provisions, as mentioned above. The NAFTA version adds to the FTA Chapter 19 to underscore the principle that panels should apply the appropriate domestic standard of review. Each country has a standard of review that is spelled out in Chapter 19, and they differ significantly from each other.⁵⁰ The standard of review in the U.S. is based on “substantial evidence on the record”, and the agency’s decision must be made “in accordance with the law”.⁵¹ In Mexico, the standard of review is set out in Article 238 of the “*Código Fiscal de la Federación*”⁵² [Federal Fiscal Code], based solely on the “administrative record”. In Canada, the standard of review involves the application of principles of natural justice and fair play, a much more equitable view of things.⁵³ Thus, the standard of review is different for each country.

⁴⁷ NAFTA, *supra* note 1, Annex 1901.2(1).

⁴⁸ *Ibid.*, art. 1905(1)(2).

⁴⁹ *Ibid.*, art. 1905(7)(8).

⁵⁰ NAFTA, *supra* note 1, Annex 1911.

⁵¹ NAFTA, *supra* note 1 Annex 1911(2)(b)(i)(ii) See also, *Tariff Act of 1930*, 19 U.S.C. s. 1516(a) (1983 & Supp. 1996) [hereinafter *Tariff Act of 1930*].

⁵² D.O., December 31, 1981.

⁵³ *Federal Court Act*, s.18.1(4), reprinted in Canada Statute Citator at F5-4. See also *Chapter 19 Binational Proceedings*, *supra* note 21 at 61.

The Chapter 19 panel process is available to any private party whose exported merchandise is subject to an AD or CVD proceeding by another Party in lieu of judicial review in national courts.⁵⁴ In AD and CVD cases, the rights and commercial interests of private parties are most directly affected, not the Party (country) imposing the order or the Party from which the goods were exported. Hence, the NAFTA affords private parties the right to require the Secretariat formally to request a Chapter 19 panel by timely filing a request for a panel review.⁵⁵ The state does not intervene in this choice of requesting a binational panel. NAFTA Chapter 19 also expanded the time limit for final panel decisions so additional remands could be accommodated, if necessary.⁵⁶

NAFTA article 1905 provides a "safeguard" mechanism that was not included in the FTA.⁵⁷ The safeguard provision is designed to protect panel rulings and the panel process where any Party's law has impeded the effective functioning of the binational panel review process.⁵⁸ Under article 1905(1), any Party that alleges that the "law" of another Party has denied it the ability to obtain panel review, prevented establishment of a panel, prevented a panel from rendering final decision, or blocked implementation of a final panel ruling

⁵⁴ *NAFTA*, *supra* note 1, art. 1904 (1).

⁵⁵ *Ibid.*, art. 1904(5).

⁵⁶ *NAFTA*, *supra* note 1, Annex 1903.2(4)

⁵⁷ *NAFTA*, *supra* note 1, art. 1905.

⁵⁸ *Ibid.*, art. 1905(1)

is entitled to consultations.⁵⁹ If after 45 days, consultations have not resolved the issue, then the complaining Party may request a “Special Committee” pursuant to article 1905(2).⁶⁰ Special Committees comprised of three members, review the allegation and issue a report containing findings with respect to any allegations under article 1905(1).⁶¹

With respect to Extraordinary Challenges, NAFTA Chapter 19 added a clause that specifically addressed the failure to apply the standard of review,⁶² because that was the claim made in all three Challenge Committees under the FTA, that they failed to properly apply the standard of review.⁶³ Likewise, it amplified the grounds for a challenge, to clarify that exceeding the standard of review, would warrant an Extraordinary Challenge. It also extended the time for conducting Extraordinary Challenge Proceedings. In addition, NAFTA Chapter 19 added new provisions to safeguard the integrity of the panel process and to replace the Subsidies Working Group with a less well-defined consultation process.

The Extraordinary Challenge Committee is also important. If a panel is accused of impropriety, its decision may be appealed to an Extraordinary Challenge Committee. Such a challenge may only be initiated by the

⁵⁹ Ibid.

⁶⁰ Ibid., art. 1905(2).

⁶¹ Ibid., art. 1905(7).

⁶² NAFTA, *supra* note 1, art. 1904 s. 13(a) (iii).

⁶³ Chapter 19 Binational Proceedings, *supra* note 21, at 62.

government of the private party.⁶⁴ *Pork*⁶⁵ and *Swine*⁶⁶ Extraordinary Challenge Committee (ECC) decisions observe that only the government of a Party could request an ECC review under NAFTA article 1904(13).⁶⁷ Unlike the provision in article 1904(5), which compels the government of a Party to request a binational panel review proceeding upon the request of a private party, there is no provision for private parties to force ECC proceedings.

To convene an ECC, a government has to allege one of three grounds: first, that there has been panel misconduct, including bias, misconduct, or a bribery. A second ground is that there has been a procedural error. The third ground is an allegation that the panel acted in excess of its authority. The State challenging a panel decision must also demonstrate before the Extraordinary Challenge Committee that the errors alleged by the government, materially affected the panel decision.

The procedure that remains in Article 1907 for ongoing negotiations concerning subsidy discipline and AD issues allowed the parties to conclude the NAFTA and to defer substantial issues to the Uruguay Round, and to discuss the subjects again without any formal schedule for resolving differences.⁶⁸

⁶⁴ *Ibid.*, at 61.

⁶⁵ *Fresh, Chilled or Frozen Pork from Canada*, (1991), ECC-91-1904-01 USA (Ex. Chall. Ctte) online: NAFTA Secretariat ,<http://www.nafta-sec-alena.org/english/index.htm>. (date accessed: May 11, 1999).

⁶⁶ *Live Swine from Canada*, (1993), ECC-93-1904-01 USA (Ex. Chall. Ctte) online: NAFTA Secretariat ,<http://www.nafta-sec-alena.org/english/index.htm>. (date accessed: May 11, 1999).

⁶⁷ *NAFTA*, *supra* note 1, art. 1904(13).

⁶⁸ *Resolving Disputes*, *supra* note 5 at 170.

NAFTA Chapter 19 explicitly calls for the use of judges or former judges on panels rather than practitioners. A code of conduct was also created, because it is necessary that panels act with objectivity and adhere to a very strict standard. For these purposes, a very rigorous disclosure system was created. Panelists cannot be affiliated with any of the Parties, that is, one of the governments; they must disclose their government contracts or representations of the U.S., Canada or Mexico. Therefore, panelists must be very careful not to be representing other clients on issues that are under litigation before the panel.⁶⁹

The administration of the Code of Conduct is the single most important role that the NAFTA Secretariat plays by serving as the clerk of the court for this system. The NAFTA Secretariat handles the entire matter, including reviews of U.S. administrative agency decisions. The NAFTA office in Ottawa handles Canadian appeals, and there is a *Seccion Mexicana* [Mexican Section], which handles all appeals from determinations issued by the *Secretaria de Comercio y Fomento Industrial* (SECOFI).⁷⁰

The U.S. and Canada have a [bifurcated] process for review of AD and CVD administrative decisions. First, a decision is made by one of the agencies as to the existence of dumping or subsidies. If the decision is affirmative, the

⁶⁹ NAFTA, *supra* note 1, Annex 1901.2.

⁷⁰ Chapter 19 Binational Proceedings, *supra* note 21, at 61.

issue of material injury is reviewed separately by a different agency⁷¹. Each of those decisions can be appealed separately. Previously, the issues had to be appealed together to federal courts in the U.S. In Mexico, SECOFI makes both the dumping or subsidy decision and then follows up with an injury decision⁷². Since in Mexico only one agency performs the whole proceeding, for both dumping or subsidy and injury, final decisions could be longer than those issued by only one agency either in the U.S. or Canada. Thus, panels in Mexico could have more work than a panel in the U.S. or Canada.

Chapter 19 of the NAFTA adds a provision to safeguard panel decisions from attempts to undermine a particular decision through domestic legislation. These provisions provide for consultations where one party alleges that other party's domestic laws interfere or obstruct the panel process.⁷³ If the consultations are unsuccessful, the complainant may request a special committee which will make a determination on the matter. If the committee issues an affirmative determination, the parties again must consult on a solution with the defending party obligated to correct the problem. Should these procedures fail, the complainant may suspend either operation of the panel process or application of the agreement with the other party.⁷⁴

⁷¹ See Annex I of this paper.

⁷² Ibid.

⁷³ *NAFTA*, *supra* note 1, article 1905.

⁷⁴ Ibid., art. 1905 (2).

The inclusion of this safeguard mechanism reflects the Parties' objective of ensuring that the panel process would not be undermined by the legislators' attempting to overturn the results of particular cases.

In my opinion, the first three Chapter 19 process in Mexico were highly controversial. However, as more reviews are performed, the binational panel system has become more and more effective, as reflected in the last reviews.

1.7. APPOINTING PANELISTS.

Under Annex 1901.2, the parties consult and develop a roster of at least 75 potential panelists, including at least 25 candidates selected from each country. In the case of any challenge under NAFTA Chapter 19, the two countries involved each identify two panelists from the roster.⁷⁵ Afterwards each party selects two panelists, and within 55 days of the request of the panel, the Parties must choose a fifth panelist.⁷⁶

After the five panelists are chosen, the panelists themselves must then elect a chairman from among the lawyers of the panel. The Chairman must be a lawyer⁷⁷ and is permitted certain authority to determine and rule on procedural issues and certain consent on motions without the need for review

⁷⁵ Ibid., Annex 1901.2(2).

⁷⁶ Ibid., Annex 1901.2(3).

⁷⁷ Ibid., Annex 1901.2(4).

by the full panel.⁷⁸ However, neither the Secretary of the Section of the NAFTA Secretariat, nor the chairman may rule on motions for extension of time or alteration of the briefing schedule.⁷⁹

1.8. BINATIONAL PANEL SCHEDULE.

Underscoring the importance of speed in these binational panel review proceedings, the corresponding schedule is set forth in Article 1904 of NAFTA, rather than an annex or procedural rule. Article 1904 states that “the rules shall be designed to result in final decisions within 315 days of the date on which a request for a panel is made...”⁸⁰ This is the same period set forth in the Canada-U.S. Free Trade Agreement.

Article 1904 goes on to specify the following schedule, beginning with the date of filing of the first request for review, and thereafter indicating the deadline measured from the preceding event:

- (a) 30 days for the filing of the complaint;
- (b) 30 days for designation or certification of the administrative record and its filing with the panel;
- (c) 60 days for the complainant to file its brief;

⁷⁸*North American Free Trade Agreement: Rules of Procedure for Article 1904, Binational Panel Review*, reprinted in 59 Fed Reg. 8685, 8690 (Feb. 23, 1994) [hereinafter *NAFTA Rules of Procedure*] Rules 10 and 17.

⁷⁹ *Ibid.*, Rule 17(2)(b).

- (d) 60 days for the respondent to file its brief;
- (e) 15 days for the filing of reply briefs;
- (f) 15 to 30 days for the panel to convene and hear oral argument; and
- (g) 90 days for the panel to issue its written decision.⁸¹

This is an ambitious time schedule, given that panelists include practicing attorneys and economists. It is faster than the schedule set forth in the rules of the United States Court of International Trade, primarily due to the fact that that court has broad discretion to entertain motions to extend the schedule provided for in the court rules.⁸² The briefing schedule was modeled on an appellate court procedural schedule, not a trial court schedule, but add deadlines for oral argument and a final panel decision.⁸³

The Rules of Procedure do allow for extensions of time and motions for leave to file out of time.⁸⁴ However, the overall time limit for the decision of the binational panel, 315 days, cannot be relaxed by the panel or the parties.⁸⁵ Motions for extensions of time, moreover, cannot be decided by the chairman, even upon consent of all parties, but must be presented to the full panel, and four panelists must agree to the extension.⁸⁶ Grounds for an extension of time include "unfairness or prejudice to a participant or the breach of a general

⁸⁰ NAFTA, *supra* note 1, art. 1904 (14)

⁸¹ *Ibid.*

⁸² *Proceedings of the Sixth Annual Judicial Conference of the United States Court of International Trade*, (1993) 131 FRD 217, at 239-40.

⁸³ *Resolving Disputes*, *supra* note 5 at 45.

⁸⁴ NAFTA Rules of Procedure, *supra* note 78, Rule 20.

⁸⁵ NAFTA, *supra* note 1, article 1904(14).

legal principle of the country in which the final determination was made,” and the time shall be extended only as necessary to avoid the unfairness, prejudice or breach of general principles.⁸⁷

PART 2

MEXICAN ANTIDUMPING AND COUNTERVAILING DUTIES: LEGAL FRAMEWORK.

2.1. OVERVIEW

It was in 1986 that Mexico enacted its first AD and CVD law, the *Ley de Comercio Exterior como Ley Reglamentaria del Artículo 131 Constitucional de los Estados Unidos Mexicanos*⁸⁸. This was when Mexico acceded to the General Agreement on Tariffs and Trade (GATT). Before GATT, no compelling reason existed for the Mexican Congress to have AD or CVD laws, due to the practice of a closed economy in the country.

In November 1986, the *Regulations Governing Unfair International Trade* were promulgated.⁸⁹ Mexico's AD regulatory framework was further expanded in 1988, when the *Agreement on Implementation of Article VI of the GATT*

⁸⁶ *NAFTA Rules of Procedure*, *supra* note 78, Rule 20(1)(c).

⁸⁷ *Ibid.*, Rules 20(1)(a), 20(1)(c).

⁸⁸ *Ley de Comercio Exterior como Ley Reglamentaria del Artículo 131 Constitucional de los Estados Unidos Mexicanos*, [Foreign Trade Act Implementing Article 131 of the Mexican Constitution], *D.O.*, January 13, 1986.

⁸⁹ *Reglamento contra practicas desleales de Comercio Internacional*, *D.O.*, November 25, 1986.

took effect. Mexico's first AD and CVD regime was relatively rudimentary and unsophisticated, and for these reasons, received unfavorable reviews both internally and externally. Serious substantive and procedural problems were detected.⁹⁰

Today, the first unfair trade Mexican legislation⁹¹ has been superseded by new foreign trade legislation.⁹² Moreover, the legal framework for AD and CVD has been further enriched by Mexico's membership of international trade agreements such as NAFTA.

The applicable constitutional provisions and legislation are: Articles 28, 73(X), and 131 of the *Constitucion Politica de los Estados Unidos Mexicanos*⁹³, the Foreign Trade Law of 1993, amended in December of the same year⁹⁴, the

⁹⁰ Andere Eduardo, "The Mexican Antidumping Regime-Regulatory Framework, Policies and Practice" (1993) 27 J. of World Trade at 24.

⁹¹ Before joining the GATT, the foreign trade measures in Mexico were structured to limit or prohibit imports for which domestic substitutes were available. Among the measures were an elaborated system of import licensing, covering virtually all customs categories and a reference price system that established arbitrary high customs values for nearly one quarter of all customs categories.

⁹² Ley de Comercio Exterior, D.O. July 27, 1993; [hereinafter Foreign Trade Law]. See also Decreto que reforma, adiciona y deroga disposiciones de diversas leyes relacionadas con el Tratado de Libre Comercio de America del Norte, D.O., December 22, 1993.

⁹³ Article 28 establishes that "subsidies may be granted to priority activities when they are general, of temporary nature, and do not substantially effect the Nation's finances." Article 73 (X) states the Congress has the authority "to legislate throughout the Republic on... commerce". Article 131 provides "the Executive may be empowered by the Congress of the Union to increase or suppress the amounts of the export or import tariffs issued by the Congress, and to create others, as well as to restrict or prohibit imports, exports, and transit of products when it is deemed urgent in order to regulate foreign trade, the economy of the country, the stability of national production, or to accomplish any other objective in benefit of the country."

⁹⁴ See Foreign Trade Law, *supra* note 92.

Foreign Trade Law Regulations of 1993⁹⁵, and the Ministry of Trade and Industrial Development (SECOFI) By-law.^{96 97}

2.2. ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS.

In Mexico the AD and CVD investigations, are conducted by the SECOFI, through the International Commercial Practices Section. This section is responsible for conducting dumping and subsidy determinations. Once an investigation on unfair international trade practices ends, SECOFI must submit the final determination to the opinion of an interagency group, the Foreign Trade Commission.⁹⁸ Another authority involved in AD and CVD investigations is the General Customs Office of the Ministry of Finance and Public Credit⁹⁹, which is in charge of the collection of the provisional and final duties.¹⁰⁰

⁹⁵ Reglamento de la Ley de Comercio Exterior, D.O., December 30, 1993 [hereinafter "Foreign Trade Regulations"].

⁹⁶ Reglamento Interno de la Secretaria de Comercio y Fomento Industrial, D.O., April 1, 1993.

⁹⁷ It is important to mention that there are other Mexican laws that indirectly are applicable to the AD and CVD Mexican legal framework, such as: Law of *Amparo*, the Federal Judicial Power Organic Law, the Federal Fiscal Code, the Income Tax Law, the Customs Law, and the Federal Public Administration Organic Law.

⁹⁸ Foreign Trade Law, *supra* note 92, art. 6 and 58; and Foreign Trade Law Regulations, *supra* note 95, Title II.

⁹⁹ *Administración General de Aduanas de la Secretaría de Hacienda y Crédito Público* [Ministry of Finance and Public Credit, General Directorate of Customs].

¹⁰⁰ Foreign Trade Law, *supra* note 92, art. 65; and Foreign Trade Law Regulations, *supra* note 95, art. 82, I (h); 83. I, (h).

According to the Foreign Trade Law, the administrative procedure for AD and CVD investigations, can be divided into three stages; the initiation of an investigation, the Preliminary Determination, and the Final Determination.

An investigation may be initiated either by SECOFI or at the request of individuals, or corporations which must meet two requirements: (i) they must be manufacturers of identical or similar merchandise to that being imported or intended to be imported under unfair international trade practices; and (ii) they must represent at least 25% of the domestic industry of the merchandise subject to investigation, or be a legally constituted organization.¹⁰¹

The Preliminary Determination must be issued within 130 days after the day the initial determination became public. Within this period, important probatory proceedings take place. In its final determination, SECOFI may impose a final AD and CV duty, revoke the provisional AD or CV duty, or declare the investigation completed without imposing any duty.

The table in Annex A, contains the calendar of the investigation procedure that the respective authorities in each NAFTA country must follow in order to determine whether AD or CVD exist.

¹⁰¹ Foreign Trade Law, *supra* note 92, art. 40,49 and 50.

2.3. PROCESS OF ADMINISTRATIVE, JUDICIAL, AND BINATIONAL PANEL REVIEW OF SECOFI'S DETERMINATIONS.

In terms of the Foreign Trade Law, interested parties may challenge SECOFI unfair trade determinations through administrative and judicial review procedures. In addition, parties from the NAFTA countries may opt for a binational panel review, under Article 1904 of NAFTA.¹⁰²

2.3.1 Administrative Review of Remedy: Appeal for Reversal.

The appeal for reversal is submitted before the International Commercial Practices Directorate of SECOFI¹⁰³ 45 days after the contested administrative determination takes effect,¹⁰⁴ and the appeal must be exhausted there for the judicial appeal to proceed before the Upper Division of the Federal Fiscal Court (TFF).¹⁰⁵ Appeals for reversal of acts enforcing final AD and CVD shall be filed before the Ministry of Finance and Public Credit.¹⁰⁶

As a result of this appeal, the disputed administrative determination may be revoked, modified, or confirmed. It offers the administrative authority the

¹⁰² Beatriz Leycegui, William B.P. Robson & S. Dahlia Stein, *Trading Punches: Trade Remedy Law and Disputes Under NAFTA*, North American Committee, (Washington, D.C.: National Planning Association 1995) at 54 [hereinafter *Trading Punches*].

¹⁰³ Foreign Trade Law, *supra* note 92, art. 94; and Código Fiscal de la Federación, *D.O.*, January 1, 1996, art. 121, [hereinafter *Federal Fiscal Code*].

¹⁰⁴ *Federal Fiscal Code*, *supra* note 103, art. 121.

¹⁰⁵ Foreign Trade Law, *supra* note 92, art. 95.

¹⁰⁶ Foreign Trade Law, *supra* note 92, art. 94(x)

opportunity to review its own decisions and to settle disputes outside ordinary courts. Unfortunately, in practice, administrative authorities usually confirm their own decisions. Thus, many have suggested that this procedure should be eliminated.¹⁰⁷

2.3.2. Judicial Review.

As mentioned, once SECOFI's decision has been rendered, it may be contested through judicial appeal before the Upper division of the TFF. The Court may either uphold the administrative decisions, declare them totally or partially nullified, remand them, indicating the terms with which the authority shall comply, order the restitution of the administrative procedure, or dismisses the appeal.¹⁰⁸

The standard of review that the TFF applies is contained in Article 238 of the Federal Fiscal Code, which reads as follows:

Article 238: An administrative determination shall be declared illegal, when one of the following conditions is demonstrated:

- (1) Lack of jurisdiction of the officer issuing, ordering or conducting the procedure, out of which the determination stems;
- (2) omission of the formal requirements demanded by law affecting any defense of the person, and transcending the

¹⁰⁷ *Trading Punches*, *supra* note 102 at 55.

¹⁰⁸ Federal Fiscal Code, *supra* note 103, art. 239.

outcome of the challenged determination, including the absence of basis or motivation, as the case may be;

- (3) defects on the procedure affecting the party's defense and transcending the outcome of the challenged determination;
- (4) If the finding facts on which the determination was based were not held, different, or were incorrectly interpreted, or that the challenged determination was issued by the agency in violation of the applicable laws or rules; and
- (5) When the administrative determination, in exercising discretionary powers, does not correspond to the ends for which the law grants those powers. The TFF could bring into the record, on its own motion, for being a public matter, the lack of jurisdiction of the authority to issue the challenged determination, and the total absence of basis and motivation of such determination. The arbitration agencies or binational panels arose from alternative dispute resolution mechanisms regarding antidumping, provided in international treaties or agreements which Mexico has entered into, could not review on its own motion, the grounds provided in this article.¹⁰⁹

Just a few of AD and CVD final resolutions have been challenged before the Upper Division of the TFF.¹¹⁰ As of 1996, not one has been resolved, either as *Amparo* action or as proceedings for annulment. Yet unfortunately, decisions are not always promptly rendered, even though the average length of the judicial proceeding is eight to nine months, some may last well over two or even three years.¹¹¹

¹⁰⁹ The final part of article 238 of the Federal Fiscal Code entered into force in 1997. It was not included in this article when NAFTA entered into force.

¹¹⁰ SECOFI, *Informe de Labores 1991-1996. El Sistema Mexicano de Defensa contra Prácticas Desleales de Comercio Internacional*, (1997) at 108.

¹¹¹ *Trading Punches*, *supra* note 102 at 56.

2.3.3. Constitutional Extraordinary Procedure of Judicial Review - *Juicio de Amparo*.

As an ultimate extraordinary review procedure, private parties may oppose a final decision of the TFF through the *Juicio de Amparo Directo*. The *Amparo* has become the judicial review mechanism of Mexican legal proceedings. The *Juicio de Amparo*, (hereinafter referred as to *Amparo*) is established in articles 103 and 107 of the Mexican Constitution and is regulated in the *Amparo* law.¹¹²

Two kinds of violations are alleged under the *Amparo*: (i) procedural errors, if they have affected the final decision of the Court; and (ii) substantive flaws in the judgements themselves. The judicial reviewing authority is “strictly limited to reviewing questions of law; that is, whether the trial court correctly applied the applicable law. Thus, in a judicial *Amparo* proceeding, *de novo* review is disallowed.”¹¹³ I would like to mention also, that among the most important functions of the *Amparo* proceedings are to protect individual guarantees, to test allegedly unconstitutional laws, to contest judicial decisions, and to review official administrative acts and resolutions.¹¹⁴ It is important to mention that in all cases the *Amparo* determinations have only individual effects. Likewise, it is important to bear in mind that in Mexico, the international

¹¹² *Ley de Amparo*, Reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, D.O. January 10, 1936, [hereinafter *Ley de Amparo*].

¹¹³ Burgoa Ignacio, *El Juicio de Amparo*, 30th ed. (Mexico: Porrúa, 1993) at 37.

¹¹⁴ *Ibid.*

treaties are law¹¹⁵. Therefore, the authority's actions are subject to the jurisdictional control provided by the *Amparo*.

Another issue concerns the final phrase of article 1904.11, which states that "No party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts."¹¹⁶ The above provision could be subject to two interpretations. The first one, is that it could be interpreted as precluding the launching of an *Amparo* action. I find that difficult because it raises the issue of the constitutionality of the NAFTA's exclusion of the *Amparo* suit. According to articles 103 and 107 of the Mexican constitution, the *Amparo* can always be brought against any act of any authority that violates the individual rights of a person, except when the same constitution states otherwise.¹¹⁷

The second possible interpretation is that it means that no ordinary jurisdictional defence is available, not that it denies the constitutional defence (the *Amparo*). In this interpretation, the issue of constitutionality of the NAFTA does not arise, because the *Amparo* is formally not a means of controlling legality, but a means of controlling constitutionality.¹¹⁸ What would happen if an *Amparo* is granted against a determination of SECOFI implementing an order of a panel? Could this be considered to be contrary to Mexico's

¹¹⁵ I will analyze this issue later in this part.

¹¹⁶ NAFTA, *supra* note 1, art. 1904(11).

¹¹⁷ NAFTA Dispute Settlement and Mexico, *supra* note 38 at 113.

¹¹⁸ Ibid.

obligations under the NAFTA, and the other parties could be in position to activate the safeguard mechanism set forth in article 1905 of NAFTA? This is a question that has to be resolved by the Mexican federal courts while interpreting NAFTA as Mexican law.¹¹⁹

As of 1998, there were 6 *Amparo* trials challenging SECOFI's determinations regarding the investigations of *Cold Rolled Steel Sheet*¹²⁰, *Flat Coated Steel*¹²¹, and others, but only the above cases are related to Chapter 19 binational panel procedures.¹²²

In October 1996, USX Corporation and Inland Steel Company, which were parties in the binational panel case *Flat Coated Steel*,¹²³ requested the federal courts to grant an *Amparo* against the binational panel award, arguing the legal nature of the panel, and some procedural reasons of the *Amparo*.¹²⁴

On March 31, 1997, the Judge in charge of the Seventh Administrative Court, decided not to grant the *Amparo* to the above mentioned corporations, on grounds that the final award of the binational panel was not a final

¹¹⁹ See section 2.4. of this paper in connection with the adoption of international treaties as a Mexican Law.

¹²⁰ *Cold Rolled Steel Plate* (1996) MEX-96-1904-01 (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

¹²¹ *Flat Coated Steel products from the United States*, (1996) MEX-94-1904-01. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

¹²² SECOFI's Annual Report 1997. Unidad de Practicas Comerciales Internacionales, 1998 at 42 [hereinafter *SECOFI Annual Report*].

¹²³ *Flat Coated Steel products from the United States*, (1996) MEX-94-1904-01. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

determination, therefore not causing a damage to the U.S. exporters. The Judge stated that only the resolution issued by SECOFI in compliance with the binational panel award could cause damage to the U.S. exporters. Nevertheless, the judge recognized the binational panel as an authority under Mexican law.¹²⁵

As a consequence of the final award of the binational panel, SECOFI issued a new administrative resolution in terms of the panel award. This new resolution was challenged in May, 1997 by the above mentioned U.S. exporters. The exporters did not challenge issues contained in the new resolution, but extended the same arguments used in the first *Amparo*. SECOFI alleged the illegality of the *Amparo* for several reasons.^{126 127}

By March 1995, 60 of SECOFI'S AD and CVD final determinations that had not been reviewed formerly by the TFF had been appealed through the *Amparo* extraordinary appeal procedure. On only 9 occasions was the *Amparo* granted. 40 cases were denied or dismissed, and 11 are still being considered.¹²⁸ I would like to mention that in none of these 9 occasions were the winning private parties from a NAFTA country. The above means that, to date, no *Amparo* has been granted regarding a Chapter 19 binational panel

¹²⁴ Ibid, at 42.

¹²⁵ *Amparo* trial 574/96 at 46-50. Copy on possession of the author.

¹²⁶ *Secofi Annual Report*, *supra* note 122, at 43.

¹²⁷ During 1998 this *Amparo* was still proceeding. As to the date of this paper, it is was not possible to determine whether the *Amparo* was granted or not, due to the fact that the judgement is not a public document.

¹²⁸ *Secofi Annual Report*, *supra* note 122, at A 15.

procedure. Moreover, none of the issues related to the granted *Amparos* were related to NAFTA.

It is important to mention that for purposes of the safeguard mechanism set forth in article 1905 of NAFTA, there is a difference between an *Amparo* challenging a SECOFI resolution issued during an AD or CVD investigation, and an *Amparo* challenging the final award of a Chapter 19 binational panel. In other words, an *Amparo* granted against a SECOFI resolution issued during a regular AD investigation, should not be a triggering event for the above safeguard mechanism.

An argument regarding the constitutionality of the *Amparo* is contained further in section 2.4.1. of this paper.

2.3.4. Binational Panel Review.

In conformity with NAFTA, the Foreign Trade Law recognizes the right of Mexican, Canadian and U.S. interested parties to request Chapter 19 binational panel reviews when contesting any of SECOFI's final determinations.¹²⁹ However, under NAFTA, certain rules are applicable. Once Chapter 19 binational panel procedure is chosen, administrative appeals for reversal, or judicial review by the TFF, shall not proceed against the SECOFI

¹²⁹ Foreign Trade Law, *supra* note 92, art. 94.

determinations, or acts relating to the enforcement of binational panel resolutions, interested parties shall comply with binational panel determinations, and binational panels shall apply the standard of review set out in Article 238 of the Federal Fiscal Code.¹³⁰

The purpose of the binational panel review is set forth in paragraphs 1 and 2 of NAFTA's article 1904. I will summarize its objectives in four basic issues:

- a) The replacement for each party, of the judicial review of final antidumping and countervailing duty determinations with binational panel review.¹³¹ This means the replacement of the nullity trial that should be carried out by the TFF.
- b) The above situation is only valid to review "a final antidumping or countervailing duty determination of a competent investigating authority of an importing party"¹³². This means that the binational panel replaces the TFF to review only the challenged final determination issued by SECOFI.
- c) The review shall be carried out, based on the administrative record.¹³³

¹³⁰ Ibid., art. 97.

¹³¹ NAFTA, *supra* note 1, article 1904(1).

¹³² Ibid., article 1904(2).

¹³³ Ibid.

- d) The task of the panel consists in determining whether such final determination was in accordance with the antidumping or countervailing duty law of the importing party.¹³⁴ The above means that the panel, based on the standard of review set out in Annex 1911, shall confront the final resolution issued by SECOFI with the internal antidumping and international trade law, with the purpose of determining whether such determination was issued in accordance of such laws.

Regarding the request of an investigation by a binational panel, article 1904(5) states that "an involved party on its own initiative may request review of a final determination by a panel and shall, on request of a person who would otherwise be entitled under the law of the importing party to commence domestic procedures for judicial review of that final determination, request such review".¹³⁵

The three NAFTA countries have drawn upon some principles of international arbitration in order to create the binational panel procedure set forth in Chapter 19. Nevertheless, there is a substantial difference in the procedure followed by a binational panel, compared to ordinary arbitration. In the latter, parties participate in the selection or elaboration of the procedural rules that

¹³⁴ Ibid.

¹³⁵ Ibid, article 1904(5).

must be applied, while in the former, such rules are established in advance by the NAFTA contracting parties.¹³⁶

On the other hand, it is important to mention that in Mexico, either the binational panel or the TFF, have the authority to review an antidumping or countervailing duty final determination, issued by a corresponding administrative authority (SECOFI). Thus, it is important to establish a distinction between the binational panels and the TFF. The former is an arbitration body, and the latter is a judicial body. Therefore they have different functions and authority.

Even though the binational panel takes the place of the TFF, it is important to note at the outset that the panel is not the TFF, and does not have the same characteristics, attributions and jurisdiction as does the TFF.¹³⁷ If that were the intention of the parties, the panelists shall only replace the judges of the TFF. The TFF and the binational panels both have their own applicable regulations. The TFF is governed mainly by the Federal Fiscal Code, its regulations and its constitutive charter. The latter have to comply with article 1904 of NAFTA and its rules of procedure.

¹³⁶ *Rolled Steel Plate imports originating in or imported from Canada*, (1997) MEX-96-1904-02. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

¹³⁷ *Flat Coated Steel products from the United States*, (1996) MEX-94-1904-01. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

Moreover, even though the TFF and the binational should apply the same substantive law in their reviews, it is important to mention the fact that the powers of the panel are only those set out in NAFTA, and that the TFF as a judicial body, has different and broad powers.¹³⁸ In other words, the binational panel is not entitled to declare a nullity of a final determination as the TFF does.

The application of NAFTA's Chapter 19 has been increasing. As of July 1999, 47 review requests had been filed. Out of those 47, 14 were resolutions issued by the corresponding Canadian authority, 24 were from the United States authority and 9 from the Mexico.¹³⁹ It is important to mention that during 1998, a new panel review was requested in order to challenge a SECOFI final determination regarding *Corn Syrup*.¹⁴⁰ The resolution of the panel has not been issued yet. From the 9 Mexican cases, five ended in a resolution of the panel¹⁴¹, three were ended at the request of the parties¹⁴², and one is pending.¹⁴³

¹³⁸ This issue is discussed further on in this paper in section 2.3.4.1.

¹³⁹ *Secofi Annual Report*, *supra* note 122, at A 18-19.

¹⁴⁰ *High Fructose Corn Syrup products from the United States*, MEX-USA-98-1904-01. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

¹⁴¹ *Flat Coated Steel (mex-94-1904-01)*, *Cut to Length Steel (MEX-94-1904-02)*, *Crystal and Solid Polystyrene (MEX-94-1904-03)*, *Rolled Steel Plate (MEX-96-1904-02)*, and *Hot Rolled Steel Plate (MEX-96-1904-03)*.

¹⁴² *Cut to Length Carbon Steel Plate (MEX-95-1904-01)*, *Cold Rolled Steel Plate (MEX-96-1904-01)* and *Hydrogen Peroxide (MEX-97-1904-01)*.

¹⁴³ *High Fructose Corn Syrup (MEX-USA-98-1904-01)*.

2.3.4.1. Powers of the Binational Panel.

A hotly debated issue in the reviews of binational panels held in Mexico, was the extent of the powers of the panel, especially in the first three cases¹⁴⁴. Even though the panel decisions are not precedents, those decisions were a useful guide to the panelists.

The controversy arose in the majority decision of the binational panel in *Cut to Length Steel*, which concluded that the panel had authority to declare the determination issued by SECOFI to be a nullity. This decision was based upon a broad interpretation of the standard of review in pointing out that the standard of review has to be construed in light of articles 237 and 239 of the Federal Fiscal Code.¹⁴⁵ In this regard, it is necessary to analyze the NAFTA in order to determine the powers of a binational panel. The powers of the binational panel are only those set forth in NAFTA. In other words, the powers of the panel are those granted by the negotiators of the three NAFTA countries, and the same are provided in article 1904(8), which states that “the panel may uphold a final determination or remand it for action not inconsistent with the panel’s decision”¹⁴⁶.

¹⁴⁴ *Flat Coated Steel (mex-94-1904-01)*, *Cut to Length Steel (MEX-94-1904-02)*, and *Crystal and Solid Polystyrene (MEX-94-1904-03)*.

¹⁴⁵ See *Cut to Length Steel imports originating in or imported from USA*, (1995) MEX-94-1904-02. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

¹⁴⁶ NAFTA, *supra* note 1, article 1904(8).

In the exercise of its judicial review function, the TFF has the unquestioned power to nullify a decision issued by SECOFI in appropriate circumstances. On the other hand, following NAFTA article 1904(8), the binational panel is not entitled to declare a nullity of a final determination. In view of the foregoing, the decision of the panel to declare a nullity was beyond the powers conferred on it by NAFTA.

Another important issue arises from the fact that the concept of remand is found in the common law, but has no exact equivalent in Mexican law. A remand is "the act of an appellate court when it sends a case back to the trial court and orders the trial court to conduct limited new hearings or an entirely new trial, or to take some other further action"¹⁴⁷. NAFTA defines "remand" in article 1911 as "a referral back for determination not inconsistent with the panel or committee decision"¹⁴⁸. The reason for having a remand procedure relates to the *ad hoc* nature of panels, and to the principle of deference implicit in Chapter 19. Panels must leave the authorities a certain freedom of action regarding the conduct to follow in response to a panel's decision. The obligation imposed on authorities is "to take action not inconsistent with the panel decision"¹⁴⁹.

The effects of the decisions of the TFF are found in article 239 of the Federal Fiscal Code, which establishes that the TFF may:

¹⁴⁷ *Black's Law Dictionary*, 6th ed., s.v., "remand".

¹⁴⁸ *NAFTA*, *supra* note 1, article 1911.

- I) recognize the validity of a challenged determination;
- II) declare the nullity of the challenged determination;
- III) declare the nullity of the challenged determination for certain effects, defining clearly the way and manner in which the authority must comply with it, except when discretionary powers are involved.¹⁵⁰

Thus, it is clearly established that the remand power conferred on the binational panels, does not have the same effect, and is different from that provided in paragraphs (II) and (III) of article 239.

Therefore, the powers of the panels are governed by NAFTA and not by the Federal Fiscal Code. The former prescribes different powers than those prescribed by the latter. Thus, the panels cannot declare a nullity for certain effects, since this is a power only for the TFF. The panel must limit itself to remanding the determination to the authority. It is for the authority to then act in a way not inconsistent with the panel's decision.¹⁵¹

The above mentioned criteria has been the same adopted by SECOFI, and it has been confirmed by some resolutions of binational panels, such as *Flat Coated Steel, Rolled Steel Plate, and Hot Rolled Steel Sheet*. These panel

¹⁴⁹ *Nafta Dispute Settlement and Mexico*, *supra* note 38 at 111.

¹⁵⁰ Federal Fiscal Code, *supra* note 103, art. 239.

decisions have concluded that the reason that a binational panel has not been vested with the power to nullify a determination, is that it has a different legal nature from the TFF. In other words, notwithstanding the fact that the panel takes the place of the Appeal Court, the panel does not have the same powers as that Court.

In support of the above mentioned criteria, neither the Canadian laws¹⁵², nor the U.S. laws¹⁵³, entitles a Chapter 19 binational panel to declare the nullity of a final determination. On the other hand, as it is in Mexico, their respective courts have the power to declare a nullity.¹⁵⁴

In view of the foregoing, it has been concluded that the binational panels do not have the power to declare a nullity of a final determination issued by the SECOFI. Thus, in terms of article 1904(8), they are only empowered to either uphold or remand the final determination.

All the binational panels reviewing Mexican determinations have concluded that the Mexican standard of review is the one set forth in article 238 of the Federal Fiscal Code and based upon the general principles of law otherwise applied by the TFF. Since a binational panel replaces the TFF, the panel shall

¹⁵¹ *Nafta Dispute Settlement and Mexico*, *supra* note 38 at 111.

¹⁵² See *Special Measures Import Act*, R.S.C. 1985, c.S-15.

¹⁵³ See *The North American Free Trade Agreement Implementation Act, Statement of Administrative Action 194*, reprinted in HR Doc NO. 159, 103d Cong, 1st Sess 643 (Nov 4, 1993).

¹⁵⁴ Uruchurtu, Gustavo A., "*Marco Juridico en el Derecho Positivo Mexicano de los Paneles Binacionales del Artículo 1904 del TLCAN*" (1998), Documentos de Trabajo, SECOFI, at 16. [Hereinafter *Marco Juridico*].

review a final determination of AD or CVD issued by SECOFI under the aforesaid standard of review. In other words, while applying the Mexican standard of review, the binational panel shall determine whether the SECOFI resolution was issued in accordance with the Foreign Trade Law, its Regulations, 1994 GATT and as applicable, with the Federal Fiscal Code and the Federal Code for Civil Procedure.

Moreover, when a panel is applying the standard of review, in order to determine the competence of the authority which issued the final determination, the panel shall take into account the Organic Law of the Federal Public Administration, the Foreign Trade Law and the Internal Regulation for the SECOFI, the delegatory agreement¹⁵⁵ and the agreement which incorporates administrative units to the SECOFI.¹⁵⁶ In the Mexican reviews, the panel shall construe the jurisprudence issued by the Mexican Judicial Power and by the TFF, which are different from the precedents used in the U.S. or Canadian reviews.¹⁵⁷

The fact that the Mexican trade remedy system is relatively young, does not justify panels which use precedents from other international agreements or other judicial precedents from other countries. In this regard, article 1904(2) makes it clear that the judicial precedents are part of the antidumping legal provisions only "to the extent that a court of the importing party would rely on

¹⁵⁵ D.O., July 24, 1996.

¹⁵⁶ D.O., October 3, 1995.

such materials in reviewing a final determination"¹⁵⁸. Neither the TFF, nor the federal courts, would ever use the decisions of other courts as a source of domestic laws, thus the binational panels must render decisions that are consistent with the Mexican standard of review and general principles of law.¹⁵⁹

2.4. CONSTITUTIONAL CHALLENGES TO CHAPTER 19 BINATIONAL PANELS.

With the implementation of NAFTA, the Binational Panel dispute settlement mechanism provided in Chapter 19 has raised several constitutional concerns among Mexican legal experts.

In Mexican law, the adoption of international treaties is provided for essentially in article 133 of the Mexican Constitution (Constitucion Politica de los Estados Unidos Mexicanos) which states that international treaties executed by the President of Mexico with the approval of the Senate, and which are in conformity with the Constitution, are to be considered the supreme law of all the union.¹⁶⁰ Consequently, those international treaties that are not made in accordance with constitutional requirements, or that violate constitutional prohibitions, will not have internal validity. In other words,

¹⁵⁷ *Marco Juridico*, *supra* note 154 at 22.

¹⁵⁸ *NAFTA*, *supra* note 1, article 1904(2).

¹⁵⁹ Lopez Ayllon, S., "El Criterio de Revision de los Paneles Binacionales del Capitulo XIX del TLCAN en el Sistema Juridico Mexicano", (1996) [unpublished] at 22. [hereinafter *El Criterio de Revision*].

subject to the requirements set forth in article 133 of the Mexican Constitution, international treaties are law and they are self-executing, and form part of the domestic law without the enactment of implementing legislation. Thus, unlike Canada and the U.S., Mexico did not go through the process of legislative enactment.¹⁶¹

Due to the self-executing nature of NAFTA in Mexican law, Mexico did not publish an official view of what changes to the law had been effected by NAFTA. This is a sharp contrast to the practice of the U.S. where, when implementing an international trade agreement, the Executive Branch prepares a Statement of Administrative Action, that sets out its view of the rights and obligations contained in the agreement, and the way in which they relate to U.S. domestic law. On the other hand, Canada, which had no previous history of publishing such statements, began to emulate the U.S. when it prepared a Statement of Implementation for NAFTA.¹⁶²

Since Mexico had not had to prepare and enact implementing legislation, and did not have a practice of publishing an official account of the results of trade negotiations, there was no authoritative statement by Mexico of how Chapter 19 was intended to operate in the Mexican legal context.¹⁶³

¹⁶¹ *Constitución Política de los Estados Unidos Mexicanos*, (United Mexican States Political Constitution) art. 133 [hereinafter *Mexican Constitution*].

¹⁶¹ *El Criterio de Revision*, *supra* note 159 at 10.

¹⁶² *Nafta Dispute Settlement and Mexico*, *supra* note 38 at 78-79.

Notwithstanding the self-executing nature of international treaties under Mexican law, legal doctrine recognizes that certain provisions of international agreements, called "*hetero-executives*", require, in order to be operative, additional legislative action. In the case of NAFTA Chapter 19, a limited amount of legislative action was necessary to allow article 1904 binational panel system to be implemented. In the first instance, certain procedural features of trade remedy investigations that had not been implemented in Mexican law¹⁶⁴, were implemented through the enactment of a new Law of Foreign Trade and its Regulation.¹⁶⁵ Likewise, it was necessary to amend articles 94, 97 and 98 of the Foreign Trade Law, article 202 of the Federal Fiscal Code and articles 15 and 24 of the Organic Law of the TFF¹⁶⁶, to modify the existing regime for judicial review of SECOFI'S final determinations on AD and CVD, and to make available any alternative dispute mechanism negotiated in an international agreement.¹⁶⁷

The above legislative intervention could not be compared to the process of enacting implementing legislation necessary in Canada and the U.S., due to the fact that its objective was limited to ensuring that underlying AD and CVD laws were common enough to the three parties in order to allow Chapter 19 review mechanism to function in a relatively balanced fashion.

¹⁶³ Ibid, at 79.

¹⁶⁴ Those listed in NAFTA article 1904.15

¹⁶⁵ Foreign Trade Law, *supra* note 92, and Foreign Trade Regulations, *supra* note 95.

It is important to bear in mind that Chapter 19 was negotiated under particular circumstances, and that its antecedent is the Canada-U.S. Free Trade Agreement. Thus, adapting the main provisions of Chapter 19, was very limited. The changes to which the parties agreed were only those strictly necessary for the chapter to be applied to Mexico. Many of the concepts and their underlying logic came from the common law, and due to the self-executing nature of the international treaties in Mexico, they became incorporated directly into Mexican domestic law. The interpretation of these concepts in the context of the Mexican civil law system is not easy, particularly where there are no equivalent or similar concepts in the Mexican law, such as the term "standard of review" which we will discuss below.¹⁶⁸

A clear example of the foregoing is article 1904(2), which defines the law as the "relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing party would rely on such materials in reviewing a final determination of the competent investigating authority."¹⁶⁹ As we can see, article 1904(2) neither refer to international treaties, nor to the parties' respective constitutions in the definition of AD or CVD laws. The reason is relatively simple. Since the relevant treaties were not self-executing in either Canada or the U.S. , they are not applied directly by the local courts, unless they are implemented

¹⁶⁶ See *Decreto que reforma, adiciona y deroga disposiciones de diversas leyes relacionadas con el Tratado de Libre Comercio de America del Norte*, D.O., December 22, 1993.

¹⁶⁷ *El Criterio de Revision*, *supra* note 159 at 10.

¹⁶⁸ *Ibid*, at 11, 12.

through legislation. Insofar as constitutional issues are concerned, the U.S. and Canada concluded that the panels should not decide them¹⁷⁰. Therefore, the omission of references to constitutions and international treaties, was not a technical mistake, as the *Cut to Length* panel asserted.¹⁷¹

The case of Mexico is different. As aforesaid, the self-executing character of the treaties under article 133 of the Mexican Constitution, means that they are to be considered as law. Moreover, the Supreme Court of Justice has concluded that article 133 "adopts the rule that international law is part of the national legal system"¹⁷². Therefore, for the case of Mexico, it is submitted that the expression "statutes", includes international agreements.¹⁷³

There is a question whether the panels can interpret the constitution under Mexican law. As already stated, the term constitution is not included in article 1904(2). A perusal of the rest of NAFTA shows that any time the parties wanted to refer to their constitutions, they did so expressly. Thus, article 1904(2) did not intend panels to construe a party's constitution. The panel's mandate should be limited to reviewing the legality of administrative acts in terms of article 238 of the federal Fiscal Code and to the relevant general principles of law.

¹⁶⁹ NAFTA, *supra* note 1, art. 1904(2)

¹⁷⁰ *El Criterio de Revision*, *supra* note 159 at 17-18.

¹⁷¹ See *Cut to Length Steel imports originating in or imported from USA*, (1995) MEX-94-1904-02. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

¹⁷² *Semanario Judicial de la Federacion*, 6a época, vol. 151-56, part 6, at 186.

¹⁷³ *El Criterio de Revision*, *supra* note 159 at 18.

In the following section I will discuss the relevant constitutional provisions whether they pose a real limitation, or whether Chapter 19 clauses are compatible with them.

2.4.1. Constitutional Provisions Relevant to Chapter 19 Panels.

In Mexico, the Executive Power (the President) has the power to negotiate international dispute settlement mechanisms under Article 89, Section X of the Mexican Constitution, which provides that the President has the authority to conduct foreign policy and to sign international treaties. Moreover, it establishes that in conducting such policy, the peaceful settlement of disputes, among other principles, shall be observed.

Notwithstanding the fact that Chapter 19 binational panel reviews are intended to resolve disputes between sovereign states, the nature of the mechanism involves private parties playing an active role during various stages of the procedure. Consequently, when negotiating Chapter 19, the Mexican negotiators of NAFTA were particularly careful in observing strict compliance with the individual guarantees and rights established in the Constitution.

Article 13. "Nobody shall be judged by exclusive laws, nor by special courts..."¹⁷⁴

This Article embodies the principle of equality of all people before the law and the courts. Due to the fact that Chapter 19 Binational Panels are established within an international treaty that has general application in Mexico, and due to the fact that the binational panels are available to every person who met the requirements prescribed under NAFTA Chapter 19, the Binational Panels of review, are in compliance with Article 13 of the Mexican Constitution.

Article 14. "... No person shall be deprived of their life, liberty or property, possessions, or rights, without a judgement or trial, before pre-established courts, in which the essential due process requirements are observed, and in conformity with laws issued before the act occurs."¹⁷⁵

The Supreme Court has interpreted the word "trial" to include not only judicial procedures, but also administrative procedures¹⁷⁶. In addition, "courts" means not only the courts in the judicial sense, but all bodies of authority to resolve disputes.¹⁷⁷

¹⁷⁴ *Mexican Constitution, supra* note 160, art. 13.

¹⁷⁵ *Ibid.*, art. 14.

¹⁷⁶ Hector Fix Zamudio, *Constitución Política de los Estados Unidos Mexicanos Comentada*, 12th edition (Mexico City: Ed. Porrúa, 1998) at 135 [hereinafter *Constitución Comentada*]

¹⁷⁷ *Ibid.*

Chapter 19 Binational Panel reviews are established on an ad hoc basis. In other words, each time a dispute arises, the rules relating to the panel's constitution and functioning have already been established and thus, comply with the due process principles.¹⁷⁸

*Article 15. "... Treaties which violate the constitutional guarantees prescribed by the Constitution in favor of men and citizens shall not be authorized..."*¹⁷⁹

NAFTA Chapter 19 not only observes the fundamental rights of individuals, but it also provides Mexican, Canadian and U.S. interested parties, with an additional alternative of review when contesting final AD and CVD determinations issued by the corresponding administrative authorities of each country.

Article 17. "All individuals shall have the right to the administration of justice, by courts which shall impart such justice expeditiously, within the time frames stipulated by the laws, issuing their determinations in a prompt, complete and impartial manner... The federal and state laws will establish the necessary means to guarantee the independence of the courts and the full execution of their resolutions..."

¹⁷⁸ *Trading Punches*, *supra* note, 102 at 60.

¹⁷⁹ *Mexican Constitution*, *supra* note 160, art. 15.

By “prompt” it is understood that decisions shall be rendered within the time frames provided by laws; by “complete”, that the court shall consider each and every issue of the dispute and give an comprehensive solution to the case; by “impartial”, that the court will act in conformity with the principles of justice and equity, recognizing the principle of procedural equality between the parties and taking into account all the evidence offered.¹⁸⁰

NAFTA Chapter 19 Binational Panels must comply with all the requirements set forth in Article 17 of the Mexican Constitution, for the administration of justice. Regarding “promptness”, NAFTA Article 1904.14 provides that final decisions shall be issued within 315 days of the date on which a request for a panel is made. Through various provisions of Chapter 19, the impartiality and independence requirements are also safeguarded (Articles 1904.7, 1904.13, 1909, Annex 1901.2, and Annex 1904.13). Finally, the execution of the panel’s determinations is provided for in Articles 1904.8 and 1904.9 of NAFTA.¹⁸¹

Article 103, Section I. “ The Federal Courts shall resolve all disputes that arise: I. As a consequence of a law or act of authority which violates the individual guarantees or rights.”

¹⁸⁰ *Constitución Comentada*, *supra* note 176, at 193, 197.

¹⁸¹ *Trading Panches*, *supra* note 102, at 61.

Article 107. "All disputes mentioned by Article 103 shall be subject to the terms and procedures provided by law, in accordance with the following conditions: ..."

The above articles constitute the constitutional framework of the "Juicio de Amparo" (Amparo Action). Article 107 regulates the operation of the action, which is well known for being an "effective procedural instrument to protect against official acts, those fundamental rights of the citizenry, including the right to challenge laws of dubious constitutionality." In conclusion, the *Amparo* Action "protects the entire system of legal rights in the country."¹⁸²

Some legal experts have argued that Article 1904.11 of NAFTA infringes on Articles 103 and 107 of Mexico's Constitution by providing that "a final determination shall not be reviewed under any judicial review procedures of the importing Party if an involved Party requests a panel with respect to that determination within the time limits set out in this Article. No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts¹⁸³."

They assert that no Mexican constitutional provision, statute, decree, or court ruling currently deprives Mexican citizens of their right to protect their

¹⁸² Hector Fix Zamudio "A Brief Introduction to the Mexican Writ of Amparo" (1979) 9 Calif. Western Intl. L.J. 311-315 [hereinafter *A Brief Introduction to Amparo*]

¹⁸³ *Trading Punches*, *supra* note 102, at 62.

individual guarantees, pursuant to Mexico's *Amparo* Action in the event of a Chapter 19 proceeding.¹⁸⁴

Notwithstanding that the above statement is correct, it may be argued that Article 1904.11 does not inhibit the *Amparo* Action from operating, due to the fact that it is not an appeal procedure but an extraordinary constitutional review procedure. Despite the latter interpretation, it is worth recalling Canadian and, in particular U.S. concerns over the operation of the *Amparo* Action during the negotiation of Chapter 19. So serious were their concerns that constitutional constraints in Mexico might interfere with the panel process, that a new mechanism was incorporated in Article 1905 for the safeguard of the panel review system. In essence, the mechanism consists of the following: If a party alleges interference in the panel process, that party can request consultations. If consultations are not satisfactory, a party can request the formation of a special committee. The special committee will make a finding on the charge of improper interference with the panel process, after which the parties will try to seek a mutually satisfactory solution within 60 days. If no solution is reached, the complaining party can suspend the operation of the AD/CVD panel system with respect to that party or suspend any other benefits under NAFTA.¹⁸⁵

¹⁸⁴ Ibid.

¹⁸⁵ NAFTA, *supra* note 1, art. 1905. See also Gary Horlick and Amanda Debusk, "Dispute Resolution Under NAFTA: Building on the U.S.- Canada FTA, GATT and ICSID", (February 1993) 27 No. 1, J. of World Trade, at 34.

Finally it is pertinent to mention that the Mexican Senate issued an opinion with regard to NAFTA's compliance with the Constitution. The Senate concluded that "NAFTA's provisions are congruent with the principles established in the Constitution in foreign policy matters, sovereignty over natural resources of the nation, activities reserved to the State and to Mexicans, legality principles, and the preservation of the rights and guarantees of men and citizens."¹⁸⁶

It is important to mention that a major test that Chapter 19 Binational Panels will certainly face in the future is being subject to constitutional challenge, especially in Mexico's judicial courts. Despite Article 1904.11 of NAFTA, which establishes the binding and final nature of binational panel determinations, none of the parties can guarantee what their judicial courts may do in the years to come.¹⁸⁷

PART 3

3. "STANDARD OF REVIEW"

¹⁸⁶ Report on NAFTA. Coordination of Information and Public Relations of the Senate of the Republic, Mexico, 1994, p. 195: cited by Guillermo Aguilar Alvarez, *Marco Juridico del Tratado de Libre Comercio de America del Norte, Modernizacion del Derecho Mexicano* (Mexico: Editorial Porrua, 1994), at 618, 619.

¹⁸⁷ *Trading Punches*, *supra* note 102 at 64.

The standard of review to be applied by a national court reviewing an AD or CVD determination is a question of national law.¹⁸⁸ As shown in Annex 2, the standards applied by each of the NAFTA parties are different, although all are designed to afford considerable deference to the administering agency with regard to findings of fact and interpretation of the controlling statutes.¹⁸⁹

In each case, the NAFTA intends that a binational panel will apply the same standard as a national court reviewing the same AD or CVD determination. The U.S. Statement of Administrative Action emphasized the importance of this feature of binational panel review, as follows:

Strict adherence by binational panels to the requirement in Article 1904(3) that panels apply the judicial standard of review of the importing country is the cornerstone of the binational process¹⁹⁰. Scholars have noted the potential within the system for disuniformity of panel decisions with each other and established U.S. Law. In order to ensure that such disuniformity does not develop through panel decisions under the NAFTA, binational panels must take care to apply properly the importing country's law and standard of judicial review.¹⁹¹

¹⁸⁸ *NAFTA*, *supra* note 1, art. 1904(3), see also *NAFTA Annex 1911*, (defining "standard of review").

¹⁸⁹ *Resolving Disputes*, *supra* note 5 at 59.

¹⁹⁰ *Ibid.*

¹⁹¹ *North American Free Trade Agreement Implementation Act, Statement of Admin Action 195-96*, reprinted in HR Doc No 159, 103d Cong, 1st Sess 644-45 (1993).

As discussed, NAFTA intends that panels apply the same standard of review, and general legal principles as are applied by national court in the relevant jurisdiction. This was one of the issues of greatest concern to the U.S. Congress in the NAFTA implementing legislation. The fact that NAFTA considers a deviation from the standard of review to be grounds for an Extraordinary Challenge Procedure, underscores the perception of the Parties that panels under Chapter 19 of the FTA, did not always apply the standard of review or general legal principles in the manner foreseen by that agreement. The precedents under Chapter 19 of the FTA, are integral to the development of the NAFTA binational panel system.¹⁹²

NAFTA Article 1904 paragraphs 2 and 3, incorporate the domestic law of each Party, instruct that the binational panels should apply the law as it would be applied in the courts of each Party, and prescribe the identical standard of review used in domestic courts.¹⁹³ Article 1904 (2) provides for review by a binational panel on the basis of the "relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such material in reviewing a final determination of the competent investigating authority."¹⁹⁴ Thus, the legislative history of the NAFTA and the background concerning the standard

¹⁹² *Resolving Disputes*, *supra* note 5 at 172.

¹⁹³ *NAFTA*, *supra* note 1, art. 1904(2).

¹⁹⁴ *Ibid.*

of review to be applied by Chapter 19 panels are a source of law for NAFTA panels interpreting U.S. unfair trade laws.¹⁹⁵

Unlike the judicial proceedings, there is no right of appeal. The Extraordinary Challenge Procedure is just that, extraordinary. The Extraordinary Challenge Committee (ECC) is itself subject to strict deadlines for decisions, and despite the requirement in the NAFTA to consider the administrative record and to ensure that the correct standard of review is applied, the procedural mechanism for such review is not as regular, or probing as a court of appeals. At least, the lack of appeals, and the deadlines for final panel decisions may be expected to result in a certain degree of inconsistency in panel decisions.¹⁹⁶

Panels have included judges under FTA Chapter 19. Similarly, binational panels under the NAFTA are not likely to consist entirely of judges. The expertise of economists and trade practitioners may be expected to result in a more searching scrutiny by the panelists. From the government's perspective, the level of scrutiny itself may be perceived as a different standard of review. Annex 2 has a table which describes the standard of review to be applied in each NAFTA country.

¹⁹⁵ *Resolving Disputes*, *supra* note 5 at 173.

¹⁹⁶ *Ibid.*

3.1. STANDARD OF REVIEW APPLIED TO UNITED STATES DETERMINATIONS.

The standard of review to be applied in a binational panel review of a United States agency final determination has been statutorily framed as follows: "The court shall hold unlawful any determination, finding, or conclusion found... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law"¹⁹⁷.

It is important to mention that, in the U.S., AD and CVD final determinations are issued by the U.S. Department of Commerce, International Trade Administration (ITA). As regards to material injury decisions, the U.S. International Trade Commission (USITC) is the agency in charge of issuing the corresponding determinations.¹⁹⁸

The United States standard of review provides binational panels with two prongs of review authority. First, a panel may find that the ITA or USITC has made a determination not supported by substantial evidence on the record. Second, panels are to ensure that agencies have not made errors of law

¹⁹⁷ Tariff Act of 1930, 19 U.S.C. s. 1516a(b)(1)(B)(i).

¹⁹⁸ See *Pine & Swine*, *supra* note 7, chapters 6, 8 and 9.

when making final determinations¹⁹⁹. In this regard, panels are to consider NAFTA article 1904(2).

Under U.S. law, courts reviewing AD and CVD determinations apply the traditional standards for reviewing administrative determinations.²⁰⁰ In a case of a determination by the USITC not to review an AD or CVD order, the standard of review is whether the agency abused its discretion, was arbitrary and capricious, or otherwise did not act in accordance with the law. The USITC has authority pursuant to 19 U.S.C. s. 1675(b), to review an outstanding AD or CVD duty order for the purpose of determining whether there are "changed circumstances", such that if the order were revoked, material injury would not recur. Such a review is initiated upon request of an interested party. Such request must allege the changed circumstances. Judicial Review of a decision not to initiate a 1675(b) review is provided for in 19 U.S.C. s. 1516a(a)(1)(B). The standard of review is set forth in 19 U.S.C. s. 1516a(b)(1)(A).²⁰¹

This is a very narrow standard "to ascertain whether there was a rational basis in fact for the determination."²⁰² The federal circuit applying this standard to a negative determination to initiate a "changed circumstances" review observed that the legislative history does not provide the USITC with

¹⁹⁹ Mercury, John, "*Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?*" (1995) 15 *Northwestern Jnl of Intl Law & Business* at 572 [hereinafter *Chapter 19 of the FTA 1989-95*].

²⁰⁰ 19 U.S.C. s. 1516a(b).

any guidance for its application. For this reason, the court found that the decision whether to initiate a review was “delegated ... to the discretion of the USITC to be determined on a case-by-case basis.”²⁰³

In the case of final AD or CVD determinations or final determinations of material injury, threat of injury, or material retardation, the panel is to review the administrative record established before the relevant agency and determine whether the decision made was supported by substantial evidence and was otherwise in accordance with law.²⁰⁴ “Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion²⁰⁵.” Courts applying this standard often restate the formula to indicate that the court is not to substitute its judgement for that of the agency, but should affirm the agency’s determination if its conclusion is reasonable.²⁰⁶

Regarding conclusions of law, courts typically refer to the holding of the U.S. Supreme Court in *Chevron* and attempt to discern the meaning of a statute from its plain language.²⁰⁷ If the statute is deemed ambiguous, the court will evaluate the agency’s construction in view of the language and purpose of the

²⁰¹ *Resolving Disputes*, *supra* note 5 at 63.

²⁰² *American Lamb Co. v. United States*, 785 F2d 994, 1004 (Fed Cir 1986) 1st Sess 252 (1979).

²⁰³ *Avesta AB v. United States*, 914 F2d 233, 236 (Fed Cir 1990).

²⁰⁴ 19 USC s. 1516a(b)(1)(B). See *Universal Camera Corp v NLRB*, 340 US 474, 477 (1951).

²⁰⁵ *Matsushita Elec. Indus Co v. United States*, 750 F2d 927, 933 (Fed Cir 1984).

²⁰⁶ *Ibid.*

²⁰⁷ *Chevron USA Inc. v. Natural Resources Defense Council*, 467 US 837, reh’g denied, 469 US 1277 (1984). [hereinafter *Chevron*]

statute.²⁰⁸ The agency's interpretation will be entitled to deference, particularly where it is contemporaneous with enactment of the statute and longstanding.²⁰⁹ Again, the courts often state that if the agency's interpretation is reasonable, it should be upheld even if the court would have reached a different conclusion.²¹⁰

The *Chevron* doctrine is straightforward: It instructs courts to defer to agencies' interpretations of law if and only if the statute in question is ambiguous, and the agency's interpretation is reasonable.²¹¹ U.S. courts generally have applied the *Chevron* doctrine to judicial review of ITA and USITC final determinations. In so doing, the courts have granted U.S. agencies broad discretion in their administration of U.S. trade remedy laws.²¹²

On the other hand, courts have excused the lack of explicit reasons in agency determination where the agency's reasoning could fairly be discerned from the record, and have afforded the agency broad deference to make adjustments to the AD calculus even when not expressly authorized in the statute. For these reasons, application of the standard of review to particular cases does not necessarily produce uniform or predictable results.²¹³

²⁰⁸ *Smith-Corona Group v. United States*, 713 F2d 1568, 1582-83 (Fed Cir 1983), cert denied, 465 US 1022 (1984).

²⁰⁹ *Chevron*, *supra* note 207, 467 US at 843 N11.

²¹⁰ *Daewoo Elecs Co v. International Union of Elec, Technical, salaried & Mach Workers*, AFL-CIO, 6 F3d 1511, 1516 (Fed Cir 1993).

²¹¹ *WTO Dispute Procedures*, *supra* note 2 at 203.

²¹² *PPG Industries, Inc. v. United States*, 928 F2d 1568, 1572 (Fed. Cir. 1991).

Although the *Chevron* principle of deference has been followed regularly when aggrieved foreign exporters have challenged ITA or USITC final determinations before the United States Court of International Trade, U.S. courts have recently weakened this approach to judicial review.²¹⁴ In *Dole v. United States Steelmakers*,²¹⁵ the U.S. Supreme Court did not apply the *Chevron* test to see if the Office of Management and Budget (OMB) had adopted a permissible reading of the Paperwork Reduction Act. Instead, the court remanded after concluding that the OMB had not applied the most natural interpretation of that statute.²¹⁶ Other recent cases have similarly diluted the classic *Chevron* principle of deference, and have espoused a more activist judicial role of reviewing agency determinations.²¹⁷

In terms of the law to be applied by panels, this precedent offers guiding principles that could be varied where necessary in individual cases. NAFTA Article 1904(2) indicates that binational panels will apply the law of the importing Party, including "judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority."²¹⁸ The FTA binational panels applying the standard of review have reached different results. Panels have

²¹³ *Resolving Disputes*, *supra* note 5, at 66.

²¹⁴ *Chapter 19 of the FTA 1989-95*, *supra* note 199 at 573.

²¹⁵ *Dole v. United States Steelmakers*, 110 S. Ct. 929 (1990).

²¹⁶ *Ibid.*, at 934.

²¹⁷ See, *K-Mart Corp. v. Cartier, Inc.* 486 U.S. 281, 291 (1988) and *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987).

²¹⁸ *NAFTA*, *supra* note 1, art. 1904(2).

articulated the substantial evidence test according to the traditional formula.²¹⁹

The U.S. agencies and the U.S. Congress have been particularly concerned with the results in a few binational panel determinations and have criticized the panels for failing to apply the proper standard of review. This criticism in part led to the emphasis on including current or former judges on panels, and to the amendment to the criteria for requesting an Extraordinary Challenge Committee.²²⁰

In practice, panels have the same latitude as courts in applying the standard of review to the evidence. Parties, therefore, should be familiar with the exceptions to the *Chevron* doctrine, the need for agency reasons with respect to material issues, the potential impact of factual errors material to the outcome, the failure of an agency to follow its own regulations, the lack of evidence on the record to support agency findings, and the various other means with which the agency determination can be challenged, notwithstanding a deferential standard of review.²²¹

The *Live Swine* decision illustrates how Chapter 19 panels under the FTA could effectively force U.S. agencies to reverse portions of their final

²¹⁹ See, e.g., In *Live Swine from Canada*, USA-91-1904-04, slip op on remand (June 11, 1993), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

²²⁰ See, e.g., S Rep No 189, 103d Cong, 1st Sess 41-44 (1993).

²²¹ *Resolving Disputes*, *supra* note 5 at 68.

determination.²²² *Live Swine* demonstrated that the flexibility present in the U.S. standard of review could be interpreted and applied in such a way as to force more reasoned agency decision-making. The careful formulation and employment of a relatively rigorous version of the errors of law test – in both its initial and subsequent opinion – allowed the panel majority to challenge unsubstantiated ITA conclusions. The Extraordinary Challenge Committee's decision in *Live Swine* confirmed that a Chapter 19 panel could engage in such rigorous and activist judicial review, without necessarily exceeding its mandate or jurisdiction.²²³

3.2. STANDARD OF REVIEW APPLIED TO CANADIAN DETERMINATIONS.

The Canadian standard of review affords considerable discretion to the decision-making agency and requires the reviewing tribunal to defer to agency decisions.²²⁴ The language of the Canadian standard is more deferential to the agency: whether the agency “based its decision or order on an erroneous finding of fact that was made in a perverse or capricious manner or without regard to the material before it. ...”²²⁵

²²² *Live Swine from Canada*, USA-91-1904-03 (Ch. 19 Panel) online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

²²³ *Chapter 19 of the FTA 1989-95*, *supra* note 199 at 587.

²²⁴ *Resolving Disputes*, *supra* note 5 at 68.

²²⁵ *Federal Court Act*, R.S.C. 1985, amended 1990, c 8, S.18.1(4)(d), reprinted in Canada Statute Citator at F5-4.

Pursuant to this standard, the Federal Court of Canada has held that findings of fact of the Anti-Dumping Tribunal (CITT) should not be disturbed, unless there was no evidence supporting the findings, or unless a wrong principle was applied.²²⁶ *Rohm and Haas*²²⁷ explains that findings of fact are, under the statute the responsibility of the Tribunal, "and should not, except in the most exceptional circumstances, be reviewed. ..."²²⁸ This is a much stricter and more deferential standard than the "substantial evidence" test applied to decisions by the U.S. administrative agencies.²²⁹

Regarding questions of law, the first ground for reversing an administrative decision under s.18.1(4) of the Federal Courts Act is whether an agency acts beyond its jurisdiction. This occurs whenever the agency's or tribunal's interpretation of the law or the facts is "patently unreasonable: a patently unreasonable error by an administrative tribunal in interpreting a provision which it has to apply within the limits of its jurisdiction will in itself cause a tribunal to lose its jurisdiction."²³⁰

As U.S. decisions commonly rely upon *Chevron*, Canadian decisions with respect to jurisdiction commonly rely upon the decisions of the Supreme Court of Canada in *Bibeault* and *Canadian Union of Public Employees*

²²⁶ *Remington Arms v. Industries Valcartier*, [1981] 37 N.R. 261, 263

²²⁷ *Rohm & Haas Canada. Ltd. v. Anti-Dumping Tribunal*, [1978] 22 N.R. 175, 177.

²²⁸ *Ibid.*

²²⁹ *Resolving Disputes*, *supra* note 5 at 69.

²³⁰ *Blanchard v. Control Data Canada*, [1984] 14 D.L.R. 4th 289, 291.

(CUPE).²³¹ *Bibeault*,²³² summarized the principles that are applied to determine whether an administrative tribunal has properly interpreted a question of law:

1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.²³³

Thus, it is necessary first to classify the type of question raised by the Tribunal's determination and then to apply the appropriate standard of review. The Alberta Court of Appeals has indicated that the court must first determine the category into which the issue falls in order to decide which standard of review should be applied.²³⁴ The court first applies a "functional and pragmatic" test to determine the purpose for creating the administrative decision-maker, its area of expertise, and the nature of the issue presented to the tribunal.²³⁵ Application of this test permits the alleged error to be categorized as an application of public law, primary fact findings, choice of remedies, procedural questions, the application to a given case of multi-factored tests, the interpretation of agreements, the making of inferences, and, of course, the interpretation of the governing statute. Having defined the

²³¹ *Resolving Disputes*, *supra* note 5 at 69.

²³² *UES, Local 298 v. Bibeault*, [1988] 2 SCR 1048. [hereinafter *Bibeault*].

²³³ *Ibid.*, at 1086.

²³⁴ *Penny & Appeals v. Alberta*, [1993] 106 D.L.R. 4th 707, 716-17 [hereinafter *Penny*].

category into which a particular question falls, the *Penny* case suggested that a standard of review will then be chosen that is appropriate to that category²³⁶.

Regarding the *National Corn Growers*²³⁷ case, the standard applied to review AD and CVD determinations was "patently unreasonable". As applied to CITT decisions in AD and CVD cases, three judges of the Supreme Court held that such determinations should not be overturned unless the CITT's construction of the Special Import Measures Act was "patently unreasonable."²³⁸

As in the case of the U.S. standard of review and *Chevron*, the Canadian standard and the judicial interpretation of *CUPE* are not without controversy. Panels approaching the issue have a variety of case law on which to draw in order to interpret the standards set forth in Article 18.1 of the Federal Courts Act.²³⁹ In the first decision by a binational panel in *Beer*²⁴⁰, the opinion devoted six pages to analyzing the appropriate standard of review²⁴¹. In the end, the panel concluded that the appropriate standard to apply was the "reasonableness" standard, relying upon *Bell Canada and Canadian Pacific*

²³⁵ *Bibeault*, 2 S.C.R. at 1088.

²³⁶ *Penny*, 106 D.L.R. 4th at 717.

²³⁷ *American Farm Bureau v. Canadian Import Tribunal*, [1990] 74 D.L.R. 4th 449 [hereinafter *National Corn Growers*].

²³⁸ *National Corn Growers*, 74 D.L.R. 4th at 464-65.

²³⁹ *Resolving Disputes*, *supra* note 5, at 73.

²⁴⁰ *Certain Beer Originating in or Exported From the United States of Am by G. Heileman Brewing Co.*, CDA-19-1904-02, Memorandum Opinion and Order (Aug 6, 1992) reprinted in NAFTA; Dispute settlement, vol 2, Booklet B16 (Nov 1993) (Holbein & Musch Oceana Publ In) [hereinafter, *Beer I*].

²⁴¹ *Beer I*, at 5-11.

*Limited*²⁴². This less strict standard was applied because the panel concluded that the decision of Revenue Canada regarding the finding of dumping and the calculation of an AD duty was, not subject to a privative clause²⁴³.

In a separate binational panel review proceeding in *Beer II*,²⁴⁴ the panel was confronted with an injury determination by the CITT. This determination is subject to a private clause, and is to be reviewed under the standard applied in *National Corn Growers*. In the decision following remand, it was first suggested that the standard of review was whether the CITT's decision was "not patently unreasonable and [was] supported by at least some evidence in the Tribunal's investigative record."²⁴⁵

In addition to the direct changes made by NAFTA to the Chapter 19 system, an important amendment has also been made to the Canadian standard of review, the privative clause was repealed. The presence of a privative clause, when combined with the ingrained judicial deference that exists in Canada to specialized administrative agencies, has made it extremely difficult for U.S. exporters to secure reversal of CITT final determinations.²⁴⁶

²⁴² *Beer I*, at 9 (citing *Bell Canada v. Canada*, 1 S.C.R. 1722, 1745-46 (1989), *Canadian Pacific Ltd. v. Canadian Transport Comm*, 79 N.R. 13, 16-17 (1987)

²⁴³ *Beer I*, at 9.

²⁴⁴ *Certain Beer Originating in or Exported From the United States of Am by G. Heileman Brewing Co.*, CDA-19-1904-02, Memorandum Opinion and Order (Aug 26, 1992) reprinted in NAFTA: Dispute settlement, vol 2, Booklet B14 (Sept 1992, Holbein & Musch Oceana Publ In) [hereinafter, *Beer II*].

²⁴⁵ *Ibid.*

²⁴⁶ *Chapter 19 of the FTA 1989-95*, *supra* note 199 at 601.

As of January 1, 1994, the *Special Import Measures Act*²⁴⁷ was amended to implement certain of Canada's obligations under Chapter 19 of the NAFTA. Among these changes, the CITT's privative clause was repealed.²⁴⁸ As a result of this amendment, one might presume that NAFTA Chapter 19 panels would now be able to review alleged CITT errors of law by way of the reasonableness standard instead of the highly deferential "patently unreasonable standard". The Supreme Court of Canada, however, recently dispelled any notion that the absence of a privative clause will subject expert agencies such as the CITT to more unyielding judicial review.²⁴⁹

The court in *Pezim*²⁵⁰ recently considered the standard of review applicable to errors of law when an expert agency is not "protected" by way of a privative clause. Two recent NAFTA Chapter 19 panels reviewing CITT final determinations applied *Pezim*.²⁵¹ Both panels confirmed that reviewing bodies must, in the absence of a privative clause, give considerable deference to the expert agency when examining alleged errors of law.²⁵²

²⁴⁷ *Special Measures Import Act*, R.S.C. 1985 c.S-15

²⁴⁸ *Ibid.*, s.76(1). Effective as of January 1, 1994, the privative clause applicable to the CITT was repealed. See *North American Free Trade Agreement Implementation Act*, SC 1993 c44 s.217(1).

²⁴⁹ *Chapter 19 of the FTA 1989-95*, *supra* note 199 at 602.

²⁵⁰ *Pezim v. British Columbia*, [1994] 2 S.C.R. 557 at 590. [hereinafter *Pezim*].

²⁵¹ See *Certain Corrosion – Resistant Steel Sheet Products Originating in or Exported from the United States of America*, (1995) CDA-94-1904-04 (Ch. 19 Panel), and *Synthetic Baler Twine with A Knot Strength of 200 Lbs or Less Originating in or Exported from the United States of America*, (1995) CDA-94-1904-02 (Ch. 19 Panel).

²⁵² *Ibid.*

Finally, it must be noted that the NAFTA adopts a broader standard of review than the FTA.²⁵³ Section 18.1(4) of the Federal Courts Act adds two additional grounds for review of determinations by Revenue Canada or the CITT: i.e., whether the Deputy Minister or CITT "acted or failed to act, by reason of fraud or perjured evidence; or ... acted in any other way that was contrary to law."²⁵⁴

3.3. STANDARD OF REVIEW APPLIED TO MEXICAN DETERMINATIONS.

The Canadian and U.S. standards of review, if not clear enough, are nevertheless explained by a well developed case law system, and based on the experience of several binational panel decisions, applying various standards of review. Under NAFTA Article 1904(2), the standard of review to be applied by the Parties can be found in "the relevant statutes, legislative history, administrative practices ... and judicial precedents..."²⁵⁵. This is easier to apply to Canadian and American cases in view of their legal tradition. In contrast, Mexico has a limited judicial history in terms of application to AD and CVD determinations. As mentioned in Part I, Mexico was required to amend its AD and CVD law, thus adopting a standard of review based solely on the administrative record. As mentioned in Part II, the standard of review is contained in Article 238 of the Federal Fiscal Code.

²⁵³ *Resolving Disputes*, *supra* note 5 at 74.

²⁵⁴ *Federal Court Act*, R.S.C. 1990 S. 18.1(4).

In Mexico, legislative histories are not as expansive as in the U.S. and Canada, and courts do not generally rely on legislative histories for purposes of statutory construction. The concept of administrative practices as understood under the U.S. administrative law, does not exist in Mexican administrative law,²⁵⁵ and a judicial precedent [jurisprudencia] is established when the Supreme Court, or the Federal Circuit Courts, consistently decide the same issue in five consecutive separate cases. Therefore, there is a little judicial precedent in trade matters.

Prior to NAFTA, Mexico had virtually no experience in solving international trade disputes through binational panels. Mexico has only about ten years of experience dealing with issues of AD and CVD. This explains why binational panels, in the first three cases held in Mexico, had problems in finding proper ways to adjudicate international disputes under binational panel procedure.

Since the AD and CVD laws are quite new in Mexico, there is no historical application of the standard of review by national courts in the context of AD and CVD cases on which panels can rely in order to interpret the standard of review. It is important to underline the fact that the more debated issue has been the definition of the standard of review. It is also to be noted that the

²⁵⁵ NAFTA, *supra* note 1, art. 1904(2).

²⁵⁶ Jimmie V. Reyna, "NAFTA Chapter 19 Binational Panel Reviews in Mexico: a Marriage of Two Distinct Legal Systems" (1997) 5 U.S.-Mex L.J. at 69. [hereinafter *Binational Panel Reviews in Mexico*].

concept of standard of review as such, has not been part of the Mexican legal lexicon before NAFTA.²⁵⁷

Once the purpose of the review is determined, the binational panel needs to determine what would be the applicable standard of review in order to determine, whether the final determination has been issued in terms of the applicable laws.

Article 1904(3) establishes that panels must apply “the standard of review set out in Annex 1911 and the general legal principles that a court of the importing party otherwise would apply to a review of a determination of the competent investigating authority”²⁵⁸. In the case of Mexico, this paragraph raises two issues. The first on the adequacy of the standard of review (article 238 of the Federal Fiscal Code), when applied to the area of AD and CVD, and the second on the definition of general legal principles in regard to Mexico.

Even though the concept of standard of review is new in the Mexican legal lexicon, the standard of review, as aforesaid, is defined in Annex 1911 of NAFTA, which stipulates that in the case of Mexico, it is article 238 of the Federal Fiscal Code.²⁵⁹ In view of the foregoing, NAFTA parties agreed to

²⁵⁷ This concept has not appeared yet in any edition of *Diccionario Juridico Mexicano*.

²⁵⁸ *NAFTA*, *supra* note 1, art. 1904(3).

²⁵⁹ See section 2.3.2 Judicial Review of this paper, which contains the text of article 238 of the Federal Fiscal Code.

define the Mexican standard of review, only in terms of the five paragraphs provided for in article 238 of the Federal Fiscal Code. Nevertheless, general legal principles are not part of article 238 of the Federal Fiscal Code, but they should be applied as the TFF otherwise would apply them to a review of a final determination. Some panel decisions illustrate that the standard of review should be composed of two parts; the first part is the standard of review set out in article 238 of the Federal Fiscal Code, and the second part is the general legal principles that should be otherwise applied by the TFF.²⁶⁰ A proof of the foregoing, is that the Foreign Trade Law in article 97, sets out very clearly that the standard of review to be applied by a binational panel shall be article 238 of the Federal Fiscal Code.²⁶¹

The five paragraphs of article 238 of the Federal Fiscal Code should serve as a guide to the binational panel, in order to enable the panel to determine whether the final determination is issued in terms of the applicable laws. It is clear that the negotiators of NAFTA did not have the intention to include in the standard of review, any other provision of the Federal Fiscal Code, otherwise they would have made a clear reference to it in the treaty. Therefore, within the scope of the standard of review, the application of any other provision different from the first five paragraphs of article 238 of the Federal Fiscal

²⁶⁰ See *Flat Coated Steel imports originating in or imported from United States*, (1996) MEX-94-1904-01. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999) at 19-20.

²⁶¹ Foreign Trade Law, *supra* note 92, article 97.

Code, should not be subject to any discussion by any binational panel, due to the fact that it could introduce legal uncertainty between NAFTA parties.²⁶²

The problem of the standard of review is not its identification, but whether it fits a subject such as that of unfair practices. In fact, article 238 establishes the standard of review that the TFF uses to judge the illegality of administrative determinations, especially those of a fiscal nature. However, AD has special features which makes it different from fiscal matters themselves.

Thus, the problem of a binational panel is to apply the standard of review to a complicated proceeding with specific features, in terms of Mexican law. Moreover, the problem is particularly complicated due to the fact that the TFF has reviewed only a few final determinations in AD, thus binational panels have no clear reference in such regard.²⁶³ Thus, since the trade remedy law has specific attributes that make it different from the fiscal area, it seems necessary to adapt article 238 to the particular characteristics of the unfair trade practices area.²⁶⁴

As to the general legal principles, there are differences in each country. Thus, the definition provided in article 1911 of NAFTA, taken from the FTA, is only an illustrative list. In the case of Mexico, there is no authority establishing the

²⁶² *Marco Juridico*, *supra* note 154 at 10.

²⁶³ *El Criterio de Revision*, *supra* note 159 at 21.

identity of the principles.²⁶⁵ For instance the *Diccionario Juridico Mexicano* says: "It is not possible to make an exhaustive list of the general legal principles... nevertheless, some can be mentioned, i.e. equity, in other words the fair application of the law to the concrete case, good faith or faithfulness to your word; the duty to fulfil the covenants, the right to self-defense..."²⁶⁶

In Mexico, some scholars have raised the question whether binational panels should refer to general principles of domestic law or to general principles in international law. The answer it is submitted is that the panels reviewing final determinations of SECOFI, can only apply general principles of law that a Mexican tribunal would use; in other words, those considered part of the domestic legal system.²⁶⁷

Despite the fact that some panels have concluded that general principles of law should be part of the standard of review²⁶⁸, the panel decision in *Hot*

²⁶⁴ *Nafta Dispute Settlement and Mexico*, *supra* note 38 at 108.

²⁶⁵ *El Criterio de Revision*, *supra* note 159 at 22.

²⁶⁶ *Diccionario Juridico Mexicano*, (Instituto de Investigaciones Juridicas, UNAM, ed. Porrúa, 1991), <general legal principles >.

²⁶⁷ *El Criterio de Revision*, *supra* note 159 at 22.

²⁶⁸ See *Flat Coated Steel imports originating in or imported from United States*, (1996) MEX-94-1904-01. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999), *Cut-to Length Steel Plate from the United States*, (1995) MEX-94-1904-02, (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999), *Crystal and Solid Polystyrene imports originating in or imported from United States*, (1996) MEX-94-1904-03. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999), and *Rolled Steel Plate imports originating in or imported from Canada*, (1997) MEX-96-1904-02. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

*Rolled Steel Sheet*²⁶⁹ concluded that general principles of law are not part of the standard of review. The panel stated that the purpose of general principles of law is to help to interpret the law. In other words, in the event of a question not covered by statute law, the principles shall be the appropriate tool to resolve the question not covered by statute law, therefore issuing a fairer determination.

On the standard of review, it is important to underline the fact that Chapter 19 binational panel procedure is based upon the logic of Canadian and American common law systems, especially with respect to the principle of deference applied by the reviewing courts with regard to the decisions of the specialized administrative agencies. The principle of deference, means that the reviewing court will normally respect the decisions of the administrative agency, especially on findings of fact and interpretations of the agency's constituting statute, due to the specialized technical knowledge that it possesses. Thus, generally speaking, even if the court differs on how the facts were assessed or the law was applied, it will confirm the decision of the agency, if reasonable.²⁷⁰

In Mexican law, neither doctrine, nor the tribunals, have developed the principle of deference as such. Nevertheless, there are two principles that if

²⁶⁹ See *Hot Rolled Steel Sheet imports originating in or imported from Canada*, (1997) MEX-96-1904-03. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999) at 15.

²⁷⁰ *Nafta Dispute Settlement and Mexico*, *supra* note 38 at 109.

brought together, they could lead to similar results. The first principle is embodied in article 8 of the Federal Law of Administrative Procedure²⁷¹ and article 68 of the Federal Fiscal Code²⁷². The second principle is the exercise of the so-called discretionary authority, which implies “the power of free assessment over the content of their acts or actions”, that the law recognizes and confers on administrative agencies. This freedom, authorized by law, can be to a greater or lesser degree and is evident when the authority must choose between two possible decisions²⁷³. The doctrine admits that this power, to be exercised by the authority, must be provided by a statute establishing limits.²⁷⁴

With respect to Mexican AD and CVD law, it would be helpful to legislate the precise extent of the authority’s discretionary powers. This would add certainty to the system and would provide guidance in the assessment of the investigating authority’s decisions either by fiscal courts or binational panels.²⁷⁵

The initial Mexican binational panel reviews have raised a number of interesting issues related to whether panels apply the appropriate standard of review. In the first three cases, reviews demonstrate that the application and

²⁷¹ “Article 8: The administrative act will be valid until, and only when, the administrative or jurisdictional authority, where appropriate, declares it a nullity.”

²⁷² “Article 68: The acts and determinations of the fiscal authorities are to be presumed legal”.

²⁷³ *Diccionario Juridico Mexicano*, (Instituto de Investigaciones Juridicas, UNAM, ed. Porrúa, 1991), <facultades discrecionales>.

²⁷⁴ *Nafta Dispute Settlement and Mexico*, *supra* note 38 at 110.

²⁷⁵ *Ibid.*, at 110.

interpretation of the Mexican law by the binational panelists has been problematic, primarily due to the differences between the legal systems of the U.S. and Canada on the one hand, and Mexico on the other. The first two countries use common law legal systems, and the latter uses a civil law legal system. Moreover, Mexico's experience in trade matters is not as developed as that of the U.S. and Canada.

The first final determination of the SECOFI to be reviewed by a binational panel under Chapter 19 of NAFTA was the *Flat Coated Steel Products From the United States*²⁷⁶. SECOFI determined that steel producers were selling flat coated steel products below the home market price in the Mexican market, therefore imposing antidumping duties. The U.S. steel producers (USX Corporation and Inland Steel Company), on September 1, 1994, submitted a petition before the Mexican NAFTA Secretariat requesting the formation of a binational panel to review the above-mentioned determination. As a result, a panel was created. The panel which issued the final award was composed of three Mexicans: Gustavo Vega Canovas, who acted as a chairman of the panel, Jose Luis Soberanes and Eduardo Magallon Gomez, and by two Americans: David Gantz and Michael D. Sandler.

On September 27, 1996, the panel issued its final award which upheld unanimously, the Final Determination of SECOFI in all respects, except as to

those provisions related to Inland Steel Company. Likewise, some issues were not upheld in connection with the dumping and injury claims. Pursuant to NAFTA Article 1904(8), the panel remanded this case and directed SECOFI, on remand, to comply with the measures the panel has directed within 120 days of the date of the Order.

The panel also analyzed the report on remand submitted by SECOFI on April 30, 1997. The panel upheld that report. New Process challenged the report on remand issued by SECOFI. On April 13, 1998, the panel issued a new decision regarding the second determination on remand of SECOFI. The panel upheld in all respects the report on remand issued by SECOFI.

Notwithstanding the fact that the case had been fully prepared and argued, the panelists found several unexpected practical problems during the proceeding. Many conflicts existed because of the differences between the legal systems. As mentioned, NAFTA Article 1904 provides that the panel shall apply the substantive law of the forum (in this case Mexican law), that would otherwise have been applied by the domestic court with jurisdiction to review a definitive administrative determination.

Of course, procedural regulations designed to operate under a common law system are bound to create practical problems when they are used in a

²⁷⁶ *Flat Coated Steel imports originating in or imported from United States*, (1996) MEX-94-1904-01. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date

proceeding mainly based on civil law. A threshold problem for the Mexican panelists in *Flat Coated Steel* was applying their understanding of NAFTA procedural rules which differ substantially from the general procedural rules that have historically applied to litigation in Mexico.²⁷⁷ The Civil Law based Mexican legal practice, is completely different than the Common Law based legal practice in the U.S. and Canada. Because of differences in legal systems and jurisprudence, a Mexican attorney's approach to interpreting an issue of law would be considerably different from the approach of a U.S. or Canadian attorney and vice-versa. Therefore, it is very important for panelists who will be involved in NAFTA Chapter 19 procedure, to reach a better understanding of the legal systems of the other countries. The more experienced a panelist is in reviewing AD or CVD decisions under NAFTA, the more expeditious the procedure of the review would be.

Another issue arose when Mexican lawyers representing the parties, cited principles of Mexican law or used Mexican legal terms. As an example, the Mexican legal principle of *motivacion* [motivation] and *fundamentacion* [foundation basis] is basic and clearly understood by a Mexican attorney. However, even translated, "motivation and basis for application" would not make any sense to an U.S. attorney. It is important to underline that this principle contained in Articles 14 and 16 of the Mexican Constitution, is one of

accessed: May 11, 1999).

²⁷⁷ Jimmie V. Reyna, Eduardo David Garcia, & David Amerine "Practice before U.S.-Mexico Binational Panels Under Chapter Nineteen of NAFTA: a Panel Discussion" (1997) 5 U.S.-Mex L.J. 74. [hereinafter *U.S.-Mexico Binational Panels*].

the pillars of Mexican constitutional law. Therefore, the lack of Mexican legal basis and rationale makes it difficult for non-Mexican panelists to fully understand the possible consequences of finding a violation of this important Mexican legal principle.

Another major issue was in connection with the authority and power of the panel. In terms of Article 1904(1) of NAFTA, the panel replaces the competent judicial authority which normally would have reviewed the case.²⁷⁸ In Mexico such judicial authority would be the Fiscal Courts.²⁷⁹ This issue has been discussed in part 2.3.4.1 above.

An important conclusion of the panel in *Flat coated Steel*²⁸⁰, concerned the powers of the panel in connection with the application of Rule 7 of the panel's rules of procedure. According to the panel Rule 7 also means that the panel must analyze the final determination to determine which elements of the final determination, if any, are affected by each issue raised in the complaint of each party. A final determination in an anti-dumping proceeding is based on many administrative acts and determinations that have occurred earlier in the anti-dumping proceeding. The panels do not have jurisdiction to review all of these administrative acts and determinations (as incorporated in the final determination) unless they are challenged in a complaint of a party. If a party

²⁷⁸ NAFTA, *supra* note 1, art. 1904(1).

²⁷⁹ Federal Fiscal Code, *supra* note 103, art. 238.

does not present a claim relating to an administrative act or determination on which a part of the final determination is based, the panel may not have jurisdiction to review that part of the final determination.

Another important conclusion of *Flat Coated Steel*²⁸¹ panel was that article 239 of the Federal Fiscal Code does not apply as a general legal principle on these standard of review. The panel stated that the U.S. exporters argued before the panel that it should consider Article 239 of the Federal Fiscal Code to be an integral part of the standard of review under Article 238, as a "general legal principle." A previous panel in *Steel Plate*²⁸² accepted this viewpoint. The panel respectfully disagreed because, in their view, the incorporation of Article 239 into the standard of review would constitute an inappropriate extension of their own jurisdiction and powers. As indicated earlier, the panel is bound by the powers and jurisdiction provided under NAFTA Article 1904(8). That provision permits the Panel to uphold a Final Determination of SECOFI, or remand the Final Determination for further proceedings, but it does not provide the authority to nullify the Final Determination, as is specifically provided to the Fiscal Tribunal under Article 239 of the Federal Fiscal Code. For this reason, the panel rejected the reasons that have been submitted before it for including Article 239 in the standard of review as a statement of the powers of the Panel.

²⁸⁰ *Flat Coated Steel imports originating in or imported from United States*, (1996) MEX-94-1904-01. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999) at 18.

²⁸¹ *Ibid.*, at 23.

The translations have also been creating some problems during the submission of briefs and in the public hearings. In some cases a literal translation could obscure the meaning of a paragraph, although the parties were supposed to provide the panel English versions of their briefs. Moreover, the Mexican translation of the NAFTA rules were entirely literal and difficult to understand. Consequently, the U.S. translation of the record was used rather than the Mexican version. Hearings presented another problem, due to the fact that under Mexican procedure, hearings are conducted to resolve questions of evidence, and the judge may make decisions about evidentiary questions without actually questioning the parties.²⁸³

The *Cut to Length Steel Plate*²⁸⁴ and *Polystyrene*²⁸⁵ reviews, confirm that the application of the Mexican law by binational panels in the first three cases has been problematic. The *Steel Plate* panel was composed of two Mexicans: Gustavo Vega Canovas, who acted as a chairman of the panel, and Jose Othon Ramirez. The American panelists were John Barton, Harry B. Endsley and Robert E. Lutz. On August 30, 1995, the panel issued its final award. The panel found against SECOFI in a three-two decision.

²⁸² *Cut-to Length Steel Plate from the United States*, (1995) MEX-94-1904-02, (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

²⁸³ U.S.- Mexico Binational Panels, *supra* note 277, at 76.

²⁸⁴ *Cut-to Length Steel Plate from the United States*, (1995) MEX-94-1904-02, (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

²⁸⁵ *Crystal and Solid Polystyrene imports originating in or imported from United States*, (1996) MEX-94-1904-03, (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

In the *Steel Plate*²⁸⁶ review, the panel ruled that the final antidumping duty determination was null and void on grounds *inter alia*, that SECOFI was not competent in the early stages of the underlying AD investigation. This ruling raised important and complex issues for the panel.

In *Steel Plate*, the panel had to determine the significance of competency in the context of a binational panel review in Mexico. The term “competent investigating authority” is provided by NAFTA Article 1904 paragraphs 2 and 3. Its meaning regarding the U.S. and Canada is simple; in the case of the U.S., “competent investigating authority” means the U.S. Department of Commerce, International Trade Administration or the U.S. International Trade Commission, and in the case of Canada, it means the Canadian International Trade Tribunal, or the Deputy Minister of National Revenue for Customs and Excise.²⁸⁷ Under the U.S. law, the legal concept of “competency” is not a significant issue and, apparently, no AD duty determination has been remanded on the basis that the investigating authority was not competent.²⁸⁸

In Mexico's case, “competent investigating authority” means the designated authority within SECOFI. Generally “Competence” [competencia] refers to capacity of an authoritative organ to undertake or conduct certain functions or legal acts. The legal interests of a person (or entity) may be affected only by a

²⁸⁶ *Cut-to Length Steel Plate from the United States*, (1995) MEX-94-1904-02, (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

²⁸⁷ NAFTA, *supra* note 1, Annex 1911.

²⁸⁸ *Binational Panel Reviews in Mexico*, *supra* note 256 at 67.

written order issued by the competent authority.²⁸⁹ Its apparent simplicity, however, belies the significance of “competency” under Mexican law and the complexity involved in its interpretation and application.

The extent of that complexity, in addition to the formalism of the Mexican law, is evident in the majority opinion in the *Steel Plate* review which held that the authority within SECOFI that conducted the initial stages of the underlying investigation had not been legally established and, therefore, did not legally exist.²⁹⁰

In *Steel Plate* the panel had to determine two important issues. First, the panel had to decide the extent, if any, of its authority to terminate the underlying AD investigation. Second, the panel had to determine the extent, if any of its authority to apply Articles 237 and 239 of the Federal Fiscal Code in order to give effect to its competency decision. NAFTA Article 1904 paragraph 8 provides that a panel may either affirm or remand a determination²⁹¹. It does not provide for termination of an investigation.

The *Steel Plate* panel decided that, in order to provide a remedy consistent with its decision, it was required to apply the judgement guidelines contained in Articles 237 and 239 of the Federal Fiscal Code. Since Articles 237 and

²⁸⁹ *Diccionario Juridico Mexicano*, (Instituto de Investigaciones Juridicas, UNAM, ed. Porrúa, 1991), <competencia>.

²⁹⁰ *Binational Panel Reviews in Mexico*, *supra* note 256 at 67-68.

²⁹¹ *NAFTA*, *supra* note art. 1904(8).

239 were invoked to give effect to a result not contemplated under NAFTA (termination), the question arose whether the application of Articles 237 and 239 violated the express provisions of NAFTA Chapter 19 and constituted an improper extension of Article 238, the applicable standard of review.²⁹²

The dissenting panelists, Gustavo Vega Canovas and John H. Barton, expressly declined to support the majority. The minority stated in this regard: "Thus, we are not deciding here whether or not the Panel has authority pursuant to article 238 of the Federal Fiscal Code to declare the determination by SECOFI to be a nullity. Neither are we deciding on any related issues, such as the assumption of the majority that article 238 of the Federal Fiscal Code can only uniformly apply along with article 239 of the Fiscal Code, or to the exercise of a rule of logical sequence in the application of article 238, much less the correct interpretation of paragraph 1 of article 238. Thus any assertion of the panel regarding those issues should not be considered corroborated by us".²⁹³ I have included the opinion of the dissenting panelists because I agree with them on grounds of the decision of the panel in *Flat Coated Steel*.²⁹⁴

In coming to its conclusion, the majority sought to discern the NAFTA parties' intentions in negotiating Chapter 19. Although NAFTA is an international

²⁹² *Binational Panel Reviews in Mexico*, *supra* note 256 at 68.

²⁹³ *Cut to Length Steel Plate imports originating in or imported from United States*, (1995) MEX-94-1904-02. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

agreement, the majority resorted to U.S. legislative history to discern the parties' intentions. Such approach had some implications. First they ignored the international character of the NAFTA. Second, they did not follow the rules of treaty interpretation established by the Vienna Convention on the Law of Treaties, which establishes that it is the language of the treaty that must be construed, first and foremost, and that the negotiating history is a supplementary means of interpretation to which reference is made only in certain limited circumstances.²⁹⁵

In my view, the majority erred in their conclusions. The structure and context of article 1904(8) set clearly that, unlike the TFF, the panel could not issue a nullity order. It could only remand the final determination for "action not inconsistent with the panel's decision". This position has been adopted by SECOFI and by the rest of the binational panels reviewing AD determinations issued by SECOFI. Therefore the result of the panel decision in this case is that it interpreted its powers more broadly than a plain reading of article 1904(8) would support.

Fortunately, the approach of the binational panel in *Steel Plate* has not been followed by other binational panels. In the *Crystal and Solid Polystyrene* case, the panel issued its final award on September 12, 1996. The majority of the panel upheld the SECOFI determination. This means that three votes

²⁹⁴ See *supra* note 293.

upheld the determination, one concurrent vote and one dissenting vote. The concurrent vote was not in agreement with the application, by SECOFI, of the exam in connection with sales in the national market. The dissenting vote argued that SECOFI made some procedural errors during the investigation.²⁹⁶

The *Polystyrene*²⁹⁷ review involved a new issue regarding the application of the standard of review. During the review, article 238 of the Federal Fiscal Code was amended, and a new paragraph was added that granted the TFF authority on grounds of public policy, to review the competency of the authority that made the final determination. Thus, the panel in *Polystyrene* misinterpreted the addition of the new paragraph and on its own, invoked the authority and reviewed the competency of the investigating authority. Hence, the question before the panel was whether it was itself competent to review the competency of the investigating authority since the standard of review was amended during the review.

The panel failed to realize that the new paragraph conferred authority only on the TFF. Despite this new paragraph contained in article 238, I submit that it should not be a part of the standard of review, due to the fact that the review of the competence of the authority is provided in paragraph I of such article,

²⁹⁵ Sinclair Ian, *The Vienna Convention on the Law of Treaties*, cited Nafta Dispute Settlement and Mexico, *supra* note 38 at 77.

²⁹⁶ *Crystal and Solid Polystyrene imports originating in or imported from United States*, (1996) MEX-94-1904-03. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-secretariat.org/english/index.htm> (date accessed: May 11, 1999).

and in the case of a binational panel review it should be limited in terms of the NAFTA and its rules of procedure.^{298 299}

Therefore, the panel should not have proceeded to review, on its own motion, the competence of the authority which issued the challenged determination. In confirming the above criteria, on December 30, 1996, another paragraph was added to article 238. The paragraph reads as follows:

1."The arbitration agencies or binational panels arising from alternative dispute resolution mechanisms regarding antidumping, provided in international treaties or agreements which Mexico has entered into, could not review on their own motion, the grounds provided in this article."³⁰⁰

The above confirms that a review by a binational panel, on its own motion, is not a part of the standard of review, and also that it is not a power that binational panels have. The standard of review shall be only that stated in the first five paragraphs of article 238 of the Federal Fiscal Code, i.e. those which were in effect when NAFTA was negotiated.

The difficulty inherent in the resolution of the issues presented in the *Steel Plate* and *Polystyrene* cases, was compounded by the lack of administrative

²⁹⁷ *Crystal and Solid Polystyrene imports originating in or imported from United States*, (1996) MEX-94-1904-03. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

²⁹⁸ NAFTA, *supra* note 1, art. 1904(14) and NAFTA Rules of Procedure, *supra* note 78, Rule 7.

²⁹⁹ See also the conclusion of the binational panel in the case *Flat Coated Steel*, MEX-94-1904-01, in connection with the application of the rule 7.

³⁰⁰ The final part of article 238 of the Federal Fiscal Code entered into force in 1997. Translated from original Spanish version.

determinations and judicial opinions which panelists could rely on for meaningful guidance. In U.S. and Canadian reviews, the panelists and parties have an abundance of judicial opinions and administrative cases to guide them. This is not the case in Mexican reviews. As already mentioned in section 2.3.2, the TFF has not issued yet any judgements with regards to AD or CVD's.

In 1996, the Canadian exporters Dofasco Inc., Algoma Inc., Stelco Inc., and the Titan Industrial Corporation, requested the review before a binational panel of a final determination issued by SECOFI, in connection with the imports of *Rolled Steel Plate*³⁰¹ from Canada. On December 17, 1997 the panel issued its final award, in which the competence of SECOFI was again confirmed, and determined that SECOFI had met all the procedural requirements during the investigation. Likewise, the panel made some recommendations to SECOFI in order to determine whether Titan was the sole exporter of rolled steel plate during the investigation, and if applicable, to reconsider the dumping margin for all the Canadian exporters. The decision of the panel was by majority and with two concurring votes. The concurring votes stated a standpoint different from the majority in connection with the application of the standard of review.³⁰²

³⁰¹ *Rolled Steel Plate imports originating in or imported from Canada*, (1997) MEX-96-1904-02. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

³⁰² Ibid.

However, the panel concluded that article 239 of the Federal Fiscal Code should not be a part of the standard of review. As to the application of article 239, the panel followed the same criteria used by the binational panel in *Flat Coated Steel*. For this reason, the panel rejected the reasons that have been submitted before it for including Article 239 in the standard of review as a statement of the powers of the Panel.³⁰³ On August 3, 1998, the binational panel upheld the second report on remand issued by the SECOFI, except as to the antidumping margin of 108% imposed on the Canadian exporters.³⁰⁴

Likewise, in 1996 the above-mentioned Canadian exporters, requested the review by a binational panel, of the final determination issued by SECOFI regarding *Hot Rolled Steel Sheet*³⁰⁵. On June 16, 1997 the panel issued, unanimously, its final award which upheld in part, the final determination issued by SECOFI. The panel upheld all the legal and procedural issues followed in the investigation. As to the standard of review, the panel concluded that "article 1904 limits a Panel to upholding or remanding Final Determinations to SECOFI."³⁰⁶

NAFTA further limits the value of Panels' decisions on precedents. NAFTA specifically provides that the effects of a Panel decision are limited to the

³⁰³ Ibid., at 30.

³⁰⁴ Ibid.

³⁰⁵ *Hot Rolled Steel Sheet imports originating in or imported from Canada*, (1997) MEX-96-1904-03. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

³⁰⁶ NAFTA, *supra* note 1, art. 1904(8).

particular matter between the particular parties before the Panel.³⁰⁷ ³⁰⁸
 Following the panel's award, on August 15, 1997, SECOFI issued its report on remand, which amended the final determination and revoked the antidumping duties imposed on hot rolled steel sheet Canadian exporters.³⁰⁹

The cases *Cut to Length Carbon Steel Plate*³¹⁰, *Cold Rolled Steel Sheet*³¹¹, and *Hydrogen Peroxide*³¹², were dismissed on motion by the claimants. The case *High Fructose Corn Syrup* is still on.³¹³

Therefore, the panel awards in *Flat Coated Steel*, *Hot Rolled Steel Sheet*, and *Rolled Steel Plate* have confirmed the criteria that the standard of review is only contained in article 238 of the Federal Fiscal Code and in no other article of such Code. This has been the position adopted by SECOFI also.

Notwithstanding the large number of AD investigations brought in Mexico during the 1990's, the Fiscal Court had yet to complete a review of AD and CVD duty determinations. It is very important that the Fiscal Court complete such reviews in order to help future binational panel reviews. This will

³⁰⁷ NAFTA, *supra* note 1, art. 1904 (9).

³⁰⁸ *Hot Rolled Steel Sheet imports originating in or imported from Canada*, (1997) MEX-96-1904-03. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999) at 13.

³⁰⁹ SECOFI Annual Report, *supra* note 122 at 41.

³¹⁰ *Cut to Length Carbon Steel Plate*, (1995) MEX-95-1904-01 (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

³¹¹ *Cold Rolled Steel Plate* (1996) MEX-96-1904-01 (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

³¹² *Hydrogen Peroxide* (1997) MEX-97-1904-01 (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

facilitate the application and interpretation of Mexican laws to foreign panelists.

The binational panel experience in Mexico, through almost five years of practice, has demonstrated some differences as to the approach to reach a final decision by the panel. Sometimes they vote unanimously³¹⁴. In the other cases, voting was not split based on nationality, but on the particular approach of each panelist.³¹⁵

Even though binational panels must apply Mexican Law, the general rules and procedures of the binational panels are provided by NAFTA and by its Procedural Rules, regardless of the fact that the standard of review is different in terms of the applicable laws of each NAFTA country. Experience has demonstrated that at the beginning of the review, panelists usually have a particular approach to the case, based upon their own interpretations on the applicable laws and statutes. Nevertheless, as the reviews progress, the panelists from time to time, began to find mutual approaches, which usually lead them to reach a satisfactory agreement between them. Therefore,

³¹³ online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

³¹⁴ *Flat Coated Steel imports originating in or imported from United States*, (1996) MEX-94-1904-01. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999) and *Hot Rolled Steel Sheet imports originating in or imported from Canada*, (1997) MEX-96-1904-03. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

³¹⁵ *Cut-to Length Steel Plate from the United States*, (1995) MEX-94-1904-02, (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999). and *Crystal and Solid Polystyrene imports originating in or imported from United States*, (1996) MEX-94-1904-03. (Ch. 19 Panel), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: May 11, 1999).

notwithstanding the fact that there exist some cultural and legal differences, these do not prevent panelists from rendering decisions.

Therefore, the panelists from NAFTA countries need to have a better understanding of the law of each country, making the procedures easier and expeditious. International trade attorneys from these countries, need to be more familiar with the applicable laws of each country regarding AD and CVD. This is particularly so because the number of cases to be resolved by panels is increasing. Despite these difficulties, the process will hopefully become easier as experience and understanding of the two legal systems develop.

CONCLUSIONS

It is important to mention that the NAFTA Chapter 19 dispute settlement procedure was created based upon the FTA Chapter 19. The U.S. and Canadian trade policy, regarding subsidies, have very similar GATT based countervailing duty laws; they essentially use binational panels to ensure that these laws are fully applied. The Chapter 19 system under NAFTA and FTA has worked because the U.S. and Canadian trade law have a long history of jointly interpreting and applying these laws and transferring their experiences and concepts from one national context to another.

Mexico has established similar subsidy/countervailing duty laws. Since Mexico's experience in Antidumping and Countervailing Duty law is recent (almost 10 years), its lawyers and economists have not yet had the opportunity to develop an adequate base of experience in applying the law in a context in which markets, not governments, are the arbiters of price. Therefore, experience is an issue.

It is important to mention that even if laws could be harmonized for the 3 NAFTA countries, what can not be changed are the traditions and customs. The difference in legal systems between Mexico and the other NAFTA countries will still be important. Therefore, the panelists from NAFTA

countries need to have a better understanding of the law of the other countries.

As a result of some of the reviews held in Mexico by binational panels under NAFTA Chapter 19, such as *Flat Coated Steel*, *Steel Plate* and *Polystyrene*, it has been demonstrated that binational panels have had integrity and independence to render their decisions, thus, providing factors that strengthen and lend credibility to the binational panel process under NAFTA.

I would like to emphasize that in these kind of procedures, participation by both common law and civil law attorneys is essential, because the panel will be composed of panelists from Mexico and the U.S. or Canada. Moreover, it is very important for lawyers involved in NAFTA panels to try to better understand the legal systems of the other countries.

Due to the lack of sufficient understanding of the Mexican legal system, U.S. and Canadian attorneys need to learn more about the Mexican legal system in the same manner that Mexican attorneys need to learn more about U.S. and Canadian legal systems.

The binational panel reviews of the first three cases held in Mexico were more difficult than the other reviews. As a new system in Mexico, the interpretation and application of some new concepts was more difficult in the beginning. As

the cases have increased, the resolutions of the panels were reached more easily.

Likewise, some criteria have been established in connection with the powers of binational panels and the application of the standard of review. It has been set clear that in terms of article 1904(8), binational panels only have authority to either uphold a final determination or remand it for action not inconsistent with the panel's decision. Moreover, the powers of the panel came from NAFTA itself, and it should not have the same powers as the TFF.

As to the application of the standard of review in Mexico, it has been concluded that, that is contained only in the first five paragraphs of article 238 of the Federal Fiscal Code. Therefore a binational panel in Mexico cannot nullify a determination issued by SECOFI. In doing so in *Cut to Length Steel Plate*, the panel interpreted its powers too broadly. As mentioned above, the binational panel does not have the same powers and functions as the TFF. Therefore, the panels have narrower powers than the domestic courts they replace.

The acceptance of the binational panel decisions by the involved parties and the absence of challenging the same, shows that the binational panel procedure in Mexico has worked in a satisfactory manner to date.

ANNEX 1

Calendar of Investigation procedures in each NAFTA country in order to determine whether AD or CVD exist.

United States	Canada	Mexico
1. Initiation of investigation, 19 U.S.C. 1671a, 1673a (Dep't Commerce) • If affirmative: investigations proceed; no appeal • If negative: petitioner may appeal to the U.S. Court of Int'l Trade, 19 U.S.C. 1516(a)(1)(a)	1. Commencement of investigation, SIMA s. 31 (Deputy Minister, Revenue Canada)	1. Commencement of investigation within 30 days after filing of the petition, For. Trade Law, art. 52 (SECOFI) • If affirmative: investigations proceed; no appeal • If negative: investigations are terminated and the petition is regarded as abandoned or as having failed to comply with the requirements of the regulation.
2. Preliminary determination "whether there is a reasonable indication that... an industry in the U.S. ... is materially injured ... is threatened with material injury, or ... the establishment of an industry in	Preliminary determination "whether the evidence discloses a reasonable indication that the dumping or subsidizing of the goods ... is causing or is likely to cause material injury ... or ...	Provisional determination of injury or threat of injury and of dumping or subsidization, For. Trade Law art. 57 (SECOFI) • If the provisional determination is affirmative, the

the U.S. is materially retarded..." 19 U.S.C. 1671(a), 1673b(a) (Int'l Trade Commission) • If affirmative: investigations proceed; no appeal. • If negative: investigations terminate; petitioner may appeal to the U.S. Court of Int'l Trade, 19 U.S.C. 1516a9a(1)(C)	retardation." SIMA Ss. 34(b) and 35(2). (The Deputy Minister of Revenue Canada may take the preliminary determination or refer the question to the Canadian International Trade Tribunal "CITT").	investigation proceeds and provisional duties may or may not be applied at least 45 days after the decision to initiate. • If SECOFI finds "sufficient evidence" that subsidies, dumping or injury "does not exist", the investigation is terminated, For. Trade Law art. 57.
3. Preliminary subsidy or LTFV ("less than fair value") determination, 19 U.S.C. 1671b(b), 1673b(b) (Dep't Commerce) • Whether affirmative or negative, investigation proceeds to final determination; no appeal.	Preliminary determination of dumping or subsidizing, SIMA s. 38 (Deputy Minister, Revenue Canada) • Whether affirmative or negative, investigation proceeds to final determination; no appeal.	
4. Final subsidy or LTFV determination, 19 U.S.C. 1671d(a), 1673(a) (Dep't Commerce) • If affirmative: proceeds to investigation of material	4. Final determination of dumping or subsidizing, SIMA s. 41 (Deputy Minister, Revenue Canada) • If affirmative: proceeds to investigation of material	3. Final subsidy or dumping and final injury or threat of injury determination, For. Trade Law, art. 59 (SECOFI) • If affirmative: SECOFI may levy final duties or

injury; • If negative: investigation terminates; interested parties may appeal to Article 1904 Binational Panel or U.S. Court of Int'l Trade, 19 U.S.C. 1516a(a)(2)(A)-(i), 1516a(g)(2)	injury by CITT • If negative: investigation terminates: interested parties may appeal to Art. 1904 Binational Panel or CITT.	may declare the investigation completed without levying duties; interested parties may appeal to Article 1904 Binational Panel • If negative: investigation terminates
5. Final determination of injury, threat or retardation, 19 U.S.C. 1671d(b), 1673d(b) (Int'l Trade Commission) • If affirmative: proceeds to issuance of AD or CVD order; interested parties may appeal to Article 1904 Binational Panel or U.S. Court of Int'l Trade, 19 U.S.C. 1516a(a)(2)(A)(i)(II), 1516a(g)(2) • If negative: investigation terminates; interested parties may appeal to Article 1904 Binational Panel or U.S. Court of Int'l	5. Final determination of injury, threat or retardation, SIMA Ss. 42, 42(CITT) • If affirmative: proceeds to issuance of AD or CVD order: interested parties may appeal article 1904 Binational Panel or to CITT for predetermination • If negative: investigation terminates: interested parties may appeal to Art. 1904 Binational Panel	

Trade, 19 U.S.C. 1516a(a)(2)(A)(i)-(I), 1516a(g)(2)		
6. Administrative review to establish the amount of AD or CVD duty to assessed and to estimate the cash deposits required on future entries, 19 U.S.C. 1675 (Dep't Commerce) • May be appealed by any interested party to Article 1904 Binational Panel or U.S. Court of Int'l Trade, 19 U.S.C. 1516a(a)(2)(I)-(I), 1516a(g)(2)	6. Re-determination of the amount of AD or CVD duty to be collected (Dominion Customs or the Deputy Minister; appeal to the CITT)	4. Administrative review of the amount of AD or CVD duties may be obtained annually, upon request of a party, For. Trade Law art. 68 (SECOFI) • Final decisions confirming, modifying or revoking final duties may e appealed by interested parties to Article 1904 Binational Panel
7. Administrative review to determine whether particular merchandise is within the scope of an AD or CVD order, 19 U.S.C. 1671, 19 C.F.R. 353.29, 355.29 (Dep't Commerce) • May be appealed by any interested party to Article 1904 Binational Panel or U.S. Court of Int'l Trade,	7. Re-determination to determine whether imported merchandise is within the scope of an existing AD or CVD order, SIMA s. 59 (Deputy Minister) • May be appealed by any interested party to Article 1904 Binational Panel or CITT, SIMA s. 61	5. After a decision to levy duties is made, interested parties may petition to determine whether particular goods are subject to the order and SECOFI will issue a determination, For. Trade Law art. 60 • May be appealed by an interested party to Article 1904 Binational Panel³¹⁶

³¹⁶ Resolving Disputes, *supra* note 5 at 36 ,37, 38, 39.

19 U.S.C. 1516(a)(2)(a)-(i)(I), 1516a(g)(2)		
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ANNEX 2

Standard of review to be applied in each NAFTA country.

United States	Canada	Mexico
Standard of review applied to decisions not to initiate a "change circumstances" review: <i>"The court shall hold unlawful any determination, finding or conclusion found ... to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ..."</i> [19 U.S.C. 1516a(b)(1)(A)] Standard of review applied to final determinations of dumping, injury, or scope of the order: <i>"The court shall hold unlawful</i>	Standard of review applied to all determinations before binational panels: <i>"The Trial Division may grant relief ... if it is satisfied that the federal board, commission or other tribunal"</i> <i>(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;</i>	Standard of review applied to all determinations before binational panels: <i>"(a) lack of competence of the authority that issued the determination or conducted the proceeding;</i>

<i>any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."</i> [19 U.S.C. 1516a(b)(1)(B)]		
	<i>"(b) failed to observe a principle of nature justice, procedural fairness or other procedure that it was required by law to observe;</i>	<i>"(b) omission of formal requirements, which affected the defense's opportunities and the outcome of the contested determination, including the absence of basis and motivation;</i>
	<i>"(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;</i>	<i>"(c) errors in the proceeding that affected the defense of the interested parties and the scope and meaning of the challenged determination;</i>
	<i>"(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;</i>	<i>"(d) the finding facts on which the determination was based were not held, different, or were incorrectly interpreted, or that the challenged determination was issued by the agency in violation of the applicable laws or rules; and</i>
	<i>"(e) acted or failed to act, by</i>	<i>"(e) an exercise of</i>

	<i>reason of fraud or perjured evidence; or;</i>	<i>discretionary authority that is inconsistent with the objectives of the law granting the legal authority to the administrative agency. For being of public order, the TFF could argue, the incompetence of the authority which issued the contested resolution, and the lack of basis and motivation of said resolution. The arbitration agencies or binational panels arise from alternative dispute resolution mechanisms regarding antidumping, provided in international treaties or agreements which Mexico has entered into, could not review officially the grounds provided in this article. [Codigo Fiscal de la Federacion, art. 238., D.O. December 31, 1981 as amended.]</i>
	<i>"(f) acted in any other way that was contrary to law." [Federal Court Act, S. 18.1(4), reprinted in Canada Statute Citator at</i>	

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