

Dossier Nr.:
MEX.-USA-2003-1904-01

**REVIEW BEFORE A BINATIONAL PANEL OF A FINAL RESOLUTION OF
THE EXAMINATION TO DETERMINE THE CONSEQUENCES OF
REVOCATION OF THE FINAL SURCHARGE IMPOSED ON IMPORTS OF
LIQUID CAUSTIC SODA, ORIGINATED FROM THE UNITED STATES OF
AMERICA, NOTWITHSTANDING ITS COUNTRY OF ORIGIN, IN
ACCORDANCE WITH ARTICLE 1904 OF THE NORTH AMERICAN FREE
TRADE AGREEMENT.**

DECISION ON THE PANEL'S COMPETENCE

Leonel Pereznieto Castro.
Presidente

Stephen Powell

Gustavo Uruchurtu

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DEFINITIONS

1. **NAFTA** The North American Free Trade Agreement between the Governments of Canada, United States of America, and the United Mexican States, binding as of 1 January 1994.
2. **Constitution** The Political Constitution of the United Mexican States.
3. **FTA** The Mexican Foreign Trade Act, published in the OFG on 27 July 1993, in force as of 28 July of that same year.
4. **Authority** The Mexican Ministry of Commerce and Industrial Assistance, today the Ministry of the Economy.
5. **OFG** The Official Federal Gazette.
6. **Caustic Soda** Liquid Hydroxide Soda (NaOH), subject of the Authority's resolution.
7. **Resolution** The definitive resolution of the antidumping investigative proceeding on Caustic Soda imports classified in item 2815.12.01 of the Imports' and Exports General Tax Act, published in the OFG on 6 June 2003.
8. **USA** United States of America.
9. **Mexico** United Mexican States.
10. **Canada** The Dominion of Canada (Canadá).
11. **US\$** Dollars, legal currency of the USA.
12. **\$** Pesos, legal currency in Mexico.
13. **CA\$** Canadian dollars, legal currency in Canada.
14. **Quota** Surcharge or any other antidumping measure.
15. **Sunset Review(s)** Sunset Reviews.
16. **National Production** "Cloro de Tehuantepec", S.A. de C.V., and "Industria Química del Istmo", S.A. de C.V.,

jointly.

17. **CANAJAD**

National Chamber of Fats, Oils, Soaps and Detergents.

18. **CANAINTEX**

National Chamber of the Textile Industry.

19. **CANAICEP**

National Chamber of the Celulose and Paper Industries.

I. PARTIES.

A. Claimant.

Claimant is CANAJAD, which was represented in this proceeding by the following persons:

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B. Authority.

The Authority is the Ministry of the Economy of the Mexican Government and its International Commercial Practices Unit, which was represented in this proceeding by:

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Lic. Alejandro Nemo Gómez Strozzi
Lic. José Manuel Vargas Menchaca
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This proceeding was also attended by Cloro de Tehuantepec, S.A. de C.V., and Industria Química del Istmo, S.A. de C.V., (National Production), which was represented in this proceeding by:

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II. BASIC TIMETABLE PRIOR TO THE PROCEEDING.

1. On 12 July 1995 the Authority published in OFG the Resolution, in which it determined that all imports of Caustic Soda originating from the USA whose prices were below the normal reference value of US\$147.43 per metric ton would be subject to the Quota.
2. On 29 February 2000 a notice was published in the OFG that the Antidumping Duties would be eliminated unless national producers with a legitimate interest requested, based on the law and facts, determination of the consequences of elimination of the Antidumping Duties.
3. On 26 May 2000 National Production requested initiation of an examination to determine the consequences of elimination of the Quota on Caustic Soda.
4. On 26 June 2000 the Authority found National Production's request insufficient to justify initiation of an investigation.
5. On 24 July 2000 National Production supplied the information identified by the Authority.
6. On 1 August 2000 the Authority published notice in the OFG identifying requests made to examine whether elimination of the Antidumping Duties would give rise to the continuation of dumping and injury, including the Caustic Soda request.
7. On 19 December 2000 Resolution RS.DOF.EC.10-00-INI was published in the OFG, initiating the present Sunset Review, in which importers, exporters, and other interested parties were invited to submit any information they considered to be in their best interest, extending such invitation to the Government of the USA and importing enterprises.

8. On 14 February 2001 an extension was granted to CANAJAD & CANAINTEX, among others, for the submission of arguments and supporting evidence.
9. On 7 March 2001 CANAICEP tendered to the International Commercial Practices Unit a written answer to the resolution initiating the investigation, submitting both arguments and supporting evidence to prove irregularities and violations of several ordinances committed by National Production, as well as by the Authority through its initiation of the Sunset Review and requesting elimination of the Quota.
10. On 8 March 2001 CANAJAD tendered to that same Unit a submission similar to that of CANAICEP. CANAINTEX also submitted transportation costs relevant to the maintenance of independent markets in Mexico and the consequences thereof on the direct supply of other independent producers.
11. On 30 April 2001 the Authority requested of several importers certain information and supporting evidence regarding imports into Mexico of several import operations, which was answered on several dates within the period of May to November of that year.
12. On 11 July 2001 CANAJAD submitted to the Authority a document answering the Authority's request and requesting both the suspension of the Sunset Review and the elimination of the Antidumping Duties which had already expired in July of 2000.
13. During August 2001 National Production, CANAHAD, and CANAINTEX each submitted additional supporting materials.
14. On 19 March and 1 April 2002 National Production submitted supporting evidence that it considered pertinent to the Authority's February 2002 request.

15. On 12 April 2002 CANAJAD submitted its responses to the information filed by other parties to the proceeding.
16. On 3 April 2003 the Authority presented to the Foreign Trade Commission its final proposal to extending the duration of the Quota for another five years, which was contested by the Federal Antitrust Commission (*Comisión Federal de Competencia*) on the grounds that it was not in accordance with the methodology used to determine the normal value of Caustic Soda.
17. On 14 April 2003 CANAJAD requested that the Authority publish the results of its Sunset Review.
18. On 14 May 2003 CANAJAD started *Amparo* Proceedings before the Sixth Judge of District “B” in Administrative Matters in Mexico City, which was granted on 21 July 2003, ordering the Authority to publish the Sunset Review results as requested.
19. On 6 June 2003 the Authority published in the OFG the Resolution, maintaining the Quota for another 5 years.
20. On 16 June 2003 CANAJAD requested a technical information meeting with the Authority.

III. THE PROCEEDINGS.

1. On 2 July 2003 CANAJAD filed with the Mexican Section of the NAFTA Secretariat a request for review of the Resolution by a NAFTA Panel.
2. During August 2003 CANAICEP and CANAINTEX submitted their notices of appearance in support of CANAJAD’s claims.
3. On 30 October 2003 CANAJAD tendered its Claimant’s memorandum.

4. On 7 January 2004 the Authority tendered its Defendant's memorandum.
5. On 8 January 2004 the Authority filed a motion to dismiss CANAJAD's request for Panel review on the grounds that Sunset Reviews by the Authority are not subject to NAFTA binational panel review.
6. On 22 January 2004 CANAJAD submitted its answer to the Memoranda of the Authority and National Production.
7. On 22 September 2005 this Panel held a public hearing relating to the competence of the panel to resolve this matter.

IV. ARGUMENTS OF THE PARTIES.

This decision addresses the jurisdiction, or competence, of the Panel.. Because this a preliminary, or incidental, decision, only the requests of the parties regarding the Panel's competence will be addressed. Substantive claims are not addressed in this decision..

A. The Authority's claims:

1. That the Resolution published in the OFG on 6 June 2003, in which the Authority decided to continue the Quota as published in the OFG on 12 July 1995, does not constitute a final determination within the meaning of Articles 1904.3, 1904.11, and Annex 1911 of the NAFTA, and, therefore, is not subject to review by a NAFTA Binational Panel;
2. That under article 1911 NAFTA, where the final determinations issued by each of the contracting states that may be reviewed by a NAFTA Binational Panel are listed, those listed for Mexico are:
 - (i) a final resolution related to investigations of antidumping or countervailing duties issued by the Ministry of Commerce and Industrial Support, today known as the Ministry of the Economy;
 - (ii) a final resolution regarding the administrative annual review of the final resolution related to antidumping or countervailing duties issued by the above mentioned Ministries; and
 - (iii) a final resolution issued by the above mentioned Ministries regarding whether a certain good not foreseen in the Resolution in dispute should be classified within that existing resolution on antidumping or countervailing duties

In the first case, subparagraph (i), reference is made to the resolutions foreseen in Article 13 of Article 131 of the Constitution's Foreign Trade Matters Regulatory Act (*Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior*), which was superseded by the FTA. In other words, it refers to final determinations that result from an antidumping or countervailing duty investigation under Article 59 of the FTA, which provides as follows:

“Article 59. Within 260 days of the day following publication in the Official Federal Gazette of a resolution that initiates an investigation, the Ministry shall issue the final resolution. Through this resolution the Ministry must:

I. Impose a final quota;

II. Revoke the provisional quota; or

III. Declare an investigation concluded without the imposition of a quota...”

In the second case, subparagraph (ii), reference is made to the annual revisions to such quotas, under Article 1911 of the NAFTA, which establishes the following and was implemented by article 68 of the FTA :

*“Annex 1904.15 Reforms to internal legal decisions:
[...] Mexico's List: [...] (o) (o) the right to an annual individual review on request by the interested parties through which they can obtain their own dumping margin or countervailing duty rate, or can change the margin or rate they received in the investigation or a previous review, reserving to the competent investigating authority the ability to initiate a review, at any time, on its own motion and requiring that the competent investigating authority issue a notice of initiation within a reasonable period of time after the request”*

The third situation (iii) refers to final determinations that are issued on the basis of coverage of a product, sometimes called “scope procedures, regulated by Article 60 of the FTA, which provided as follows at the time this review was begun:

“A definitive resolution dictated by the Ministry of Commerce and Industrial Support related to the pertinence of a particular kind of merchandise to a class or kind of merchandise as described in an existing resolution on antidumping or countervailing duties.”

3. In accordance with the above and with the general legal principle of *pacta sunt servanda*, the possibility in NAFTA to submit to a binational panel different kinds of resolutions as contended by the Claimant is nowhere to be found;
4. That in conformity with decisions issued by Mexico’s Federal Courts, the request for review before a [NAFTA] Binational Panel may not be granted where the treaty does not provide authority for the request, and it is inappropriate to engage in expansive, self-interested, construction to find such authority, particularly with respect to an International Treaty, when the terms of the treaty do not contemplate this jurisdiction..
5. That in light of the precision of the language of Annex 1911 of the NAFTA and with a straight-forward, objective, grammatical, word-by-word examination of its contents, there is no other proper interpretation of the treaty’s provisions.

B. CANAJAD argues:

1. That in conformity with the established meaning of Article 1902.1 NAFTA, which refers generally to antidumping and countervailing duties, the interpretation should not be limited to a personal and biased interpretation of that specific article for its understanding, but instead it must be construed as part of an entire legal system, because article 1904.3, which is quoted below, requires that the Panel apply the general principles of law that would be applied by a Mexican Tribunal in reviewing the Resolution by the Authority regarding Liquid Caustic Soda.

Article 1904.3

“The panel shall 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”

2. Taking into account that the Authority alleges Articles 1904.3 and 1904.11 of the NAFTA as grounds for dismissal, by virtue of Article 1904.11 these allegations are improper since CANAJAD never resorted to the Mexican mechanisms or procedures of judicial review and opted exclusively for the dispute settlement mechanisms provided for by NAFTA. The referred Article provides that:

Article 1904.11

“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 courts.”

3. That the Authority wrongfully maintains that resolutions resulting from its review of the validity of antidumping duties (Sunset Reviews) are not included within the definition of “Final Determination” in Annex 1911 of the NAFTA, because when the Agreement was signed by the three Parties, there was no discussion—much less during negotiation of the General Agreement on Tariffs and Trade (GATT)—of the obligation to include in national laws a time limit of five years for antidumping duties, unless an extension request was made on behalf of national producers, in which case an investigation would be initiated to determine the consequences of such duties. It was not until the conclusion of the GATT-WTO Uruguay Round in April 1994 that it was agreed to conduct Sunset Reviews. That is why reference to Sunset Reviews is nowhere to be found in NAFTA. For this reason, it is improper to conclude from this omission that Sunset Reviews were deliberately excluded by the Agreement’s negotiators.

4. That the Resolution issued by the Ministry of the Economy related to the Sunset Review of Liquid Caustic Soda is a “Final Determination” within the meaning of Annex 1911 of the NAFTA, because there is an identity of elements between Sunset Reviews and the original antidumping investigations., because they are determined by the same authority, the object and effect of such determinations is exactly the same, and there is an identity of parties between the two kinds of procedures.

5. That the Authority has misunderstood the principles governing interpretation of the law, because, according to Villoro Toranzo, to interpret is not to integrate, since interpretation requires the existence of a legal precept that could somehow cover the unforeseen circumstances. Recognizing that there may be a case in which circumstances not foreseen by the legislature, and that are not encompassed within a particular interpretation of the law, exist and the judge must resolve such a case even in the absence of a particular rule of applicable law, by virtue of the principle of the law’s rational completeness. If there is a gap in the law, the judge must fill it, and the law itself provides the criteria that are to be used in order to accomplish this task. Most codes provide that in these kinds of situations, one must turn to the General Principles of Law, Natural Law, or equity. But the Judge’s activity in this case is not interpretative but constructive. Regarding the “*interpretación exegetica*”, the same author indicates that such an interpretative method must be used,,: first looking to the letter of the law, based on the laws of grammar and language; second, if the above is not sufficient, the intention of the legislature at the time of the creation of the law is sought; third, the commentaries and notes of those involved in the writing of such law constitute a valuable guide for the interpreter, because they allow the reconstruction of the spirit of the law and the application of analogous laws; fourth, if none of the above apply, the general principles of law shall apply. Therefore, turning to Article 1904.3 of NAFTA, the possibility of reasoning by analogy is available where there is nothing expressly provided in the treaty’s terms.

C. National Production argues:

1. That due to the fact that nowhere in the legal rules applicable to the review of final determinations on antidumping or countervailing duties before a Binational Panel is the possibility contemplated that Sunset Reviews may be subject to review under Article 1904 of the NAFTA, this claim should be rejected.
2. That, in regard to Final Determinations, Annex 1911 of the NAFTA defines these determinations, and therefore it must be understood that a binational panel may only review those determinations enumerated in that Article, because that list is limited and does not include definitive resolutions that are derived from other procedures, such as Sunset Reviews of antidumping or countervailing duties. In this regard, this Article establishes:

“Annex 1911. Country Specific Definitions...:

(i) a final resolution regarding antidumping or countervailing duties investigations by the Secretaría de Comercio y Fomento Industrial ("Secretariat of Trade and Industrial Development"), pursuant to Article 13 of the Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior ("Foreign Trade Act Implementing Article 131 of the Constitution of the United Mexican States"), as amended,

(ii) a final resolution regarding an annual administrative review of antidumping or countervailing duties by the Secretariat of Trade and Industrial Development ("Secretaría de Comercio y Fomento Industrial"), as described in paragraph (o) of its Schedule to Annex 1904.15, and

(iii) a final resolution by the Secretariat of Trade and Industrial Development ("Secretaría de Comercio y Fomento Industrial"), as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing antidumping or countervailing duty resolution... ”

3. That in accordance with Rule 34 (d) of the Rules of Procedure established in NAFTA Chapter XIX and the FTA, the request for review before a binational panel must fulfil the requirements established in article 97 and 98 FTA.

Specifically, article 97 of the FTA establishes the types of resolutions of unfair international commercial practices issued the Mexican Authority that may be subject to review before a Binational Panel, and Sunset Reviews of antidumping duties are not included. Therefore, Claimant has not complied with the requirements of Rule 34(d) of the Rules of Procedure.

V. LAW APPLICABLE TO THE ISSUE OF THE PANEL'S COMPETENCE

To resolve the question of jurisdiction or competence of this Binational Panel, it is necessary to indicate that said jurisdiction is determined in accordance with Article 1904 of the NAFTA, including Annex 1911, together with Articles 59, 68, 70, 89, 89(A), 89(B), 89(D) and 89(F) of the FTA.

VI. ANALYSIS OF THE ISSUE OF THE PANEL'S COMPETENCE.

A. Scope of Binational Panel Review under NAFTA Article 1904

NAFTA Article 1904.3 requires that panels apply the general legal principles that a court of the importing party would apply. This Article establishes the following:

Article 1904: Review of Final Antidumping and Countervailing Duty Determinations
3. The panel shall 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.

A federal court in Mexico has available to it an array of equitable principles to ensure the fair and accurate interpretation of legislation, including treaty provisions that have been incorporated into Mexico's domestic law. The courts may reason by analogy and use

other methods to fill legal gaps, recognizing that the legislature cannot possibly anticipate every situation that may arise under the law.

However, we believe that Mexico's courts have no basis to apply these general principles when the law is specific, clear, and unambiguous. In such a case, there is no reason to believe that there are legal gaps that must be filled. As would be the case before U.S. courts, when the law leaves no room for interpretation, the job of the court is to apply the law as written to the facts of the case.¹

It is important to recall that the competence of the Panel is determined by the treaty, not by Mexico's other laws (the treaty itself has also of course been adopted as part of Mexican law). Mexico's laws are relevant to the competence issue now before the Panel only because these laws are used by the treaty to assist in defining in Annex 1911 which of Mexico's "final determinations" are subject to binational panel review.

Looking, then, to the language of the treaty, we find that Article 1904.1 requires the Parties to replace judicial review of "final determinations" under their AD/CVD laws with binational panel review. Article 1904.1 establishes the following:

"As provided in this Article, each Party shall replace judicial review of final_antidumping and countervailing duty determinations with binational panel review."

The Parties tell us what they mean by "final determinations" in Annex 1911, where the term is defined separately for each Party. This Annex defines what is understood by each of the Parties as a "final determination" in order to identify the determinations subject to binational panel review. Three unique AD/CVD matters are listed in Mexico's definition, and none of them qualifies as sunset reviews:

¹ "If the intent of the Congress is clear, that is the end of the matter." Chevron U.S.A, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-843 (1984).

“(i) a final resolution regarding antidumping or countervailing duties investigations by the Secretaría de Comercio y Fomento Industrial (“Secretariat of Trade and Industrial Development”), pursuant to Article 13 of the Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior (“Foreign Trade Act Implementing Article 131 of the Constitution of the United Mexican States”), as amended,

(ii) a final resolution regarding an annual administrative review of antidumping or countervailing duties by the Secretariat of Trade and Industrial Development (“Secretaría de Comercio y Fomento Industrial”), as described in paragraph (o) of its Schedule to Annex 1904.15, and

(iii) a final resolution by the Secretariat of Trade and Industrial Development (“Secretaría de Comercio y Fomento Industrial”), as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing antidumping or countervailing duty resolution... ”

In the first case, subparagraph (i) refers to final resolutions pursuant to article 13 of Article 131 of the Constitution’s Foreign Trade Matters Regulatory Act, as amended, which established:

“Article 13. Once an administrative investigation is concluded, the Ministry of Commerce and Industrial Development, within six months after the provisional resolution enters into effect, shall issue a final resolution based on the exhibits submitted by the national producers, importers of the merchandise in question, and other information that the Ministry has obtained. This resolution must be published in the Federal Official Gazette.

The Ministry of Taxing and Public Credit shall proceed, as appropriate, to implement the decision if duties are imposed. If duties are revoked or modified, paragraph two of the preceding Article shall apply.”

This article referred to the resolutions that conclude an administrative investigation in antidumping or countervailing duty matters, either by imposing duties or by terminating the investigation without the imposition of duties.

Article 13 of the Foreign Trade Act, replaced in 1993 by Article 59 of the FTA, applies only to “investigations,” a term of art in AD/CVD law which means the initial examination of a petition filed by a domestic industry to determine whether the imports are being dumped or subsidized, as well as whether this dumping or subsidization is causing injury to the competing domestic industry.

Sunset reviews, on the other hand, are undertaken every five years and may occur only as a result of an AD or CVD order that already exists following an initial “investigation.” In other words, a sunset review is a review of the original results of the investigation referred to in Annex 1911 “final determination” (c)(i).

Paragraph (c)(ii) of the definition of “final determination” in Annex 1911 refers to annual reviews of antidumping and countervailing duties, implemented by Article 68 of the FTA, as amended on December 22 ,1993. At the time of this Review, the Article provided:

“Article 68. Final countervailing duties must be reviewed annually upon petition by an interested party and may be reviewed at any time ex officio by the Ministry. In all cases the resolutions that declare the initiation and conclusion of the review must be notified to the interested parties and published in the Federal Official Gazette. In the review procedure the interested parties shall participate and may may enter into the agreements contemplated by article 72 hereof.

The corresponding final resolutions that confirm, modify or revoke antidumping or countervailing duties shall have the character of final resolutions and shall be subject to the prior opinion of the Commission.”

The final determinations referred to in this paragraph are the annual administrative reviews described in paragraph (o) of Mexico’s Schedule to Annex 1904.15, that is,

annual reviews to change the margin or obtain an individual margin for a particular company. These reviews are authorized by Article 68 of the LCE. The fact that these reviews are conducted “annually,” as contrasted with a sunset review’s occurrence only once each five years, is a compelling distinction. Moreover, a sunset review does not have as its principal purpose either changing the margin or obtaining an individual margin. Its purpose is to determine whether injury or dumping/subsidization would continue if the investigating authority revoked the order entered during the original investigation. “Annual administrative review” thus has a specific and unique meaning.

The Panel believes it is important to repeat that the FTA uses the term “investigations” only when reference is made to those agency actions that have as their purpose the imposition of an antidumping or countervailing duty, that is, to the initial investigations whose resolutions are foreseen in the first subparagraph of the Mexican definition of final determinations in Annex 1911. In other cases, the FTA uses terms such as:

- Annual reviews, as indicated by their name, in accordance with article 68 FTA, reference is made to a *review*;
- Sunset reviews, under FTA Article 70 , as amended in 2003, which adopts the term examination of the validity of the antidumping or countervailing duties, by applying Article 11.3 of the *AAD*;
- Scope reviews (product coverage), in Article 89 FTA, as amended in 2003, makes reference to a *procedure* to decide product coverage.
- Anti-circumvention: Article 89B FTA, as amended in 2003, refers to a *procedure*.
- New exporter: FTA Article 89D, as amended in 2003, speaks of a *procedure* for new exporters.

Finally, paragraph (c)(iii) of NAFTA Annex 1911 refers to the definitive resolutions of the product coverage (scope) procedures, which were regulated by FTA Article 60 at the time of initiation of these proceedings (these types of procedures were not provided by the previous law), which provides as follows:

“Article 60. Once a final resolution imposing antidumping or countervailing duties has been issued, the interested parties may request the Ministry to resolve whether a particular product is subject to such duty. In that case, the Ministry shall permit the participation of other interested parties and must respond to the requesting party by the procedures established in the Regulation (Reglamento), which shall have the character of a final resolution. The resolutions shall be notified to the interested parties and will be published in the Federal Official Gazette.”

As a result of the amendments to the FTA on March 13 ,2003, this procedure is now regulated by article 89A, which reads:

“ARTICLE 89. Once a definitive surcharge is determined, the interested parties may ask the Ministry to resolve whether a particular product is subject to such surcharge and, if the request is accepted, a product scope procedure shall begin within 20 days of the request and a final resolution shall be issued within 60 days of its initiation. These resolutions must be published in the Federal Official Gazette.”

Scope reviews also are completely unlike sunset reviews, in that their sole purpose is to decide whether a particular product is included within the coverage of the order entered after the original investigation. It is important to point out that scope reviews were not included in the Regulatory law of Article 131 of the Constitution and were included in the FTA as a result of an express agreement by Mexico in Article 1904.15(o).

In summary, under NAFTA Article 1904.1, the Parties agreed to replace with NAFTA Chapter 19 panel review “final determinations” issued under their anti-dumping and countervailing duty laws. Annex 1911 contains the “Country-Specific” definition of “final determinations,” which is different for each of the three Parties. Mexico defines the term to mean three specific measures issued by the Secretary of the Economy pursuant to Article 13 of the Regulatory Law of Article 131 of the Constitution, as that law may be amended. In 1993, the Ley de Comercio Exterior was enacted, repealing the law referenced in Mexico’s definition of “final determination” and replacing Article 13 with Article 59 of the Ley de Comercio Exterior. Article 59 repeats without change the three measures that will be subject to NAFTA panel review. Article 59 does not include sunset reviews, which are addressed in Article 70 of that same Ley de Comercio Exterior.

Article 70 does not make sunset reviews subject to challenge before NAFTA Chapter 19 panels.

We conclude from the above that the negotiators of NAFTA only considered the resolutions listed above to be subject to review by a Binational Panel in the case of México and they took care to define the included determinations expressly in the Treaty. Mexico has chosen not to make sunset reviews, which are unlike any of the three listed measures in Mexico's Annex 1911 definition of "final determinations," subject to Chapter 19 review. Either Canada or the United States, if it had wished, could also have excluded sunset reviews from the competence of NAFTA Chapter 19 panels.² If this situation creates an imbalance in treaty obligations, that is a matter for the Parties, not this Panel, to correct.

If the purpose of NAFTA Article 1904 were to ensure that all final determinations regarding dumping (AD) and countervailing duty (CVD), whether in existence at the time the treaty was drafted or created later, would be subject to binational panel review, the drafters would not have found it necessary to include a definition of what the term, "final determination," means for each Party. Contrary to that intent, the definitions section carefully sets down precisely those "final determinations"—no more and no less—that will be subject to binational panel review.

If the inclusion of precise definitions for each Party of those "final determinations" eligible for binational panel review is not sufficient proof of the limited intent of the Parties, further evidence may be found in the treatment of anti-circumvention determinations, which investigate whether imports are being made in such a manner as to improperly avoid the effects of the AD or CVD duty. The anti-circumvention provisions were a part of U.S. law prior to negotiation of the NAFTA. Section 781 of the Tariff Act

² Like Mexico, the United States enacted a separate section of its law implementing the WTO Anti-Dumping Agreement to address sunset reviews. However, it went one step beyond Mexico's implementation action by cross-referencing that section within the law listed in its Annex 1911 definition of "final determinations." The United States would not have been in violation of its NAFTA obligations if it had chosen not to make sunset reviews subject to NAFTA Chapter 19 review.

of 1930, "Prevention of Circumvention of antidumping and countervailing duty orders," was added by Section 1321 of the Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418, 19 U.S.C. 1677j (1988).

At the time of the negotiations, this was the only legislation of the Parties that provided for an anti-circumvention procedure. If the purpose of Article 1904 and Annex 1911 was to include all final determinations regarding AD and CVD duties, the definition of what "final determination" means for the United States would have included this type of final determination, which also may impose AD/CVD duties if circumvention is found. However, for whatever reason, the U.S. definition does not include anti-circumvention determinations among those final determinations that are eligible for panel review.

Over ten years later, no Party has argued that U.S. anti-circumvention determinations are subject to Chapter 19 review. No Party has argued that Mexico violated the treaty when, in its 2003 amendments to the LCE, that Party also failed to include anti-circumvention reviews in the Article 97 reference to actions subject to binational panel review. Nor has any Party argued that Mexico has acted contrary to the intent of the Parties in Article 1904 when it failed to make New Exporter (or shipper) reviews, another type of final determination regarding AD/CVD that can impose duties, subject to binational panel review.

B. Sunset Reviews

Sunset reviews, which are the subject of the present binational panel review, were regulated by Article 70 of the FTA when the present review began. Article 70 of the FTA provides as follows:

ARTICLE 70.- Final countervailing duties shall be revoked if within a period of five years following their entry into force none of the interested parties has requested their review and the Ministry has not initiated such a review ex officio.

Additionally, Article 109 of the FTA regulation (Reglamento) requires notice to the parties when the legal period for imposition of duties has elapsed and the anti-dumping duties will be revoked by operation of law.

“ARTICLE 109. The Ministry shall declare the revocation of final countervailing duties in the circumstances to which Article 70 of the Act refers, provided that it notifies the interested parties known to it that the legal time-limit has elapsed. The declaration shall be published in the Official Federal Gazette.”

The review provided by Article 70 of the FTA does not refer to annual reviews. It refers to the review provided for in Article 11 paragraph 3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) which is complementary to Mexican legislation due to its self-executing character. This provision establishes the following:

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping or countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.

The purpose of the review referred to by this provision is to analyze if the elimination of the AD/CVD duty would cause the recurrence of the dumping or subsidy and of the injury, in order to determine the propriety of its elimination. This determination is substantially different from the annual review determination, whose objective is to confirm, modify, or eliminate anti-dumping or countervailing duties. In the same way, the Antidumping Agreement also refers to these two reviews separately (Article 11.3 for sunset reviews and Article 11.2 for annual reviews).

“11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or revised, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.”

It is important to note that even though the 2003 amendments to the FTA do not apply to the instant case, since it was initiated in the year 2000, Article 89F subsection IV(a) of the FTA, which regulates the sunset review special procedure, grants the Ministry the authority to modify the amount of the duty

ARTICLE 89F...

IV. Within a period not exceeding 220 days from the date following the publication of the resolution initiating the review in the Diario Oficial de la Federación, the Ministry shall issue the final resolution, whereby it may:

a. Decide to extend the countervailing duty in effect for another five years following the date on which the duty lapses. In so deciding, the Ministry may modify the amount thereof;

The Panel is not aware of the reason why Mexico chose to include among the actions possible during a sunset review the modification of an AD/CVD duty. We also are not aware whether Mexico, in the 82 sunset reviews it has conducted to date, ever changed such a duty. Such an aspect of a sunset review certainly does not follow from the WTO Anti-Dumping Agreement, which required the conduct of sunset reviews every five years and that led WTO Members, including the Parties to the NAFTA, to modify their laws to authorize the conduct of sunset reviews. Mexico has created a version of sunset reviews that includes one element of an annual administrative review. This aberration cannot transform what in all significant respects is a sunset review, not listed in Annex 1911, into an annual review, which is so listed.

As previously stated, the differences between these two types of final determinations are striking. An annual review decides new individual AD or CVD duties for each interested exporter that requests the review. That is its single and sole purpose. This review could be initiated at the request of an interested party or by the Authority on its own motion, although the practice is that generally annual reviews are initiated at the request of an interested party. In the Panel's opinion, the reference in Article 68 of the FTA to the term "ex officio" means only that the Ministry may initiate an administrative review on its own motion at any time (self-initiate), rather than waiting to open a review based upon a request from an interested party for a change. The phrase refers to the timing of the action, not its nature.

A sunset review, on the other hand, is initiated in the case of Mexico by the Authority on its own motion as long as the national industry has previously expressed their interest in such review. In the case of the United States, legislation authorizes initiation either at the request of an interested person or ex officio by the Department of Commerce (the Panel takes note that by regulation all sunset reviews in the United States are initiated ex officio, that is, self-initiated), every five years. Its crucial purpose is to assess whether, if the existing AD/CVD proceeding is ended, dumping or subsidization will continue, or whether the national industry will continue to be harmed by such dumping or subsidization. This is a specialized determination that takes account of completely different data to reach its result than an annual review, which looks at the actual rate of dumping or subsidization to determine what amount of AD/CVD duties should be charged to the exporter/importer until the next annual review is requested. The inclusion in Mexico's implementation of sunset reviews of one element of an annual review no more converts sunset reviews into annual reviews than the ability of an original investigation to impose AD/CVD duties makes that activity into an annual review. Each of these final determinations has a specific purpose and a specific benchmark that authorizes the agency to take action.

C. Implementation of NAFTA Article 1904 by the FTA

In Mexico, the judicial review of anti-dumping and countervailing duty determinations is provided for in the FTA. Specifically, Article 94 of the FTA indicates the situations in which the recurso de revocación (appeal for reversal) and the juicio contencioso administrativo o de nulidad (annulment procedure) before the Federal Tribunal of Fiscal and Administrative Justice are proper.

ARTICLE 94 - An appeal for reversal through administrative channels may be filed regarding resolutions:

- I. Concerning the marking of the country of origin or the refusal to issue prior licenses or allow participation in import or export quotas;*
 - II. Concerning certification of origin;*
 - III. Declaring the rejection or abandonment of the request for initiation of investigation proceedings as referred to in Article 52, paragraphs (II) and (III);*
 - IV. Declaring the investigation terminated without imposition of a compensating duty pursuant to Article 57, paragraph (III) and Article 59, paragraph (III);*
 - V. Fixing final compensating duties or the acts by which they are implemented;*
 - VI. Responding to requests by the interested parties pursuant to Article 60;*
 - VII. Declaring the investigation terminated pursuant to Article 61;*
 - VIII. Rejecting a request for review or concluding the review referred to in Article 68, as well as confirming, modifying or revoking final compensating duties, referred to in the same Article;*
 - IX. Declaring the investigation referred to in Article 73 concluded or terminated; and*
 - X. Imposing the penalties referred to in this Act.*
- Appeals for reversal of resolutions regarding certification of origin and the acts by which final compensating duties are implemented shall be filed with the Ministry of Treasure and Public Credit. All other such appeals shall be filed with the Ministry.*

Subsection III of Article 94 refers to the determinations that reject the unfair practices investigation request; subsection IV refers to determinations that conclude an unfair practices investigation in the preliminary or final stage without imposing a compensating duty; subsection V refers to determinations imposing compensating duties; subsection VI

refers to determinations regarding scope reviews; subsection VII refers to determinations that end in a settlement proceeding; subsection VIII refers to determinations that reject or conclude an administrative annual review, and Subsection IX refers to determinations that conclude an investigation through a price settlement.

It is evident that Article 94 does not create the possibility to challenge sunset reviews through the recurso de revocación and juicio contencioso administrativo o de nulidad, even though sunset reviews were already provided for by the FTA and, when NAFTA became effective, neither the U.S. nor the Canadian legislation provided for sunset reviews.

Additionally, taking into consideration the definitions of NAFTA Annex 1911, the Mexican legislation indicated in Article 97 of the FTA the kind of determinations subject to binational panel review.

“ARTICLE 97 - Regarding the determinations and acts referred to in Article 94, paragraphs IV, V, VI, and VIII, any interested party may choose to resort to the alternative dispute settlement mechanisms concerning unfair practices provided for in the international treaties and trade agreements to which Mexico is a party. If such mechanisms are chosen:

I. Neither the appeal for reversal provided for in Article 94, nor proceedings instituted before the Upper Chamber of the Federal Tax and Administrative Court against said determinations or against the Ministry's determination issued as a result of the decisions emanating from said alternative mechanisms shall be admissible, and it shall be understood that the interested party that resorts to such an option accepts the resolution stemming from the alternative dispute settlement mechanism;

II. Only the resolution issued by the Ministry as a result of the decision emanating from the alternative mechanisms shall be considered final;

III. The provisions of Article 238 of the Federal Tax Code shall apply.

We can see from these provisions that sunset reviews were not included within the determinations subject to alternative dispute settlement mechanisms such as the binational panel review provided by NAFTA Article 1904, given the fact that article 94 does not refer to sunset reviews and, thus, article 97 could not refer to them either. In the event that an interested party wanted to challenge the determination of a sunset review, the proper procedure would be the juicio de amparo.

Proof of this statement is the fact that sunset reviews were included in the FTA published on July 27, 1993, before NAFTA became effective on January 1, 1994. In this regard, it is important to emphasize that before NAFTA became effective, the Parties ensured that all the agreements reached in NAFTA Chapter XIX were fulfilled in order for this mechanism to properly function once NAFTA became effective. In this regard, in the case of Mexico, before the enactment of the FTA, consultations with U.S. and Canadian representatives were carried out in order for them to verify whether both the FTA law and its regulation complied with the agreements contained in the NAFTA, or otherwise, to propose the pertinent modifications. This law included the text of article 70, which established sunset reviews, article 94, which established the determinations subject to recurso de revocación and juicio contencioso administrativo o de nulidad (judicial review), and article 97, which established the determinations subject to binational panel review. Articles 94 and 97 did not include sunset review determinations. The Panel is advised by the Investigating Authority, on behalf of the Government of Mexico³, that there were no objections by the U.S. or Canadian representatives regarding which determinations should be subject to the binational panel review provided for NAFTA Chapter 19. This fact is further support for the conclusion of the Panel that it was not the intention of the negotiators for Mexico to include sunset reviews among the determinations subject to NAFTA Chapter 19 binational panel review..

³ See Submission of Investigating Authority dated 29 Sept. 2005, Doc. No.ISMSTLC-2005-J-0747, *Presentación de copia de la notificación a los gobiernos de los Estados Unidos de América y Canadá de la iniciativa para reformar la Ley de Comercio Exterior, en cumplimiento a lo solicitado por el Panel durante la audiencia incidental celebrada el 22 de septiembre de 2005.*

Furthermore, the Rules of Procedure for Article 1904 of NAFTA Chapter 19, which in the case of Mexico were published on June 20, 1994, and were negotiated after the enactment of the FTA, particularly Rule of Procedure 34(1)(d), establishes that in the case of Mexico a request for panel review must be made in accordance with Articles 97 and 98 of the FTA.

34. (1) A Request for Panel Review shall be made in accordance with the requirements of

- (a) section 77.011 or 96.21 of the *Special Import Measures Act*, as amended, and any regulations made thereunder;
- (b) section 516A of the *Tariff Act of 1930*, as amended, and any regulations made thereunder;
- (c) section 404 of the United States *North American Free Trade Agreement Implementation Act* and any regulations made thereunder; or
- (d) articles 97 and 98 of the *Ley de Comercio Exterior* and its regulations.

Rule 34 is further proof that the Parties recognized that in the case of Mexico a request for binational panel review under NAFTA Article 1904 is proper only for the determinations indicated in article 97 of the FTA, which does not contain any mention of sunset reviews.

Further evidence of the intent of Mexico to exclude sunset reviews from binational panel review is the fact that the amendments to the FTA of March 13, 2003, which modified Articles 94 and 97, excluded sunset reviews from review through dispute settlement mechanisms. From the 2003 amendments, the text of article 94 of the FTA establishes that the recurso de revocación may be instituted against the following determinations:

- I. Concerning the marking of the country of origin or the refusal to issue prior licenses or allow participation in import or export quotas;*
- II. Concerning certification of origin;*
- III. Declaring the rejection or abandonment of the request for initiation of investigation proceedings as referred to in Article 52, paragraphs (II) and (III);*
- IV. Declaring the investigation terminated without imposition of a countervailing duty pursuant to Article 57, subsection (III) (WHEN THERE IS INSUFFICIENT EVIDENCE OF DUMPING, OR THE*

ALLEGED INJURY OR OF THE CAUSAL RELATION BETWEEN THEM) and Article 59, subsection (III) (CONCLUSION OF THE INVESTIGATION WITHOUT IMPOSING ANTIDUMPING OR COUNTERVAILING DUTIES);

V. Fixing final countervailing duties or the acts by which they are implemented;

VI. Responding to requests by the interested parties pursuant to Article 60;

VII. Declaring the investigation terminated pursuant to Article 61 (Conciliatory Hearing);

VIII. Rejecting a request for review or concluding the review referred to in Article 68, as well as confirming, modifying or revoking final countervailing duties, referred to in the same Article (Annual Review);

IX. Declaring the investigation referred to in Article 73 concluded or terminated (Price Compromise);

X. Declaring the investigation referred to in Article 89B concluded (Circumvention);

XI. Concluding the investigation referred to in Article 89F, subparagraph IV (Sunset Reviews); and

XII. Imposing the penalties referred to in this Act.

According to the above provisions, amended Article 94 establishes that sunset review determinations are subject to review only through the recurso de revocación.

In turn, while the second paragraph of Article 97 of the FTA was modified, the first paragraph was left undisturbed and, therefore, the exclusion of sunset review determinations from the Chapter 19 binational panel review was maintained. The current text of Article 97 reads as follows:

“ARTICLE 97 - Regarding the determinations and acts referred to in Article 94, paragraphs IV, V, VI, and VIII, any interested party may choose to resort to the alternative dispute settlement mechanisms concerning unfair practices provided for in the international treaties and trade agreements to which Mexico is a party. If such mechanisms are chosen:

I. Neither the appeal for reversal provided for in Article 94, nor proceedings instituted before the Federal Tax and Administrative Court against said determinations or against the Ministry's determination issued as a result of the decisions emanating from said alternative mechanisms shall be admissible, and it shall be understood that the interested party

that resorts to such an option accepts the resolution stemming from the alternative dispute settlement mechanism;

II. Only the resolution issued by the Ministry as a result of the decision emanating from the alternative mechanisms shall be considered final;

III. The provisions of Article 238 of the Federal Tax Code shall apply.

From the above, it can be seen that even though the FTA provides that the *recurso de revocación* is proper in the case of a sunset review, the same law establishes as well the precise cases in which the alternative dispute settlement mechanisms provided for in international trade treaties are proper. According to this law, the determinations that can be subject to alternative dispute settlement mechanisms are:

- Determinations that CONCLUDE AN INVESTIGATION without imposing a countervailing duty (article 59 subsection III) or when there is not enough evidence of price discrimination or dumping, of the alleged injury or of the causal relation between them (article 57 subsection III).
- Determinations that determine definitive countervailing duties or the acts that apply said duties.
- Determinations that decide the requests referred to in article 60 (repealed article which referred to scope reviews)
- Determinations that reject or conclude the requests referred to in article 68 (annual reviews) as well as the determinations that confirm, modify, or revoke definitive compensatory duties regarding the same article (Art. 68)

Sunset reviews clearly (Art. 94, subsection XI) are excluded from Article 97 and, thus, from NAFTA Chapter 19 binational panel review.

D. Relevance of NAFTA Articles 1902 and 1903

NAFTA Article 1902 establishes the obligation of the Parties to notify the remaining Parties of any amendment to its legislation and to carry out consultations, prior to the amendment's approval, if consultations are requested by any Party in order to verify that the amendments are compatible with the GATT, the WTO Agreements, and the object and purpose of NAFTA. In accordance with NAFTA Article 1902, the 2003 amendments to the FTA were also notified to the NAFTA parties. As previously noted, there were no objections on behalf of the other Parties. If the Parties considered that the amendments did not fulfill the agreements, they could exercise the actions provided for in NAFTA Article 1903 in order for a panel to declare whether or not the amendments are incompatible with these agreements. If the panel finds incompatibility, the Parties must seek a mutually satisfactory solution.

It is necessary to emphasize that Article 1902.2 of the Treaty confirms that the Parties are free to amend their AD/CVD laws so long as such amendments are consistent with the GATT, the WTO, and with the NAFTA. In determining whether the amendment is consistent with "the object and purpose" of the NAFTA and particularly of Chapter 19, as required by Article 1902.2(d)(ii), the Article requires that "such object and purpose" be determined by analyzing "the provisions of this Agreement, its preamble and objectives, and the practices of the Parties." In other words, Article 1902.2 does not create a new "object and purpose" by which amending legislation of the Parties is to be judged, but instead confirms that existing provisions and practices must be used to determine whether an AD/CVD amendment is consistent with the NAFTA's object and purpose. The Panel has addressed all contentions based upon other provisions of the Agreement or practices of the Parties. The Panel is instructed by Article 1902's terms that consideration of these other provisions is all that is required to decide that Mexico's amendments to the LCE are consistent with Article 1902.2.

For greater clarity the text of NAFTA article 1902 follows:

Article 1902: Retention of Domestic Antidumping Law and Countervailing Duty Law

1. Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Party. Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents.

2. Each Party reserves the right to change or modify its antidumping law or countervailing duty law, provided that in the case of an amendment to a Party's antidumping or countervailing duty statute:

(a) such amendment shall apply to goods from another Party only if the amending statute specifies that it applies to goods from that Party or from the Parties to this Agreement;

(b) the amending Party notifies in writing the Parties to which the amendment applies of the amending statute as far in advance as possible of the date of enactment of such statute;

(c) following notification, the amending Party, on request of any Party to which the amendment applies, consults with that Party prior to the enactment of the amending statute; and

(d) such amendment, as applicable to that other Party, is not inconsistent with

(i) the General Agreement on Tariffs and Trade (GATT), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Antidumping Code) or the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code), or any successor agreement to which all the original signatories to this Agreement are party, or

(ii) the object and purpose of this Agreement and this Chapter, which is to establish fair and predictable conditions for the progressive liberalization of trade between the Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices, such object and purpose to be ascertained from the provisions of this Agreement, its preamble and objectives, and the practices of the Parties.

If a Party's interests were affected by the terms of this article, this Party would have recourse to Article 1903 in order to safeguard its rights. Article 1903 reads as follows:

Article 1903: Review of Statutory Amendments

1. A Party to which an amendment of another Party's antidumping or countervailing duty statute applies may request in writing that such amendment be referred to a binational panel for a declaratory opinion as to whether:

(a) the amendment does not conform to the provisions of Article 1902(2)(d)(i) or (ii); or

(b) such amendment has the function and effect of overturning a prior decision of a panel made pursuant to Article 1904 and does not conform to the provisions of Article 1902(2)(d)(i) or (ii).

Such declaratory opinion shall have force or effect only as provided in this Article.

2. The panel shall conduct its review in accordance with the procedures of Annex 1903.2.

3. In the event that the panel recommends modifications to the amending statute to remedy a non-conformity that it has identified in its opinion:

(a) the two Parties shall immediately begin consultations and shall seek to achieve a mutually satisfactory solution to the matter within 90 days of the issuance of the panel's final declaratory opinion. Such solution may include seeking corrective legislation with respect to the statute of the amending Party;

(b) if corrective legislation is not enacted within nine months from the end of the 90day consultation period referred to in subparagraph (a) and no other mutually satisfactory solution has been reached, the Party that requested the panel may

(i) take comparable legislative or equivalent executive action, or

(ii) terminate this Agreement with regard to the amending Party on 60day written notice to that Party.

In the case of the amendments of March 13, 2003, neither Canada nor the United States objected to the amendments or exercised the action provided by NAFTA Article 1903. We believe the Panel is justified in concluding from this lack of objection that the exclusion of sunset reviews from the binational panel review provided for in Article 97 is compatible with the Mexican definition of the term “final determination” established in NAFTA Annex 1911, and therefore sunset review determinations are not subject to the binational panel review provided for in NAFTA Article 1904.

Furthermore, the NAFTA Rules of Procedure for Article 1904, which in Mexico’s case were published on June 20, 2004. and negotiated after the FTA’s enactment, particularly Rule of Procedure 34(1)(d) (the text of which is set out below), establishes that in the case of Mexico, a request for panel review must be made in accordance with Articles 97 and 98 of the FTA:

34. (1) A Request for Panel Review shall be made in accordance with the requirements of

- (a) section 77.011 or 96.21 of the *Special Import Measures Act*, as amended, and any regulations made thereunder;
- (b) section 516A of the *Tariff Act of 1930*, as amended, and any regulations made thereunder;
- (c) section 404 of the *United States North American Free Trade Agreement Implementation Act* and any regulations made thereunder; or
- (d) articles 97 and 98 of the *Ley de Comercio Exterior* and its regulations.

This means that the Parties recognized that in the case of Mexico the request for binational panel review, according to NAFTA article 1904, is proper only for the determinations indicated in article 97 of the FTA, which does not contain any mention of sunset reviews and, thus, they are excluded from binational panel review.

The amended Article 97 of the FTA stipulates the following (the text amended on March 13, 2003, has been underlined):

“ARTICLE 97 - Regarding the determinations and acts referred to in Article 94, paragraphs IV, V, VI, and VIII, any interested party may

choose to resort to the alternative dispute settlement mechanisms concerning unfair practices provided for in the international treaties and trade agreements to which Mexico is a party. If such mechanisms are chosen:

I. Neither the appeal for reversal provided for in Article 94, nor proceedings instituted before the Federal Tax and Administrative Court against said determinations or against the Ministry's determination issued as a result of the decisions emanating from said alternative mechanisms shall be admissible, and it shall be understood that the interested party that resorts to such an option accepts the resolution stemming from the alternative dispute settlement mechanism;

II. Only the resolution issued by the Ministry as a result of the decision emanating from the alternative mechanisms shall be considered final;

III. The provisions of Article 238 of the Federal Tax Code shall apply.

If the intention of the NAFTA negotiators had been to include sunset review determinations within the determinations subject to binational panel review, they would have done so expressly, or otherwise, they would not have specified in such detail the determinations subject to binational panel review pursuant to NAFTA article 1904, and instead would have utilized more general language indicating that any resolution determining antidumping or countervailing duties would be subject to bi-national panel review. However, the language utilized by the NAFTA negotiators was very precise and it restricted binational panel review only to the cases provided for in the NAFTA text. This is also the reason why the anti-dumping or countervailing duties imposed through other procedures, such as the anti-circumvention procedure, are not subject to binational panel review in the United States or Mexico, despite the fact that determinations under these procedures do indeed result in imposition of duties. To assume that sunset review determinations are subject to binational panel review would also imply that anti-circumvention determinations would be subject to binational panel review. As noted earlier, if this were the intention, it would have been easier for the NAFTA negotiators to have utilized very general language embracing every determination imposing antidumping and countervailing duties. In short, the NAFTA negotiators employed very

precise language because they intended to include only the determinations expressly indicated.

The fact that the United States and Canada included sunset review determinations within the scope of binational panel reviews does not imply that Mexico should follow suit. It is likely that the United States and Canada included sunset review determinations due to their legislative technique while implementing the Uruguay Round Agreements, incorporating sunset reviews into articles that were already included within their NAFTA definition of final determination. This is irrelevant in the case of Mexico considering that sunset reviews were already provided for in the Mexican FTA before the signing and entry into force of the Uruguay Round Agreements.

As an illustration, in the case of the United States, article 1911 subsection III, which defines the term “final determination,” includes Section 751 of the Tariff Act of 1930. When the NAFTA became effective this Act only referred to administrative annual reviews and change of circumstances reviews. However, as a result of the commitments agreed upon in the Uruguay Round, the U.S. legislature decided to include sunset reviews in paragraph (c) of this Act (while paragraph (a) refers to annual reviews and paragraph (b) refers to change of circumstances reviews). The text of Section 751 reads as follows:

“Section 751. Administrative Reviews of Determinations

(a) Periodic Review of Amount of Duty.-

.....

(b) Reviews Based on Change of Circumstances.-

.....

(c) Five Year Review.-

...”

Given the fact that the determinations provided for in Section 751 are subject to binational panel review, because this section is expressly indicated in NAFTA, the amendment to this section adding sunset reviews makes sunset review determinations automatically subject to the NAFTA Article 1904 binational panel review process. This

inclusion of sunset reviews was not as a result of a commitment agreed upon in NAFTA, because this review did not even exist in the U.S legislation at that time.

It cannot be considered that the definition provided for in NAFTA Annex 1911(c)(i) in the case of Mexico includes sunset review determinations, because these determinations are based on Article 70 of the FTA, which cannot be considered a successor to Article 13 of the FTA implementing Article 131 of the Mexican Constitution. Furthermore, with the enactment of the FTA in 1993, after consultations, the NAFTA parties tacitly recognized the exclusion of sunset review determinations from binational panel review.

As a conclusion and in order to further clarify our opinion, we find proper to mention the case of scope reviews in the Mexican legislation. With the controlling treaty language in mind, we note the existence of a clerical error in the 2003 amendments to the LCE, which does not apply to this review begun in 2000. The amendment drafters transferred the scope (product coverage) provisions of Section 60 to new Section 89A and repealed Section 60. However, the drafters apparently failed to change the reference to the former Section 60 in the new Section 94(VI). Section 94 describes those AD/CVD actions that are eligible for Recurso de Revocacion before the Secretary of the Economy. This omission in turn affects the meaning of Section 97, which lists the actions subject to Chapter 19 review by referring to certain subsections of Section 94, including the erroneous Section 94(VI).

If this Panel's task were to determine whether scope reviews were subject to binational panel review, despite this clerical error, the treaty language alone would quickly answer the question in the affirmative. There would be no need even to refer to the LCE, which the Parties did not mention in the treaty's definition of scope reviews and whose description in the treaty is clear and unambiguous.

If the Panel nonetheless wished to decide whether there was a conflict between the treaty and other Mexican law, we would be justified, because of the ambiguity created by this clerical error, in using the general legal principles that Mexico's courts would apply to

determine whether Mexico intended that scope reviews would continue to be subject to binational panel review under the LCE. In doing so, the Panel would have little difficulty filling this legal gap by concluding that the drafters did not intend to violate the clear language of the treaty by eliminating in 2003 the eligibility of scope reviews provided by the 1993 LCE from both Recurso de Revocacion and from binational panel review.

From the fact that scope reviews should continue to be eligible for binational panel review, despite the clerical error⁴, the Panel may not properly reason that sunset reviews also should be eligible for binational panel review. The fact that sunset reviews under Mexican law may, in addition to accomplishing their primary purpose, also change an AD/CVD duty, does not mean that sunset reviews somehow can be fit within the language of Article 94(V) or Article 94(VIII) and that the Panel should read these subsections as giving the Panel competence.

We note again our view that sunset reviews are not listed in the treaty among Mexico's definition of the final determinations subject to binational panel review. We find no ambiguity, obscurity, or absurdity in this plain reading of the literal language of the treaty. The three actions listed are clear, and each is substantially different from a sunset review. This language is controlling.

VII. BINATIONAL PANEL DECISION

Based on NAFTA Article 1904, Annex 1911, and Articles 59, 68, 70, 89, 89(A), 89(B), 89(D) and 89(F) of the FTA and In light of the reasons stated above this binational panel decides that it lacks competence to review the final determination of the examination to determine the consequences of revocation of the final antidumping duties imposed on imports of liquid caustic soda, originated from the United States of America,

⁴ It is proper to mention that Article 94.V of the FTA was amended on January 24, 2006, to correct the erroneous reference to Article 60 changing it for the correct reference to Article 89A.

notwithstanding its country of origin, in accordance with article 1904 of the North American Free Trade Agreement.

This decision resolves the competence issue regarding the present Binational Panel, and since this panel has declared its incompetence to review the sunset review determination challenged by CANAJAD, the present decision concludes this binational panel's task. Consequently, this decision is final and definitive.

By this means I certify that this decision was issued in Mexico City, United States of Mexico, on July 13, 2006.

Signed in the original by

Stephen J. Powell
Stephen J. Powell

July 1st. 2006.
Date

Gustavo Uruchurtu Chavarín
Gustavo Uruchurtu Chavarín

July 13, 2006.
Date

Leonel Pereznieto Castro
Leonel Pereznieto Castro
Presidente.

July 10, 2006.
Date

DISSENTING VOTE OF THE MINORITY COMPOSED OF PANELISTS DALE BECK FURNISH AND LUIS GUSTAVO ARRATIBEL SALAS, MEMBERS OF THE BINATIONAL PANEL INSTALLED FOR THE PURPOSE OF REVIEWING THE FINAL RESOLUTION OF THE EXAMINATION TO DETERMINE THE CONSEQUENCES OF THE SUPPRESSION OF THE DEFINITIVE COUNTERVAILING DUTY LEVIED ON IMPORTS OF LIQUID CAUSTIC SODA, ORIGINATING FROM THE UNITED STATES OF AMÉRICA, INDEPENDENT OF ANY COUNTRY OF PRIOR ORIGIN, IN CONFORMITY WITH ARTICLE 1904 OF THE NORTH AMERICAN FREE TRADE AGREEMENT, CASE NUMBER: **MÉX.-USA-2003-1904-01.**

MOTION BY THE MEXICAN (INVESTIGATING) INVESTIGATIVE AUTHORITY IN WHICH IT SEEKS A DECLARATION OF LACK OF JURISDICTION IN THIS BINATIONAL PANEL TO REVIEW THE FINAL RESOLUTION FOR WHICH IT WAS CONSTITUTED.

This minority dissents from the resolution set out in the order issued by the majority of the members of this Binational Panel. The majority grants the motion before us, with the effect of denying jurisdiction to carry out the procedure of binational review sought by the Mexican *Cámara Nacional de Aceites, Grasas, Jabones y Detergentes* (CANAJAD) with respect to the five-year sunset review and final determination of the *antidumping* investigation of imports of Caustic Soda, under the customs classification 2815.12.01 of the [tariff schedule] *Tarifa de la Ley de los Impuestos Generales de Importación y de Exportación*, published in the *Diario Oficial Federal* for 6 June 2003. Procedurally the decision conforms to Rule 71(1) of the Rules of Procedure for Article 1904 of NAFTA, under which the majority finds that this review is improper and cannot proceed, since the final determination at issue here—one that resulted from a five-year sunset review—does not fall within those final determinations properly within the jurisdiction of this H. Binational Panel, as contemplated in the catalog of final determinations specified in NAFTA, Annex 1911 for Mexico.

We offer in support of our minority vote the following reasons of law, policy and fact.

I.- According to Articles 31 and 32 of the Vienna Convention on the Law of Treaties, interpretation of treaties must take into account their context, intentions, objectives and fundamental changes of circumstances. In addition, the treaty should be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

NAFTA Article 102(1)(e), states as one of the primary “objectives” of the NAFTA, the creation of more efficient procedures for the application of and compliance with the treaty, for its joint administration and for the resolution of disputes.

NAFTA Article 1904 makes it clear that all countervailing duty decisions should be submitted to binational arbitration under Chapter 19. NAFTA § 1904, entitled “**Article 1904: Review of Final Antidumping and Countervailing Duty Determinations,**” states in its subsection (1), “As provided in this Article, each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review.” The intention and purpose of the NAFTA seems clear: in general, all final countervailing duty determinations by any of the three Parties should be subject to binational panel review.

Binational Panel review of any Mexican determination must proceed under and apply Mexican national law, as referenced in Annex 1911 Mexico. Mexico’s applicable statute is the *Ley de Comercio Exterior* (LCE), promulgated in 1993 to replace the *Ley Reglamentaria del Artículo 131 de la Constitución*, the law in effect at the time that the parties negotiated and drafted NAFTA. The LCE as it stood at the outset of the Caustic Soda review, initiated in year 2000, applies here.¹

¹ The amendments to the LCE introduced in 2003 include a transitory article 3 that specifies that all actions in process at the time of the 2003 amendments “shall be resolved under the terms of the LCE of 1993 as published in the Diario Oficial . . .” Article 97 of the LCE states which final determinations shall be subject to binational review.

In their Annex to NAFTA Article 1911, each of the NAFTA countries defines the meaning of certain terms used in drafting the NAFTA as those terms apply in their national context. Mexico's Annex 1911(c) defines the meaning within Mexico's system of the term "final determination." That definition takes on essential importance to our deliberations here since that is the type of determination subject to binational review through the alternative dispute resolution mechanisms contemplated by NAFTA Chapter 19 and Article 1904.

When Mexico drafted its national Annex to NAFTA Article 1911, it cited the only kinds of "final determination" of countervailing duties that existed in its legislation at that time under the *Ley Reglamentaria del Artículo 131 de la Constitución*.² Thus, Mexico's annexes repeat and apply the general intention and purpose to submit all antidumping and countervailing determinations emanating from the Mexican authority, as they existed at the time of the NAFTA's entry into force, to binational panel review. Quite logically, the Mexican Annex to NAFTA Article 1911 did not include a reference to the determinations resulting from five-year sunset reviews of countervailing duty determinations, since no such procedures existed in Mexican legislation at that time, nor in the legislation of the other Parties to NAFTA.

² Mexico's Annex 1911(c) specifically defined "final determination" for purposes of Article 1904(1) as including:

- (i) a final resolution regarding antidumping or countervailing duties investigations by the Secretaría de Comercio y Fomento Industrial pursuant to Article 13 of the Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior, as amended;
- (ii) a final resolution regarding an annual administrative review of antidumping or countervailing duties by the Secretaría de Comercio y Fomento Industrial, as described in paragraph (o) of its Schedule to Annex 1904.15. . .

Nonetheless, utilizing the definition of “final determination” set out in subsection (c)(ii) of Mexico’s 1911 Annex, here cited, it appears that its reference to those final determinations that resolve annual ex officio reviews of countervailing duties could and should include the determinations that resolve five-year sunset reviews, for the following reasons:

a) That conclusion springs from the terms of the *Ley de Comercio Exterior* (Mexico’s Law of Foreign Trade, or LCE), Article 70, subsections (I) and (II), which prohibit the initiation of a five-year sunset review if an annual review, either ex officio or upon request, has begun:

b)

Article 70. Established countervailing duties shall be eliminated at the end of five years, from the date that they enter into effect, unless before such period has run, the Secretariat [of Economy] has commenced:

(I). An annual review shall be commenced upon the request of an interested party or ex officio, in which there shall be analysis of price discrimination [relevant to dumping] or the amount of subsidies, as well as of injury.

(II). An ex officio review of the effect of the countervailing duty, to determine whether the removal of the countervailing duty would result in continuation or repetition of unfair trade practices . . .³

³ In the original Spanish, the provisions read,

Artículo 70. Las cuotas compensatorias definitivas se eliminarán en un plazo de cinco años, contados a partir de su entrada en vigor, a menos que antes de concluir dicho plazo la Secretaría haya iniciado:

I.- Un procedimiento de revisión anual a solicitud de parte interesada o de oficio, en el que se analice tanto la discriminación de precios o monto de las subvenciones, como el daño.

II.- Un examen de vigencia de cuota compensatoria de oficio, para determinar si la supresión de la cuota compensatoria daría lugar a la continuación o repetición de práctica desleal.

The law's provisions prohibit the initiation of a five-year sunset review at the same time as an annual review, since the same study of countervailing duties contemplated for an annual review would be carried out in a five-year sunset review. That is, whenever an annual or ex officio review of countervailing duties undertakes to resolve the fundamental question of whether dumping exists, the five-year sunset review of the same issue may not be undertaken, since it would duplicate the ongoing annual review. This is particularly true in Mexico where the five-year sunset review does not restrict itself to either continuing or terminating an existing countervailing duty (as in Canada and the United States), but also contemplates the possibility of modifying the amount of that duty.⁴

c) Our common classification of determinations that resolve an annual ex officio review of countervailing duties with those that resolve five-year sunset reviews derives from our application of the contents of NAFTA

Mexico Annex 1911(c)(ii), as read in conjunction with Annex 1904.15(o).⁵ Read together, as they must be, those provisions validate the jurisdiction of this Binational Panel.

⁴ See LCE, Art. 89F.

⁵ Mexico's Annex 1904.15(o) states: Mexico shall amend its antidumping and countervailing duty statutes and regulations, and other statutes and regulations to the extent that they apply to the operation of the antidumping and countervailing duty laws, to provide the following:

(o) the right to an annual individual review on request by the interested parties through which they can obtain their own dumping margin or countervailing duty rate, or can change the margin or rate they received in the investigation or a previous review, reserving to the competent investigating authority the ability to initiate a review, at any time, on its own motion and requiring that the competent investigating authority issue a notice of initiation within a reasonable period of time after the request;

We should not lose sight of the fact that Annex 1911(c)(ii) and Annex 1904.15(o) are not limited to those determinations that resolve annual reviews of countervailing duties, but also apply to those final determinations that resolve ex officio reviews that the Mexican Investigating Authority may initiate “at any time.” The latter category includes five-year sunset reviews of countervailing duties by the literal language of Annex 1911(c)(ii) and Annex 1904.15(o). The first provides for review of any “final resolution regarding an annual administrative review of antidumping or countervailing duties by the *Secretaría de Comercio y Fomento Industrial*, as described in paragraph (o) of its Schedule to Annex 1904.15.” When we turn to the latter, we find that it provides for “annual individual review on request by the interested parties . . . reserving to the competent investigating authority the ability to initiate a review, at any time, on its own motion,” which clearly could and would include five-year sunset reviews.

The basic inquiry is the same in those determinations that resolve annual reviews, ex officio reviews and five-year sunset reviews: whether or not dumping exists, as demonstrated by the provisions of LCE Article 70(I) and (II).

So long as the basic inquiry that they carry out and resolve is the same, it has no relevance for our binational jurisdiction that the administrative procedure, carried out by the Secretary of Economy to decide whether a countervailing duty should continue and at what level, may occur as an annual review, a review at any time, or as a five-year review.

If we do not accept jurisdiction of this review, our denial causes a rupture in the application of NAFTA, since both Canada and the United States do submit their five-year sunset reviews to binational arbitration under NAFTA Chapter 19. In fact, the majority decision leaves a single discrepancy in the three countries' application and practice under the NAFTA. In every other particular, the countries are consistent in allowing binational Chapter 19 review of their national determinations affecting countervailing duties. Only with respect to Mexican five-year sunset reviews—or more especially, to this Mexican sunset review of Caustic Soda duties—would binational Chapter 19 review be unavailable.⁶

We believe that Mexico had every intention to follow the example of its partners in the NAFTA, but did not do so with language as clear as theirs, opening the possibility for its Investigating Authority to allege the lack of jurisdiction here resolved on a split vote.

II.- This minority considers it necessary to reiterate the fundamental premise that nowhere in their treatment of unfair practices and countervailing duties do the provisions of the former *Ley Reglamentaria del Artículo 131 de la Constitución* nor the current LCE provide a basis for concluding that a Binational Panel lacks jurisdiction to review a determination that resolves a five-year sunset review.

⁶ None of the three countries permit review of their determinations in anti-circumvention proceedings. Such proceedings, however, do not determine the presence of injury, nor the level of subsidy or dumping to be offset by countervailing duties. Anti-circumvention proceedings accept the countervailing duty without question, and turns its inquiry to whether parties have attempted to evade that duty. Anti-circumvention procedure fulfills a police activity, rather than an administrative activity. It is notable that the three countries agree that binational review should not apply to anti-circumvention decisions.

NAFTA in its Article 1904 and in its Annex 1911 for Mexico, both cited here, defines a clear intention and purpose to submit to Binational Panels under Chapter 19 all final determinations regarding countervailing duties to offset dumping or subsidies. At the moment those dispositions were drafted sunset reviews did not exist, but given the nature of the determinations that resolve such reviews, they may be classified with other final determinations that fix

countervailing duties. Therefore they fall within the general definition contained in the NAFTA and its Mexican Annexes, faithful to and consistent with the intention and purpose of those provisions.

The Mexican legislation effective for questions of countervailing duties against dumping or subsidies is, as we have said, the LCE. In the NAFTA, drafted before 1993, Annex 1911 for Mexico refers to the *Ley Reglamentaria del Artículo 131 de la Constitución*, in effect when NAFTA was drafted, “as amended.” Afterwards, the LCE abrogated the *Ley Reglamentaria*. The *Ley Reglamentaria* made no reference whatever to either five-year sunset reviews nor to reviews of continuing effectiveness, since neither existed at the time.

In its original version, in 1993, the LCE contemplated in its Article 59 the imposition of countervailing duties in cases of international trade goods imported under conditions of unfair trade practices. Initially, the LCE referred to five-year reviews in its Article 70. When it was subject to wholesale amendment in 2003, the LCE added Articles 70A y 70B, referring to sunset reviews, to harmonize the LCE with the GATT Convention on Application of Article VI (1994) and the sunset reviews instigated by the

WTO and the Uruguay Round (1994). Between 1993 and the amendments of 2003, no amendment touched LCE Article 94, the LCE provision that specifies those determinations subject to administrative appeal and revocation within the Mexican national system.

We must presume that final determinations in sunset reviews under LCE Article 70, as it stood until the reforms of 2003, were subject to appeal and review within the Mexican national system by the language of Article 94 (V), which provided for such appeal from “those determinations . . . that set definitive countervailing duties or those acts that apply them.”⁷ Any other interpretation would have left all LCE Article 70 determinations immune from challenge and review until the 2003 amendments, a clear violation of Mexican constitutional guarantees. Thus, with no interpretive stretch, Article 94(V) would have and should have provided a means to challenge Article 70 determinations.

In Article 97 of the LCE, the law provides that binational jurisdiction under NAFTA Chapter 19 applies in the case of those determinations covered by LCE Article 94(V). Therefore, reading Article 94(V) to include five-year sunset reviews—an appealing application in any case, but inevitable as the means to prevent unconstitutionality in the LCE—we conclude that five-year sunset reviews must be subject to the jurisdiction of this Binational Panel under Mexican law.

⁷ In the original Spanish, Article 94(V) refers to, “las resoluciones . . . que determinen cuotas compensatorias definitivas o los actos que las apliquen.”

The Mexican law stood thus in the year 2000, when the sunset review of Caustic Soda began, leading to the final determination now before this Binational Panel for review. For the reasons set out above, there exists no doubt of our jurisdiction under the Mexican law in force in 2000.

III.- The 2003 reforms to the LCE engendered no observations by either the United States or Canada, as to possible contradictions of the NAFTA, although the new legislation would have been subject to their review for that purpose. The Mexican Investigative Authority supports its case against our jurisdiction by arguing “that silence” implies that Canada and the United States agree that Mexican five-year sunset reviews should fall outside the jurisdiction of Chapter 19 Binational Panels. The unlikely argument fails because in the absence of concrete proof to the contrary it is reasonable that Canada and the United States, both of which submitted their own five-year sunset reviews to Chapter 19 jurisdiction by specific legislation,⁸ simply assumed that Mexico also had done so. There would have been no reason that it would not do so and no language in the LCE that made specific reservation against Chapter 19 for sunset reviews. Especially in light of the organic nature of the 2003 amendments, neither the United States or Canada would have had reason to conjure up an observation against the LCE based on a negative implication against the general language of the new law and the established practice and purpose between the parties.

⁸ *See* United States Tariff Act of 1930, Section 751 as amended; and Canada’s Special Imports Measures Act, Section 53(1) as amended. Both countries Annex 1911 provisions include references to those sections.

At oral argument, the minority panelists asked both counsel for the Investigative Authority and counsel for those other parties supporting its position what possible reason Mexico might have had to exclude five-year sunset review determinations from the jurisdiction of a Binational Panel. No counsel present could offer any reason at all. The only statement they ventured in response was to state that Mexico could have done so if it wished, but this evades the key question. In fact, the oral exchange reveals that no reason—neither political nor legal—exists for denying jurisdiction in this case. The objection to competence of the Binational Panel is no more than a lawyer’s argument, offered in hopes of winning the case on a procedural technicality, which has prevailed on a 3-2 vote. The implications, however, are far reaching and unfortunate. Mexico conducts many five-year sunset reviews of countervailing duties, all of which are immune from binational review, if this panel’s decision is correct.

While the advocates against Chapter 19 jurisdiction could produce no reason against it, there are strong reasons in the principle of reciprocity that support it. Almost certainly, Canada and the United States will be surprised by the majority holding. The three countries parties to NAFTA set up Chapter 19 as an open, inclusive alternative form of review for all final determinations on countervailing duties, by means of Binational Panels. The Mexican law contains no explicit contradiction of this policy in any of its provisions. In the face of such strong and conclusive implication, with no reason to counter and ample reason to support it, this minority is convinced that this Panel is competent to review the final determination presented to it.

IV.- It is clear that the 2003 amendments to the LCE contained defects in drafting, and it would thus be improper for this Panel to support a decision of no competence on the basis of inaccuracies or gaps due to legislative oversight.

Several provisions were added to the LCE that make a specific reference to five-year reviews, or to “sunset reviews.” An entire chapter on “Special Procedures” was added to the LCE, in which Article 89F of the LCE—completely new, in a completely new chapter—introduces the procedures for the sunset review, or five-year review.⁹ Subsequently, Article 94 of the LCE was amended (which refers to the legal basis of the administrative appeal for revocation), in which three new sections were added—IX, X y XI, referring to the new processes implemented as a result of the 2003 amendments, two of which appear in the new chapter designated “Special Procedures”.

This minority dissents from the reasonings put forward in the decision issued by the majority, in which it succinctly indicates that if the intention of Mexico were to replace the domestic judicial review of the final determinations regarding sunset reviews of antidumping or countervailing duties with review by a binational panel, then the amendments to the LCE in 2003, (1) by creating the possibility for sunset review resolutions to be challenged through the administrative appeal for revocation implemented by Article 94 of the LCE, (2) would have made an express reference in Article 97 of the LCE providing that these determinations could be reviewed

⁹ Although, interestingly, in the Mexican process—contrary to the American and Canadian ones, where the countervailing duties are only either confirmed or revoked— the possibility exists to also modify the current duties in the five-year review.

by the Binational Panels implemented in Chapter 19 of NAFTA, as an alternative mechanism of solution of controversies in the area of unfair practices in international trade.

The aforementioned analysis is flawed, because if we applied the same logic used in the majority's decision to the case of Binational Panel competence in the review of final determinations regarding the procedure of "product coverage", we would also have to conclude that the Binational Panels are not competent in that matter, despite an open contradiction with the NAFTA provisions in Mexican Annex 1911(iii), which specifically includes such a determination within Mexico's definitions of "final determination" subject to Chapter 19 binational review.

This unlikely result is due to the following: the 2003 amendments to the LCE did not touch the law's Article 97, which refers to Mexican final determinations subject to challenge or review before the alternative mechanisms of solution of controversies in the matter of unfair practices contained in international trade treaties, such as the Binational Panels implemented in NAFTA Chapter 19. Thus, the provisions in Article 97 of the LCE, which refer to sections IV, V, VI and VIII of LCE Article 94, did not change at all.

The way Article 97 now stands leads to an odd result, since Article 97 section VI refers specifically to Article 60 of the LCE, which was repealed by the 2003 amendments and was replaced by Article 89A of the LCE. Article 60 no longer exists. Under a literal reading of Article 97, final determinations regarding product coverage would also fall outside the scope

of Binational Panel competence after the 2003 amendments to the LCE, because the LCE in section VI of Article 97 does not refer to the new Article 89A of the LCE, but instead only to the repealed Article 60. Such a conclusion, however, would be absurd and quite clearly against the intention of the drafters of the 2003 amendments to the LCE.

All the references in LCE Article 97 remained the same even after other 2003 amendments would seem to have required adjustments in Article 97. They did not take into account any of the additional sections to Article 94 of the amended LCE. The basic problem with Article 97 today is that it neither specifically excludes nor specifically includes sunset reviews from NAFTA binational panel competence. Nevertheless, the implicit effects of Article 97's rules, wide-ranging and obvious, are consistent with an intention in the legislator to include sunset reviews within the competence of a Binational Panel.

This leads to the conclusion that the amendments of March 13, 2003 to the LCE reveal certain technical failures and oversights in the legislative process, and under no circumstances should this panel sustain a decision based on these errors, as the reformed Article 97 is not a trustworthy guide.

V.- III.- In the “RULING OF THE COMMISSION OF COMMERCE AND INDUSTRIAL DEVELOPMENT OF THE CONGRESS OF THE UNION, WITH PROPOSED DECREE THAT AMENDS, ADDS AND REPEALS VARIOUS PROVISIONS OF THE FOREIGN TRADE LAW”, of December 14, 2002, it stated in section EIGHT that: “...It is established that the sunset review procedure of a countervailing duty **will be initiated sua**

sponte by the investigating authority, and establishes clear rules for the offer and submission of evidence during the procedure...”

Article 11.3 of the WTO Antidumping Agreement refers initially to the automatic termination of the countervailing duty, and on the other hand Article 11.2 of the WTO Antidumping Agreement indicates the type of reviews that can be raised annually, of the authorities own initiative or at anytime upon request by any interested party, to examine whether the continued imposition of the antidumping duty is considered necessary, or “whether the injury would be likely to continue or recur if the duty were removed or varied, or both”.

The fact that in the revision of the amendments of the LCE in which sunset reviews of countervailing duties were included, no observation had been made on the part of the U.S. or Canadian representatives, does not imply an intention with “that silence” to consider the determinations of these reviews to be outside the scope of competence of the Binational Panels implemented by NAFTA Chapter 19.

It is necessary to keep in mind that to interpret the text of Annex 1911, and conclude that the Binational Panel is not competent, as in the case before us, would contravene the general principle of law of interpretation that states: “*actus inelligendi sunt potius ut valeant quam ut pereant*”, “in acts and contracts efficiency is favored over inefficiency”.¹⁰

¹⁰ En cuanto al Principio en cita tiene aplicación las tesis siguientes:

This principle is Developer in detail in the following case decisions by the Circuit Court of Appeal for the 1st Circuit, by the Supreme Judicial Court of the Nation, the summaries –properly known as tesis has not been translated:

Séptima Época, Tribunales Colegiados de Circuito, Semanario Judicial de la Federación, Tomo: 57, Sexta Parte, tesis aislada, página: 49:

Despite the fact that the provisions in Articles 70 and 89F of the LCE were not effective at the moment in which NAFTA was enacted, in accordance with the commitment assumed by Mexico and which emerges from Article 1902.2 section d) subsection ii) of NAFTA, it is presumed that these provisions of the LCE are compatible with that set out in Chapter 19, as it would not be logical to conclude that in amending its legal provisions in antidumping and countervailing duty matters, Mexico removed the final determinations resulting from a five-year review of final countervailing duties from the scope of application of NAFTA, and thereby excluded them from the review of the Binational Panels; to maintain the contrary would

RECURSOS ADMINISTRATIVOS. DUDA SOBRE LA NATURALEZA DEL INTERPUESTO.

Cuando exista alguna duda sobre la naturaleza del recurso hecho valer por un particular, debe estimarse interpuesto el más apto para obtener una decisión de fondo sobre su pretensión, pues no puede estimarse que los recursos hayan sido establecidos por el legislador como laberintos o trampas procesales para estorbar a los causantes la defensa de sus derechos, a fin de obtener recaudaciones fiscales indebidas, sino como medios de defensa para obtener la alta finalidad de componer jurisdiccionalmente los conflictos que surjan entre los afectados y el fisco, a fin de que dichos afectados sean debidamente oídos en defensa de sus derechos, para decidir sobre el mérito de sus pretensiones.

PRIMER TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO.

Amparo directo 267/73. Carlos Echenique Rendón. 3 de septiembre de 1973. Unanimidad de votos. Ponente: Guillermo Guzmán Orozco.

Quinta Época, Segunda Sala de la SCJN, Semanario Judicial de la Federación, Tomo: CXV, tesis aislada, página: 297:

RECURSOS, DUDA SOBRE SU ADMISION. La simple duda sobre la procedencia de un recurso, es motivo suficiente para admitirlo, puesto que no debe ser desechado sino en los casos previstos por la ley.

Reclamación 6109/51. Luz Sordo de Colombres y coags. 14 de febrero de 1953. Unanimidad de cuatro votos. Ausente: José Rivera Pérez Campos. La publicación no menciona el nombre del ponente.

Quinta Época, Segunda Sala de la SCJN, Semanario Judicial de la Federación, Tomo LXIX, tesis aislada, página: 4693:

DEMANDA DE AMPARO, LA DUDA SOBRE EXISTENCIA DE UN POSIBLE RECURSO NO LA HACE IMPROCEDENTE.

La simple duda de la existencia de un posible recurso contra los actos reclamados en el juicio de amparo, no es bastante por sí sola, para rechazar la demanda respectiva, cuando sea más conveniente iniciar su tramitación, a fin de estudiar debidamente el punto debatido; sin perjuicio de dictarse el sobreseimiento que corresponda, si del resultado de dicho estudio, apareciere realmente la existencia de alguna causa de improcedencia.

Amparo administrativo. Revisión del auto que desechó de plano la demanda 4978/41. Sociedad "R. Ricoy y Compañía". 24 de septiembre de 1941. Unanimidad de cuatro votos. Relator: Alfonso Francisco Ramírez.

imply an admission that Mexico has failed to honor the commitment assumed in NAFTA.

The fact that to this date, neither Canada nor the U.S., had made use of the prerogative that NAFTA Article 1903 confers on them, can also be due to the fact that these countries took it to mean that neither the amendments to the LCE that incorporate the sunset reviews of countervailing duties, nor NAFTA in Chapter 19, specifically in Annex 1911, exclude final determinations of five-year sunset reviews from Binational Panel review. For that reason it had not been necessary to employ the procedure contemplated in NAFTA Article 1903, especially since Mexico did not make any Exception or Reservation on the matter in negotiating NAFTA.

In order to standardize the form which the parties set out in Annex 1911 for their definitions, Mexico assumed the same system of describing in detail “all” the determinations that existed in antidumping and countervailing duty matters at the moment of the negotiation of NAFTA, of which it can be clearly inferred that in including all the existing determinations, the intention of the negotiators was not to exclude in the future any other type of determination that would share the same nature. In the case of the determinations resulting from sunset reviews, they are absorbed in the determinations listed in Annex 1911, specifically in section (ii) of the definition of final determination for Mexico, in relation with NAFTA Annex 1904.15, subsection (o).

VI.- The LCE incorporated the sunset review of a countervailing duty in both Articles 70 and 89 F, in consideration that this duty need not be

terminated automatically when it expires, but that the Ministry of the Economy could undertake a thorough investigation, with a hearing for the interested parties, in which it would be determined if the circumstances that gave rise to the countervailing duty continue to occur, that is to say, if the dumping continues or not. Depending on the result of this “new investigation”, it will be determined if the duty continues to be in effect, or even whether to modify the amount of the duty (Article 89 F of the LCE).

The aforementioned makes it necessary for the Ministry of the Economy/Secretariat of Economy to initiate the review of the countervailing duty, before its validity expires, “**sua sponte**”, or of its own initiative, (section (ii) of the definition of final determination for Mexico, in NAFTA Annex 1911, in relation with NAFTA Annex 1904.15, subsection (o)); the sunset review cannot be understood any other way.

According to the criterion above, sunset reviews have to be assimilated with the reviews that the Ministry of the Economy initiates “sua sponte” before the expiration of the countervailing duties. (Therefore, we can say that the legal basis for the administrative appeal for revocation contemplated in Article 94 of the LCE, in the case before us, is supported by section VIII of the rule, which happen to be those mentioned in the first paragraph of Article 97 of the LCE.)

What reason would Mexico have had in departing—before or after 2003—from the practice of its NAFTA partners, Canada and the United States, who have clearly set out the competence of the Binational Panels with respect to the review of determinations regarding sunset reviews of countervailing

duties, as soon as these reviews were created by the WTO? The legislative history of the LCE is extensive, but it does not have any explicit reference to distinguish the determinations that resolve the five-year sunset reviews from those that resolve the remaining processes related with international unfair trade practices. This only emphasizes that Mexico had always contemplated the competence of the Binational Panels respecting the review of determinations regarding sunset reviews, even before 2003, and never thought of changing this situation with the amendments of March 13, 2003 to the LCE.

To us it appears inevitable to conclude that the language of the LCE, good practice, the intentions and the purposes of the negotiating partners of NAFTA—all these factors, and more—support the competence of this panel to review the determination of the sunset review that is before us. Application of Articles 31 and 32 of the Vienna Convention on the Law of Treaties strongly supports competence. It would be necessary to extract a forced interpretation, against the spirit and letter of NAFTA and the LCE, to conclude the contrary. Even though there is no explicit reference neither for nor against, all the implicit references, available and applicable, mitigate in favor of competence. There is no reason or necessity to force an interpretation that obtains a negative implication from the legislative sources when they so easily lead us to a positive one. We can even say that the confusions produced by the 2003 amendments to the LCE, instead clarify the application of the law effective before that date, in favor of competence, and there was no change in that aspect.

For these reasons, this minority does not accept the idea that the 2003 amendments to the LCE indicate the incompetence of this Binational Panel. At the most, there were deficiencies in the implementation of those amendments within the whole law. Among other things of particular relevance here, the amendments did not deal with Article 97 of the LCE, whose contents were not adjusted despite an apparent need to have done so, as we have already noted. The final result in the LCE cannot support the dubious rule that the Investigative Authority and its co-participants used in their arguments, and which carried the three majority votes.

Signed in the original by:

Gustavo Arratibel Salas
Gustavo Arratibel Salas

June 6, 2006.

Dale Beck Furnish.
Dale Beck Furnish.

June 12, 2006.