

**ARTICLE 1904 EXTRAORDINARY CHALLENGE
PURSUANT TO THE
NORTH AMERICAN FREE TRADE AGREEMENT**

In the Matter of

**GRAY PORTLAND CEMENT AND
CLINKER FROM MEXICO**

Fifth Administrative Review
(8/15/94 – 7/31/95)

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Secretariat File No.
ECC-2000-1904-01USA

**OPINION AND ORDER OF THE
EXTRAORDINARY CHALLENGE COMMITTEE**

This Extraordinary Challenge Committee (“ECC”) was convened pursuant to an extraordinary challenge petition filed on April 13, 2000 by the United States Government, Office of the Trade Representative and the Department of Commerce (“United States”). The petition requested that an ECC be convened to consider one of fourteen determinations made by a Binational Panel, which had reviewed the results of the U.S. Department of Commerce’s decision in its Fifth Administrative Review Final Results (“Final Results”) issued on April 9, 1997. The original antidumping duty order, relating to gray portland cement and clinker from Mexico, was published by the Department of Commerce on August 30, 1990. See *Gray Portland Cement and Clinker From Mexico Antidumping Duty Order*, 55 Fed. Reg. 35443 (1990).

The Binational Panel itself had addressed fourteen (14) determinations made by the Department of Commerce as part of the Final Results. In its decision issued on June 18, 1999, the Binational Panel affirmed ten (10) of the fourteen findings, and modified the other four (4) findings, remanding certain of the modified findings to the Department of Commerce for further action consistent with the Panel’s decision. The period of review (“POR”) addressed in the Final Results, and in the Binational Panel’s review, was August 15, 1994 through July 31, 1995. Following the remand from the Binational Panel to the Department of Commerce, the Department modified the amount of the countervailing duty (imposed under the original antidumping order) for this POR in accordance with the terms of the remand.

After careful review and consideration of the applicable provisions of the North American Free Trade Agreement (“NAFTA”) and other applicable legal provisions and the extensive record, including briefing by the United States and the Southern Tier Cement Committee (“STCC”), an *ad hoc* association of U.S. producers of gray portland cement, in

support of the petition for extraordinary review, and by CEMEX, S.A. de C.V. (“CEMEX”) and Cementos de Chihuahua, S.A. de C.V. (“CDC”) and others in opposition to the petition, as well as briefing by the Government of Mexico and the Government of Canada, the ECC reaches the following findings of fact and conclusions of law:

1. The ECC recognizes the request of the Government of Canada to intervene in this ECC proceeding, and denies STCC’s motion to strike the brief filed by Canada. The ECC concludes that Canada, as one of the three States-Parties to the NAFTA, has standing pursuant to Chapter 19 of the NAFTA and ECC procedural rules to participate at the extraordinary challenge level. The ECC accepts and adopts the position set forth by the Government of Canada that, even though it may not have a direct financial interest in the particular antidumping duty dispute that is the subject of the Binational Panel decision now being challenged, Canada has standing to participate in an extraordinary challenge because such challenges address broader issues relating to the purpose and function of extraordinary challenges under the NAFTA. In particular, extraordinary challenges are designed to address, *inter alia*, issues of systemic importance and that “threaten the integrity of the bi-national panel review process.” See the NAFTA, Article 1904(13)(a)(iii).

Under the provisions of Chapter 19 of the NAFTA, an extraordinary challenge proceeding is not the equivalent of a legal appeal in which the parties with a direct stake in the outcome brief and argue the issues. Rather, under the streamlined process created under the NAFTA, an extraordinary challenge review has a more limited and specific purpose, namely, to consider allegations that action taken by a particular binational panel are outside the scope of the panel’s authority, and pose a threat to the integrity of the panel review system. As such, the extraordinary challenge process by definition implicates the interests of all States-Parties, including Canada.

The States-Parties to the NAFTA selected a specific process for resolving disputes as an alternative to the standard court appeal process of the nation whose law governs the particular dispute. Under the alternative process adopted under the NAFTA, the binational panel review system is the mechanism for appeal of specific claims and agency determinations involving the antidumping and countervailing duty laws. By contrast, the extraordinary challenge process, as its name suggests, is reserved for extraordinary situations where there are substantial allegations of legal error, such as gross misconduct, serious departure from fundamental rules of procedure, action that manifestly exceeds a panel’s authority or similar acts that threatens the integrity of the panel review process. As one of the States-Parties to the NAFTA, Canada has a fundamental interest in any threats to the integrity of the NAFTA decision-making process.

2. The ECC will not dismiss the extraordinary challenge petition filed by the United States on April 13, 2000 for lack of jurisdiction. Under NAFTA Article 1904.13, a party may invoke an extraordinary challenge committee review as follows:

“Where, within a reasonable time after the Panel decision is issued, an involved Party alleges that:

(a)(i) A member of the Panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated a rule of conduct;

(ii) the Panel seriously departed from a fundamental rule of procedure;

(iii) the Panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, for example by failing to apply the appropriate standard of review, and

(b) any of the acts set out in subparagraph (a) has materially affected the Panel's decision and threatens the integrity of the Binational Panel review process, that Party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13."

No extraordinary challenge committee has ever been convened under the NAFTA prior to this ECC, so there is no direct guidance as to how to interpret the provisions defining the minimum pleading requirements for invoking an ECC.

The parties acknowledge that three extraordinary challenge committees were convened under a predecessor to the NAFTA, namely, the Canadian Free Trade Agreement ("FTA"), and that the standards outlined in the opinions issued by these three ECCs are persuasive on the issue of jurisdiction. Our review of the statutory provisions of the NAFTA, and the guidance provided by the ECCs convened under the FTA, lead us to conclude that the United States has satisfied the minimum requirements for seeking ECC review. The United States has asserted:

(1) that the Binational Panel violated Article 1904.13(a)(iii) in that it "manifestly exceeded its powers" in rejecting the definition of the "like foreign product" made by the Department of Commerce in the Final Results for purposes of calculating the amount of the antidumping duty to be applied for the POR, because the agency's product product definition was supported by substantial evidence;

(2) that in so doing, the Binational Panel violated Article 1904.13(b), because its error has "materially affected the Panel's decision;" and

(3) that in so doing, the Binational Panel's decision "threatens the integrity of the Binational Panel review process" because the Panel did not sustain the agency definition at issue, as the United States maintains it was required to do under the substantial evidence rule, and instead determined that there was not substantial evidence to support the agency definition.

Because the United States petition for extraordinary challenge review alleges the requirements for such review, and supports these legal claims with substantial factual allegations tied to the record, the ECC will not dismiss the petition for lack of jurisdiction.

3. The ECC determines that this is not an appropriate case in which to reverse or modify the decision of the Binational Panel on the merits of the petition filed by the United States.

Under Article 19 of the NAFTA, the Binational Panel must apply the law of the importing country, here the United States, in reviewing appeals from an administrative agency determination. In its extraordinary challenge petition, the United States argues that the Binational Panel violated two key principles of United States statutory and decisional law regarding judicial review of agency determinations: the “substantial evidence” test and the rule of “great deference” to agency decisionmaking.

The United States argues that the Panel, in rejecting the determination of the “foreign like product” set forth in the Final Results, failed to follow the “substantial evidence” test, under which a reviewing court must uphold the agency’s findings so long as they are based on “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” See *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966). The court (or as here, the Binational Panel) must uphold such findings even if there is other substantial evidence in the record that might support different findings. In addition, the reviewing court must not conduct a *de novo* review of the evidence in the record. The United States argues that there was more than sufficient evidence to support the product definition set forth by the Department of Commerce in the Final Results.

The United States also argues that the Panel violated the principle that courts must show great deference to agency decisionmaking. Under the well-known standard for judicial review of actions taken by administrative agencies set forth in *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837 (1984), a reviewing court may reverse or modify an agency determination only if it is clearly contrary to applicable law, or the intent of Congress as clearly set forth in the law. Generally speaking, the United States Supreme Court declared in *Chevron* that agency determinations should be given “great deference” if they are made as to an issue about which the governing statute is silent or ambiguous, or if the issue is one as to which Congress had clearly delegated decisionmaking authority to an administrative agency. Courts in the United States have recognized this principle in the context of international trade, declaring that the Department of Commerce has “special expertise” with regard to U.S. antidumping laws.

In opposing the extraordinary challenge petition, CEMEX sharply disputes the position of the United States on both principles. First, CEMEX asserts that the Binational Panel was correct in finding that there was insufficient evidence in the record to support the definition of the “foreign like product” announced in the Final Results, arguing that the evidence in the record was substantially similar to the product definition used in earlier administrative reviews of the antidumping order at issue, and that nonetheless the Department of Commerce adopted a different product definition in the Final Results without support in the record.

On the principle of deference to agency decisionmaking, CEMEX argues that the *Chevron* decision and subsequent decisions of United States courts make clear that there are limits to deference to agency decisions, and that “[n]o deference is due to agency interpretations at odds with the plain language of the statute itself.” See *Public Employees Retirement System of Ohio v. June M. Betts*, 492 U.S. 158 (1989). CEMEX argues that the Panel was well aware of, and discussed at length, its obligations to review interpretations of the antidumping statutes under the *Chevron* principles, and that the Panel reversed the Department of Commerce

definition in part on purely legal grounds in that the Department of Commerce failed to apply several portions of the applicable statute, and impermissibly misinterpreted the one portion it did apply.

After careful review, the ECC has determined that it will not disturb the decision of the Binational Panel because the United States petition fails to establish a substantial violation of an extraordinary nature sufficient to authorize the ECC to reverse the Binational Panel's decision. The ECC fails to find evidence of "gross misconduct," "serious conflict of interest" or other wrongdoing that might justify invoking the ECC process and reversing the Panel's decision. The United States petition, while raising serious issues with regard to the particular determination by the Panel which it has challenged, has failed to demonstrate that the Panel "manifestly exceeded its powers" or that the decision of the Panel in any way "threatens the integrity" of the binational panel review process.

As the Government of Canada has outlined, and as the parties acknowledge, the Binational Panel review process is intended to replace regular appellate court review with a streamlined process for reviewing agency determinations, and Panel review is intended to be the final appeal of determinations, absent the "extraordinary" circumstances required for an ECC to be convened pursuant to NAFTA Article 1904.13. All parties also acknowledge the persuasive, if not binding, interpretations by the three ECC panels convened under the FTA. All of these ECC panel decisions declare that ECC review is much more circumscribed and exceptional than a legal appeal of a court decision.

Here, the Binational Panel:

- Wrote a 204-page detailed opinion setting out its review and analysis;
- Correctly outlined the relevant provisions of the NAFTA, the role of the Department of Commerce in conducting its review and issuing the Final Results, the substantial evidence standard for reviewing the factual record before the agency, and the principle of great deference to agency decisionmaking, except where an agency decision is deemed to be a clear violation of applicable law;
- Reviewed fourteen issues raised by CEMEX and CDC in their appeal of the Final Results, sustaining ten of the Department of Commerce determinations, and reversing and/or remanding on the other four issues;
- Conducted a careful review of the record on each issue, made due reference to the evidence, and repeatedly cited to the substantial evidence standard and the duty of deference to agency rulings in analyzing each issue;
- Found, on the single issue giving rise to this ECC petition, that the Department of Commerce had failed to apply all the factors set forth in the relevant statutory provision, and that the Department's finding was not supported by substantial evidence;
- Found that in light of application of all provisions of the relevant law and the record evidence, that there was substantial evidence to support a modified definition of the product; and
- Remanded to the Department of Commerce to re-calculate the correct amount of the duty to be imposed in light of the Final Results, as modified.

The ECC concludes that, even if the Binational Panel may have erred in its determination that the product definition in the Final Results was not supported by substantial evidence and that the agency failed to apply all the factors set forth in the relevant statutory provision, the Binational Panel did not act in a manner that violates the provisions of NAFTA Annex 1904.13. Rather, the ECC determines that the Panel proceeded in precisely the manner contemplated by the NAFTA binational panel review provisions. The ECC concludes that it is apparent that the Panel understood and applied the substantial evidence standard, as well as the *Chevron* doctrine of great deference to agency decisions, in its analysis, even if the manner in which it applied those standards to the factual issue that is the subject of this petition appears to be erroneous from the perspective of the United States and the STCC.

The extraordinary challenge process is not a typical appellate court review of a decision, either by an agency or a lower court. Rather, the process is clearly reserved for extraordinary situations which reflect a systemic problem that threatens the overall panel review process. Even if the Panel erred in its legal determination that the Department of Commerce product definition was not supported by substantial evidence, and that the agency did not apply all the relevant statutory factors, nothing in the Panel's conduct rises to the level of "manifestly exceeding its powers, authority or jurisdiction," and above all nothing in the Panel's handling of its review of the Final Results appears to "threaten[] the integrity of the Binational Panel Review process" as required by NAFTA Annex 1904.13 in order for the ECC to reverse or modify the Binational Panel's decision. The ECC therefore declines to do so.

4. Although the ECC finds, after a careful examination of the record and the briefs on the petition of the United States, that the petition fails to establish the kind of gross misconduct, serious conflict of interest or other impropriety, and further that the petition fails to establish conduct that "manifestly exceeded [the] powers, authority or jurisdiction" of the Binational Panel or that "threatens the integrity of the Binational Panel review process," the members of the ECC do note, as dicta, that in their view the dissenting opinion of panelist Harry B. Endsley with regard to the specific issue that gave rise to the petition for extraordinary challenge review reflects the better-reasoned approach.

CONCLUSION

For the reasons set forth herein, the ECC concludes that the petitioners here, the United States and the STCC, have failed to demonstrate either that the Binational Panel “manifestly exceeded its powers, authority or jurisdiction” or that the Panel’s determination on the single issue raised in the petition “threatens the integrity of the Binational Panel review process.” Inasmuch as these criteria have not been met, the petition is denied and the June 18, 1999 decision of the Binational Panel will not be disturbed.

Signed in the original by:

Honorable Carlos del Rio Rodriguez

Honorable Carlos del Rio Rodriguez

Honorable Harold R. Tyler, Jr.

Honorable Harold R. Tyler, Jr.

Honorable Arlin M. Adams

Honorable Arlin M. Adams

Dated: October 30, 2003