

DECISION AND ORDER OF THE PANEL
IN CONNECTION WITH THE DETERMINATION ON REMAND
SUBMITTED BY THE INVESTIGATING AUTHORITY OF THE
REVIEW OF THE FINAL DETERMINATION
OF THE ANTIDUMPING INVESTIGATION
ON IMPORTS OF UREA,
ORIGINATING IN THE UNITED STATES OF AMERICA
AND THE RUSIAN FEDERATION

CASE: MEX-USA-00-1904-01

Courtesy Translation

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I. INTRODUCTION

This Panel was established in accordance with Article 1904 of the North American Free Trade Agreement (“NAFTA”), to review the final determination issued by the former Ministry of Commerce and Industrial Development (*Secretaría de Comercio and Fomento Industrial*), currently known as the Ministry of Commerce (*Secretaría de Economía*) (indistinctively, the “Ministry of Commerce”), on the imports of urea, product classified under tariff item 3102.10.01 of the Tariff of the Importation General Tax Law, original from the United States of America and the Russian Federation, regardless of the exporting country, as published in the Federal Official Gazette (*Diario Oficial of the Federación*) (the “DOF”) of the United Mexican States (“Mexico”) on April 17, 2000 (the “Final Determination”).

II. BACKGROUND

A. OF THE ADMINISTRATIVE INVESTIGATION

1. On September 30, 1998, Agro Nitrogenados, S.A. de C.V., currently known as Agromex Fertilizantes, S.A. de C.V. (“AGROMEX”), requested the Ministry of Commerce the initiation of an administrative investigation on international commercial unfair practices, in the matter of dumping, and the application of countervailing duties, in connection with imports of urea original from the United States of America, the Russian Federation and the Republic of Latvia, regardless the exporting country. AGROMEX argued that during the period from May 1st, 1997 thru April 30th, 1998, the imports at issue were made under dumping conditions, which allegedly caused damage to the national production of identical or similar goods.

2. On December 14, 1998, the Ministry of Commerce published in the DOF the relevant determination declaring the initiation of the administrative investigation in connection with the imports of urea original from the United States of America and the Russian Federation, for a period of review from May 1st, 1997 thru April 30th, 1998. The Ministry of Commerce dismissed the request for an administrative investigation regarding the imports original from the Republic of Latvia.

3. On December 10, 1999, the Ministry of Commerce published in the DOF the Preliminary Determination of the administrative investigation at issue, in which the Ministry of Commerce resolved to continue the mentioned investigation without the assessment of provisional countervailing duties whatsoever.

4. On April 17, 2000, the Ministry of Commerce published in the DOF the Final Determination of the administrative investigation at issue, in which the Ministry of Commerce resolved to conclude the mentioned investigation without the assessment of definitive countervailing duties whatsoever, based upon the reasons that are subject to analysis in this review.

B. OF THE REVIEW PROCEEDINGS BEFORE THIS BINATIONAL PANEL

1. On May 4, 2000, AGROMEX filed a Request for Panel Review in accordance with Article 1904 of the NAFTA regarding the Final Determination.

2. On June 5, 2000, AGROMEX submitted a Complaint challenging the Final Determination (the "Complaint").

3. On June 16, 18 and 19, 2000, the Ministry of Commerce, Union Oil Company of California Corporation ("UNOCAL"), Promotora Nacional Agropecuaria Mexicana, S.A.

de C.V. (“PRONAMEX”) and JSC Togliattiazot (“JSC”) submitted, respectively, their corresponding Notices of Appearance in opposition to the Complaint filed by AGROMEX. By means of several pleadings thereafter, the above mentioned participants, including AGROMEX, appointed their respective counsels for record, and requested their authorization and/or revocation for protective orders on confidential information in this review.

4. On September 6, 2000, AGROMEX submitted a Brief in support to its own Complaint (the “Brief in Support to the Complaint”).

5. On October 13, 2000, the Ministry of Commerce submitted the relevant copies of the Final Determination, the index for the administrative record, and both confidential and public versions of the administrative record.

6. On November 1 and 3, 2000, the Ministry of Commerce, PRONAMEX, JSC and UNOCAL submitted, respectively, their corresponding Briefs in opposition to the Complaint filed by AGROMEX (respectively, the “Brief in Opposition to the Complaint” of each participant).

7. On November 21, 2000, AGROMEX filed a response to the Briefs submitted by the Ministry of Commerce, PRONAMEX, JSC and UNOCAL (respectively, the “Brief in Response” to each participant).

8. On December 4, 2000, AGROMEX and the Ministry of Commerce filed the appendix to their respective Briefs.

9. On November 6, 2001, this Binational Panel issued an Order setting the date for the Public Hearing to be held on December 4, 2001. By means of several pleadings

thereafter, the participants appointed their respective representatives to intervene during the Public Hearing.

10. On November 15, 2001, JSC filed a motion to exclude from the Panel review the imports from the Russian Federation.

11. On November 22, 2001, the Ministry of Commerce filed a motion in order for the topics on the standard of review and the scope of the review by the Binational Panel to be discussed during the Public Hearing.

12. On December 3, 2001, this Binational Panel issued an Order by which it granted the motion filed by JSC to exclude from the Panel review the imports of urea from the Russian Federation, based on the reasons referred to in section III. A. hereof.

13. On December 4, 2001, the Public Hearing for this review was held in Mexico City. At the Public Hearing, this Binational Panel denied the motion to hear allegations on the standard of review and the scope of the review by the Binational Panel, upon considering that such issues were not controversial. On the same date, the Ministry of Commerce filed a pleading including a written version of its oral interventions at the Public Hearing.

14. On January 28, 2002, this Binational Panel issued an Order requesting the Ministry of Commerce to submit certain information referred to in items 54, 73 and 74 of the Final Determination, in connection with information allegedly provided by Petroquímica Cosoleacaque, dated December 10, 1999 and January 28, 2000.

15. On January 31, 2002, the Ministry of Commerce submitted information in response to the Order mentioned in the paragraph immediately above.

16. On May 23, 2002 this Binational Panel issued its Final Decision and Order in connection with the review of the Final Determination, published in the Federal Official Gazette on June 17, 2002, and resolved to remand the Final Determination to the Ministry of Commerce with several instructions, including the one regarding the submission of a Determination on Remand according to Rule 73(1) of the Rules of Procedure of NAFTA Article 1904 (the "Panel's Decision").

17. On October 14, 2002 the Ministry of Commerce issued the Determination on Remand consisting of certain resolution deriving from the Panel's Decision, published in the Federal Official Gazette on October 18, 2002, which in addition to the relevant considerations on the matter of this review, revoked the Final Determination on the matter of Russian imports, with respect to which it issued a new determination (the "Determination on Remand").

18. On October 21, 2002, the Ministry of Commerce submitted the supplementary remand record of the review at issue, under file number ECD-23-05-2002.

19. On November 11, 2002 PRONAMEX filed certain written submission challenging the Determination on Remand, by means of which it requested this Binational Panel, essentially, to have it as an adherent party to the "writ in opposition to the Determination on Remand as may be submitted by the participant Union Oil Company of California Corporation on this very same date" (*sic*), in order for this Panel "to issue a written resolution remanding [the Determination on Remand] to the investigating authority, so that [the investigating authority] may issue a final Resolution consistent with the decision issued by the Panel in accordance with Rule 72..." (*sic*) (the "Join of PRONAMEX").

20. On November 11, 2002 Agrium U.S., Inc. ("Agrium"), appearing as successor in interest of UNOCAL, filed certain written submission challenging the Determination on Remand, by means of which it requested the Panel, essentially, to acknowledge it as successor in interest of UNOCAL and resolve in conformity with several allegations related to the Determination on Remand (the "Agrium's Challenge").

21. On December 2, 2002 the Ministry of Commerce filed certain writ in response and opposition ad cautelam to the Join of PRONAMEX and the Agrium's Challenge, asking the Panel, essentially, to dismiss the written submissions filed by PRONAMEX and Agrium, based on several allegations expressed therein (the "Opposition to Agrium's Challenge").

22. On March 17, 2003 this Panel called the participants to present their allegations at a Public Hearing.

23. On April 4, 2003, a Public Hearing was held. On the same date, the Ministry of Commerce submitted a writ containing its oral interventions in the Public Hearing.

24. On October 29, 2003 Agromex requested the Ministry of Commerce an extension to reactivate the production of urea, based on certain facts stated in the Determination on Remand. In this regard, the Ministry of Commerce denied this request based on the fact that the subject matter of the request is still pending in this review by the Panel. Said writ and the relevant communications from the Ministry of Commerce were made available to this Panel on November 6, 2003. The Panel acknowledges receipt of a copy of such documents in the understanding that the above mentioned documents do not constitute a request to the Panel under the North American Free Trade Agreement (NAFTA) or the procedural rules.

25. On November 3, 2003, PRONAMEX, JSC Togliattiazot and Agrium each presented a formal request to revoke the antidumping duties imposed by the Determination on Remand, under the authority of items 471, 472 and 473 of said Determination. This request argued that the Ministry of Commerce had not acknowledged the fulfillment of the legal condition required for the application of the antidumping duties. The Ministry of Commerce denied this request based on the fact that the subject matter of the request is still pending in this review by the Panel. The Panel acknowledges that it has received a copy of such documents on November 6, 2003, for information purposes only, in the understanding that such documents filed do not constitute a request to the Panel under NAFTA or the procedural rules derived from said agreement.

III. DECISION

A. *ON THE CAPACITY OF AGRIMUM'S REPRESENTATIVE*

1. The first disputed issue has to do with the capacity of Agrium's representative, Mr. David Hurtado Badiola, with respect to which the Ministry of Commerce seeks the assertion that Mr. Hurtado lacks capacity to represent Agrium, and that accordingly the Agrium's Challenge has no merits. Opposition to Agrium's Challenge ¶10 and 11, pp. 5 and 6

2. According to the Opposition to Agrium's Challenge, the Ministry of Commerce argues that the power of attorney submitted by Mr. Hurtado is invalid, essentially, for three reasons: (i) because it does not evidence the capacity of the individual granting the power of attorney on behalf of Agrium; (ii) because it does not evidence the legal existence of Agrium, and (iii) because it is not notarized by Notary Public in Mexico. According to the Ministry of Commerce, under such circumstances Mr. Hurtado appeared as an apparent

agent or negotiorum gestor (“*gestor de negocios*”) of Agrium Opposition to Agrium’s Challenge ¶10 and 11, pp. 5 and 6 and ¶14 p. 7

3. This Binational Panel does not agree with the Ministry of Commerce in this regard. Article 546 of the Federal Code of Civil Procedures –of supplemental application to the Federal Tax Code, according to what is provided for in Article 197 of the mentioned Code–, provides that “in order for public foreign documents to be effective within the Mexican Republic, they shall be submitted legalized by the competent Mexican Consulates in accordance with the applicable laws...” In this case, the power of attorney submitted by Mr. Hurtado is indeed legalized by the Mexican Consulate.

4. As for the capacity of the person who executes the power of attorney and the legal existence of Agrium, the Ministry of Commerce demands the submission of “documentary evidence supporting the capacity of the alleged grantor” and the Articles of Incorporation of Agrium. Opposition to Agrium’s Challenge ¶17 and 18, p. 10

According to the allegations of the Ministry of Commerce, this claim seems to be based rather than on a legal requisite on the signatory’s capacity –legal requisite that is unidentified–, on the mere suspect that the persons executing the power of attorney, Dorothy E. Bower and Richard L. Gearheard, may both act under a same title of Vice-Presidents. Essentially, this Panel does not find any valid allegation with respect to the alleged legal requisite to submit “documentary evidence” to support the capacity of the person who executes the power of attorney.

The same finding is made in connection with the demand to submit the Articles of Incorporation of Agrium. Leaving aside the fact that the Articles of Incorporation are not per se proof enough to evidence the current existence or the good standing of a foreign company, the Ministry of Commerce does not present any legal argument according to

which the Articles of Incorporation must be submitted, but that the power of attorney is invalid due to its noncompliance with “some of the above mentioned requisites, such as the legalization before Mexican Consul, and the notarization by Public Notary [in Mexico].”
Opposition to Agrium’s Challenge ¶18 p. 10

To the extent that the legalization before the Mexican Consulate is an undisputed issue in regard to the power of attorney submitted by Mr. Hurtado, and that the Panel has not found any sustained allegation with respect to the alleged mandatory submission of the mentioned documents, or any sustained allegation in connection with the capacity of the person who executes the power of attorney at issue, it only remains pending the analysis of the events of notarization argued by the Ministry of Commerce.

5. The Ministry of Commerce argues that the power of attorney is invalid because it does not appear notarized before Notary Public in Mexico. In order to support this claim, the Ministry of Commerce states that Article 140 of the Notary Public Law for the Federal District provides that “powers of attorney granted abroad, once legalized or *apostilled*, and translated by expert translator, if applicable, must be notarized in order for them to be effective in accordance with law.”

The substantive law in connection with the validity of powers of attorney granted abroad, within the context of proceedings of federal jurisdiction –as it is in this case– is the Federal Civil Code. Article 13, Section IV of the Federal Civil Code provides that “the formality of legal acts is ruled by the law where such acts are executed. However, they may be in accordance with the formalities provided for in this Code when the act is to be effective in the Federal District or the Mexican Republic on federal matters..:”

[Judicial Precedent/Authority on POWERS OF ATTORNEY GRANTED ABROAD, THEY ARE GENERALLY RULED BY THE LAW OF THE COUNTRY WHERE THEY ARE GRANTED]

Within the context of the commented provision, the formality of the power of attorney submitted is a matter pertaining to the place where the power of attorney was granted. While the Mexican law allows that a power of attorney granted abroad may be granted in accordance with formalities provided for in the Federal Civil Code, that possibility does not mean that substantively, within the context of a proceeding under federal jurisdiction, such power of attorney needs to be notarized or comply with any formality different from the legalization required under the applicable procedural provisions –this is to say, Article 546 of the Federal Code of Civil Procedures–.

Therefore, strictly based on the allegations made by the Ministry of Commerce, this Panel makes no finding on any valid motive or objection so that the power of attorney submitted by Mr. Hurtado may be declared invalid or affected by nullity, or otherwise prevented from being effective within the current proceedings.

6. Accordingly, the allegations of the Ministry of Commerce in connection with the unacceptability of acting as apparent agent or negotiorum gestor (“*gestor de negocios*”) in these proceedings, is innocuous.

7. In regard to the Join of PRONAMEX to the Agrium’s Challenge, the Ministry of Commerce argues that “this motion must be fully dismissed due to the inexistence of the motion to which it allegedly joins, in view that Union Oil Company of California Corporation did not appear to this remand proceeding...” Opposition to Agrium’s Challenge ¶18 p. 10

In this regard, Agrium has certainly appeared as successor in interest of UNOCAL, based on what is provided for in Article 2 of the Federal Code of Civil Procedures –of supplemental application to the Federal Tax Code, as mentioned before– which provides

that in case of transfer of interest to a third party, the transferring person shall not be a party anymore, and the acquirer person shall become a party.

Strictly based on the allegations made by the Ministry of Commerce, this Panel makes no finding on any valid motive or objection so that the power of attorney submitted by Mr. Hurtado may be declared invalid or affected by nullity, or otherwise prevented from being effective within the current proceedings.

B. ON THE COMPLIANCE OF THE MINISTRY OF COMMERCE TO THE PANEL'S DECISION

1. Agrium argues that the Determination on Remand of the Ministry of Commerce “did not legally comply and exceeded the application of the Panel’s Decision of June 17, 2002, acting in a manner inconsistent with the obligations of the Ministry of Commerce under the Mexican legislation, including the 1994 GATT Article VI Antidumping Code...” Agrium’s Challenge p. 1

Essentially, Agrium argues that the Ministry of Commerce complied “excessively” (sic) with the Panel’s Decision. According to Agrium, the Ministry of Commerce should have taken into consideration only the evidence on the administrative record. Agrium argues that the Ministry of Commerce exceeded the Panel’s Decision by taking into consideration “information that was extraneous to the administrative record... with the only purpose of issuing a determination as desired by Agromex... and not consistent with the evidence existent on the administrative record.” Agrium’s Challenge p. 12

Agrium claims that the Ministry of Commerce’s decision to gather and evaluate additional evidence to the ones that existed on the administrative record upon the issuance of the Panel’s Decision, does infringe the antidumping laws –as they are meant within the context of the NAFTA– and/or the Panel’s Decision. Agrium states that the Ministry of

Commerce's Determination on Remand (i) affects the legal certainty of the parties, to the extent that the Determination on Remand does not comply with what was stated and supported during the review proceedings; (ii) infringes due process principles of procedural equity and the right to defend, to the extent that Agrium and PRONAMEX did not have the chance to know and rebut the new evidence; (iii) reveals partiality in the performance of the Ministry of Commerce, since the Ministry of Commerce held private meetings with officers of AGROMEX, presumably with the purpose of "pursuing at any cost the assessment of antidumping duties"; (iv) erroneously determines antidumping duties based not on dumping margins but on information and financial projections presented by AGROMEX; (v) lacks of legal support to set conditional antidumping duties, and (vi) revokes a final determination in connection with the public policy hypothesis referred to in Article 88 of the Foreign Trade Law. Agrium's Challenge p. 13 to 19

2. On the contrary, the Ministry of Commerce argues essentially that the Determination on Remand is consistent with the Panel's Decision. The Ministry of Commerce sustains that NAFTA Article 1904.8 –which is the one that rules on the remand of a final resolution to the investigating authority in order for the investigating authority to take actions compatible with the decision of a panel– “does not set out any parameters for the performance of the Ministry of Commerce” and that therefore, the investigating authority may issue its determinations on remand “according to its legal attributions and the domestic legal framework.” Opposition to Agrium's Challenge ¶23 to 26 pp. 12-14

In the same token, the Ministry of Commerce explains that obtaining additional information and evidence is consistent with and a logical derivative of the Panel's Decision, and that in any event the investigating authority does have the authority to integrate a supplementary remand record –as stated in the Rule 73(2)(a) of the Rules of Procedure of NAFTA Article 1904–, which role is precisely making known to the parties the information

gathered by the investigating authority to issue the Determination on Remand.” Opposition to Agrium’s Challenge ¶40, 43 to 50 and 51 pp. 21, 22-26, 27

B.1. On the consistency of the Determination on Remand with the Panel’s Decision

3. The opinion of the Panel in this regard is that the Ministry of Commerce did comply with the Panel’s Decision. Specifically, the Panel’s Decision remanded the Final Determination “in order for the investigating authority to issue the corresponding final determination to be consistent with [the Panel’s Decision], particularly with what is provided for in sections III. D. and III. E., and in general to adopt any measures not incompatible with [the Panel’s Decision].” Panel’s Decision, Order

4. Essentially, Section III. D. of the Panel’s Decision discussed and rejected the termination of the investigation on the “lack of subject matter” allegedly based on the lack of legal standing as plaintiff (“*legitimación procesal activa*”) within the context of administrative proceedings. The reasoning of the Panel was based, besides of the legal logic that the institution of legal standing as plaintiff (“*legitimación procesal activa*”) may not be applied within administrative proceedings, on the consideration that the term national producer “must take into consideration the entirety of elements gathered throughout the course of an administrative investigation with respect to the capacity of a petitioner (or other participants) to produce identical or similar goods to the ones that are the subject matter of the relevant investigation.” Panel’s Decision, ¶III.D, 7

5. As for Section III.E of the Panel’s Decision, in such Section the Panel discussed certain claim based on the alleged inattention to evidence of the administrative record that, according to the Claimant, “[are] enough to demonstrate injury to the national production due to urea imports.” Panel’s Decision, ¶III.E, 1

In this regard, the Panel found logical that the Ministry of Commerce had not evaluated evidence in connection with injury, because the Ministry of Commerce had previously –though erroneously– terminated the investigation based on the alleged lack of standing of the petitioner. Accordingly, the Panel resolved that to the extent that such decision to terminate the investigation was unacceptable, the Ministry of Commerce should now take into consideration all evidence which evaluation was considered unnecessary for the issuance of the Final Determination.

6. According to these resolutions, an outline of possible expectations deriving from the Panel’s Decision may consist of the following actions: (i) finish the investigation without consideration whatsoever of its termination due to “lack of subject matter” allegedly based on the lack of legal standing of AGROMEX or analogous reasons; (ii) evaluate the entirety of evidence existing in the administrative record, including evidence on the characterization of AGROMEX as national producer, with respect to the capacity or ability of AGROMEX to produce identical or similar goods to the ones that are the subject matter of this review.

7. The Determination on Remand does indeed make reference to the conclusion of the investigation and the corresponding injury analysis, and the relationship between urea imports and such injury, without consideration whatsoever on the personal status of the petitioner or other procedural reasons, and presents the evaluation of evidence of the administrative record that, according to the Ministry of Commerce, results in the conclusions and the relevant resolution as expressed in the Determination on Remand. Both actions are, in the opinion of this Panel, consistent with the Order stated in the Panel’s Decision.

8. Administrative proceedings on unfair international trade practices require, because of their own nature, gathering information as necessary to determine the assessment of antidumping duties. Accordingly, collecting and gathering information or evidence to support the determination of antidumping duties are per se actions compatible with the Panel's Decision.

[Judicial Precedent/Authority on ANTIDUMPING DUTIES, THE PROCEEDINGS TOWARDS THEIR ASSESSMENT IS NOT ANALOGOUS TO THE ONE DEVELOPED BY THE ADMINISTRATIVE BODIES TO SET BASIS, QUOTAS OR FEES FOR A CONTRIBUTION, NOR TO ACHIEVE THE LIQUIDATION OF A CONTRIBUTION, AND BECAUSE OF THEIR NATURE THEY MAY NOT BE CHARACTERIZED AS EXTRA-FISCAL CONTRIBUTIONS]

B.2. On the Supplementary Remand Record

9. Agrium argues that the "excessive" compliance of the Ministry of Commerce with the Panel's Decision derives from the fact that the Ministry of Commerce gathered and collected additional evidence, arguably (i) contrary to what it was ordered by the Panel, and (ii) to "investigate economic and financial situations and business plans and programs of [AGROMEX]... with the only purpose of assessing antidumping duties based not on dumping margins, but on what [AGROMEX] stated that it needed to re-enter into the urea domestic market." Agrium's Challenge, p.12

10. The Panel's Decision stated that the Ministry of Commerce, in remand action of the Final Determination, must "take into account and evaluate the evidence of the administrative record." Beyond any semantics, the Panel's Decision does not make any pronouncement with respect to the scope or the way in which the administrative record may be integrated, including any documents contained within the so called supplementary remand record.

11. Accordingly, leaving aside any question on the need or convenience to gather additional documentation –in any event, referred to extraneous situations to the period of investigation–, the collection of evidence is not per se an action that may be considered inconsistent with the Panel’s Decision.

12. To the extent that the scope of review of this Panel in regard to the Determination on Remand is limited to the examination of consistency of actions adopted by the Ministry of Commerce based on the Panel’s Decision, this Panel does not and may not resolve on whether any document that integrates the supplementary remand record was obtained or gathered by the Ministry of Commerce with a hidden purpose or otherwise consented ex parte with AGROMEX, to deliberately impose determined antidumping duties.

13. In any event, the Panel lays stress on the fact that there is no evidence on the record, or any other indication supported by the participants upon the filing of the challenge that is now discussed, or otherwise derived from the analysis of the Determination on Remand, with respect to the alleged violation to due process principles or the right to defense of any participant, or to the alleged impartiality of the Ministry of Commerce in issuing the Determination on Remand based on the injury analysis and the relationship between urea imports and such injury as described in the Determination on Remand.

14. Moreover, even assuming that the decision of the Ministry of Commerce to gather and collect additional information in connection with the viability of urea production could be considered out of the range of the Panel’s Decision, it is worth mentioning that such information is extraneous to the fact –now undisputed in the Determination on Remand– that there was national production and that AGROMEX was a national producer during the period of investigation.

B.3. On the Assessment of Antidumping Duties and the Declaratory of Dismissal of Related Claims

15. A remaining claim for the Panel to look into is Agrium's objection that the Ministry of Commerce "determined the assessment of antidumping duties on a manner not allowed by law, conditioned to future and uncertain situations, such as [AGROMEX] reinitiating operations... [therefore granting AGROMEX] a blank letter... by stating that is [AGROMEX] does not reinitiate operations, the antidumping duties shall be imposed three months after reinitiating operations." Agrium's Challenge, p. 16

16. The Ministry of Commerce said in the Determination on Remand –now constituting the new resolution in this review– that antidumping duties apply to urea imports "as long as there is national production", and that for such purpose, antidumping duties would apply "as from April 16, 2003, this is to say, three months after the date set for the reactivation of production by [AGROMEX]. Determination on Remand, ¶470

Moreover, the Ministry of Commerce stated that if AGROMEX had not started operations on January 15, 2003 –which seems to have happened, as far as this Panel knows–¹ "[such] three months shall be counted as from the date the investigating authority verifies the reactivation of operations." Finally, the Ministry of Commerce established that "if [AGROMEX] has not started operations by October 2003 at the latest, the antidumping duties shall be revoked." Determination on Remand, ¶471, 473

¹ At least this is so based on certain Resolution declaring the initiation of an examination to determine the consequences of the elimination of definitive antidumping duties imposed on urea imports from Ukraine, published in the Federal Official Gazette on April 4, 2003, Second Section, ¶64 stating that "the Ministry of Commerce considers AGROMEX as national producer, even though it is not currently producing, according to the Panel's Decision of May 23, 2002 in case MEX-USA-00-1904-01.

17. In this regard, Agrium objects that “the condition on which the determination of antidumping duties is based, this is to say the reactivation of urea production by the Claimant, is a totally imprecise and undetermined condition, since there is no definition of what urea production means, therefore running the risk of considering that there is reactivation of production by producing one daily ton, and the consequent risk for the agriculture. Moreover, the Ministry of Commerce did not establish any requisite in order for the production to be continued, so that there is a risk that supply may fail, and that the Claimant may decline production for long terms as it has happened in the past... and still antidumping duties would be enforceable in prejudice of agriculture industrials.” Agrium’s Challenge, p. 16

18. The Ministry of Commerce replies that “as for Agrium’s comment in the sense that the investigating authority does not define what urea production should mean... the Ministry of Commerce considers that domestic laws on the matter does not provide that in order [for the investigating authority] to impose antidumping duties such elements must be attended”, and that while it is true that within a market economy “all enterprises may shut down” this situation “does not prevent the investigating authority from adopting a determination... in connection with the treatment that certain branch of national production must receive upon its closure; or determining how much [a national producer] must produce to impose antidumping duties.” Opposition to Agrium’s Challenge ¶150 (emphasis added in the original).

19. The Panel has always recognized the importance and complexity of this case, which requires, because of its particularities, the ultimate need to equilibrate the protection of the national industry –which according to the investigation of the Ministry of Commerce, has suffered injury due to dumped urea imports– and the indispensable access of consumers to the urea market under normal price conditions. In other words, the Panel has always bore in mind the need for protection of an injured industry, but at the same time

the need to find a legal solution to assure the supply of the goods at issue for consumers and the rest of the industry.

20. Because of these reasons, the Panel considered since the filing of Agrium's Challenge to the Determination on Remand, in view of the nature of the controversial issues –particularly the ones related to the conditional assessment of antidumping duties–, that according to a basic principle of procedural economy, the decision of the Panel on the Determination on Remand and the Agrium's Challenge should be necessarily subjected to the fact which generates the fundamental objection to the Determination on Remand –this is to say, the reactivation of production by AGROMEX–.

So far, the Panel has discussed the several claims of the participants in connection with the Determination on Remand, including the relevant replication by the investigating authority. However, specifically in the case of the objections rose in regard to the determination of antidumping duties, insofar as they do not apply nor are imposed if the condition of reinitiating production is not met –as provided for in the Determination on Remand–, it would be obviously pointless and legally ineffective for this Panel to make any decision whatsoever with respect to claims which are now mute.

21. Accordingly, to the extent that the Panel is not aware of any official notice on the realization of the legal condition for the antidumping duties to be effective, which confirms their enforceability –notice expressly required under Section 472 of the Determination on Remand–, this Panel does not find any reason, justification or convenience whatsoever to make any determination on claims in connection with the validity of the assessment of antidumping duties, in view that according to the Determination on Remand, no antidumping duties are enforceable or imposed, and therefore all claims in that connection are now mute. In any event, the only statement of the Panel in this regard is that such event is not incompatible with the Panel's Decision.

22. Accordingly, no additional statement or resolution is now required in connection with the pleadings referred to in items II (24) y (25) hereof.

B.4. On the Alleged Contradiction to a “Final Determination” on the Hypothesis Set Forth in Article 88 of the Foreign Trade Law

23. Agrium claims that the Determination on Remand is also “illegal and excessive because it left ineffective and unlawfully contradicted a final determination that was not disputed by the Order of the Panel, the one regarding the public interest hypothesis is set forth in Article 88 of the Foreign Trade Law.” According to Agrium, such “conclusion... was a final decision... that was not a subject matter of the Order of the Panel, and that must accordingly be considered as a final determination, and as such, may not be unilaterally revoked by the investigating authority.” Agrium’s Challenge, pp. 17-18

24. The Panel does not agree. On the subject, the Panel’s Decision stated specifically the following:

“5. *In the opinion of this Binational Panel, the statement of the Ministry of Commerce with respect to the eventual application of a public interest criterion –whether actually provided for or not in Article 88 of the LCE– is certainly a matter only hypothetical. In opinion of this Binational Panel, the reasoning of the Ministry of Commerce does not strengthen any argument stated in the Final Determination –in view of the undisputed fact that the Ministry of Commerce did not analyze the merits of the case in the final stage of the investigation– although it certainly does not affect nor cause any prejudice to the Complainant in this review.*”

Based on the above, regardless of the agreement or disagreement of this Binational Panel with the gratuitous statements made by the Ministry of Commerce with respect to the potential application of the mentioned public interest criterion, and regardless of their de validity or not –analysis which, in any event, would result

unbeneficial to this review— this Binational Panel finds that the statements at issue are made with respect to a hypothesis that is not happening in this review and, therefore, that cannot prejudice the Complainant in this review. Panel’s Decision, ¶G, 5 (emphasis added)

As mentioned above, the Panel stated expressly that the event describe by the Ministry of Commerce was merely hypothetical, and not related to the investigation. Based on the above, this Panel reiterates its decision in the sense that there is not determination whatsoever based on the event at issue.

25. Moreover, even taking by granted that a “final” determination had been made in regard to such event, or that the Panel’s Decision or the Order had not made any reference to it, it is still undisputed that the subsequent issuance of a later resolution, on the same subject, and within the same proceeding, creates necessarily a new resolution on the subject which prejudice, if any, must be challenged based on the text and language of the later resolution.

26. Analogously, the following judicial precedent sustained by the Federal Courts supports this appreciation (what on the “amparo” field it is known as one of the events of “change of legal situation”):

[Judicial Precedent/Authority on ANTIDUMPING DUTIES, PROVISIONAL DETERMINATION IMPOSING ANTIDUMPING DUTIES, INFRINGEMENTS DURING THE PROVISIONAL DETERMINATION ARE IRREPARABLY PERFORMED DUE TO THE CHANGE OF LEGAL SITUATION]

27. In any event, as mentioned in Section B.3. of this Decision, this claim is now mute due to the reasons expressed in such section.

B.5. On the Dumping Allegations

28. Finally, Agrium states several claims related to the substantive analysis on dumping performed by the Ministry of Commerce.

29. In this regard, the Panel agrees with the Ministry of Commerce's allegations that the scope of review of the Determination on Remand by the Panel is naturally limited to determine whether the Determination on Remand complied with the Panel's Decision and the Order of the Panel, and in no way extends or may be extended to become a substantive review proceeding, that necessarily would lead the Panel to review a new case, therefore creating a sort of ad infinitum review as new controversial issues might continue arising out from writs or actions from the Ministry of Commerce as consequence of subsequent decisions from the Panel.

30. In any event, as mentioned in Section B.3. of this Decision, this claim is now mute due to the reasons expressed in such section.

IV. ORDER

Now therefore, based on the above and on what is provided for in Article 1904.8 of the NAFTA, this Binational Panel hereby confirms the Determination on Remand of the Ministry of Commerce with respect to imports of urea, product classified in the tariff item 3102.10.01 of the Tariff of the Importation General Tax Law, original from the United States of America, regardless of the exporting country.

It is so ordered by this Binational Panel on January 22, 2004, in this:

Review by a Binational Panel pursuant to Article 1904 of the North American Free Trade Agreement of the Final Determination of the Antidumping Investigation on the Imports of Urea, product classified under Tariff Item 3102.10.01 of the Tariff of the Importation General Tax Law, original from the United States of America and the Russian Federation, regardless of the exporting country.

File Number with the Mexican Chapter of the North American Free Trade Agreement Secretariat: MEX-USA-00-1904-01

DECISION AND ORDER OF THE PANEL
ON THE DETERMINATION ON REMAND

Signed in the original by:

Issued on January 29, 2004.

Francisco José Contreras Vaca
Francisco José Contreras Vaca
Chairman

January 23, 2004.
Date

Peggy Chaplin
Peggy Chaplin

January 29, 2004.
Date

Raymundo E. Enríquez
Raymundo E. Enríquez

January 27, 2004.
Date

Michael W. Gordon
Michael W. Gordon

January 27, 2004.
Date

Leonard E. Santos
Leonard E. Santos

January 27, 2004.
Date