

**BINATIONAL PANEL REVIEW PURSUANT TO ARTICLE 1904 OF  
THE NORTH AMERICAN FREE TRADE AGREEMENT**

**IN THE CASE:**

**FINAL DETERMINATION OF THE  
ANTIDUMPING INVESTIGATION OF  
CARBON STEEL TUBE IMPORTS  
WITH STRAIGHT LONGITUDINAL  
SEAMS, MERCHANDISE  
CLASSIFIED WITH TARIFF  
NUMBERS 7305.11.01 AND 7305.12.01  
OF THE TARIFF SCHEDULE OF THE  
GENERAL IMPORT AND EXPORT  
TAXES LAW, FROM THE UNITED  
STATES OF AMERICA,  
INDEPENDENT OF COUNTRY OF  
ORIGIN.**

**SECRETARIAT FILE:  
MEX-USA-2005-1904-01.**

**MEMBERS OF THE PANEL<sup>1</sup>:**

James R. Holbein.

Dale Tursi.

Héctor Cuadra y Moreno.

Oscar Cruz Barney.

Francisco José Contreras Vaca, Chairman.

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<sup>1</sup> The panelists would like to express their sincere gratitude for the support of their assistants: Mónica Salguero Osuna, Gabriel Cavazos, Günter Sanabria, Yaratseth Mondragón, Eunice Herrera Cuadra and Nick Ranieri.

## **PARTICIPANTS:**

- BERG Steel Pipe Corporation, represented by Ricardo Ávila de la Torre, attorney at law.
- American Steel Pipe Division, represented by Ricardo Ávila de la Torre, attorney at law.
- Stupp Corporation, represented by Ricardo Ávila de la Torre, attorney at law.
- Secretaría de Economía de los Estados Unidos Mexicanos, represented by Hugo Perezcano Díaz, Natividad Martínez Aguilar, Adriana Díaz Ortiz, and Rodrigo Orozco Gálvez, attorneys at law.
- TUBACERO, S.A. de C.V. and Tubería Laguna S.A. de C.V., represented by Andrés González Sandoval, attorney at law.

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## BINATIONAL PANEL DECISION

### I. INTRODUCTION.

This Binational Panel (Hereinafter “Panel”) has been established pursuant to Article 1904.2 of the North American Free Trade Agreement (Hereinafter “NAFTA”) and it has the authority to review the Final Determination rendered by the *Unidad de Prácticas Comerciales Internacionales* of the Mexican *Secretaría de Economía* (Hereinafter “UPCI” “Secretary of Economy”, “Secretary”, “Investigating Authority”, “IA” or “Authority”) dated May 17, 2005, which was published in the *Diario Oficial de la Federación* ( Hereinafter “DOF”) on May 27, 2005, pursuant to the Antidumping Investigation on the Imports of *Tubería de Acero al Carbono con Costura Longitudinal Recta. Goods Classified in Sections 7305.11.01 y 7305.12.01 of the Ley de los Impuestos Generales de Importación y de Exportación, de los Estados Unidos de América, independientemente del país de procedencia*, which established final antidumping duties on the above-referred imports with exterior diameters greater than 16 inches and not more than 48 inches (between 406.4 and 1,219.2 millimeters) inclusive, with a wall thickness of 0.188 to 1.000 inches (4.77 to 25.4 millimeters) inclusive. The Authority considered these final duties to be equivalent to the margins of dumping that it calculated which were:

- for the imports of the investigated product manufactured by the company BERG Steel Pipe Corporation (Hereinafter “BERG” or “Complainant”), of 6.77 percent;

- for the imports of the investigated product manufactured by the company Oregon Steel Mills, Inc. (Napa Pipe Corporation, Hereinafter “OREGON”), of 25.43 percent, and
- for the imports of the investigated product manufactured by all other exporting companies of the United States of America, of 25.43 percent.

In addition to the Investigating Authority, the following companies participated in this review: BERG, American Steel Pipe Division (Hereinafter “ACIPCO”), Stupp Corporation (Hereinafter “STUPP”); TUBACERO, S.A. de C.V. (Hereinafter “TUBACERO”) and Tubería Laguna S.A. de C.V. (Hereinafter “TUBERÍA LAGUNA”).

Hereby, this Panel renders its decision, pursuant to Article 1904.8 of NAFTA and Part VII of the Rules of Procedure of Article 1904 of NAFTA regarding Binational Panel Reviews (Hereinafter “Rules of Procedure”).

## **II. BACKGROUND**

### **A. The Administrative Investigation**

1. On April 28, 2003, TUBACERO and TUBERÍA LAGUNA, through their legal representatives, appeared before the Investigating Authority to request the initiation of an administrative investigation in the matter of unfair trade practices related to dumping, as well as the establishment of antidumping duties on the imports of carbon steel tubing with straight longitudinal seams, from the United States of America, independent of country of origin. Such merchandise is classified with tariff numbers 7305.11.01 y 7305.12.01 of the

*Ley de los Impuestos Generales de Importación y de Exportación de los Estados Unidos Mexicanos (Hereinafter “LIGIE”).*

2. The companies TUBACERO and TUBERÍA LAGUNA alleged that during the period from January to December of 2001, imports of carbon steel tubing with straight longitudinal seams, from the United States of America, were dumped causing injury to the domestic production of identical or similar goods, pursuant to Articles 28, 30, 39 and 40 of the *Ley de Comercio Exterior* (Hereinafter “LCE”).
3. On August 29, 2003, the *Secretaría de Economía* published its Notice in the DOF, that it had accepted the request and declared the initiation of the antidumping investigation on the imports of carbon steel tubing from the United States of America, establishing the period of January through December of 2001 as the period of investigation.
4. On August 16, 2004, the *Secretaría de Economía* published the Preliminary Determination in the DOF, which continued the above-referred investigation without imposing provisional antidumping duties.
5. On May 17, 2005, the *Secretaría de Economía* rendered the Final Determination of the above-referred antidumping investigation, which was published in the DOF on May 27, 2005 (Hereinafter “Final Determination” or “Determination”), and which imposed the following antidumping duties:
  - For the imports of the investigated product manufactured by BERG- 6.77 percent.
  - For the imports of the investigated product manufactured by OREGON- 25.43 percent.

- For the imports of the investigated product manufactured by all other exporting companies from the United States of America- 25.43 percent.

## **B. The Binational Panel Review Proceeding**

1. On June 24, 2005, BERG filed a request for Binational Panel Review pursuant to Article 1904 of NAFTA, with respect to the Final Determination of the referenced antidumping investigation. (Hereinafter “Initial Request”).
2. On July 25, 2005, BERG filed its complaint regarding the referenced Final Determination.
3. On August 5, 2005, TUBACERO and TUBERÍA LAGUNA, filed their Notice of Appearance, in opposition to BERG’s complaint.
4. On August 8, 2005, the *Secretaría de Economía* filed its Notice of Appearance in opposition to BERG’s complaint. On the same date, ACIPCO and STUPP filed their Notices of Appearance, supporting BERG’s complaint.
5. Through various petitions, the Participants appointed their respective legal representatives and requested authorizations and/or cancellation of access to confidential information in this procedure.
6. On August 23, 2005, the Investigating Authority, pursuant to Article 1904.14 of NAFTA, filed before the Mexican Section of the Secretariat of the North American Free Trade Agreement (Hereinafter, “the Secretariat”) copies of the Final Determination, the administrative record index, and the administrative record, in its non-confidential and confidential versions.
7. On October 24, 2005, BERG filed its brief in support of its complaint. On the same date, ACIPCO and STUPP filed their brief in support of BERG.



8. On December 20, 2005, the Investigating Authority filed its brief, in opposition to the claims of BERG, ACIPCO y STUPP.
9. On December 21, 2005, TUBACERO filed its brief in opposition to the complaint and its support of the brief of the Investigating Authority.
10. On January 5, 2006, TUBERÍA LAGUNA filed its brief in opposition to the complaint and supporting the brief of the Investigating Authority.
11. On January 9, 2006, BERG filed its brief in reply to the briefs of the Investigating Authority, TUBACERO and TUBERÍA LAGUNA.
12. As well, on January 9, 2006, ACIPCO and STUPP filed their briefs in reply to the briefs of the Investigating Authority, TUBACERO and TUBERÍA LAGUNA.
13. On January 27, 2006, BERG on one side, and ACIPCO and STUPP on the other, filed the annex to their respective briefs.
14. On December 4, 2006, this Panel was appointed, and its members were notified of their appointments on the 7<sup>th</sup> day of the same month and year.
15. On April 2, 2007, this Panel issued an order establishing April 26, 2007 as the date of the Public Hearing, and granting the participants time to appoint lawyers or attorneys at law, as their authorized representatives to participate in the oral argument.
16. On April 16, 2007, this Panel issued a new order extending the existing agenda for the Public Hearing, in order to provide more time for the oral arguments of all the Participants.
17. Within the term established by the Panel, the Participants appointed their respective representatives to present oral arguments during the Public Hearing.

18. On April 26, 2007, the Public Hearing, in this Panel review, was held.
19. On April 27, 2007, this Panel issued an order requiring all of the Participants to clarify certain issues contained in their briefs, based on clarifications which were requested during the Public Hearing.
20. Within the terms of the Panel Order, the *Secretaría de Economía*, BERG, ACIPCO, STUPP, TUBACERO and TUBERÍA LAGUNA filed briefs in response to the Order.

### **III. STANDARD OF REVIEW**

Article 102 of NAFTA establishes the objectives of this agreement, including the principles of national treatment, the most favored nation clause and transparency, which, within the parameters of international law, serve as a criterion for the interpretation and application of the agreement's provisions, which include the:

- Elimination of barriers to trade in, and facilitation of the cross-border movement of goods and services between the territories of the Parties;
- Promotion of conditions of fair competition in the free trade area;
- Substantial increase in investment opportunities in the territories of the Parties;
- Provision of adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
- Creation of effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
- Establishment of a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

The parties confirm their rights and obligations pursuant to the *General Agreement on Tariffs and Trade* (Hereinafter, “GATT”).<sup>2</sup> One of the most salient aspects of NAFTA, is the inclusion in its text of dispute settlement mechanisms.

A fundamental aspect of the treaty negotiation was the assurance that the exporters of the three NAFTA countries could resort to a transparent procedure for the review of the administrative determinations, in matters of dumping and subsidies, through independent and binational arbitral bodies.

Chapter 19 establishes two types of ad-hoc tribunals and two committees:

- An arbitral tribunal to determine whether a legislative amendment, in matters of antidumping, is in accordance with NAFTA, specifically with Chapter 19.<sup>3</sup>
- An arbitral tribunal to review the relevant determinations rendered by the domestic entities.<sup>4</sup>
- A special committee to safeguard the review mechanism.<sup>5</sup>
- An Extraordinary Challenge Committee<sup>6</sup>.

Articles 1904.3 and Annex 1911 establish that in the case of the United Mexican States, a Panel established pursuant to Article 1904, shall apply the Standard of Review set out in Annex 1911 of Chapter 19, which in the case of the United Mexican States is

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<sup>2</sup> NAFTA, Art. 103.

<sup>3</sup> NAFTA, Articles 1902.2 and 1903.

<sup>4</sup> NAFTA, Art. 1904.

<sup>5</sup> NAFTA, Art. 1905.

<sup>6</sup> NAFTA, Art. 1904, paragraph 12 and annex 1904.13.

Article 238 of the *Código Fiscal de la Federación* (Hereinafter “CFF”), or any superseding legislation.<sup>7</sup>

The application of the Standard of Review shall be limited to the administrative record, as well as the general principles of law that a tribunal of the importing Party would otherwise apply to review a determination of the relevant investigating authority.

It is important to highlight that Article 238 of the *CFF* provides:

*Article 238.- An administrative determination shall be declared illegal when any of the following findings are demonstrated:*

- I. Lack of competence or jurisdiction of the official who rendered the determination, or initiated the procedure from which such determination has arisen;
- II. Lack of those formal requirements provided by law, in a way that negatively prejudices the defenses of the individual as well as the outcome of the challenged determination, including, in any case, the absence of legal foundation and motivation.
- III. Procedural defects which negatively prejudice the defenses of the individual as well as the outcome of the challenged determination.
- IV. The facts that motivated the determination did not actually take place, were different, or were assessed in an erroneous manner, or if the determination was rendered in contravention of the relevant legal provisions, or if these relevant legal provisions were not actually applied.
- V. When the final determination is rendered based on the exercise of discretionary powers, and this exercise is inconsistent with the objectives for which the law has conferred such powers.

The Federal Tribunal of Fiscal and Administrative Matters can adjudicate with respect to the lack of jurisdiction of the authority to render the challenged determination and with respect to the absolute lack of legal foundation and motivation of the determination, even when the

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<sup>7</sup> This Panel is conscious about and knowledgeable of the changes in the Mexican legislation and, in particular, those of the *Código Fiscal de la Federación* related to the administrative litigation procedure before the *Tribunal Federal de Justicia Fiscal y Administrativa*. These changes occurred after the beginning of this procedure of review and, therefore, they are not applicable to the present case. On December 1 of 2005, the *Ley Federal del Procedimiento Contencioso Administrativo* was published in the *Diario Oficial de la Federación*, in which Article First Transitory established its coming into force on January 1st., 2006.

challenging individual has made no specific claim on these issues because they are deemed to public policy.<sup>8</sup>

The arbitral bodies or binational Panels, established as alternative dispute resolution mechanisms for unfair trade matters, pursuant to the various international treaties and agreements of which Mexico is a Party, shall not review the causes of action contained in this Article when the claimant has not specifically raised them.”<sup>9</sup>

Regarding the general principles of law, Article 1911 of NAFTA refers to principles such as legal standing, due process, rules of interpretation for statutes, mootness and exhaustion of administrative remedies. Article 18 of the *Código Civil Federal* establishes that silence, gray areas, or insufficiency of the law, does not authorize judges to abandon the adjudication of a controversy.

Also, Article 14 of the Constitution establishes that in civil procedure, the final judgment shall be in conformity with the text or the legal interpretation of the law and, in the absence of an interpretation, the judgment shall be based on the general principles of law. The contents of this provision is reiterated in Article 158 of the *Ley de Amparo*, where it states that a direct *Amparo* lawsuit shall only be meritorious against final judgments or awards and determinations that end a trial rendered by civil, administrative, or labor tribunals, when they are contrary to the applicable text of the relevant law, its legal interpretation, or the general principles of law, or in the absence of an applicable law.

It is possible to find such general principles of law through the *regulae iuris* or rules of law, the fundamental sources of which are the *Corpus Iuris Civilis*<sup>10</sup>, the *Corpus*

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<sup>8</sup> Amended by paragraph III of the 11th Transitory Article of the *Ley Orgánica del Tribunal Fiscal de la Federación*, published in the *Diario Oficial de la Federación* on December 31, 2000.

<sup>9</sup> The last paragraph was added through the Law that establishes and modifies diverse fiscal provisions published in the *Diario Oficial de la Federación* on December 30, 1996

<sup>10</sup> *Corpus Iuris Civilis*, Alemania, apud Weidmannos, 1967-1973, 3 vols.

*Iuris Canonici*<sup>11</sup>, and the *Siete Partidas* of Alfonso X<sup>12</sup> as well as the “*brocardos*” in the works of the glossators and the post-glossators.

In the United Mexican States such rules were compiled in editions such as the *Ilustración del Derecho Real de España*, by Juan Sala, in its first Mexican edition of 1833,<sup>13</sup> and the *Pandectas Hispano-Megicanas* by Juan N. Rodríguez de San Miguel.<sup>14</sup>

Jurisprudential theses regarding the application of the general principles of law have pointed out that the operation of these principles, at their full extent, has not been restricted to civil matters, as might be reasoned from a strict interpretation of Article 14 of the Constitution, but its application is generally accepted to the extent that they are regarded as the most general formulation of the values in the current conception of the law. Also, it is generally admitted that their function does not end in the task of integration of legal gray areas. Their function especially reaches the task of interpretation of statutes and application of the law. This is why tribunals have the power, and in many cases they are obliged, to render their final judgments, keeping in mind, that in addition to the expression of the statute, always limited because of its own generality and abstraction, the fundamentals of the general principles of law, because they are an authentic and clear

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<sup>11</sup> *Corpus Iuris Canonici*. Emanuelis Turneyesen, Coloniae Munatianne, 1783, 2 volumes

<sup>12</sup> *Las Siete Partidas del Sabio Rey Don Alonso el Nono, Glosadas por el Licenciado Gregorio López, del Consejo Real de Indias de S.M.*, Madrid, En la Oficina de Benito Cano, 1789, 4 volumes. There is a facsimile edition published in 2004 by the Supreme Court of Justice.

<sup>13</sup> Sala, Juan, *Ilustración del Derecho Real de España, ordenada por Don Juan Sala, Reformada y añadida con varias doctrinas y disposiciones del derecho novísimo y del patrio*, México, Imprenta de Galván, 1831-1833, 5 tomos.

<sup>14</sup> See Rodríguez de San Miguel, Juan N., *Pandectas Hispano-Megicanas, ó sea Código General comprensivo de las leyes generales, útiles y vivas de las Siete Partidas, Recopilación novísima la de Indias, autos y providencias conocidas por de Montemayor y Beleña, y cédulas posteriores hasta el año de 1829*, Nueva Edición, Méjico, 2 tomos, 1852. More recently in the works of Mans Puigarnau, Jaime M., *Los principios generales del derecho. Repertorio de reglas, máximas y aforismos jurídicos*, Barcelona, Bosch, 1979 y de Soberanes Fernández, José Luís, *Los principios generales del derecho en México. Un ensayo histórico*, México, Ed. Miguel Angel Porrúa, 1999.

manifestation of a community's aspirations of justice. The following theses are relevant in this context:

RESOLUTIONS OF THE JUDGES OF AMPARO. CAN BE BASED ON THE GENERAL PRINCIPLES OF LAW WHEN THERE IS A LACK OF AN APPLICABLE LEGAL PROVISION. According to Article 219 of the *Código Federal de Procedimientos Civiles*, of a substitute application in the matter of *Amparo*, every judicial resolution must contain, among other requirements, the legal grounds that support it; nevertheless, when there is no applicable legal provision, the Amparo judge can invoke as a legal ground for his/her resolution the general principles of law, such as the one of procedural economy and an expedited procedure, principles contained in Article 14 of the Constitution, the application of which should not be deemed as limited to civil matters, but applicable to all legal matters, because such principles are considered the most general formulation of the values established by our current legal order and their objective is not only to fill in the gray areas of the law, but to support the interpretation and application of the law.

THIRD ADMINISTRATIVE TRIBUNAL OF THE FIRST CIRCUIT. Complaint: 243/91. Rodolfo Santa Ana Pérez. August 21, 1991. No dissents. Opinion rendered by: Genaro David Góngora Pimentel. Secretary: Guadalupe Robles Denetro. Octava época, Instancia: tribunales colegiados de circuito, Fuente: semanario judicial de la federación, Tomo: VIII, noviembre de 1991, page: 145.

GENERAL PRINCIPLES OF LAW, THEIR TASK IN THE LEGAL ORDER. Traditionally, in the Mexican legal system, it has been thought that judges, to render a decision in the cases submitted to their jurisdiction, are not only subject to the application of the legal – positive law, but also to those general principles that integrate and provide coherence to the legal order. These are known as general principles of law in accordance with the expression of the constitutional drafters in Article 14 of our magna carta. – The full operation of these principles – for some they are the original source of all other legal provisions, for some others they serve as an orientation thereof – has not been deemed as restricted to civil matters as it could be strictly interpreted from the above-referred constitutional Article, but even without a direct reference to other areas of law, is frequently admitted to the extent that those principles are considered the most general formulation of the values of the current conception of law. – Their function is not limited to filling in the gray areas of the law; but it is extended especially to the task of interpretation and application of the law and that is why tribunals have the authority and, in many cases they are obliged to render their judgments keeping in mind, in addition to the expression of the statute which is always limited by its own generality and

abstraction, the fundamentals of the general principles of law, because they are an authentic and clear manifestation of a community's aspirations of justice.

THIRD ADMINISTRATIVE TRIBUNAL OF THE FIRST CIRCUIT.

Complaint: 93/89. Federico López Pacheco. April 27, 1989. No dissents. Opinión rendered by: Genaro David Góngora Pimentel. Secretary: Adriana Leticia Campuzano Gallegos.

Octava Época, Instancia: Tribunales Colegiados de Circuito, Fuente: Semanario Judicial de la Federación, Tomo: III, Segunda Parte-2, Enero a Junio de 1989, Pagina: 573

With respect to the Standard of Review, there have been two lines of reasoning concerning the proper Standard for binational panels to apply. One criterion has been expressed in the sense that Article 238 of the CFF, which establishes the Standard, should be interpreted simultaneously with Articles 237 and 239 of the same Code, despite the fact that there is no reference of this in the NAFTA.

This criterion was expressed for the first time in the case MEX-94-1904-02, resolved on August 30, 1995, that reviewed the final determination on the imposition of antidumping duties and countervailing duties for the Imports of *Cut-to-Length Steel Plate Products from the United States of America* (the second Mexican case before a Binational Panel, but the first resolved).

The parallel application of the three Articles by the Panel, in accordance with paragraphs II and III of Article 239 of the CFF, led them to declare the challenged determination as null and void, or to declare the determination as a nullification resulting from specific effects, clearly establishing the form and terms by which the Authority should observe the Panel Decision, unless there were discretionary powers involved.

In the case MEX-USA-00-1904-01 in the matter of Imports of Urea from the United States of America, in Paragraph 11 of the Final Decision, the panel used a different



analysis, where it was resolved that “...Based on the above-mentioned considerations, regarding the NAFTA provisions, this Binational Panel is obliged to determine whether the Final Determination in this matter was rendered in accordance with the relevant Mexican antidumping and countervailing duty legal provisions (in accordance with Article 1904 of NAFTA), applying for that purpose the Standard of Review provided by Article 238 of the CFF, based only on the record and, in the absence of an expressed provision, the general legal principles “ in the same way they would be applied by a Mexican tribunal.”<sup>15</sup>

It is important to highlight the resolution of the Binational Panel, established pursuant to Article 1904 of the NAFTA, MEX-USA-00-1904-02, in the matter of *Bovine Meat* from the United States of America, regarding the Standard of Review. In this resolution, the Panel clarified that the claims of the participants regarding Articles 14 and 16 of the Constitution, cannot be resolved by the Panel because it is beyond the scope of its powers and it is within the exclusive jurisdiction of the Federal Judiciary Power, “... and this Panel has replaced the *Tribunal Federal de Justicia Fiscal y Administrativa* (Hereinafter “TFJFA”) that controls the legality of the administrative authorities and the causes of illegality contained in Article 238 of the *Código Fiscal de la Federación* (Hereinafter “CFF”) ...”<sup>16</sup>

BERG has expressed the above-mentioned possibility in its brief filed with the Mexican Section of the Secretariat on October 24, 2005, in pages 40, 48, and 50 of this brief.

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<sup>15</sup> Final Decision in the case MEX-USA-00-1904-01, p. 15.

<sup>16</sup> Final decision in the case MEX-USA-00-1904-02, p. 11.

In this respect, this Panel considers that the application of any other Article, in addition to Article 238 of the Federal Fiscal Code, in the Standard of Review in any manner, would clearly exceed its powers and competence.

The text of Annex 1911 of NAFTA clearly establishes the Standard of Review, limiting it to the provisions of Article 238 of the CFF, or any superceding legislation, based only on the record, 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. For this reason, there cannot be any other interpretation that changes the scope of this provision.

Regarding legal interpretation and following the relevant provisions of Mexican Law that is exclusively applicable in the procedures of Binational Panel review, pursued within the United Mexican States, there are very clear guiding rules in this respect, both in the *Código Civil Federal* as well as in the *Código Civil del Distrito Federal*; Article 1851 of both codes establish:

“...if the terms of a contract are clear and leave no doubt about the intention of the contracting parties, its interpretation shall based in the textual sense of its clauses.”

Even though other panel decisions are not binding on this Panel, they can be persuasive as references. It is important to highlight the final decision in the case MEX-94-1904-01, in the matter of Flat Coated Steel Products from the United States of America, which was the third Mexican Panel Decision rendered. This decision pointed out that within the powers conferred upon the Panel, there does not exist a power to declare the nullification of administrative determinations of the Investigating Authority, and adequately considered that “...*the incorporation of Article 239 to the Standard of Review*

would constitute an undue enhancement of its competence and powers...”<sup>17</sup> In identical terms, the panelists in the final Panel decision of MEX-96-1904-02, in the matter of Rolled Steel Plate from Canada, expressed themselves adding: “...if the governments of Mexico, the United States and Canada would have had the intention of providing this Panel with powers in the procedure of review in the same way that the Federal Fiscal Tribunal, in accordance with Article 239, they would have included this Article in the standard of review and would have drafted Article 1904(8) of NAFTA in a different manner...”<sup>18</sup>

In the final decision of the Panel case MEX-94-1904-03 in the matter of Polystyrene and Impact Crystal from the United States of America, and in the one of the case MEX-96-1904-03, in the matter of Hot Rolled Steel Sheet from Canada, the Panels considered that the only applicable Standard of Review was the one established in Article 238 of the above-referenced Code.<sup>19</sup>

Finally, in the resolution of the Panel case MEX-98-1904-01, in the matter of High Fructose Corn Syrup from the United States of America, the Panel concluded: “...the incorporation of Article 239 into the standard of review would constitute an undue enhancement of the Panel’s competence and powers...”<sup>20</sup>

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<sup>17</sup> Final decision in the case MEX-94-1904-01, p. 21-22.

<sup>18</sup> Final decision in the case MEX-96-1904-02, p.30-31.

<sup>19</sup> Final decision in the case MEX-94-1904-03, p. 13 and final decision in the case MEX-96-1904-03, p. 14.

<sup>20</sup> Final decision in the case MEX-98-1904-01, p. 36-37.

In addition, there is abundant Mexican doctrine that confirms that, in the United Mexican States, the Standard of Review is limited to Article 238 of the above-mentioned Código Fiscal de la Federación.<sup>21</sup>

For these reasons, this Panel considers that the only applicable Standard of Review is exclusively the one contained in Article 238 of the *Código Fiscal de la Federación* in force at the time of the beginning of the present procedure of review.

This Panel considers as well that the application of Article 239 of the referred Code would constitute an undue expansion of its powers and competence.

#### **IV. PARTICIPATION OF ATTORNEYS BEFORE THE PANEL**

The Panel Order of April 2, 2007 established that, pursuant to Article 1904.7 of NAFTA, the legal representatives of each participant could intervene in the oral arguments before the Panel during the public hearing if they were persons authorized to practice law in the United Mexican States.

Also, at the beginning of the public hearing the Chairman of this Panel informed the participants that “...*the parties with legal standing to appear before this Panel, shall be represented by attorneys at law in accordance with Article 1904.7 of NAFTA...*”.

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<sup>21</sup> Gieseze, Craig, “Los desafíos jurídicos de México, Canadá y Estados Unidos bajo en nuevo sistema de solución de controversias en materia antidumping y cuotas compensatorias del capítulo XIX del Tratado de Libre Comercio de América del Norte”, *Prácticas desleales del comercio internacional (Antidumping)*, México, Instituto de Investigaciones Jurídicas, UNAM, 1995; Endsley, Harry B., Irish, Maureen, Veytia Palomino, Hernany, “Standard of review under the NAFTA”, *Ars Iuris*, México, Revista del Instituto de Documentación e Información jurídicas de la Facultad de Derecho de la Universidad Panamericana, número 21, 1999; Veytia Palomino, Hernany y Gutiérrez, José Angel, “El criterio de revisión para México”, *Ars Iuris*, México, Revista del Instituto de Documentación e Información jurídicas de la Facultad de Derecho de la Universidad Panamericana, número 21, 1999; Cruz Miramontes, Rodolfo, “Comentarios en torno a la resolución pronunciada por el Panel establecido al amparo del capítulo XIX del TLCAN, en el expediente MEX-USA-94-1904-02”, en *Revista de derecho privado*, México, Instituto de Investigaciones Jurídicas, UNAM, año 7, núm. 19, enero-abril, 1996, among others.

In this context, the Panel required the participants to submit a copy of their *cédula profesional* (professional practice license), corresponding to each representative, to authorize their participation in the public hearing.

Without exception, the participants appointed attorneys at law, authorized to practice law in the United Mexican States.<sup>22</sup>

This Panel believes that the strict application of Article 1904.7 of NAFTA is of vital importance. This provision requires the participation of lawyers during the review procedure and the public hearing(s) that take place in the Binational Panel reviews, pursuant to Article 1904 of NAFTA.

This issue has arisen twice before Binational Panels, first, in the Panel case MEX-USA-94-1904-01, in the matter of Imports of *Imports of Flat Coated Steel Products from the United States of America*, and later in the Panel case MEX-USA-98-1904-01, in the matter of *High Fructose Corn Syrup from the United States of America*.

Professions are activities or jobs of the individuals in a society, and their free practice is subject to the norms and administrative requirements established by law with the purpose of guaranteeing the common wealth. These requirements include the granting and registration of a degree, which demonstrate that the studies corresponding to a particular professional career have been completed, and that all the relevant requirements, determined by the authorized higher education institutions, have been complied with.

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<sup>22</sup> TUBACERO filing on 20 April, 2007; TUBERIA LAGUNA, filing on 20 April, 2007; STUPP and ACIPCO, filing on 19 April 2007; BERG filing on 19 April, 2007, and the IA, filing on 20 April, 2007.

According to Article 24 of the *Ley Reglamentaria del Artículo 5° Constitucional*, related to the practice of professions in the Federal District, a professional exercise or practice is:

ARTICLE 24. - “Professional exercise, for the purposes of this law, is the habitual undertaking, with or without payment, of all acts or services rendered that are characteristic of each of the professions, even when it is a mere consulting or the promotion of a person as a professional by means of business cards, advertisements, plaques, insignia, or in any other manner. Any action taken in situations of emergency with the purpose of immediate assistance, shall not be considered as professional exercise.”

From this definition we can distinguish those elements that are part of the professional exercise, which applied to the specific case of the law profession, are the following:

- The habitual exercise with or without payment;
- Of all acts or services rendered that are characteristic of the legal profession; and
- The labor of consulting, and/or the display of such professional skills through business cards, advertisements, plaques, insignia, or any other mean.

The limits in the exercise of profession are founded in the State interest to protect the general public requiring professional services. The legal disposition that establishes the rules for the exercise of a profession determine – *inter alia* - the conditions to obtain a professional degree, point out which legal institutions are the ones authorized to grant the degrees and determine the prohibitions to foreigners to exercise these activities in our country.<sup>23</sup>

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<sup>23</sup> See *Diccionario jurídico mexicano*, 7a ed., México, Instituto de Investigaciones Jurídicas, UNAM, Volume P-Z, entry: *Profesiones*.

In order to be lawfully exercised in the United Mexican States, any profession should be subject to the provisions of the *Ley de Profesiones*.

It is important to highlight that, to exercise a profession in the *Federal District*, Article 25 of that Law requires the following:

- To be in full legal capacity to exercise the civil rights.
- To have a professional degree legally granted and duly registered, and
- To obtain the patent for the exercise from the *Dirección General de Profesiones*.

On the other hand, the same law establishes that, to obtain a professional degree, it is indispensable to prove that all the academic requirements provided by law have been satisfied. For the registration of the degrees granted by institutions outside of the national educational system, it is necessary to have a validation of the corresponding studies by the *Secretaría de Educación Pública*, and an accreditation that a community service has been performed.<sup>24</sup>

In addition, the judicial authorities and those in charge of administrative litigation matters, are obliged to reject the submissions, as agents or technical advisors of the persons with legal standing, of any individual without a registered professional degree. Moreover, a power of attorney for any judicial or administrative litigation matter can only be granted to those professionals with a duly registered professional degree, as required by law.<sup>25</sup>

In summary:

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<sup>24</sup> *Ley de Profesiones*, Art. 8.

<sup>25</sup> *Id.*, Art. 26.

- A professional exercise involves the habitual undertaking, with or without payment, of all acts or services rendered that are characteristic of each of the professions, even when it is a mere consulting or the promotion of a person as a professional by means of business cards, advertisements, plaques, insignia, or in any other manner, including the authorization in writing before domestic authorities; and
- To be exercised in Mexico, any profession should be subject to the provisions of the *Ley de Profesiones*.

We now proceed to refer to the specific provisions of Chapter 19 and to the final decisions adopted in the above-mentioned cases pursuant to NAFTA Article 1904.

In the case MEX-94-1904-01, involving Flat Coated Steel Products from the United States of America, when a motion for lack of legal personality was filed, the Panel resolved to recognize two Mexican lawyers as accredited legal representatives, with the condition that they prove to the Panel their status as attorneys at law by showing their *cédulas profesionales*, issued by the *Dirección General de Profesiones* of the *Secretaría de Educación Pública*. In the interim, a lawyer who did not comply with the above-referenced requirements was only recognized as a legal advisor, and not as a legal representative.<sup>26</sup>

NAFTA Article 1904, paragraph 7, clearly establishes that:

*“The competent investigating authority that issued the final determination in question shall have the right to appear and be represented by counsel before the panel. Each Party shall provide that other persons who, pursuant to the law of the importing Party, otherwise would have had the right to appear and be represented in a domestic judicial review proceeding*

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<sup>26</sup>Final decision in the case MEX-94-1904-01, p. 9.



*concerning the determination of the competent investigating authority, shall have the right to appear and be represented by counsel before the panel..” (emphasis added)*

It is important to highlight that the word “and” in this Article joins the verbs “to appear” and “to be represented” in an affirmative manner. In other words, the appearance of the participants before the Panel should be made through the representation of a counsel or attorney at law.

On the other hand, Rule 3 of the Rules of Procedure establishes that an “*interested person*” means a person who, pursuant to the laws of the country in which a final determination was made, would be entitled to appear and be represented in a judicial review of the final determination; this definition is related to the last paragraph of Article 200 of the *CFF*, in force at the beginning of this procedure, which establishes that to appear as a representative before the Tribunal, a person shall have a degree in Law.

From the plain reading of the cited provisions we conclude that only the lawyers or attorneys at law can be appointed by the participants to be represented in the proceedings before the Panels reviewing final determinations established pursuant to NAFTA Chapter 19.

The appearance of juridical persons and government entities before the dispute resolution Panels can only be made through their duly accredited representatives or attorneys, individuals who, pursuant to Article 1904.7, shall be attorneys at law.

Thus, for a person to be considered as an accredited legal representative of any of the participants, they are required to be an attorney and to sign a document before the Panel.

In accordance with the second paragraph of NAFTA Article 1904, the applicable legal provisions in this case are the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination; in this context, it is necessary to rely on Article 5 of the Constitution, Article 24 of the *Law Regulating Article 5 of the Constitution and its Regulations*, , as well as the Decree of December 31, 1973 in its second transitory Article.

In reading of the above-referred legislation, we conclude that the legal profession and its practice is a right established and regulated by law, which is limited for reasons of public policy by the applicable legal provisions that have been indicated.

Also, other requirements should be fulfilled to permit lawful professional exercise, from the accreditation of being an attorney at law or lawyer by means of the professional degree and the corresponding *cédula profesional*, the latter issued by the *Dirección General de Profesiones de la Secretaría de Educación Pública*.

Of course, a fundamental element is the fact that the interested person is in full exercise of his/her civil rights.

A question arises in this context: Is a power of attorney - granted for a representation to a person, lawyer or not, national or not - sufficient to appear and present arguments before a Panel?

An issue at this point is: what does the exercise or practice of law mean? By answering this question it is possible to determine whether the representation before a NAFTA Article 1904 Panel involves such a professional practice and, as a consequence,

the fact that the accredited representatives should be lawyers in accordance with the expressed text of the relevant agreement.

The most important part of the legal profession is precisely to speak and to write in legal terminology. In other words, the art of writing and speaking in juridical terms are fundamental skills of a lawyer. By definition, arguments of law have a distinctive legal technical component, in contrast with the testimonial or experts' evidence.

If the main task of a NAFTA Chapter 19 Panel is to determine whether the Investigating Authorities, of each of the three Parties, have rendered their determinations in accordance with their own domestic antidumping and countervailing duty legislation (that in the case of the United Mexican States include the *Ley de Comercio Exterior* (Hereinafter "LCE"), the *Reglamento de la Ley de Comercio Exterior* (Hereinafter: "RLCE"), the Agreement on the Implementation of Article VI of GATT 94 (Hereinafter "Antidumping Agreement"), the Agreement on Subsidies and Countervailing Measures of GATT 1994 and the Agreement on Safeguards of GATT 1994, as well as the Understanding on Rules and Procedures Governing the Settlement of Disputes of the World Trade Organization (Hereinafter "WTO"). It is evident that all arguments presented before the Panel, orally or in writing, necessarily have a legal component, because they seek to demonstrate before the Panel whether, or not, the authority based its determination on the domestic legal provisions.

Also, the presentation of arguments orally or in writing, before a Chapter 19 Panel is an exercise of the legal profession under the terms provided by Article 24 of the *Ley Reglamentaria del Artículo 5° Constitucional*.

To represent a participant in a dispute settlement mechanism, such as a NAFTA Chapter 19 Panel, pursuant to the above-mentioned Article 1904, paragraph 7, either advising or defending the interests of the participants, necessarily requires a demonstration that the representative has a *cédula profesional* that allows him/her to practice law.

Therefore, it is not enough that any lay person, or a lawyer without a proper professional certificate, appear before the Panel as legal representatives of any of the participants in the procedure, but it is necessary to demonstrate that they have complied with all the other relevant requirements directly related to the practice of law.

Thus, with respect to this issue, this Panel considers that in order to appear before a body established pursuant to NAFTA Chapter 19, it is necessary to demonstrate the possession of a professional degree and a certificate that authorizes the practice of law. This requirement was fulfilled by all of the legal representatives of the participants at the public hearing.

## **V. ISSUES**

According to the points raised by BERG, in its Complainant's Brief, dated 24 October, 2005, the Final Determination violates the following legal provisions:

1. Articles 3.1, 3.2, 3.4 and 3.5 of the *Antidumping Agreement*; articles 39 and 41 of the LCE; articles 59, 64, 65, 69 and 76 of the RLCE, and article 238, paragraphs II, III and IV, of the CFF, when it determined, as the period of investigation the dates between January 1 and December 31, 2001.
2. Articles 14, 16 and 17 of the *Constitución Política de los Estados Unidos Mexicanos* (Hereinafter, "Constitution"); article 5.10 of the *Antidumping*

*Agreement*; article 59 of the LCE and article 238, paragraphs II, III and IV, of the CFF, as well as the essential formalities of due process and various judicial precedents, when it rendered the final determination beyond the term provided by law.

3. Articles 14 and 16 of the Constitution; article 2.2 of the *Antidumping Agreement*; article 32 of the LCE; article 43 of the RLCE; paragraphs II, III and IV of article 238 of the CFF, and its own administrative practice, when it changed the mechanism to determine the normal value from prices to costs, without consideration of any evidence provided by any of the participants.
4. Article 80, paragraph II, of the RLCE; article 238, paragraphs II and IV, of the CFF, and articles 14 and 16 of the Constitution, when it imposed a duty for “all other exporters”.
5. Articles 62 of the LCE, article 9.2 of the *Antidumping Agreement*; article 80, paragraph II, of the RLCE, article 238, paragraph II, of the CFF and articles 14 and 16 of the Constitution, when it ordered the imposition of antidumping duties based on the customs value.
6. Articles 3.1, 3.2, 3.4 and 3.5 of the *Antidumping Agreement*; article 41 of the LCE; article 64 of the RLCE; article 238, paragraph II, of the CFF, and articles 14 and 16 of the Constitution, when it did not consider, in their proper context, the arguments and evidence of the administrative record, incorrectly determining the existence of injury to domestic production.

## **VI. ANALYSIS OF THE ALLEGED VIOLATIONS COMMITTED BY THE INVESTIGATING AUTHORITY BY DETERMINING**

## **JANUARY 1 TO DECEMBER 31, 2001 AS THE PERIOD OF INVESTIGATION.**

The Complainant alleged that the Investigating Authority determined as the period of investigation, the time between January 1, 2001 and December 31, 2001, which is too distant from April 28, 2003,<sup>27</sup> the date when the request for the investigation was filed. This is a difference of sixteen months between the period of investigation and the filing of the above-mentioned request, which is when the petitioner businesses proposed the period of investigation should begin.

According to BERG, this time difference violated articles 3.1, 3.2, 3.4 and 3.5 of the *Antidumping Agreement*, articles 39 and 41 of the LCE; articles 59, 64, 65, 69 and 76 of the RLCE; and article 238, sections II, III and IV, of the CFF.<sup>28</sup>

It is important to highlight that the Investigating Authority decided to respond to each one of the alleged violations filed by the Complainant.

The Investigating Authority responded that the Complainant did not present “Any arguments that explain in what form or in what way the Investigating Authority has violated or omitted the legal precepts applicable to the case before us.”<sup>29</sup> Therefore, according to the Investigating Authority, by not filing arguments that would explain the alleged wrongs, the allegations are rendered ineffective, since they preclude the defense of the Investigating Authority and of the businesses requesting the antidumping investigation.

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<sup>27</sup> Request for Initiation of the Investigation. Administrative Record. Non-Confidential version. Sheet 0301726.

<sup>28</sup> BERG's Brief. Non Confidential version. P. 15.

<sup>29</sup> Brief of the Investigative Authority. Non Confidential version. P. 14.

Additionally, the Investigating Authority, in its Brief filed in opposition to the complaint, indicated that in this type of procedure, the replacement of the complaint by action of the Panel is inapplicable, according to article 238 of the CFF, which states the following in its last paragraph:

*“The arbitration agencies or binational Panels derived from alternative dispute resolution mechanisms regarding unfair practices concerning treaties and international agreements which Mexico is a party to, will not be able to revise, without request, the causes of action referred to in this article”*

In accordance with this legal precept, this Panel finds that it does not have the authority to replace the deficiencies in the complaint due to the lack of argument by the Complainant or its failure to relate each one of the above-mentioned articles to the alleged violations.

Likewise, it is important to note that in order to reinforce its argument, the Investigating Authority’s Brief cited diverse precedents and jurisprudential theses, which, although they only represent persuasive arguments to the Panel, according to article 1904.2 of the NAFTA<sup>30</sup>, they form part of the legal authorities that the Panel should consider in its review. Said precedents and jurisprudential theses state the following:

*“VIOLATION UNDER REVIEW.” It is understood for violation, an error is committed within a judicial determination by having unduly applied the law, or by omitting to apply the law that governs the case; consequently, in describing each violation, the complainant must indicate what is the part of the description that causes the violation, cite which legal precept was violated, and explain why the concept was infringed; it is improper to take into consideration, consequently, the violations that lack those requirements.” (Emphasis added)*

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<sup>30</sup> Article 1904.2 [...] For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority. [...]

*SECOND COLLEGIAL TRIBUNAL OF THE FIFTH CIRCUIT. Precedent. Protection in review 254/91.- Clemente Cordoba Hazard.- February 11, 1992.- Unanimity of votes.- Speaker Adam Gilberto Villarreal I Neuter.- Secretary: Arturo Ortégón Heron. Protection in review 148/92.- Francisco Barraza Gutiérrez.- June 26, 1992.- Unanimity of votes.- Speaker José Nabor González Ruíz.- Secretary Sergio Cross Carmona. Protection in review 238/92.- National Financiam, S.N.C.- October 28, 1992. Unanimity of votes.- Speaker Pike Antonio Castle González.- Secretary Ramón Vine López. Protection in review 121/93. Sure The Provincial one, INC.- June 18, 1993. Unanimity of votes.- Speaker Alicia Rodríguez Cross.- Secretary Eduardo Anastacio Chávez García. Protection in revisión 110/93.- Soul Yadira Petterson Téllez.- June 23, 1993.- Unanimity of votes. Speaker Alicia Rodríguez Cross.- Secretary Juan Carlos Luque Gómez. Eighth Era, T. C. C. Judicial Seminar of The Confederacy. XII. September of 1993. Thesis V. 2°J/76. Jurisprudence. P. 39.*

*“EXISTENCE AND NON-EXISTENCE OF THE VIOLATIONS.- there are violations against a judicial decision, when expressly formulated reasoning is subject to direct attack, in the conclusions and the diverse arguments of the disputed Determination, but it is indisputable that violations do not truly exist, while to attempt to undermine the Determination, only mere allegations are put forward .” (Emphasis added)*

*Sixth Era, Second Room, Judicial Weekly of the Confederacy, Third Part, CXXI, p. 13.*

*INSUFFICIENT OFFENSES.- THOSE THAT ALLEGE THE VIOLATION OF A LEGAL PRECEPT WITHOUT EXPLAINING WHAT CONSTITUTED THE VIOLATION .- When the authority, in using its discretion of review, alleges that the Sala de Reconocimiento of the court violated, to its disadvantage, specific legal precepts, without expressing the reasoning supporting its conclusion that said appraisal was performed, it should be considered that the violations expressed in such manner are insufficient to counteract the failure incurred, since by not indicating which action caused the concrete injury, the judging body is precluded from making any pronouncement in the issue, at risk of incurring the replacement of the complaint .” (Emphasis added) Judgment of Suggestive Competency No. 18/89.- Resolved in session of May 2, 1990 unanimously of 7 votes.- Judge Speaker: Gilberto García Camberos.- Secretary Mentioning Magaña Herrejón.- Preceding.- Review Not. 1548/85.- Resolved in session of July 9, 1986 unanimously of 8 votes.*



Regarding this point, the Panel agrees with the reasoning provided by the Investigating Authority, since according to Annex 1911 of NAFTA, the Panel must apply the Standard of Review described in article 238 of the CFF and, consequently, it cannot supply the deficiencies in the presentation of the Complainant's arguments. Correspondingly, this Panel declares that it has carefully studied each one of BERG's allegations and has afforded them the weight that the legal logic permits.

According to BERG, the consequences of the difference between the period of investigation and the initiation of the investigation are:

- *"...That the examination of the volume and effects of the prices performed by the Secretaría de Economía was not subjective and was not based on positive tests, as required by paragraphs 1 and 2 of Article 3 of the Antidumping Agreement;*
- *that the examination of 'all the pertinent economic factors' that influence the national production which was performed by the Secretaría de Economía was not subjective and was not based on positive tests, as required by paragraphs 1 and 4 of Article 3 of the Antidumping Agreement;*
- *that the Investigating Authority's Determination regarding imports subject to dumping causing injury to the national production was not subjective and was not based on positive tests, as required by paragraphs 1 and 5 of Article 3 of the Antidumping Agreement ..."*<sup>31</sup>

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<sup>31</sup> Brief of BERG. Non Confidential version. P. 18.

In its Brief the Investigating Authority points out that the articles of the *Antidumping Agreement* indicated by BERG “...refer to some of the elements and conditions that an Investigating Authority should keep in mind to use as decisive guidance regarding the existence of injury, ...”<sup>32</sup>. They establish the elements to be considered to determine the existence of the injury, but they fail to indicate the time that should exist between the period of investigation and the initiation of the investigation.

In fact, this Panel has verified that the articles of the *Antidumping Agreement* stated by the Complainant which were supposedly violated, do not mention anything regarding the period of investigation. On the other hand, they indicate the following:

“3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance. [ . . . ]

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or

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<sup>32</sup> Brief of the Investigating Authority. Non Confidential version. P. 18.

investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.”

Likewise, BERG alleged that the determination of the period of investigation violated the Investigating Authority’s own instructions, since in the norms for petitioner businesses it is established as a clear criterion that the injury and the causality “...*should cover at least six months and should be closest to the date when the request was filed....* ”

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In turn, the Investigating Authority indicated in its Brief and during the public hearing, that from the initiation of the investigation<sup>34</sup> it explained to all the parties that the national consumption of the investigated product responds to a distinctive situation of the market and of the industry, since its importation depends on the purchases made by means of tenders or bids for the construction of hydraulic projects, petroleum, petrochemical or similar plants and some purchases to wholesale clients. This implies that the demand for

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<sup>33</sup> Brief of BERG. Not Confidential version. P. 15, citing the Section I.B. 8. of the form for applicants.

<sup>34</sup> Determination by the Investigating Authority that the request of the interested party is accepted and the initiation of the antidumping duty investigation is declared concerning the imports of carbon steel tubing with straight longitudinal seams.

the merchandise cannot respond to a predefined seasonal pattern, as is the case for the agricultural products or of permanent consumption.<sup>35</sup> This same explanation is taken up again in points 117 to 120, 160 and 197 of the Final Determination and it is based on tests included in the administrative file.

Likewise, the Investigating Authority indicated<sup>36</sup> that the period of investigation was proposed by the petitioning businesses when they gave their answers in the forms included with their initial request for the investigation. There, the applicants TUBACERO and TUBERIA LAGUNA explained the reasons why this period was selected as representative. It is appropriate to note that this Panel has observed that the administrative practice of the Investigating Authority is oriented to making use of said information, when the same is considered as representative and reasonable, just as it happened in the case at hand. Likewise, included in the brief filed by the Investigating Authority and during the argument at the public hearing<sup>37</sup> the Investigating Authority emphasized that the election of that period of investigation was due to the unique nature of the tubing market, since it does not have cyclical periods, as is the case for agricultural products.<sup>38</sup>

Additionally, the Investigating Authority noted that even when there is evidence for the need to consider this period of investigation in particular, and even when this was made known to all of the parties during the administrative investigation, giving extensive legal opportunity to the parties to make their corresponding arguments on the matter, the BERG Corporation contributed no argument or questioning during the administrative

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<sup>35</sup> Brief of the Investigating Authority. Not Confidential version. P. 21-25.

<sup>36</sup> Response of the Investigating Authority to the Request for Additional Information formulated by the Panel subsequent to the public Hearing. Confidential version. May 14, 2007. P. 2-3.

<sup>37</sup> April 26, 2007.

<sup>38</sup> Brief of the Investigating Authority. Non Confidential version. P. 21-26.

procedure in relation to the selection of such period of investigation. In other words, it appears that they failed to exhaust their administrative remedies for this issue by not raising any concerns prior to the Panel proceeding.

The Investigating Authority also pointed out that the forms to request the initiation of the investigation, where the applicants should propose a period of investigation, were in conformity with the Antidumping Agreement. Notwithstanding that the forms require that the period of investigation should cover at least six months and be closest to the date when the request was filed, neither these forms nor the applicable legislation established fatal deadlines for the selection of the period of investigation nor prohibit the consideration of a more extensive or more distant period. It is a matter of discretion for the Investigating Authority for each of the members of the World Trade Organization (Hereinafter “WTO”).

It is important to note that the applicable legislation limits such discretion of the Investigating Authority, according to articles 65 and 76 of the RLCE. In fact, Article 65 of the RLCE states the following:

*Article 65. - The Office of the Secretary should evaluate the economic factors described in the previous article within the context of the economic cycle and the specific conditions of competition of the affected industry. In that respect, the petitioners will contribute the information corresponding to the relevant factors and characteristic indicators of the industry concerning at least three years prior to the filing of the request, including the period of investigation, unless the business in question had occurred in a smaller period of time. Likewise, the national producers, petitioners or the organizations that represent them will contribute economic studies, monographs, technical literature and national and international statistics on the behavior of the market in question, or any other documentation that would permit the identification of the economic cycles and the specific conditions of competition of the affected industry (emphasis added).*

In this respect, the Investigating Authority alleged that it evaluated the pertinent economic factors in the context of the economic cycle and the specific conditions of competition of the affected industry and that, due to the nature of the industry, it had to elect the period of investigation within the three years indicated by the above-mentioned article 65 of the RLCE.

On this subject, Article 76 of the RLCE indicates:

*Article 76.- The investigation of unfair practices in international trade will discuss the existence of price discrimination or subsidy and the injury caused or that can be caused to the national production. It will cover a period which includes imports of merchandise identical or similar to those of the national production that could as a result be affected, which had been performed during a period of at least six months prior to the initiation of the investigation.*

*The period of investigation above mentioned will be able to be modified at the discretion of the Office of the Secretary by a period covering the imports that occurred after the initiation of the investigation. In this case, the Determinations which impose provisional or final antidumping duties will apply to the original period as well as to the expanded period. (Emphasis added)*

According to the above mentioned article, this Panel finds that the period of investigation should cover “*at least*” six months and be “*prior*” to the initiation of the investigation and that the period of investigation in this case is greater than six months and occurs prior to the initiation of the investigation, for which reasons it complies with the legal precepts required by law.

The Investigating Authority stated that it had complied with the requirements dictated in Articles 65 and 76 of the RLCE, and that the period in question, “*...is of twelve months; is prior to the initiation of the investigation; the injury evaluation period of time included three years and, said period was appropriate to the specific characteristics of the case, the industry and the domestic market ...*”.<sup>39</sup>

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<sup>39</sup> Brief of the Investigating Authority. Not Confidential version. P. 11.

In that respect, BERG argued in its brief and during the public hearing, that Article 76 of the RLCE requires an interpretation, since the term “*prior*” should be understood as “*immediately preceding*”, every time that it is applied, upon being written in the past tense, the legislators “...*adhered tacitly the concept of ‘immediacy’ as an implicit attribute to the concept of ‘priority’ ...*”.<sup>40</sup>

Concerning these arguments, the Investigating Authority indicated that Article 76 only specifies that the period should be previous to the initiation of the investigation, and it does not speak of immediacy. Likewise, the Investigating Authority alleges that there is no legal decision that defines a specific parameter indicating how far back the months that comprise the period of investigation should begin, for which this determination remains subject to the discretion of the Investigating Authority.

Consequently, this Panel declares that it finds that the aforementioned intention of the legislature in article 76 of the RLCE is sufficiently clear and exact, for which it does not require any interpretation.

Likewise, BERG alleged that the Investigating Authority violated sections II, III and IV of the article 238 of the CFF, which state:

*“It will be declared that an administrative Determination is illegal when some of the following causalities are shown:*

*I. [ ]...*

*II. Omission of the formal requirements provided by law, which affects an individual's defenses and impacts the result of the challenged resolution, including the lack of legal foundation or reasoning, as the case may be.*

*III. Procedural errors which affect an individual's defenses and impact the result of the challenged resolution.*

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<sup>40</sup> Response Brief of BERG. Not Confidential version. P. 6.

*IV. If the facts which underlie the resolution do not exist, are different or were erroneously weighed, or if (the resolution) was issued in violation of applicable legal provisions or if the correct provisions were not applied.*

[ ]...”

It should be noted that the Investigating Authority maintained that the Complainant did not argue the reasons why the above-mentioned sections were violated, in spite of the fact that they presented some general allegations about this issue.

As for section II of the article above indicated, regarding the omission of formal requirements, the Investigating Authority declared that it complied with the legal requirements related to the acceptance of the request and the initiation of the investigation; since it notified the interested parties and called for their participation in the administrative procedure, exactly as was required in accordance with the requirements of the LCE and the RLCE.

Additionally, the Investigating Authority alleges, that the above-mentioned section II requires that those omissions must affect the defense of the individual and that, nevertheless, it is understood from the administrative file that the right of hearing and of reply was granted during the procedure to all the interested parties; so this was not an obstacle which would force the exporting businesses (among them BERG) and the importers to choose not to participate in the public hearing or to file subsequent briefs. Therefore, the Authority maintained that there were no omissions that weaken the sense of the Final Determination, since during the corresponding period of investigation, which is the subject of analysis for this Panel, such decision was properly supported and warranted. Based on this reasoning, the Investigating Authority took the position that the precepts stated in section II of Article 238 of the CFF were not violated.



In relation to section III of the article at hand, that refers to the errors in the procedure, the Investigating Authority supports its arguments citing the jurisprudential thesis issued by the *Suprema Corte de Justicia de la Nación*, which says:<sup>41</sup>

*VIOLATION OF THE CAUSES FOR ANNULMENT STATED IN ARTICLE 238, SECTIONS II AND III OF THE CÓDIGO FISCAL DE LA FEDERACIÓN.*

*“The errors of procedure are translated in the contempt to the consequences of legal and logical order foreseen by the objective norms for the issuance of the administrative determinations or in the omission of the formalities established by the laws, which is in violation of the legal guarantees of THE SENTENCES FROM THE TRIBUNAL FISCAL DE LA FEDERACIÓN. Tribunales Colegiados de Circuito. Seminario Judicial de la Federación. 8ª Época. Tomo X. July. Thesis I. 3º A. 457 TO. P. 411.*

Considering the previously stated principle, this Panel finds that the decision by the Investigating Authority regarding the determination of the period of investigation was performed without errors, was within its discretion and that it adhered to the legal and logical consequences foreseen by the objective norms previously stated to issue its Determination. Therefore, there were no errors that could affect either the Final Determination, or an action incurred in any of the other two causalities foreseen in this section, since the Authority did not affect the defense of the individual and did not weaken the sense of the Determination. That is to say, the precepts from section III of Article 238 of the CFF were not violated.

Finally, the precepts included in section IV of the before mentioned article 238 were not violated, since the facts that warranted the decision of the Investigating Authority existed and were properly verified with conclusive documents in the administrative record, and the administrative procedure, as well as the Final Determination, adhered properly to the law.

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<sup>41</sup> Brief of the Investigating Authority. Not Confidential version. P. 33

On the other hand, the Complainant alleged that the information gathered by the Investigating Authority could not be a sufficient foundation to subjectively verify the existence of the dumping, injury and the causal relation or a decision based on positive tests; and indicated that the Investigating Authority did not have the necessary information to determine that the investigated imports were subject to dumping and that they were the cause of the present injury in the industry<sup>42</sup>. The Investigating Authority argued that the conclusions drawn from the administrative record and the unfair practices shown could not simply dissipate with time.

It should be noted that this allegation of BERG raises the idea that the Investigating Authority should have determined the existence of discrimination of prices and actual injury up to the present. Nevertheless, we will not enter into the discussion of this allegation, since this is not a function of this Panel.

In its Brief, to support its position, BERG referred to the report of the WTO dispute resolution panel which issued Antidumping Measures on Bovine Meat and Rice, where it was also found that various interpretations of the LCE were incompatible with the *Antidumping Agreement*, and it was found that the period of investigation established by the Investigating Authority had been too distant from the initiation of the administrative investigation.<sup>43</sup>

Consequently, the Investigating Authority argued that the Complainant ignored the principle that each antidumping investigation presents special characteristics and that the case before this Panel has specific conditions of competition of the investigated product

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<sup>42</sup> Brief of BERG. Non Confidential version. P. 17-18.

<sup>43</sup> Case WT/DS295/R. May, 2005.

which are very different from those of the rice or the beef cases.<sup>44</sup> It also argues that the decisions of the WTO dispute resolution panels are not mandatory precedents for the Binational Panels of Chapter 19 of NAFTA and that each case is unique and different and should be analyzed in a specific way considering each one of the circumstances that influenced the case.

Considering the previous facts, the Panel finds that although the decisions of other multilateral dispute settlement bodies are not mandatory precedents for the Panel, nor to any other panels of NAFTA Chapter 19, it analyzed the cited case with attention to the differences existing among the case at hand and the matter referred to by the Complainant, giving the due doctrinal weight that all decisions issued in this subject have, which are valuable for the construction of the international trade law. Nevertheless, the Panel is well aware that its abilities are established by article 1904 of NAFTA which does not list the ability to determine whether the LCE is compatible with the *Antidumping Agreement* or with any other legal instrument.

In the same manner and in spite of the fact that the issue regarding the appropriate Standard of Review for the Panel has been already discussed in depth during the beginning of this decision, it is nevertheless necessary to clarify the panel's scope of authority, as indicated in article 1904.2 of NAFTA, which states:

*“ An involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. .... ”*

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<sup>44</sup> Brief of the Investigating Authority. Not Confidential version. pp. 21-26.

Then, it is clearly stated that this Panel does not have any authority to verify whether or not the LCE is in violation of the *Antidumping Agreement*, and that the Panel's function is to review the Final Determination in this case in light of the conclusive tests in the administrative record and their conformity with the applicable legislation.

Consequently, having reviewed with extreme care all the arguments filed by the Participants, equally in their briefs as in their oral appearances, as well as the conclusive evidence in the administrative record and their due relation to each one of the above-mentioned legal precepts, this Panel affirms this issue of the Final Determination, since it is in compliance with the applicable legislation, since the Investigating Authority based its opinion on conclusive evidence in the administrative record, the participants did not raise the issue with sufficient clarity during the administrative review, the Investigating Authority properly exercised its legal discretion, and used them to correctly determine the period of investigation.

## **VII. ANALYSIS OF THE ALLEGED VIOLATIONS OF THE INVESTIGATING AUTHORITY WHEN IT RENDERED ITS FINAL DETERMINATION BEYOND THE TERM ESTABLISHED BY LAW.**

BERG alleged that the Final Determination was performed outside of the legal period, without citing any justification. The arguments of BERG refer to the fact that the investigation was performed in 21 months (beginning with the publication in the DOF of August 29, 2003, of the Determination under which the request was accepted and the initiation of the antidumping investigation that occupies us was declared, and concluding

with the publication of the Final Determination in the DOF of May 25, 2005).<sup>45</sup> Consequently, BERG alleges that the Investigating Authority violated provisions of the Constitution, the *Antidumping Agreement*, the LCE, the CFF, and essential procedural formalities and various jurisprudential precedents.

Specifically, the Complainant alleged that the delay in the filing of the Final Determination violates article 5.10 of the *Antidumping Agreement*, which establishes that:

5.10 “Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation”.<sup>46</sup>

BERG indicated that this provision does not allow the Investigating Authority to continue investigating after 18 months. It indicates that the investigation was not finished within this period and expressed that no exceptional circumstances existed to justify such delay.<sup>47</sup>

Likewise, BERG declared that the Final Determination also contravenes article 59 of the *LCE*, which establishes:

*“Within a period of 210 days from the day following the publication in the Diario Oficial de la Federación of the determination to initiate the investigation, the Secretary shall render the final determination.”*<sup>48</sup>

According to BERG, there is no discretion or justification to carry out the Final Determination outside the period of 210 days, which indicates that the Final Determination should have been issued on October 8, 2004 and not on May 27, 2005. In this case, the delay of 146 days had, as a consequence, the filing of the Final Determination in 356 work

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<sup>45</sup> Brief of BERG, p. 21

<sup>46</sup> *Antidumping Agreement*, article 5.10

<sup>47</sup> Brief of BERG, p. 22

<sup>48</sup> *Id.*

days<sup>49</sup>.

BERG alleged that the infringements of the *Antidumping Agreement* and of the LCE resulted in a violation of the Constitution. It expressed specifically that the delay in the filing of the Final Determination implies that the Investigating Authority did not comply with the essential formalities of the procedure. Likewise BERG alleged that such delay violates constitutional articles 14, 16 and 17, which establish the guarantees of judicial legality and security. It indicated that these requirements are currently in force and that the authorities cannot indefinitely and arbitrarily act in a way that affects them or that affects the individuals.<sup>50</sup> The Complainant alleged that its position is supported in the jurisprudential theses referred to by the *Suprema Corte de Justicia de la Nación*, which states in relevant part:

*“...even when the precepts cited do not establish expressed sanctions regarding cases when the authority does not comply with the specified period in the law, such illegality causes the smooth and plain nullification of that Determination, in terms of section IV of article 238 of the Código Fiscal de la Federación, since the contrary would imply that the authorities act arbitrarily in indefinite form, maintaining control of the duration of their actions, which would be a violation of the guarantee of legal security contained in article 16 of the Constitución Política de los Estados Unidos Mexicanos ...”<sup>51</sup>*

The Complainant alleged that this thesis of jurisprudence clearly establishes that when the Investigating Authority does not file a Determination within the period legally established, the illegality causes the expressed nullification, which was what happened in the present case, and was the reason by which it requested to the Panel that it release a

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<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Jurisprudential Thesis (2ª./J.140/2002 consulted in page 247, Volume XVI, December 2002, Novena Época. Seminario Judicial de la Federación y su Gaceta, Segunda Sala de la Suprema Corte de Justicia de la Nación, registration number 185, 344.

statement of nullification of the effects produced by the Final Determination<sup>52</sup>.

BERG likewise maintained that the Panels of Chapter 19 of the NAFTA Agreement have also recognized the importance of filing Determinations within the period legally established and, on that matter, cited the Decision issued by the Panel that was established under NAFTA Chapter 19 in the case relating to Laminated Steel from the USA, which stated:

*“... the Investigating Authority has the obligation to strictly comply with the maximum limits established... and to present the special circumstances that justify the delay...”*<sup>53</sup>

The Complainant considered that the Constitution extends protection of individual guarantees, since article 17 establishes:

*“...Every person has the right to be administered justice by courts that will do so promptly and within the time limits and terms set by the laws, producing its Determinations in a prompt, complete and impartial manner...”*<sup>54</sup>

Likewise, BERG invoked diverse jurisprudential theses that interpret article 17 of the Constitution, regarding the filing of Determinations which were outside the period established by law. It maintained that the Supreme Court of Justice has confirmed the quick and prompt administration of justice upon establishing:

*“... the reserve of law by virtue of which the cited constitutional precept indicates that justice will be administered in the time limit and terms set by the laws...”*<sup>55</sup>

The Complainant also referred to a jurisprudential precedent established by the Supreme Court of Justice, which indicated that article 17 of the Constitution establishes

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<sup>52</sup> Brief of BERG, p. 24

<sup>53</sup> MEX 96-1904-02

<sup>54</sup> *Constitution*, article 17

<sup>55</sup> Registration No. 902206.

diverse principles that form the subjective public law, obligating the authorities to act according to the law, which requires the following:

*“... prompt justice, which translates into the obligation on the part of the authorities responsible for adjudicating it, to resolve the controversies within the terms and times established by the laws...”*<sup>56</sup>

BERG argued that the interpretation of the Court refers to the fact that justice should be administered within the time and the terms legally established, which should not be interpreted in any other manner by the legislators and much less by administrative agencies.

Similarly, the Complainant argued that, by acting outside the time periods established by the law, the Investigating Authority imposed an antidumping duty in an illegal manner. BERG alleged that the Final Determination is in violation of article 238, sections II, III and IV of the CFF.<sup>57</sup>

The Investigating Authority declared that the Final Determination was correctly filed within the time period established by law and, continues to argue that the determination was submitted according to the law, properly founded and warranted, without defects and without causing any injury to the Complainant.

The Investigating Authority also indicated that it complied with the *Antidumping Agreement*, stating that the agreement has a provision for exceptional circumstances and that, due to the fact that said agreement does not specify what are considered exceptional circumstances, the Investigating Authority considered as such the following situations:

- complexity of the investigation,

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<sup>56</sup> Registration No. 921075: PROMPT JUSTICE, WHICH IS REPRESENTED BY THE OBLIGATION OF THE AUTHORITIES RESPONSIBLE FOR ITS ADMINISTRATION, TO RESOLVE THE CONTROVERSIES BEFORE THEM, WITHIN THE TERMS AND TIME LIMIT THAT THE LAWS ESTABLISH FOR SUCH EFFECT.

<sup>57</sup> Brief of BERG, p. 28



- the volume of the information,
- the number of participants involved,
- the difficulty of obtaining the information, data or evidence;
- extensions, requirements of information, and
- the opportunity for compliance, among others.<sup>58</sup>

The Investigating Authority subsequently argued that the investigation that was the foundation of the present review presented exceptional circumstances and it was necessary to add at least 58 more work days to the investigation to allow the participants to respond to the requirements. Since they also requested and received numerous extensions, the Investigating Authority also maintained that the additional time was lost as a consequence of intending to carry out an on-site verification for OREGON. Likewise, it noted that the reluctant contribution by the participants in the investigation complicated the procedure even more.<sup>59</sup>

The Investigating Authority declared that it did not contravene the *LCE*. It maintained that said law has to be interpreted in harmony with other laws regarding unfair trade practices, such as the *RLCE*, and the *Antidumping Agreement*. It indicated that the text of the *LCE* allows for exceptions to the terms established and that the delays of the investigation were justified by the circumstances.<sup>60</sup>

The Investigating Authority stated that simply alleging a delay in the filing of the Final Determination is insufficient to dispute it and argued that BERG had not shown how it had presumably been injured by such delay. It also indicated that in the case of Chapter 19 of the NAFTA regarding the Panel of Laminated Steel, it was established that any requested review based on a delay in the filing of the Final Determination should be

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<sup>58</sup> Brief of the Investigating Authority, pp. 92-95 and the Public Hearing Record, p. 40

<sup>59</sup> Brief of the Investigating Authority, pp. 95-99

<sup>60</sup> Brief of the Investigating Authority, p. 102

founded on the demonstration of an economic or legal injury, indicating that the Panel had maintained that:

*“...In conclusion, this Panel considers important to emphasize that in this case, the plaintiffs did not show the economic or legal injury caused or potentially caused by the excessive delay in the filing of the preliminary and final decisions by the Investigating Authority....61*

The Investigating Authority maintained that the Complainant did not suffer, nor did it show to have suffered, some economic or legal injury caused by the delay in the filing of the Determination, and it maintained that it offered extensive opportunities to all the participants to intervene in the investigation. Also, it pointed out the extensions requested by the Participants, which were granted, as well as the fact that the Preliminary Determination was filed without the imposition of an antidumping duty.

The Investigating Authority also argued that the arguments of the Complainant related to the violations to the Constitution and to the CFF, are unworkable. It maintained that BERG failed to specify the supposed constitutional violation that occurred and that, in any event, it has been already established that the constitutional violations were beyond the capacities granted to this Panel by article 238 of the CFF. The Investigating Authority also stated that the Complainant did not specify how article 238 of the code was violated and that it failed to show the injury suffered and the legal link established by the CFF. It insisted that this Panel should affirm the Final Determination and it declared that, in any event, the review of the Panel is limited to affirming or remanding the Determination without being authorized to reverse it or to declare its nullification.<sup>62</sup>

As previously stated, this Panel emphasizes that the review performed is conducted in strict compliance with the NAFTA. In fact, as it has been stated, it is important to

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<sup>61</sup> MEX-96-1904-02

<sup>62</sup> Brief of the Investigating Authority, pp. 114-115 and the Public Hearing Record

emphasize that NAFTA restricts the review of the Panel to what is stated in Annex 1911 and the general principles of law that the court of the importing Party would apply for the review of a decision filed by the competent authority.<sup>63</sup> As we have stated, NAFTA determines the Standard of Review to utilize, which in the case of the United Mexican States is established in Article 238 of the CFF or any other law that substitutes for it, relying only on the administrative record.<sup>64</sup> Therefore, this Panel is incompetent to replace the Investigating Authority or to annul the Final Determination; it is simply limited to affirming or remanding the Determination so that the Investigating Authority can carry out actions that are not incompatible with the Decision of the Panel.<sup>65</sup> To a greater extent, as already was stated, under the Mexican law this Panel is not competent to make findings regarding constitutionality, for which reason the Panel will not resolve questions of constitutionality alleged by the Complainant.

Regarding the allegation concerning the violation of article 238, sections II, III, and IV of the CFF, this Panel finds that BERG has not shown that it suffered any injury or prejudice from the delay of the filing of the Final Determination. In fact, after having analyzed the Briefs filed by BERG, the verbal arguments made by it during the public hearing and the administrative record, this Panel concludes that the Investigating Authority did not intentionally delay the procedure for the purpose of causing prejudice to the Complainant, so that BERG would suffer some harm, or so that the Final Determination would have been affected because of it. Likewise, in the event that the Complainant would have suffered some harm, the burden of proof rested on the

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<sup>63</sup> NAFTA, article 1904 (3)

<sup>64</sup> NAFTA, Anexo1911

<sup>65</sup> NAFTA, Annex 1911

Complainant to show it and not on the Investigating Authority to explain it.

It is important to emphasize that Article 238, sections II and III of the CFF establishes that an administrative decision is illegal when:

*“... II. Omission of the formal requirements provided by law, which affects an individual's defenses and impacts the result of the challenged resolution, including the lack of legal foundation or reasoning, as the case may be.*

*III. Procedural errors which affect an individual's defenses and impact the result of the challenged resolution....”*

Therefore, BERG was obliged to prove the following three elements to prove the violation of article 238 of the cited code by the Investigating Authority:

- The existence of the alleged failure or omission in the procedure;
- That said failure or omission in the procedure negatively affected its defense, and
- That this situation negatively affected the result of the disputed Determination.

Consequently, the success of the arguments of BERG in this respect depends on the proof of these three elements. In fact, if BERG has only shown that the delay is illegal, but the injury is not confirmed, then the situation created is described by the Mexican laws as *“not disabling illegalities”*.<sup>66</sup> This means that the illegality of the act does not affect the validity of the administrative decision. The Mexican courts have opined on the matter, establishing by means of a jurisprudential precedent that for administrative decisions to be challenged, *“it is necessary that the failures or procedural omissions affect the defenses of the individual and transcend to the sense of the disputed Determination, and consequently a material harm be caused”*.<sup>67</sup>

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<sup>66</sup> The concept of harmless error is well accepted in the U.S. and appears analogous to this situation.

<sup>67</sup> *ADMINISTRATIVE ACT. THEIR VALIDITY AND EFFICACY ARE NOT AFFECTED BECAUSE OF "NOT DISABLING ILLEGALITIES" THAT DO NOT TRANSCEND NOR CAUSE DEFENSELESSNESS OR INJURY. If the illegality of the act of the authority is not translated into an injury that affects the individual, such error turns out to be irrelevant, while the end desired was obtained, that is to say, to offer the opportunity to offer*

As previously stated, this Panel finds that the Complainant did not allege that the delays of the Investigating Authority constituted an “*omission of the necessary formal requests*”, according to section II of Article 238 of the CFF, or in which way such delay amounted to “*the existence of failures in the procedure that affect the defenses of the individual and that transcend to the sense of the disputed Determination*”, according to the section III of the same article. To a greater extent, BERG did not declare the existence of some “*failure on the part of the authority or public official in relation to the filing of a Determination that was founded and warranted*”. In this context, this Panel finds that it is authorized to have knowledge of the alleged causes for the argument made by the authority, *without request*, since Article 238, last paragraph of the present code specifically prohibits the Binational Panels from establishing investigations in relation to these causes when the complainants do not validate them.<sup>68</sup>

Finally, this Panel observes that the Complainant did not properly establish the

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*tests and allegations as to what to its rights corresponds prior to a decision. Consequently, it is evident that the supposed illegality is not present regarding article 238, paragraph III, of the Código Fiscal de la Federación, since the defenses of the individual were not affected even though the legal conditions were not satisfied for the efficacy of the illegality in question, it is improper to declare a nullification when the ratio legis is very clear, in the sense of preserving and to conserve actions of the administrative authority that, although illegal, do not generate effects on the individual, therefore should also be attended and pursue the conducive, collective interests to assure effects such as an adequate and efficient fiscal collection, which justifies the prevention, clear and unconditional of the legislature, in the sense of safeguards the validity and efficacy of certain actions. And it is thus, that article 237 of the Código Fiscal de la Federación develops the legitimacy presumption principle and conservation of the administrative acts, that includes what in the theory of the administrative right is known as "not disabling illegalities", regarding which, of course, does not proceed to declare its nullification, but to confirm the validity of the administrative act. Then, it is necessary that such omissions or errors affect the defenses of the individual and they transcend to the sense of the disputed determination and that cause an effective damage. Because otherwise the concept of annulment used would be insufficient to declare the nullification of the disputed administrative determination. (emphasis added)*

CUARTO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO.

*Amparo Directo 44/2004. Mauricio Chavero Blázquez and other. April 28, 2004. Unanimity of votes. Speaker: Jean Claude Tron Petit. Secretary: Claudia Patrician Peraza Espinoza. See: Semanario Judicial de la Federación, Octava Época, Tomo VII, March of 1991, page 106, thesis I.2o.A.268 TO, of area: "ADMINISTRATIVE ACTS, LIGHT VICES OF THE."*

<sup>68</sup> See article 238, last paragraph of CFF which states, that: “...The arbitral bodies or binational Panels, established as alternative dispute resolution mechanisms for unfair trade matters, pursuant to the various international treaties and agreements of which Mexico is a Party, shall not review the causes of action contained in this Article when the claimant has not specifically raised them”

difference between the criteria established to declare as illegal an administrative decision in compliance with sections II and III of Article 238 of the CFF and section IV of such disposition. In fact, BERG limited itself to alleging that the Investigating Authority's delay in filing its Determination violated those three sections; nevertheless, the Mexican jurisdiction has established by means of jurisprudential theses that section III refers to errors in the "procedure" while section IV refers to errors *iudicando* – law enforcement-. In that sense, an offense based on section IV applies to cases in which the administrative authority issues a decision based on laws which differ from the ones that it should have applied. On the contrary, an offense based on section III can be validated in those cases in which the administrative authority has made a mistake itself in the application of the procedural norms (not in the substantive norms).<sup>69</sup>

The Complainant alleged, correctly, that the Investigating Authority exceeded the period established by article 59 of the LCE, which states:

*"Article 59.- Within a period of 210 days from the day following the publication in the Diario Oficial de la Federación of the determination to initiate the investigation, the Secretary shall*

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<sup>69</sup> LEGAL PROCEDURAL AND SUBSTANTIVE VIOLATIONS FORESEEN IN ARTICLE 238, PARAGRAPHS III AND IV, OF THE CÓDIGO FISCAL DE LA FEDERACIÓN. SPECIFIC DIFFERENTIATION. When in an administrative procedure an extra adjudicative code is applied which differs from the one that, in accordance with the corresponding decisions, turns out to be applicable, it should be understood that the cause of nullification is to be found according to paragraph III and not to paragraph IV, both of Article 238 of the Código Fiscal de la Federación. Therefore, while the above-mentioned paragraph III details, in an express way, specifically and clearly, the hypothesis at hand, that errors of procedure that affect the defenses of the individual and effect the result of the opinion, while paragraph IV refers to the failure to apply appropriate authorities, and in spite of the apparent congruency among these hypothesis within said paragraphs, the specific difference rests in which the first one of them will be seen as a violation of the procedure as a by-product of the undue application of an adjudicative norm, while the second is created in the undue application of a substantive norm... The difference between both hypothesis has a direct relation with the classification that has been doctrinally defined as errors in adjudication, that would correspond to that contained in paragraph IV, and the errors in proceeding, which correspond to what is indicated in paragraph III. (emphasis added)

DÉCIMO SEGUNDO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO.

Revisión Fiscal 4292/2001. Titular del Area de Responsabilidades del Órgano Interno de Control en el Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado (ISSSTE). 13 of September of 2001. Majority of votes. Dissident: Hilario Bárcenas Chávez. Speaker: Jorge Arturo Camero Ocampo. Secretary: Alfredo Cid Garcia. Direct protection 7072/2001. Roberto Damián Rivers. 13 of September of 2001. Unanimity of votes. Speaker: Roberto Avendaño. Secretary: Minerva H. Mendoza Cross.

*render the final determination.”.*

Nevertheless, this Panel agrees with the Investigating Authority in the sense that the Complainant did not show that it would have been legally harmed or prejudiced by the delay or that the Final Determination would have been affected as a result of such delay.<sup>70</sup>

Regarding the provisions contained in the *Antidumping Agreement*, this Panel considers that the Investigating Authority did not comply with the terms established, and although it cautions about differences of tone among the official WTO texts in English and in Spanish, it finds that the Investigating Authority exceeded the requirements. In fact, the texts previously mentioned, respectively state:

*“5.10. Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation”.*

*5.10. Salvo en circunstancias excepcionales, las investigaciones deberán haber concluido dentro de un año, y en todo caso en un plazo de 18 meses, contados a partir de su iniciación”.*

Thus, this Panel finds that the text in Spanish can be interpreted as giving to the Investigating Authority greater flexibility and, in spite of this, the Panel does not consider that the Investigating Authority complied with such period in any event. In fact, the phrase *“except in exceptional circumstances”*, at the beginning of the text of the cited article in the Spanish version, can be interpreted to modify the annual period as well as the period of the 18 months. Nevertheless, and taking into account the WTO editing of the text in English (where only the period of a year is modified), the history of article 5.10 and the previous one, 5.5, as well as the insertion *“in every case”* (in its Spanish version upon being referred to the period of 18 months), obliges this Panel to conclude that the interpretation made by BERG regarding article 5.10 turns out to be incorrect. Because of

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<sup>70</sup> Brief of the Investigating Authority, p. 102

this, despite the fact that the Investigating Authority violated the *Antidumping Agreement*, such situation does not yield a result favorable to the Complainant.

This Panel finds that according to the hierarchy of the international treaties in the Mexican legal order, in the United Mexican States the authorities should apply the Mexican law in a way which does not contradict the international agreements. Therefore, it affirms the interpretation offered by the Investigating Authority with regard to the prominent provisions of the LCE and of the *Antidumping Agreement*.

Even when it is accepted as a fact that the Final Determination was filed after the periods established by the *Antidumping Agreement* and the LCE this Panel declines to declare as illegal the Determination filed by the Investigating Authority in the issue that is analyzed. In fact, it is evident that the Complainant did not comply with the consistent legal requirement in showing the economic or legal injury produced by the late filing of the Determination or that such circumstance affected the same. Apparently the existing delays are the direct result of circumstances of the investigation and, in fact, such delays offered to the Complainant the opportunity to participate with greater depth in the administrative procedure and to solidify its arguments.

**VIII. ANALYSIS OF THE ALLEGED VIOLATIONS OF THE INVESTIGATING AUTHORITY WHEN IT CHANGED THE METHODOLOGY TO DETERMINE THE NORMAL VALUE FROM PRICES TO COSTS WITHOUT REFERENCE TO ANY EVIDENCE PROVIDED BY THE COMPLAINANTS.**



The complainant alleges that once the investigation was initiated using the method of domestic prices for calculating the normal value of the investigated product, the Investigating Authority, without any basis, also required information about its cost of production with the purpose of determining the normal value under that methodology, in order to compare this with the export price, deriving from this comparison an artificial dumping margin.<sup>71</sup>

BERG argued that the companies that requested the antidumping investigation never requested the Investigating Authority to exclude any sales made at a loss and never filed any evidence or information in the record that supported such an exclusion, in accordance with the RLCE. In this sense, BERG relied upon the second paragraph of article 32 of the LCE and also a portion of article 43 of the RLCE. These articles are cited as follows:

*Article 32 LCE- "Sales in the ordinary course of trade are those commercial transactions which reflect market conditions in the country of origin, that have been made regularly or during a representative period between independent buyers and sellers.*

*In calculating the normal value of the merchandise subject to investigation, home-market or third-country sales which reflect persistent losses shall be excluded. Such sales shall be defined as transactions the prices of which do not permit the exporter to cover production costs and general expenses incurred in the ordinary course of trade within a reasonable period, which may be a period longer than the period of investigation.*

*When the home-market or third-country market sales transactions that generate profits are insufficient for such sales to be considered representative, the normal value of the merchandise subject to investigation shall be established in accordance with the constructed-value methodology.*

*Article 43 RLCE." In accordance with article 32, paragraph two of the LCE, the petitioner shall provide information that supports the requested exclusion. In these cases, the Authority shall take into account the fact, that during the period of investigation, the selling prices have been exceptionally low or the costs exceptionally high, due to temporary or critical situations.*

*As a general rule, domestic sales with profits or export sales to a third country in the same condition, shall be considered as representative when they account for, at least 30 per cent of the relevant market."*

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<sup>71</sup> BERG's Brief. pp. 28-30

Also the complainant argued that ...” *It is the case that in this investigation the petitioner did not request any exclusion of sales with losses, and neither filed an evidence or information that supported such an exclusion in accordance with the RLCE. In addition, the petitioners filed as proof for calculating the normal value domestic prices in the U.S. market; which implies the use of prices rather than costs to determine the normal value....*”<sup>72</sup>

BERG in its Brief referred to point 44 of the Initiation Determination, which literally states: “44. *Based on articles 31 of the LCE—and 2.2 of the Antidumping Agreement, the Secretary accepted the information filed by the petitioners for calculating the normal value in accordance with the option of the domestic selling price in the country of origin*”.

Due to the preceding argument, the complainant alleges that, “...*in this explicit way the petitioners and the Investigating Authority both recognized that the Normal Value should be, and can be determined using the domestic market prices of such country...*”<sup>73</sup>

BERG additionally argued that the only document filed by the petitioners, that is in the administrative record and in which a similar issue is mentioned only in two paragraphs, is “*clearly insufficient*” because it does not contain any information that supports the decision to change the methodology to use costs rather than prices.

The complainant argues that based on the preceding argument, it can be concluded that: “...*When changing the methodology without evidence or proof filed by the petitioners, the Investigating Authority violated Articles 14 and 16 of the Mexican Constitution, 2.2 of the Antidumping Agreement, 32 of the LCE—and article 43 of the*

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<sup>72</sup> BERG's Brief , p. 29

<sup>73</sup> BERG's Brief , p. 30

RLCE, in addition to its own administrative practice, so that the Final Determination is illegal because it violates paragraphs II, III and IV of article 238 of the Código Fiscal....”<sup>74</sup>

The Investigating Authority argued that a Final Determination legally issued in compliance with the legal framework, necessarily fulfills the requirements of the Mexican Constitution (Articles 14 and 16). The authority considers as irrelevant the argument of the complainant in the sense that the Investigating Authority did not violate the aforementioned articles of the Constitution, confirming that the investigation was issued in accordance with the legal framework”.<sup>75</sup>

The Investigating Authority argued, in addition, that article 2.1 of the *Antidumping Agreement* establishes that the comparable price to the export price has to be in the ordinary course of trade, stating that “for this reason nobody should be surprised due to the cost requirement of the Mexican Authority”.<sup>76</sup> In support of this proposition, the Authority cited article 2.2.1 of the *Antidumping Agreement*.

The investigating Authority also argued that for the purpose of determining whether the domestic sales in the market of the USA had been made in the ordinary course of trade, using price comparisons, it requested the North American exporters to provide information about their costs of production, a situation that permitted the Authority to use the test of “below-cost sales” mentioned in points 91-95 of the Final Determination.<sup>77</sup>

The Investigating Authority, during the public hearing, also pointed out that article 2.2.1 and in the general way, the *Antidumping Agreement* “....do not forbid or identify the

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<sup>74</sup> Id

<sup>75</sup> Op. Cit. Number 31, pp. 54-61.

<sup>76</sup> Id.

<sup>77</sup> Points 91 to 95 of the Final Decision

*specific moment during the investigation when the Investigating Authority can require necessary information for determining that the sales reported by the export companies were made during the ordinary course of trade....*”<sup>78</sup> The Authority rejects the allegation that it violated article 32, second paragraph of the LCE when requiring the companies to provide the necessary information for performing the test of costs pointed out above.

After referring to the first paragraph of article 43 of the RLCE, the Investigating Authority stated that when the petitioner companies initiating the antidumping investigation make arguments that the sales of export companies were not made in the ordinary course of trade, the petitioners shall file information and evidence to support this argument.

The Investigating Authority also argued that article 43 of RLCE quoted above is not applicable to this antidumping investigation, “...*because the petitioners of the antidumping investigation did not show that the domestic sales in the USA market were made below-cost...*”<sup>79</sup>

The Investigating Authority argued that it is not necessary to have a specific argument from the petitioners companies, in accordance with articles 2.1 and 2.2 of *Antidumping Agreement*, requesting that the comparable price to the export price to Mexico is in the ordinary course of trade<sup>80</sup>, from this situation, it is understandable the Authority used its discretion in requiring the use of cost information, with the purpose of achieving this determination.

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<sup>78</sup> Op. Cit. Number 39, p. 63

<sup>79</sup> Op Cit. Number 31 p.59

<sup>80</sup> See paragraph 131 of the Brief of the Investigating Authority.

Likewise, the Authority denied that it had violated the rights of the complainant under sections II, III and IV of article 238 of the *CFF* because there was no failure to follow the formal requirements demanded by the laws or errors in the procedure that influenced the sense of the Determination.

Regarding the violation of the Authority's administrative practice, argued by the complainant, the Authority argued that "*the Investigating Authority acts in accordance with the particular conditions of each issue, taking into account the legal framework....*".<sup>81</sup>

The complainant in its Reply Brief argued that it is the obligation of the Authority to verify that sales in the domestic market are in the ordinary course of trade, "*....it is also obligatory to use this test (for below-cost sales) after the exporter files its response to the formal questionnaire...*"<sup>82</sup> because, otherwise the exporter's capacity to defend itself is violated, when losing its *procedural* opportunity to file information about another alternative with the Authority in order to determine the normal value.

During the public hearing, the counsel of the complainant<sup>83</sup> alleged that the Investigating Authority violated its rights under several sections of article 238 of the *CFF*, when requiring BERG, during the antidumping investigation, to file cost information in order to determine the normal value, because, "*....even though it is an obligation of the Authority to verify that the sales in the domestic market are in the ordinary course of trade, it is equally obligatory for the Authority choosing the methodology, once the exporter files its answer to the antidumping investigation questionnaire, not by choosing*

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<sup>81</sup> Op. Cit Number 31 p.61

<sup>82</sup> Op. Cit. Number 39 pp. 20-22

<sup>83</sup> Op. Cit. Number 39, pp. 20-26

*the methodology - as the Authority did in this case - in later phases of the procedure.....”*

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BERG stressed that eight months after the Initiation of the Antidumping Investigation the Investigating Authority issued a requirement for the complainant requesting them to file cost information, which implied an absolute change in the methodology. “..... *the argument of my client is: why? ¿Why did the Authority change at that time its methodology, eight months after the Initiation of Antidumping investigation was published? ¿Why did the Authority not provide notice from the beginning, after the filing of the petitioner’s request?*”<sup>85</sup>

The complainant also argued that article 43 of the RLCE explains article 32 of the LCE when establishing that the petitioner in an antidumping investigation shall provide information that supports the antidumping duties. Also, the complainant pointed out that there was no proof from the petitioners, but however, the Investigating Authority’s requirement was still there.<sup>86</sup>

Regarding the issue mentioned above, BERG concluded that such violation affected the guarantees established in articles 14 and 16 of the Mexican Constitution, violating article 2 of *Antidumping Agreement*, article 32 of LCE and article 43 of the RLCE, and likewise the Authority’s administrative practice, because it never had applied such a decision in other cases, and therefore, that article 238 of the CFF was also violated against BERG’s interests.<sup>87</sup>

During the public hearing the Panel asked BERG’s counsel whether, when the Investigating Authority required BERG to provide cost information, the complainant had

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<sup>84</sup> Op. Cit. Number 60, pp 20-26.

<sup>85</sup> Id.

<sup>86</sup> Id.

<sup>87</sup> Id

delivered such information to the Authority. In response, the counsel answered “YES”. The panel also asked whether, during the procedure, BERG had stated its disagreement with the Investigating Authority’s decision to change the methodology when using constructed value; in response, BERG answered that effectively it had showed its disagreement, and in supporting this, it would inform the panel of the date of the document where such manifestation had been done.<sup>88</sup>

Later, the Panel insisted that BERG point out exactly which document was mentioned above, and the counsel responded in the affirmative, adding: “...*Now, only I want to mention an, an important situation, we said also by writing, we will point out the exact document, but where eh, I cannot remember eh, I do not know if there was a technical information meeting that normally eh we required. I will confirm this situation in case that happened, in order to defend also eh this issue. Here the, the point, it is important to say that unfortunately these technical meetings do not have a transcript ¿no?. These meetings are very general, anyway, these are recorded. In any case, it is in others, in others, documents or appearances.....*”<sup>89</sup>

During the Public Hearing, also the Panel asked BERG whether, in its opinion, the change of methodology shifting Normal Value to Constructed Value had any affect on the calculation of the *dumping* margin. The answer of BERG’s counsel was in the sense that effectively the margin of dumping had been affected due to the change of methodology, resulting in a margin of 6.77 percent. “...*With the change of methodology the dumping margin was affected. If our original proposal had been respected with domestic prices, we would have had a dumping margin of zero, even negative....*”

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<sup>88</sup> *Id.*

<sup>89</sup> *Ibid.*, pp 22-23

Likewise, in the Public Hearing the Panel asked BERG's counsel whether the Constructed Value was erroneously calculated. In response, the counsel said that, first the methodology used was not properly notified to the exporter, because: *".... If had been notified, probably we would have requested access to the proprietary record, in answering the Panel's question we need to see the proprietary data, specifically the calculation made by the Authority, in order to know whether there are specific mistakes in its methodology, that surely there are flaws, but we do not know because we lost the opportunity of having access to the proprietary record and the Authority decided, in the middle of the procedure, to change the methodology"*.

In regard to domestic sales, in the Public Hearing the Panel asked the Complainant's counsel if the information related to this issue was given to the Authority, that is, information to show sales in accordance with the ordinary course of trade; the counsel answered affirmatively, stressing that even in this situation, the Investigating Authority had reached a contrary conclusion.

During the Public Hearing, the Panel also pointed out that the Investigating Authority frequently used Constructed Value in order to get trustworthy information, which is a practice that is not seen as a violation against the Authority's administrative practice, because Administrative Law has the main characteristic of being malleable.

Also the Complainant's counsel in the Public Hearing pointed out that even if the Panel agreed with the Investigating Authority's broad exercise of discretion, there are limits imposed by the LCE, the RLCE, the *Antidumping Agreement* and other supplementary Law, so that, *".... In this case, in accordance with article 43 of the RLCE, for the Authority to shift from option one – domestic prices - to option three - constructed value - it is necessary to have a request from the petitioner, asking about this issue. In the*



*record, there is no such request, so that, in legal terms, this exercise of discretion should not be applied at the Authority's own initiative...*"<sup>90</sup>

Regarding the ordinary course of trade, the Complainant's counsel, during the Public Hearing, argued that the Investigating Authority should have identified what type of ordinary course of trade operation it was relying upon. These kinds of operations should be transactions that reflect market conditions in the country of origin and that have been made regularly or in a representative period, between independent buyers and sellers. The complainant stressed that there was also a lack of justification, meaning the reasons, circumstances and clear motives that the Authority should have invoked for changing the methodology in calculating the Normal Value and in accordance with the applicable legal framework.<sup>91</sup>

In determining the Normal Value, the Investigating Authority, during the Public Hearing, argued<sup>92</sup> that it had acted based on the Law and in accordance with its administrative practice, which was never violated when asking for cost information. For the Investigating Authority, article 2.1 of *Antidumping Agreement* establishes that Normal Value has to be set in the ordinary course of trade, but this article does not point out the specific moment when the Authority can request information to determine this situation. Likewise, the Investigating Authority affirmed that in determining that the domestic sales in the USA market, reported by the exporters, had been made in the ordinary course of trade, it requested information related to costs of production and made the test of below-cost sales, as it was explained in points 91-95 of the Final Determination.

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<sup>90</sup> Ibid., pp. 25-26.

<sup>91</sup> Id

<sup>92</sup> Ibid., pp. 62-68

Therefore, the Investigating Authority argued that there was no violation of article 32 of the LCE when it required export companies to provide information to enable it to determine, through the test of below-cost sales whether the domestic sales in the USA had been made in the ordinary course of trade.<sup>93</sup>

During the Public Hearing, the Investigating Authority affirmed that, in accordance with articles 2.1 and 2.2 of *Antidumping Agreement*, it has the authority to see whether the comparable prices fulfill the criteria for being in the ordinary course of trade and also that it can legally ask for cost information in order to reach such determination, “...*without the need for any specific request from the petitioners.....*”

Even if the Antidumping Investigation was initiated by calculating Normal Value using the option of domestic prices in the USA, considering the evidence that the petitioners reasonably had provided, as is established in article 75, section XI of *the RLCE*, this fact does not prevent the Authority, during the investigation, from requiring information about costs that can support calculating the normal value using the option of constructed value.<sup>94</sup>

The Investigating Authority also argued that it did not omit any of the requirements established in the legal framework or commit errors in the procedure that would have affected the defense of BERG. Rather, the Authority argued “..... *to the contrary, we gave a broad opportunity to the complainant to defend its interests, having influence on the procedure used to render the determination and not formally opposing the change in*

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

*procedure,, which was therefore issued in accordance with law, without violation of sections II, III and IV of article 238 of the Código Fiscal de la Federación... ”.*<sup>95</sup>

The Panel asked the Authority during the Public Hearing whether it is necessary to notify the participants in the antidumping investigation, regarding the change of the methodology. The Authority’s counsel answered that article 46 of the *RLCE* establishes that the petitioners can request a change in the methodology, *”But article 2.1 of Antidumping Agreement, no, article 2.2.1, does not set any requirement, giving to the Authority the opportunity for making that change.... ”.*<sup>96</sup>

In addition, during the Public Hearing the Panel asked the Authority if in accordance with article 2.2 of *Antidumping Agreement* and the LCE there are only two hypothesis for changing the methodology, which are referred to *“when there are no sales of the like or similar product in the country of origin “* and *“when such sales do not allow a valid comparison”*. The Investigating Authority’s counsel answered that cost information had been requested from BERG, because with the existing information on the record, it could not determine whether the sales were representative in the market of the USA, so that *“... Once we had that information, we could determine that the right way was the methodology applied.... ”*<sup>97</sup>

It is important to point out that during the Hearing the Panel requested all participants to provide various information related to questions that arose. The Panel ordered all responses to be filed not later than May 14, 2007. Also it is important to

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<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> Id.

mention, that through an Order issued by this Panel on April 27, 2007, in regards to this issue, the following information was requested from the complainant:

- To point out specifically the documents in the administrative record that contain the arguments related to the antidumping margin found by the Investigating Authority during the preliminary stage of the administrative investigation.
- To point out specifically the documents in the administrative record that show that BERG opposed the methodology of Constructed value during the administrative investigation.

The complainant filed a document on time on May 14, 2007, with the Mexican Secretariat. The complainant responded that during the technical information meeting held on August 31, 2004, “.....BERG talked about its disagreement due to the change of the dumping methodology when using costs instead of domestic prices in the market of USA. It is important to mention, that these arguments were not included in the report of this meeting...” and continued with: “In this way, even though BERG expressed very clearly and with detail its disagreement with the change of the methodology made by the Authority, there is no evidence in the record about this situation,<sup>98</sup> due to the omission made by the Authority in the report of the technical meeting.”

In the aforementioned Order issued by this Panel, the following information was required from the Authority:

- To point out the legal basis for changing the methodology used in calculating the Normal Value, and
- To identify in the administrative record the information it relied upon to make such a change according to paragraph 94 of the Final Determination.

The Investigating Authority filed a document on time on May 14, 2007, with the Mexican Secretariat. The Investigating Authority, in response to the information requested, argued that it had the power to change the methodology during the investigation

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<sup>98</sup> Emphasis added

in accordance with articles 2.1, 2.2, 2.2.1 and 6.8 of the *Antidumping Agreement* and articles 31, 32 and 54 of the *LCE*. The Authority noted that “...*the information taken into account by the Authority for determining the change of the methodology was the proof of below-costs sales...*” and that, “*based on the nature of the current case and the result of the price analysis, the Authority decided to require cost information from both exporter companies in order to make the determination established in article 2.2.1 of the Antidumping Agreement*”. Similarly, the Authority argued that in the administrative record, the basis of the procedure used to reach the determination was in accordance with the working documents of the *Dirección General Adjunta de Investigación de Dumping y Subsidios*. The Authority identified the number of the documents in the administrative record, through which it decided to change the methodology.

Based on the arguments of all the Participants in the administrative record, those expressed during the Public Hearing and the answers to the requests of this Panel filed after the mentioned Hearing, this Panel finds the following:

It is important to stress that article 32 of the *LCE* establishes that transactions in the ordinary course of trade are the trade operations that reflect market conditions in the country of origin, and that have been made regularly, or in the representative period, between independent buyers and sellers.

In addition, the article above mentioned, in its second paragraph, establishes that “*for calculating the normal value, the sales of the country of origin or export sales to a third country shall be excluded if the Authority determines that such sales reflect constant losses.*” Transactions which are considered as losses are those transactions where the prices do not cover the costs of production and the general costs incurred during the ordinary course of trade in a reasonable period, which can be more extensive than the

period of investigation. Then, when the operations in the country of origin or export sales to a third country do not have sufficient profits to qualify as representative, then normal value shall be established in accordance with constructed value.

In this sense, article 43 of the *RLCE* points out that in regards to second paragraph of article 32 of the *LCE*, the petitioner of an antidumping investigation “*shall file*” the information that supports the exclusion. In these cases, these criteria require the Authority to determine whether during the period of investigation, the selling prices have been exceptionally low or the costs exceptionally high, due to situations of temporary or critical character.

This Panel stresses that the *RLCE* does not demand that the petitioner of an Antidumping Investigation to request the exclusion of sales with losses, because it is enough that it only provides the information for the Authority to use in its calculations. This Panel also considers that the requirement set by the *RLCE* concerning the obligation of the petitioner to provide the information mentioned above, is not contained in article 32 of the *LCE*. Therefore, this Panel considers the fact that the Investigating Authority has stated in point 44 of the Notice of Initiation of the Investigation that it had “.... *accepted the information filed by petitioners in calculating the normal value based on the option of domestic prices of country of origin,*” does not mean an obstacle for, in accordance with articles 32 of *the LCE* and 2.2.1 of *Antidumping Agreement*, changing the methodology in accordance with the information obtained during the investigating procedure. The Authority could legally initiate the investigation based on domestic prices due to the simpler requirements for beginning to collect evidence. The investigation, by its fact-finding nature is designed to enable the Authority to collect and analyze the information necessary to determine whether dumping has occurred. If the price evidence was

unreliable and the cost evidence was more reliable for making a determination of dumping, the Authority has the discretion to rely upon the evidence it reasonably finds the most reliable and persuasive.

Regarding the arguments of the complainant that the Investigating Authority found against BERG in violation of articles 14 and 16 of the Mexican Constitution, this Panel declares that it cannot resolve such arguments because these are outside of its authority and jurisdiction, a situation that can be solve only under the exclusive competence of the *Poder Judicial de la Federación de los Estados Unidos Mexicanos*.

In regards to the argument of BERG that the Authority violated its own administrative practice, this Panel considers this argument inadequate because the complainant did not point out what the administrative practice was and also did not indicate what was the legal basis that results in such practice (if there is in one sense or other) becoming binding on the authority in issuing its future determinations.

This panel stresses the fact that during the Public Hearing it asked BERG's counsel whether, when the Authority asked BERG for cost information, the complainant had given such information. The counsel answered yes. Likewise, this Panel also stresses that during the Hearing, BERG's counsel was asked whether at any time during the investigation, it had filed its disagreement because the Authority changed the methodology using constructed value. The counsel answered that of course BERG had manifested its argument against such a change, and that it would inform the Panel exactly which document it had filed in which such argument had been raised. However, when the complainant filed its response to the requirements of the Panel, related to this issue, BERG's counsel pointed out that such argument against the methodology had been filed during the technical meeting hold on August 31, 2004, " ... *BERG talked about its*

*arguments related to its disagreement due to the dumping methodology when using costs instead domestic prices in the market of the USA. It is important to mention that these arguments were not included in the report of the technical meeting...*” and continued with, *“In this way, even though BERG expressed very clearly and with detail its disagreement with the change of the methodology made by the Authority, there is no evidence in the record about this situation, due to the omission made by the Authority in the report of the technical meeting”*<sup>99</sup>. Therefore, the complainant itself points out that there is no evidence in the record about its opposition to the change of the methodology. In this sense, this Panel declares that it is not able to resolve issues that are not based on the administrative record, in accordance with article 1904.2 of NAFTA and rule 41 of *the Rules of Procedure*. Also, this Panel wonders why if BERG’s objections were not included in the report of the technical meeting, the complainant had not filed any document complaining about that omission immediately after the meeting or later during the Antidumping Investigation.

It is important to point out, that during the Public Hearing this Panel asked BERG’s counsel whether he considered that the change in the methodology shifting from normal value to constructed value affected the calculation of the dumping margin. The answer of the counsel was in the sense that yes, they had been affected because with the change in the methodology resulted in a dumping margin of 6.77 percent, stressing that: *“.... There is an affect. If our original proposal had been respected using domestic prices, we would have had a zero dumping margin, even negative....”*<sup>100</sup>

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<sup>99</sup> Emphasis added.

<sup>100</sup> Ibid., p.23



In regards to this quote above, for this Panel it is clear that the power established in article 2, paragraph 2.1, 2.2 and 2.2.1 of *Antidumping Agreement* granted to the Investigating Authority the authority and discretion to change its methodology. Indeed, such articles set out that:

“Article 2. Determination of Dumping

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country,<sup>101</sup> such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities<sup>102</sup> determine that such sales are made within an extended period of time<sup>103</sup> in substantial quantities<sup>104</sup> and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale

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<sup>101</sup> Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered as sufficient quantity for the determination of the normal value if such sales constitute five per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide a proper comparison.

<sup>102</sup> When in this Agreement the term “authorities” is used, it shall be interpreted as meaning authorities at an appropriate senior level.

<sup>103</sup> The extended period of time should normally be one year but shall in no case be less than six months.

<sup>104</sup> Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transaction under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time”.

This Panel further stresses that point 91 of the Final Determination states that, “In regard to article 2.2.1 of the *Antidumping Agreement*, the Secretary identified the domestic sales in the USA of those identical codes that were not incurred in the ordinary course of trade, through a comparison between the domestic selling prices and cost of production plus general cost (total cost of production), determined with the information filed by BERG Steel”, point 94 of the Determination establishes in a very concise way that, “As result of the comparison between the prices and total costs of production, the Secretary determined that the total transactions for each one of the 5 identical codes to those exported to Mexico, did not perform in the ordinary course of trade.” And the point 95 goes on to say that, “According to article 2.1 of the *Antidumping Agreement* and 31 of the LCE, the Secretary determined not to take into account the Normal Value estimated with the domestic selling price in the country of origin and decided to establish the Normal Value in accordance with the Constructed Value of the identical codes of those exported to Mexico”. It is therefore clear that the Authority took into account article 2.2.1 of the *Antidumping Agreement* rather than relying upon article 43 of the RLCE. As it was established in point 91 of the Final Determination, article 2.2.1 of the *Antidumping Agreement* provides the Authority with the discretion to choose to use below-costs sales for this calculation.

Therefore, this Panel finds that the legal basis is linked to Mexican Law and in accordance with the interpretation made by the *Poder Judicial de la Federación* to article 133 of the Mexican Constitution that international treaties are ranked in the second place immediately after the Constitution and above the Federal and Local Law. It is important to point out that the *Suprema Corte de Justicia* has established recently that the systematic interpretation of article 133 of the Constitution allows it to identify the existence of a superior legal order with a national character, composed of the Constitution, international treaties and general laws. From this interpretation, which is in accordance with the

General Principles of Law that are spread within the text of the Constitution, and in the RLCE and fundamental premises of that area of the Law, the conclusion can be drawn that international treaties are below the Constitution in the hierarchy of laws and above general, federal and local laws, because treaties are ratified by the Mexican Government in accordance with the Vienna Convention of the Treaties Law between States and International Organizations or between International Organizations. In this legal evaluation, we take into account the fundamental principle of the consuetudinary International Law “*pacta sunt servanda*”, through which countries that have signed Conventions freely acquire obligations before the international community that can not be disavowed by invoking rules of domestic Law so that the failure to fulfill such obligations doubtless leads to a responsibility of international character. To support this position we are relying upon the following legal precedents:

INTERNATIONAL TREATIES ARE ABOVE THE FEDERAL LAWS IN THE LEGAL HIERARCHY AND IN SECOND PLACE IN RELATION TO THE FEDERAL CONSTITUTION.

Constantly, the question in the doctrine has been formulated about the hierarchy of legal dispositions in Mexican Law. There is unanimity that the Federal Constitution is the fundamental rule and even the expression “will be the Supreme Law in all the Union” presupposes that not only is the Constitution the supreme law, any objection is overcome by the fact that the laws should come from the Constitution and be approved by a constituted body, like the Congress and treaties should be in accordance with the Supreme Law, which clearly indicates that only the Constitution is the Supreme Law. The problem about the hierarchy of the other legal dispositions in the system, has resulted in the jurisprudence and the doctrine yielding different solutions, among which stand out: the supremacy of federal law vs. local law and the same hierarchy of both in their plain meaning and with the existence of “constitutional laws” and the law that will be supreme and qualified as constitutional. Nonetheless, this Supreme Court of Justice considers that international treaties are in second place immediately under the Fundamental Law and above the federal and local law. This interpretation of the article 133 of the Constitution derives from the fact that these international commitments are accepted by the Mexican State and they create commitments

for all its authorities in relation to the international community; so that it is understandable that the Congress has created faculties for the President of the Mexican Republic for subscribing to international treaties in the capacity of Chief of the Mexican State, and in the same way, the Senate intervenes representing the will of the federal states and, through its faculty of ratification binds all of its authorities. Another important aspect in considering this hierarchy of the treaties, is that there is no limit in the competence between the Federation and the federal states, which means, there is no taking into account the federal or local competence of the content of the treaty, but in accordance with article 133, the President and the Senate can bind the Mexican State in any subject, independently that for other effects such subject is within the competence of the federal states. As consequence, the interpretation of article 133 involves placing federal and local Law in the third place within the same hierarchy based on the article 124 of the Fundamental Law, which requires that, "The powers that are not expressly granted by this Constitution to the federal officials, are reserved to the States". It is important to keep in mind, that the Supreme Court of Justice, in its previous conformation, had adopted a different position in the thesis P. C/92, Published in the Gazette of Judicial Power, Number 60, December 1992, page 27, titled: "FEDERAL LAWS AND INTERNATIONAL TREATIES HAVE THE SAME HIERARCHY RULING"; however this Tribunal considers it opportune to abandon that criterion and assumes the criterion that considers the superior hierarchy of the treaties even vs. the federal Law.

Amparo that is being reviewed 1475/98. *Sindicato Nacional de Controladores de Tránsito Aéreo*. May 1, 1999. Unanimity for ten votes. Absent: José Vicente Aguinaco Alemán. Lecturer:: Humberto Román Palacios. Secretary: Antonio Espinoza Rangel.

The Tribunal in its private session held on October 28 approved, with the number LXXVII/1999, the thesis, deciding that with the votes the jurisprudential thesis can be affirmed. México City. October 28, 1999.

Note: This thesis abandons the criterion of the thesis P. C/92 Published in the Gazeta del Poder Judicial, Number 60, December 1992, page 27, titled: "FEDERAL LAWS AND INTERNATIONAL TREATIES HAVE THE SAME HIERARCHY RULING";

Thesis Subject (s): Constitutional, Novena Época, Instancia: Pleno, Source: Gazeta del Poder Judicial, X, November 1999, Thesis: P. LXXVII/99, Page 46.

"INTERNATIONAL TREATIES ARE AN INTEGRAL PART OF THE SUPREME LAW OF THE UNION AND ARE PLACED HIERARCHICALLY ABOVE THE GENERAL, FEDERAL AND LOCAL LAWS. INTERPRETATION OF ARTICLE 133 OF THE CONSTITUTION. The systematic interpretation of article 133 of the Mexican Constitution permits us to identify the existence of a superior legal order with a national character conformed by the Federal Constitution, the international treaties and general laws. Likewise from this interpretation, that is in accordance with the principles of International Law spread

within the text of the Constitution, and also the legal dispositions and fundamental premises of this Law, it can be concluded that international treaties are placed hierarchically under the Federal Constitution and above the general, federal and local laws in the sense that the Mexican State when signing such treaties, according to the Vienna Convention about the Law of Treaties between States and International Organizations or between International Organizations and others, adopted the fundamental principle of the consuetudinary international law "pacta sunt servanda", acquiring freely obligations before the international community that can not be ignored by invoking domestic legal dispositions, and the lack of fulfillment of such obligations, implies a responsibility of international character".

Thesis Number P. VII/2007 pronounced by the *Pleno de la Suprema Corte de Justicia de la Nación* resolving Amparo 120/2002, February 13, 2007.

In regards to the issue analyzed in this section, this Panel finds that the Complainant did not justify the existence of any of the points included within article 238 of the *CFF* and that the Investigating Authority, in changing the methodology, applied correctly the *Antidumping Agreement*, which was clearly supported by the explanation and analysis in points 91 to 95 of the Final Determination.

## **IX. ANALYSIS OF THE ALLEGED VIOLATIONS OF THE INVESTIGATING AUTHORITY WHEN IT ESTABLISHED AN ANTIDUMPING DUTY FOR “ALL OTHER EXPORTERS”**

In the Final Determination, the Investigating Authority determined:

“The antidumping duties imposed by this Determination are equivalent to the dumping margins calculated at this point in the procedure in the following terms:

- A) 6.77 per cent for the imports of like product produced by Berg Steel Pipe Corporation.
- B) 25.43 per cent for the imports of like product produced by Oregon Steel Mills, Inc.

- C) 25.43 per cent for the imports of like product produced by all other exporter companies from USA.<sup>105</sup>

In its Complainant Brief, BERG alleged that article 54 of the LCE refers to the possibility of analyzing facts based on the information available, only in the case when exporters, from whom the Authority required information, evidence and data, had not fulfilled such requirements in a satisfactory way.<sup>106</sup>

BERG also alleges that the Authority had not described with detail in its Final Determination, those exporters to whom the Authority had sent the information requirements and which of them had not responded in a satisfactory way. The Investigation Authority instead had imposed an artificial dumping margin and determined an antidumping duty over unknown persons, e.g., all other exporters of the like product, current and future. So that, the complainant alleges that article 54 of the LCE is not a legal basis for supporting the decision of the Investigating Authority, because its content involves a different set of assumptions.<sup>107</sup>

Similarly, the Complainant alleged in its reply brief that article 6.8 of *Antidumping Agreement* is also not a legally applicable basis, even though it was also invoked by the Investigating Authority in its Final Determination, which prejudiced the complainant for the following reasons:

- Article 6.8 of the *Antidumping Agreement* establishes that in cases in which any interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation,

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<sup>105</sup> Point 94 of the Final Determination.

<sup>106</sup> Op. cit. Number 27, p. 38

<sup>107</sup> Id.

preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

- With a simple reading of the Final Determination, it is clear that there is no argument or issue, because in this case this situation did not happen, that shows that all other exporters of the like product in the USA had refused access to the Investigating Authority to the necessary information or otherwise have not provided responses. The Final Determination simply does not establish anything about those exporters placing substantial obstacles to the investigation.<sup>108</sup>

BERG also argued that using the logic of the LCE, the Investigating Authority should have proved that all other exporters entered the Mexican Market with unfair international trade practices, like dumping.<sup>109</sup> The methodology through which the Investigating Authority estimated Antidumping margins and imposed Antidumping duties on all other exporters of the like product from the USA, involving diverse economic agents linked to the export activity of this merchandise in the USA, was not correct.

According to BERG, there is no doubt that the assumptions mentioned are not in accordance with articles 54 of the LCE-and 6.8 of *Antidumping Agreement* which are not mentioned by the Investigating Authority in its Determination. Therefore in consequence, the decision of the Authority when imposing in the Final Determination an antidumping margin on all other exporters and determining antidumping duties for the importers of the like product from all other exporters in the USA, does not have a legal basis. For this reason, the Determination falls into the category of nullification established in paragraphs

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<sup>108</sup> Ibid., pp.39-40

<sup>109</sup> Id.

II and III of article 238 of the CFF, so that in terms of article 239, paragraph II, of the same Code, it is appropriate that the Panel orders the nullification of the Determination.<sup>110</sup>

In its Reply Brief, the Investigating Authority, affirmed that when it established a dumping margin for all other exporters that did not appear in the antidumping investigation, it did not violate the terms of article 80, paragraph II, of the RLCE because the legal basis for setting such a margin was established in articles 54 of the *LCE*, and 6.8 of the *Antidumping Agreement*, as the Authority described in point 102 of Final Determination.<sup>111</sup> The Authority argued that when it published its Initiation of Investigation in the *DOF* on August 12, 2003, it was released to all interested persons in the investigation, either domestic or foreign, asking them to appear before the Authority in order to participate in the procedure, through a formal questionnaire.<sup>112</sup>

Likewise, in the Brief, the Authority established that the formal questionnaires had been sent to all exporter and importer companies the Authority knew about it (companies that are mentioned in point 19 of the Determination of Initiation of the Investigation). From these companies, the only ones that filed a questionnaire showing their legal interest, were the exporter companies OREGON and BERG. Therefore, the Authority had requested information, evidence and data from all the exporter companies through the formal questionnaires, fulfilling the requirements of with article 54, paragraph I of the *LCE*.<sup>113</sup> -

According to the Authority's Brief, it determined that all other exporter companies fulfilled the requirements of the paragraph II of article 54 of the *LCE*, because these

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<sup>110</sup> *Ibid.*, p.40.

<sup>111</sup> *Op-cit.* Number 31, p.63-64

<sup>112</sup> *Ibid.*, p. 65

<sup>113</sup> *Ibid.*, p. 66



companies did not file information, data or evidence required by the Authority through the formal questionnaires. Therefore, the Investigating Authority could make its determination based upon facts available.<sup>114</sup> In its Reply Brief the Authority pointed out that article 6.8 of the *Antidumping Agreement* was sufficient to support its reasoning and its decision to apply a residual antidumping duty to STUPP, ACIPCO and all other exporter companies, based on the facts available. This article establishes the following:

*In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.*<sup>115</sup>

Also in its reply brief, the Authority established that for those companies that did not file the information required during a reasonable period of time, which is the situation for all other exporters (companies that did not appear), the Authority can decide to take into account the facts available, as it did in the Antidumping Investigation that resulted in the Final Determination that is the object of this review. Also the Authority stressed that had properly exercised its discretion in issuing a determination based on the facts available.<sup>116</sup>

Further to this point, the Authority stated that through an integral interpretation of points 102 and 243 of the Final Determination, it arrived at the conclusion that the Authority had determined a residual Antidumping Duty, referring to in point 245 (C) of the Determination, based on articles 54 and 62 of the LCE, 6.8 and 9.1 of the *Antidumping Agreement*, and article 89 of the RLCE, this situation clearly showed that the decision

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<sup>114</sup> Id.

<sup>115</sup> Ibid, p.67.

<sup>116</sup> Id.

made by the Authority was in accordance with the legal framework, because it is evident that the Authority has the power to impose a definitive residual antidumping duty on all those companies that did not appear in the antidumping investigation. More importantly, it is possible that a new exporter procedure could be initiated, as provided for in article 89 (D) of the LCE and article 9.5 of *Antidumping Agreement*, with the purpose of determining a specific margin for all those companies that did not export during the period of investigation.<sup>117</sup>

In its Reply Brief, the Authority, continued saying that the Binational Panel that reviewed the final determination of the imports of flat coated steel products, from the USA (MEX-94-1904-01) and the Binational Panel in the case of rolled steel plate originating from Canada (MEX-96-1904-02) had rejected the idea of nullification or revocation of the determinations issued by the Investigating Authority, and this decision is based, fundamentally, on the fact that a Binational Panel is not the *Tribunal Federal de Justicia Fiscal y Administrativa* (Hereinafter, “TFJFA”, previously called the *Tribunal Fiscal de la Federación*).<sup>118</sup>

BERG in its Reply Brief in response to the Authority’s, pointed out that it was evident that article 54 of the LCE–does not refer to other factual assumptions, such as giving the power to the Authority to make determinations based on the facts available in cases when exporter companies that did not export during the period of investigation, but exported after this period, and that, the Investigating Authority could not act beyond what the legal framework allowed it.<sup>119</sup>

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<sup>117</sup> Ibid., p.69.

<sup>118</sup> Ibid., p.76.

<sup>119</sup> Op. Cit. Number 42, p. 17.

BERG also argued in its Reply Brief, that in this case the Authority imposed Antidumping duties in an extensive way, without limits, on the importers that acquired the like product from those exporters whom the Authority did not notify and on other exporters that did not sell the like product in the Mexican market but exported outside the period of investigation. The Antidumping measure is in force unfairly on all other exporters that sold the merchandise after the issuance of the Final Determination or those who will export in the future. As a consequence, BERG confirmed its argument that the Investigating Authority had not made such its determination based on the legal framework when it imposed a dumping margin and residual antidumping duties on all other exporters, alleging that “...based on the same argument that BERG Steel described in accordance with article 54 of the LCE, article 6.6 of *Antidumping Agreement* neither is applicable nor can it serve as the legal basis for the Investigating Authority to impose dumping margins on all other exporters that did not appear in the antidumping proceeding, or antidumping duties on the importers that acquired the merchandise from the other exporters that were not notified according to the Law, and did not export during the period of investigation, but exported after this period...”<sup>120</sup>

In its Reply Brief to the Investigating Authority, BERG argued that the Authority pretended to repair its flawed reasoning by covering itself with an instrument that, in legal terms, could not be taken as a notification, specifically, the publication of the Notice of Initiation of the Investigation in the *DOF* on August 12, 2003. This is not a legally sufficient instrument for notifying the interested parties, because article 53 of the LCE requires that the day following the publication of the Notice of Initiation of the

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<sup>120</sup> Ibid., pp. 17-18.

Investigation in the *DOF*, the Secretary of Economy should notify the interested parties that it knows, with the purpose that these parties can appear to protect and defend their rights. Therefore, BERG argued that it is evident that the Investigating Authority had the obligation of notifying all exporters about the Initiation of the Investigation, that it knew about, and it should have sent to each one of them the formal questionnaire referred to in article 54 of the LCE.<sup>121</sup>

Likewise, the Complainant argued that the Investigating Authority had pointed out in its Reply Brief that it was bound to take into account other articles that were a legal base for its actions, such as article 62 of the LCE, article 89 of the RLCE, and article 9.1 of the Antidumping Agreement,<sup>122</sup> so that,

“...In attention to articles 89-D of the LCE and 9.5 of Antidumping Agreement, the procedure for new exporters is used in cases when the companies have not exported during the period of investigation, and for this reason, they cannot be characterized as interested persons. Nonetheless this procedure does not have any relation to the fact that the Authority imposes antidumping duties on the operations of the importers of the other exporters that sell its products outside the period of investigation [...] articles 89-D and 9.5 of Antidumping Agreement do not give any power to the Authority taking such actions as these articles represent only a procedural instrument that new exporters can use for proving to the Secretary of Economy that they did not commit dumping, but with the decision of the Authority, the importers that conduct business with these exporters have to face a residual antidumping duty, the highest obtained by the Authority and with an antidumping duty in the same level imposed on the importers in national territory. The result, in accordance with the decision of the Investigating Authority and based on the articles above mentioned, is that all other exporters have the right to invoke a special procedure that in event it is accepted, the Investigating Authority exempts these importers from paying the antidumping duties...”<sup>123</sup>

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<sup>121</sup> Op. Cit Number 42, p. 20.

<sup>122</sup> Ibid., p.21.

<sup>123</sup> Ibid., p. 23.

In the above mentioned Reply Brief, BERG also argued this situation legally implies that all other exporters that sold the investigated merchandise in the period of investigation, even when they would not have been notified, those that export outside the period of investigation and those that in the future will export the merchandise (after the issuance of the Final Determination that imposed the antidumping duties), despite the fact that they had no chance to defend their interests, automatically have dumping margins. This implies that there is a legal presumption that they committed dumping, and therefore, if their importers want to sell the merchandise in the Mexican market they must pay a definitive antidumping duty. Nonetheless, they have the option that the Authority, in another proceeding, can review their situation and resolve whether they have, in fact, committed dumping when they exported to Mexico.<sup>124</sup>

BERG argued that,

“The investigating Authority argues that it has the power to impose the highest dumping margin obtained upon based on the facts available in accordance with article 64 of the LCE. However, this precept, in accordance with the amendments of the LCE,—in 2003, is not invoked in the Final Determination. More importantly it has been declared by the Dispute Settlement Body of the World Trade Organization as not compatible with the Rules of the Antidumping Agreement...”<sup>125</sup>

“In this sense, it is important to point out the report of the Appellate Body of the WTO in case WT/DS295/AB/R on November 29, 2005, which concluded that the lack of compatibility of article 64 of the LCE—with the requirements of the Antidumping Agreement: ‘... iv) confirms the decisions made by the Panel that established in paragraphs 7.242 and 8.5, b) of its report, that article 64 of the LCE—is not compatible with itself, paragraph 8 of article 6 and paragraphs 1, 3, 5 and 7 of Annex II of Antidumping Agreement and with paragraph 7 of article 12 of such Agreement’”<sup>126</sup>

“Based on these arguments, it is evident that the use of the highest dumping margins as the ‘best available option’ as the Authority decided to apply for determining a ‘residual’

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<sup>124</sup> Id.

<sup>125</sup> Ibid., p.25.

<sup>126</sup> Ibid., p.26.

antidumping duty, is illegal and against BERG's interests, as this company has expressed in its brief, and therefore a new determination should be issued eliminating such residual duty ...<sup>127</sup>

During the Public Hearing, BERG's counsel further argued before the Panel that the Investigating Authority can only make determinations on the basis of the facts available and as consequence it does not have the power to impose dumping margins on all other exporters, current and future, that do not appear in the investigation or that did not export during the period of investigation. BERG argued that article 6.8 of *Antidumping Agreement* allows the Authority to use a procedure on the basis of the facts available when an interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, but such article does not represent the legal basis for the Authority to impose a dumping margin on all other exporter companies, current and future, that did not appear in the proceeding. In order to make this determination it was necessary for the Authority to have taken into account as the legal basis articles 54 of the LCE and 6.8 of *Antidumping Agreement*, that require the authority to notify and to send the formal questionnaire to all the companies that exported during the period of investigation.<sup>128</sup> Despite this requirement, the Authority did not prove or demonstrate which companies exported during the period nor how each one of the exporter companies was notified.

In addition, BERG pointed out that the publication of the Notice of Initiation of the Investigation in the *DOF* does not imply a notification, and even though the RLCE points out that when the Investigating Authority does not have knowledge of all of the exporters,

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<sup>127</sup> *Id.*

<sup>128</sup> *Op. cit.* Number 60, p. 48

it must provide notice only to the exporters it really knows about, so the Authority has the obligation to publish, in a Newspaper with a broad release in Mexico, a summary of the reasons and motives why the Authority decided to initiate the investigation, a situation that it was not fulfilled by the Authority in this case.<sup>129</sup> During the Hearing when BERG's counsel was questioned by the Panel about whether he considered that BERG was legally authorized to speak on behalf of all other exporters, the counsel answered "definitively yes", because BERG is an exporter company free to export directly or through its facilities, distributors, subsidiaries, or using any other economic agent.<sup>130</sup> Also in its Reply, BERG's counsel stated that he had listened to the Investigating Authority's argument that it was logical and fair to establish a general antidumping duty, an argument that even BERG agreed with, but also argued that the Authority's position was not legal and in this case we were talking about legality not justice or logic. BERG argued that the Authority only can proceed and act when the Law permits it.<sup>131</sup>

Analyzing the arguments expressed by the parties about this issue, it is clear for this Panel that the BERG company is not legitimately able to bring this cause of action (*legitimation ad causam*) to initiate the defense of those interests that only fall to "all other exporters," even though it is evident for the Panel that the companies STUPP and ACIPCO, which supported BERG's complaint, can be benefited by the arguments raised by the complainant. It is important to point out, that in accordance with articles 28 and 39 of the LCE, the imposition of antidumping duties by the Investigating Authority has the purpose of protecting the Mexican industry against the imports of merchandises from

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<sup>129</sup> Ibid., pp. 48-49.

<sup>130</sup> Ibid., p.49.

<sup>131</sup> Id.

other countries that enter in the Mexican market through unfair trade practices. For this reason the Authority, in accordance with article 62 of the LCE, has the power to establish the antidumping duty. In this sense, based on articles 28, 66 and 67 of the LCE, the authority for establishing antidumping duties, is not restricted to the importers that appeared during the administrative antidumping investigation because it also involves those persons that imported the merchandise from the country that has committed unfair trade practices, when such merchandise are located in the tariff heading identified in the Determination, so that, such determinations have a general character and should be applied to all importers of the like product. This criterion has consistently been sustained by the *Tribunal Fiscal de la Federación de los Estados Unidos Mexicanos* (current *Tribunal Federal de Justicia Fiscal y Administrativa*) and also by the *Tribunales Colegiados de Circuito* in several theses and jurisprudential precedents. Some of the more important precedents are presented below:

ANTIDUMPING DUTIES, THE DETERMINATIONS ARE ESTABLISHED TO BE OF GENERAL APPLICATION.

In accordance with articles 28 and 39 of the LCE, the issuing of antidumping duties by the Secretary of Economy, has as the main purpose to protect the Domestic Industry in order to face the imports of merchandise that enter in the Mexican Market through unfair trade practices, for this reason, the Secretary, based on article 62 of the LCE—can establish an antidumping duty. According to articles 28, 66 and 67 of this Law, the issuing of antidumping duties is not restricted only to the interested importers that appeared during the administrative procedure, but the determination of duties is established for all those persons that import merchandise from the country in which unfair trade practices occurred, when these imports are located in the tariff heading specified in the determinations issued by the Secretary, which is sufficient reason for considering that the determinations have a general application (general character) and therefore can be applied to those importers of the like product.

*Judgment No. 100(20)15/98/453/97.- Resolving by the Segunda Sección de la Sala Superior del Tribunal Fiscal de la Federación, May 21, 1998, voting in favor 4 votes, and 1 vote against. Magistrada Ponente; Silvia Eugenia Díaz Vega.- Secretario: Lic. Miguel Ángel Luna Martínez. (Thesis proved in session on June 2, 1998), Cuarta Época, Year I, September 1998.*



ANTIDUMPING DUTIES. THE LEGAL INTEREST TO CLAIM THEM ONLY FOR THEIR APPLICABILITY DURING THE JUICIO DE AMPARO NEEDS TO DEMONSTRATE THAT THE COMPLAINANT REGULARLY IMPORTS THE MERCHANDISE, AND THE SITUATION CAN BE SUPPORTED WITH ENTRIES IN THE REGISTER OF IMPORTERS. The antidumping duties are established by the federal administrative authority as a means to control and regulate a specific domestic productive sector, in relation to the international industry of the same sector, so that it implies special taxes that are obligatory for any person that imports legally a product that enters into the national territory, in this sense, the fact of imposing the duties is applied naturally on the imports of the merchandise. Based on these issues, it is clear that those duties can be claimed in the juicio de amparo due to its application, which can be demonstrated with the import document that shows the payment of a specific amount for such operation, and in consequence, the legal interest needed to file the judgment established on Article 73, paragraph V, of the Ley de Amparo. It is also possible that complaints can be based on antidumping duties through the method of posing a guaranty; however in this case, the demonstration of the legal interest needs the proof that the complainant is dedicated regularly – not merely occasionally - to importing the merchandise, a situation that clearly shows that such burden, only for its entrance in force, affects its legal interests, because the importers have the unavoidable obligation to pay the duty when importing, an evidence could be its current inscription in the register of importers, which shows before the administrative authority that they are registered as habitual importers. Therefore, in this latest case, it is not enough to prove the legal interest to file only an import document issued before the entrance into force of the duty, because it does not prove that the person has as a habitual activity to import the merchandise, neither, does it demonstrates the application of the current antidumping duty.

*DÉCIMO QUINTO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO. Amparo en revisión 103/2004. Tavistock Holding, S.A. de C.V. and others. September 22, 2004. Unanimity voting. Lecturer: Armando Cortés Galván. Secretary: Ricardo Gallardo Vara. Novena Época, Instancia: Tribunales Colegiados de Circuito, Source: Semanario Judicial de la Federación and its gazeta, XXI, February 2005, Page: 1669, Thesis: I.15o.A.21 A, Tesis Aislada, Materia(s): Administrativa*

DEFINITIVE ANTIDUMPING DETERMINATIONS. LEGAL NATURE. The investigation of unfair trade practices by the Secretary of Economy implies an investigation in the public interest, the purpose of which is to protect the domestic production against unfair or injurious trade practices and also to be concerned about the interest of all national producers, and not to protect the rights of one particular person; such investigation culminates with the definitive

antidumping determination that can establish antidumping duties that are obligatory for all importers or consignees of the merchandise that appear in the mentioned determination, beginning the day following its publication in the Diario Oficial de la Federación, independent of the fact that any particular person has or has not participated in such investigation. Therefore, there is no question that the legal nature of such determinations is to be regulatory acts because they create a non-personal legal situation with general character, and are identified with the acts materially legal and in a formal way administrative, because they are issued by the federal public administration centralized and with the power to do that, and not the Judicial Power.

*PRIMER TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO. Amparo directo 442/2003. Rosalinda Núñez Perea. January 13, 2004. Unanimous Vote. Lecturer: Carlos Ronzon Sevilla. Secretary: José Luis Cruz Álvarez. Novena Época Instancia: Tribunales Colegiados de Circuito, Fuente: Semanario Judicial de la Federación y su Gaceta, XXI, Febrero de 2005, Página: 1777, Tesis: I.1o.A.124 A, Tesis Aislada, Materia(s): Administrativa*

ANTIDUMPING DUTIES DETERMINED BY THE SECRETARY OF ECONOMY IN ISSUING THE DEFINITIVE DETERMINATION IN THE ADMINISTRATIVE PROCEDURE AGAINST UNFAIR TRADE PRACTICES ARE OF GENERAL APPLICATION FOR ALL IMPORTERS OR CONSIGNEES OF THE MERCHANDISE INCLUDED IN SUCH DETERMINATION, INDEPENDENTLY OF WHETHER THESE IMPORTERS HAVE PARTICIPATED IN THE INVESTIGATION. The antidumping duties mentioned in the LCE, are applied once the investigation against unfair trade practices is made, which is initiated by the independent decision of the authority or at the request of an interested party as is required by article 49 of such Law; then, the procedure of the unfair trade practices, is included in articles 49 to 60 of this Law, which establish the rules for the initiation of the investigation, to determine preliminary antidumping duties (article 57) or establish definitive antidumping duties, also this determination even can revoke the preliminary antidumping duty or conclude the investigation with no duty (article 59). In other words, in accordance with article 89 of the LCE, the antidumping duties issued by the Secretary of Economy, are obligatory from the day following its publication in the Diario Oficial de la Federación; therefore, after that date, the importers or consignees shall be required to estimate in the import document, the amounts of the preliminary or definitive antidumping duties, that shall be paid along with the trade duties. This situation clearly shows that the antidumping duties determined by the Secretary of Economy, once the final determination is issued in the investigation against unfair trade practices, have an obligatory character for all the importers or consignees of the merchandise, when the correspondent determination is published in the Diario Oficial de la Federación; furthermore it is not relevant that the particular participant

whom the antidumping duties are applied, has or has not participated in such investigation, because article 89 of the LCE is strict in establishing that the importers or consignees shall be liable individually for such duties, without regards as to whether the customs authority applies such duties, even when the first assumption does not happen. In supporting this argument, it is the fact that the investigation against unfair trade practices made by the Secretary of Economy, did not involve a procedure for “solving a particular case”; but it implies an investigation in the public interest that has as its main purpose to protect the national production against unfair trade practices that cause injury to this production, through such investigation and with the imposing of the antidumping duties, the interests of all the producers are protected, not individual rights, so that, there are no actors nor defendants, but the procedure can be initiated with a demand or by the independent decision of the authority.

*TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL SEXTO CIRCUITO. Revisión fiscal 393/99. Subadministrador de lo Contencioso "I" de la Administración Local Jurídica de Ingresos de Puebla. July 6, 2000. Unanimous vote. Lecturer: Francisco Javier Cárdenas Ramírez. Secretary: Luz Idalia Osorio Rojas. Novena Época, Instancia: Tribunales Colegiados de Circuito, Source: Semanario Judicial de la Federación y su Gaceta XII, Septiembre de 2000, Página: 736, Tesis: VI.A.79 A, Tesis Aislada, Materia(s): Administrativa.*

This Panel stresses that the Investigating Authority, acting in accordance with the criterion set out above, has determined in several cases that the imposition of antidumping duties on specific importer companies, but also in general for all those companies importing the like product, even though such companies would not have participated in the administrative procedure or did not import during the period of investigation, situations that it are clearly portrayed in such cases as the final determinations issued in the following antidumping investigations: Estearic acid from USA (Final Determination, April 8, 2005), Epoxidated Soya Oil from the USA (Final Determination, July 29, 2005) and Fatty Acids partially hydrogenated (Final Determination, April 7, 2005).

Therefore, and on the basis on the arguments above mentioned, it is evident for this Panel that in accordance with the Mexican Law it is possible to impose a residual antidumping duty, so that the Investigating Authority did not violate section II nor section

IV of article 238 of the CFF, conforming with the Standard of Review that should be applied by this Panel in reviewing the Final Determination<sup>132</sup> and that the complainant alleged violated its rights by the Investigating Authority.

The Investigating Authority, in imposing in its Determination “residual antidumping duties” acted in accordance with the applicable legal framework, for this reason, the Authority did not omit any requirement demanded by the Law affecting the defense of the participants, this situation neither changed nor impacted the result of the Determination, including the lack of legal support and motivation, or the facts needed to impose a residual antidumping duty had not been fulfilled, were different, or had been applied in a wrong manner, or that the Determination had been issued against the applicable dispositions or the necessary dispositions had not been applied. Therefore, the Investigating Authority’s final Determination is affirmed with respect to the issue described above.

## **X. ANALYSIS OF THE ALLEGED VIOLATIONS OF THE INVESTIGATING AUTHORITY WHEN IT ORDERED THE ESTABLISHMENT OF ANTIDUMPING DUTIES BASED ON THE CUSTOMS VALUE.**

In the Final Determination issued by the Investigating Authority, it was determined that: “246. The antidumping duties imposed in the previous section of this Determination, will be applied to the declared customs value in the corresponding Customs import application (*pedimento*).”

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<sup>132</sup> In accordance with article 1904.3 and Annex 1911 of NAFTA.

In its brief, BERG indicated that, in point 246 of the Final Determination, the Investigating Authority had ordered that the antidumping duties imposed in point 245 of the Determination be applied to the declared customs value in the corresponding Customs import application (*pedimento*). Consequently, BERG alleged that the Determination was illegal since it violated Article 62 of the LCE; article 9.2 of the *Antidumping Agreement* article 80, section II of the RLCE, article 238, section II of the CFF, and articles 14 and 16 of the Constitution. Due to this flaw, the determination lacks absolute foundation and motivation because the Investigating Authority did not invoke any precept on which it could base its decision, nor did it describe the factual circumstances or the special situations with regard to those precepts that it should have invoked or taken into account to support its decision. Likewise, it highlighted that “...Such actions can be inferred to cause a violation of sections II and III of article 238 of the CFF, for which, in terms of article 239, section II, of the Code invoked, it is appropriate to order a nullification of the determination subject to the present review.”<sup>133</sup>

In its brief, BERG continued by indicating that the Final Determination, as stated, violated the precepts invoked, to BERG’s detriment, since the Mexican importer that acquired steel pipe with straight longitudinal seam, would have to apply an antidumping duty of 6.77 percent over the customs value declared on the customs import application (*pedimento*) of the respective imports, a value that was not considered in the investigation procedures for the margin of dumping calculation. It also indicated that “.... As it is well known, the dumping margin is obtained from the difference between the adjusted normal value and the adjusted export price, with relation to this last price, in which the value at

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<sup>133</sup> Op. Cit. Number 27, p.50.

customs is not relevant. This decision also affects the Complainant as its exporting capacity is limited by the application of an antidumping duty in Mexico that over protects the national industry...”<sup>134</sup>

Finally, in the cited Brief, the Complainant indicated that applying the antidumping duty as the Investigating Authority ordered, based on the customs value declared on the pedimento of the corresponding imports, results in the average itself surpassing the dumping margins already determined, in violation of article 62 of the LCE and article 9.1 of the *Antidumping Agreement*.<sup>135</sup>

In turn, in its Reply Brief, the Investigating Authority stated that it considered the arguments advanced by the Complainant to be improper and that the legislation regarding the issue did not precisely state on which value the antidumping duties should be applied, since articles 9.1 and 9.3 of the *Antidumping Agreement* only referred to the ability of the Investigating Authority to establish antidumping duties. Although these articles were silent on that issue, the Investigating Authority proceeded according to what is established in the *Ley de Aduanas* (Customs Law), in its Regulation, and in the LCE.<sup>136</sup>

In the above-mentioned Brief, the Investigating Authority continued by stating that:

“In fact, article 64 of the first code cited establishes that the taxable basis of the import tariffs is the value of the merchandise in customs ...In turn, article 87 of the LCE indicates that the antidumping duties or antidumping taxes can be determined, if they were ad valorem, by the value of the merchandise in customs ...”<sup>137</sup>

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<sup>134</sup> Id.

<sup>135</sup> Ibid., p.51.

<sup>136</sup> Op. cit. Number 31, pp. 77-78.

<sup>137</sup> Ibid., p.78.

“Consequently, the Investigating Authority did not violate articles 62 of the LCE, Article 80 Section II of the RLCE, or 9.2 of the Antidumping Agreement, since it applied antidumping duties on the value of the merchandise in customs, in accordance with the *Ley de Aduanas*, its Regulation, and the LCE, in levels that do not exceed the margins of the dumping found, but that are necessary to re-establish conditions of fair competition...”<sup>138</sup>

“Articles 64 of the *Ley de Aduanas* and Article 1 of the Agreement Relating to the Application of Article VII of the General Agreement on Tariffs and Trade of 1994 (Customs Valuation Code), establishes that the value of the merchandise in customs will be the value of transaction of the same, meaning the price paid by the importer in a direct or indirect manner to the salesperson on his benefit...”<sup>139</sup>

“From these statements, it is inferred that, in principle, the value in customs will be equal to the value of acquisition or sale (transaction) of the merchandise, meaning the export price, except in exceptional cases in which it is not appropriate to apply said method of customs assessment...”

“In this sense, for the *Servicio de Administración Tributaria* of the *Secretaría de Hacienda y Crédito Público*, the term “customs value” is defined as “...the value of a good for purpose of collection of tariffs on an imported good...” and likewise, in its guide of imports, it details the following: “... the value of the merchandise for customs purposes is defined as ‘customs value’...the value of the merchandise in customs. This is the transaction value, which is the price paid ...the ‘price paid’ is the total payment for the imported merchandise that the importer has performed or will perform, in a direct or indirect manner, to the salesperson for his benefit ...”<sup>140</sup>

“In the same sense, with regard to the fact that the value in customs is preferred to calculate the degree reached by the diverse restrictions to foreign trade, the standard of the national courts is reflected in the following statement: ‘the customs value that should be taken into account to calculate the degree reached by the diverse restrictions to the imports...’”<sup>141</sup>

“In conclusion, the decision of the Investigating Authority regarding point 246 of the Final Determination that indicates that ‘the antidumping duties shall be applied on the customs

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<sup>138</sup> Ibid., p.79

<sup>139</sup> Ibid., p.80.

<sup>140</sup> Ibid., p.81.

<sup>141</sup> Ibid., p. 82.

value declared on the customs import application (*pedimento*)' is correct, because in such determination, the Investigating Authority clarifies the standard of valuation that should be applied to its collection, and otherwise, the said standard of valuation would remain open, which would imply that the SAT would have to determine the application of this or another standard of valuation, as well as the additional time that this can represent to make the respective collection and the merchandise be allowed to enter. Therefore, the application of the antidumping duty ad valorem on this basis, is in compliance with article 62 of the LCE, which directs that the antidumping duties will be equivalent to the difference between the normal value and the export price, such that the export price equates to the normal value."<sup>142</sup>

Subsequently, the Investigating Authority in its Reply Brief stated that the *Antidumping Agreement* was silent with respect to the modalities that could be adopted to impose antidumping duties, and that, because of this, these remained reserved to each country. BERG confused the nature of the procedures before a binational panel by pretending to validate a nullification in the incorrect court.<sup>143</sup>

In turn, BERG, when responding to the arguments of the Investigating Authority, maintained that "by elementary logic, if the normal value *ex work*, effectively calculated by the authority during the investigation, remains constant, with the variations inherent in the inflationary process in the United States of America, and it so happens that the actual export price, corresponds to the customs value, under the first standard of valuation, for customs purposes, the resulting total would be greater than the dumping margin [ ... ] It is an express right that the customs value as stated by the Investigating Authority, is the product of a discussion among several countries in the multilateral forum, that the Mexican authorities validate in their legislation, however, this methodological plan is valid

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<sup>142</sup> Ibid., p.84.

<sup>143</sup> Ibid., p. 84-85.



for customs tariff purposes, without it being so to correct a supposed commercial distortion caused by a practice of dumping...”<sup>144</sup>

Likewise, the representative of BERG, was interrogated in the Public Hearing by the Panel with respect to why, if article 87 of the LCE established that if the antidumping duties imposed *ad valorem* had to be calculated in terms of percentage over the value of the merchandise in customs, it was possible to set them based on another parameter. BERG’s counsel responded that the fact that the Authority did not invoke such basis, by itself was an anomaly; because it was obliged to support its decision and, that by the Authority’s order to apply the antidumping duty based on the customs value, this surpassed the dumping margin from a mathematical standpoint and that, because of it, the legislation, both domestic as well as international, allowed the Authority to apply antidumping duties below the margin of dumping with the purpose of not overprotecting the industry.<sup>145</sup>

Subsequently, in the Hearing, the Panel once again interrogated BERG’s Counsel asking him to specify whether the problems originated from the need to have the Authority determine a smaller percentage, to which the BERG’s counsel responded that the Authority, in its Determination, did not support such decision and that as a rule of law it was obligated to do so. In case that this was an Authority’s oversight, it should have been fixed by saying “It is not that we admit that dumping has occurred, but we think that the antidumping duty shall, in any case, be applied on a reasonable basis and with legal logic, since what the law foresees is that the antidumping duty eliminates the distortion but not

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<sup>144</sup> Op. Cit. Number 42, p.30.

<sup>145</sup> Op Cit. Number 60, pp. 52-53.

that it inhibit the market ...”.<sup>146</sup> Subsequently, during the Public Hearing the representative of BERG alleged that the Final Determination lacked the legal foundation that allowed the Authority to impose the duties based on the customs.<sup>147</sup>

In the Public Hearing, the Investigating Authority, upon being interrogated by the Panel with respect to why, in its Final Determination, it had not supported the imposition of the antidumping duties using the customs value, declared that in the cited determination the legal support was not established, but it was definitively not within its responsibilities to collect the antidumping duties, since it only could determine them, but that those who applied and should have supported such application at the time of payment were the customs authority and, concluded: “...we probably omitted to mention the article, but the content was stated...”<sup>148</sup>

It is important to note that article 87 of the LCE states that:

“Antidumping duties and safeguards measures can be determined in specific quantity or ad-valorem ... If they are determined ad-valorem, they will be calculated in percentage terms on the value of the merchandise in customs.”

Consequently, this Panel finds that the Investigating Authority, upon ordering in its Final Determination that the antidumping duties imposed should be applied on the customs value, declared on the customs import application (*pedimento*), does not violate section II of article 238 of the CFF which contains the Standard of Review that this Panel has to utilize to analyze the Determination in dispute and that the Complainant believes to have been violated by the Investigating Authority in its decision. Regardless of being evident that in the determination subject to this analysis, the Authority failed to support

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<sup>146</sup> Ibid., pp- 53-54.

<sup>147</sup> Id.

<sup>148</sup> Ibid., p.73.

this aspect of its decision by not invoking article 87 of the LCE, it is also true that BERG did not allege that such circumstance would have affected its defense or that such omission would have risen to the level of undermining the Determination that is analyzed today, notwithstanding, such lack of support does not suffice for this Panel to remand the determination. On this basis, the Panel affirms the Final Determination on this issue.

**XI. ANALYSIS OF THE ALLEGED VIOLATIONS OF THE INVESTIGATING AUTHORITY FOR FAILURE TO CONSIDER, IN ITS PROPER CONTEXT, THE ARGUMENTS AND EVIDENCE CONTAINED IN THE ADMINISTRATIVE RECORD AND ERRONEOUSLY DETERMINING THE EXISTENCE OF INJURY TO THE DOMESTIC PRODUCTION.**

BERG alleged that the Investigating Authority violated Articles 3.1, 3.2, 3.4 and 3.5 of the *Antidumping Agreement*, 41 of the LCE, 64 of the RLCE, 238, section II of the CFF, and 14 and 16 of the Constitution, in not considering, in context, the arguments and evidence contained in the administrative record, and therefore improperly finding that the national production was injured.

From the administrative record, it is evident that the Investigating Authority analyzed the imports during the period of investigation and found that most of the volume that entered the Mexican market from the United States was imported by GASODUCTO BAJANORTE (Hereinafter “GASODUCTO”) to build a gas pipeline in the peninsula of Baja California.

The Mexican producers, in particular TUBACERO, did not qualify to participate in supplying product for that project. The Investigating Authority collected substantial amounts of information and analyzed the transactions surrounding the bid process and reached the conclusion that imports from the United States were dumped at margins

causing injury to the domestic industry. After a lengthy explanation, the Investigating Authority found that, "... the Secretary concludes that the trend of imports of the like product and its growing participation in the Mexican market resulted from the dumping which they used in order to achieve a price below the national prices, in particular compared to the price of TUBACERO (applying the pertinent adjustments for making them comparable, as mentioned before) and the imports from other origins, but not due to competitive factors."<sup>149</sup>

**A. The injury suffered by the domestic production is a consequence of those imports corresponding to the bid of 2001.**

BERG alleged that the Authority failed to conduct an objective analysis of each of the arguments presented by the parties based on the administrative record. BERG also alleged that the imports investigated did not cause injury to the domestic industry in Mexico, since they resulted from bids unfavorable to TUBACERO, which did not satisfactorily comply with technical and financial requirements. According to BERG, most of the import volume from the USA during the period of investigation was purchased by GASODUCTO to satisfy the contract for the pipeline project. In 2001, the volume of GASODUCTO's imports, and the imports from another company, represented 82 percent of the total U.S. imports and 80 percent of the total Mexican imports. Berg added that since TUBACERO could not qualify to supply products for that contract, it could not have been injured by the U.S. imports from the winning bidder.

TUBACERO participated in the 2001 bid, which was the subject of the investigation, but as alleged by BERG, TUBACERO did not comply with the technical,

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<sup>149</sup> Point 180 of the Final Determination.

logistical, and financial requirements, as determined by GASODUCTO, who managed the bid process. In particular, TUBACERO failed the technical, logistical, and financial requirements of the 2001 bids for following reasons:

- A report by an independent auditor indicated that TUBACERO could not produce the steel pipe in compliance with the timing requirements of the project;
- TUBACERO did not have the number of workers that were qualified to operate the three shifts required for the project;
- TUBACERO depended on third parties for steel plates, which is relevant due to the scarcity and seasonal nature of this product;
- The machinery of this national manufacturer could fail at critical moments, due to the lack of use in the prior 3 years and to its inadequate maintenance;
- TUBACERO proposed to deliver the steel pipe 7 months after the bid award;
- The manufacturing methods proposed by TUBACERO could produce a high number of defective steel pipes; consequently, to remedy this problem, they would have to produce steel pipe in numbers well beyond those of the U.S. companies;
- Because there are no railroads between Monterrey and Mexicali, the steel pipe would have to be transported to the U.S., crossing the border twice resulting in four customs checks to reach the final delivery destination in Baja California; and
- During the 2001 bids, TUBACERO presented fragile finances, lack of liquidity, scarce capital, and insufficient information to evaluate the financial situation of the company, for which Sempra Energy (Hereinafter “SEMPRA”), the bid evaluator, required TUBACERO to provide a letter of credit or performance bond.<sup>150</sup>

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<sup>150</sup> Op. Cit. Number 27, pp. 55-58.

BERG alleged several other problems with TUBACERO's bid that could have contributed to its failure to receive the award. First, the company would have no time margins to accommodate unexpected events. Second, the processing plant for steel pipes did not operate according to ISO standards; this plant had not been operated for a year and the machinery used for the coating processes was being utilized in another country. Third, the processing plants were located far from TUBACERO, although in the same city, which could cause deterioration to the steel pipe from the transportation of the pipe.<sup>151</sup>

BERG further alleged that TUBACERO also proposed to conduct the double jointed process in Baja California, after delivering the steel pipe, which means that the revision of the double joints would be conducted with standard x-ray machines and could result in steel pipe below standard quality. On the other hand, conducting the process in the plant allows for extensive revision methods that allow for the correct quality of the steel pipe. Berg also indicated that for TUBACERO to be able to perform the double joint process on campus, SEMPRA would have had to provide a place to accommodate the huge platforms in places close to where the steel pipe would be used.<sup>152</sup>

BERG also alleged that GASODUCTO demonstrated that the imports were independent of the national wholesale market and its prices are in fact similar to those at which the steel pipe commercialized. In effect, the bid was awarded to the provider that offered the third highest price and that, additionally, had the technical, logistical, and financial capacity to manufacture steel pipe in accordance with the quality and timing established.<sup>153</sup>

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Ibid.*, p. 59.

BERG argued that the established conditions of the market, where manufacturers cannot participate unless they comply with stated requirements, makes competition in this market independent from competition that takes place in a free market. Therefore, the transactions that take place in this temporary market resulting from the bids can only cause an effect to those companies that participated in said bid, and not to those that in no manner were mentioned in the bid. Therefore, Berg said that the allegations made by TUBACERO did not in any way adversely affect the national industry in terms according to articles 41 of the LCE and 3.4 and 3.5 of the Antidumping Agreement. Additionally, Berg alleged that it is important to note that prices from the bids have no effect on the rest of the market, because bids deal with specific products.<sup>154</sup>

BERG alleged, in conclusion, that the analysis conducted by the Investigative Authority in this particular point was superficial and lacked exhaustiveness. Had the arguments, information, and evidence in the record been properly analyzed, U.S. imports could not have injured the domestic industry.<sup>155</sup>

The Investigating Authority pointed out that the arguments of the petitioner (BERG) were made by GASODUCTO, were answered by the domestic producer and analyzed by the Investigating Authority in the Preliminary Determination<sup>156</sup> and also in the Final Determination. The Investigating Authority affirmed that neither BERG nor GASODUCTO filed more information or arguments against the Final Determination<sup>157</sup>. The Investigating Authority confirmed important elements of the Preliminary Determination in the Final Determination in Points 184-195.

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<sup>154</sup> Ibid., p.60

<sup>155</sup> Ibid., p.61.

<sup>156</sup> Points 211, 212, 215-230, and 231-242 of the Preliminary Determination .

<sup>157</sup> Point 243 of the Preliminary Determination.

The Investigating Authority highlighted several points of its analysis, such as:<sup>158</sup>

- During the period of investigation, TUBACERO had enough technical capacity to produce the pipe with the specifications required in the public bid;
- There is no objective evidence for assuming that a company that is not vertically integrated cannot produce the merchandise on time and in the volumes required;
- During 2001 and 2002, TUBACERO reported the availability of its equipment, with percentages of merchandise rejection below 2 percent;
- The audit report applied to TUBACERO, established that its quality system was satisfactory after preventive and corrective actions;
- According to the audit report TUBACERO had participated in several projects as supplier of the like product, using a method for producing the tubing that has been fully accepted by the principal users;
- Situations such as the number of border crossing and shifting the production from one plant to another did not represent evidence for having low product quality or delays in delivery;
- The evidence in the administrative record showed that the national producer proposed to begin the tubing deliveries after three months and 1 week from the award date,<sup>159</sup> not the longer period that GASODUCTO considered;
- SEMPRA did not take the option offered by TUBACERO to produce the “double joint” process (produce tubing of 80 feet of length welding two separated joints of 40 feet) outside its facility. SEMPRA did not inform TUBACERO that this was a reason for deciding that it did not qualify for the bid, even when TUBACERO

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<sup>158</sup> Op. Cit. Number 31, pp. 97-100.

<sup>159</sup> Point 236 of the Preliminary Determination.



could have offered the “double joint” process in its own facility, because the company had the necessary equipment;

- There is evidence that TUBACERO would have had the working capital,<sup>160</sup> because the *Banco Nacional de Comercio Exterior* (BANCOMEXT) indicated its availability to support financially TUBACERO;
- TUBACERO required an advance payment of 64 percent of the total bid price within three months after signing the contract, in order to be in a competitive position in the bid; however, if it had won, TUBACERO would have attempted to fulfill the conditions and payment terms established in the process;
- There was evidence to determine that the bid process did not occur in an isolated market and had no influence over other distribution channels of like product<sup>161</sup>;
- Bids in the Mexican market are the main channel of commercialization of the like product<sup>162</sup>;
- The magnitude of the bid represented about 63 percent of national consumption,<sup>163</sup> which explained the growth of 903 percent in absolute terms of the dumped imports during 2001 in comparison to 2000 and the increase of 469 percent in the period of investigation in relation to 1999.<sup>164</sup> This bid also explains that imports shifted from 7 percent to 67 percent of the national consumption from 1999 to 2001<sup>165</sup>;

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<sup>160</sup> Points 289 and 290, Preliminary Determination, and 219, Final Determination.

<sup>161</sup> Points 157 and 165 of the Preliminary Determination and 219 of the Final Determination.

<sup>162</sup> Points 137-139 of the Preliminary Determination and 66-68 and 117-120 of the Final Determination.

<sup>163</sup> Point 191, Final Determination

<sup>164</sup> Point 136, Final Determination

<sup>165</sup> Point 142, Final Determination

- The bid process in general, and specifically the bid of 2001, involved a pushing process in which the participants tried to offer their best options and lower prices. TUBACERO pointed out that it was forced to cut its prices 16.5 percent due to this pushing process, and the final price was also below the price of the pipe sold in the USA through bids;<sup>166</sup>
- Because the Investigating Authority had access to the electronic background of the bid,<sup>167</sup> it could analyze the different price proposals and explained that even though the imports were the result of the bid process, it does not mean that the imports did not enter into the Mexican market without dumping margins or that the price was not a determinant element for acquiring the merchandise;<sup>168</sup>
- The Investigating Authority found that imports from the USA were dumped in margins higher than de minimis: 25.43 percent and 6.77 percent depending on the exporting company, and that the company that won the bid in 2001 had a dumping margin of 25.43 percent;<sup>169</sup>
- In order to evaluate the arguments of all participants and have more information about the national and U.S. export markets, sales through bids, and wholesale channels, the Investigating Authority requested additional information from the participants. However, even though BERG cooperated, OREGON did not respond, claiming that the information was not relevant to calculate the dumping margin and that all the necessary information had already been filed;<sup>170</sup>

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<sup>166</sup> Points 95 and 96, Final Determination

<sup>167</sup> Point 185, Preliminary Determination

<sup>168</sup> Point 184, Preliminary Determination and points 158 and 179, Final Determination

<sup>169</sup> Points 50 and 102, Final Determination

<sup>170</sup> Points 164-165, Final Determination

- The Investigating Authority established the reasons for comparing the real price of the imports with the sale price in the national market in equivalent terms;<sup>171</sup>;
- From the analysis of the information above mentioned, the Investigating Authority concluded that the prices of dumped imports was below the national prices in margins between 1 and 13 percent;
- The Investigating Authority had access to the electronic background of the bid and to the contract that shows the terms and conditions for granting the bid to OREGON. From this analysis, the Investigating Authority could determine that the payment accepted by Oregon was 4 percent lower than the price the company offered during the close of the bid; and
- For determining the injury to the national production, the Investigating Authority based its analysis not only on the undervalued prices, but also based upon the overall evaluation of all the elements established in Articles 3.1, 3.2, 3.4 and 3.5 of the Agreement.<sup>172</sup>

This Panel notes that the vast majority of the steel pipe imported from the United States during the period of investigation entered Mexico to fulfill the contract for GASODUCTO. The contract was awarded to U.S. producers after an extensive competitive bidding process that included both Mexican and U.S. producers. The award appeared to be based on objective factors. The bidders were all audited by the same firm and at least some were given a higher rating by the auditors than the national producers.<sup>173</sup>

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<sup>171</sup> Points 197-203, Preliminary Determination and 173-179, Final Determination

<sup>172</sup> Points 121-242, Final Determination.

<sup>173</sup> It is important to mention that most of the documents pointed out by BERG in its response to the panel order (April 27) to prove that TUBACERO did not qualify, were also identified by the Authority. Some of the information related to the auditor's report was reviewed by the panel in order to confirm the evidence mentioned by the parties.

This Panel also points out that BERG and GASODUCTO highlighted several deficiencies in the national producers' bids that allegedly resulted in the selection of a U.S. supplier.

Several questions raised by BERG must be analyzed in order for the Panel to determine the legitimacy of the Investigating Authority findings on this issue. These include:

- Did the Investigating Authority have the legal authority to look behind the bid transaction to determine dumping?
- Did the Investigating Authority follow the legal requirements in its analysis of the bid award?
- Did the Investigating Authority have sufficient evidence to make its findings?
- Was the Investigating Authority causation analysis proper under the law?
- Were the bid award and the shipments that resulted independent of the national market and therefore not subject to the antidumping provisions of Mexican law?
- If TUBACERO simply did not qualify to obtain the bid award, could U.S. imports injure the national industry?

*1. Did the Investigating Authority have the legal authority to look behind the bid transaction to determine dumping?*

Article 41 of the LCE specifically assigns the responsibility to the Secretary of Economy for determining whether the importation of the subject merchandise into Mexico causes injury to the domestic industry competing under unfair trade practices. Under the LCE, the Investigating Authority is delegated the responsibility and authority from the Secretary to conduct investigations to determine dumping and injury, taking into account the following factors:

- The volume of imports to determine whether there has been a significant increase in such imports relative to the domestic output or consumption;
- The direct or potentially direct effect that the unfairly traded imports have upon the domestic prices of identical or similar products in the domestic market, taking into account significant price underselling or price depression on domestic prices of the like product or if the effect of those imports is to reduce prices or to prevent domestic price increases that otherwise would have occurred.
- The impact that the unfairly traded imports have upon the domestic producers of identical or similar merchandise, taking into account all of the relevant economic factors and indices having a bearing upon the condition of the relevant sector, such as the actual and potential decline in output, sales, market share, profits, productivity, return on investment, or capacity utilization; factors affecting domestic prices; and actual and potential negative effects upon cash flows, inventories, employment, wages, the ability to raise capital, investment, or production growth; and
- Any other factor that the Secretary may consider relevant.<sup>174</sup>

Based upon this legal provision, the Investigating Authority has not only the legal authority to review the bidding process<sup>175</sup>, but also the legal responsibility to do so. As to the extent of the Investigating Authority's authority, it extends to determine whether the contract enabled price discrimination that caused injury to domestic producers.

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<sup>174</sup> Article 41 of the LCE and 3.1 of the Antidumping Agreement.

<sup>175</sup> See volumes 1 and 2 of the record. Annex 15 A, Results of the bid on line.

*2. Did the Investigating Authority follow the legal requirements in its analysis of the bid award?*

This Panel notes that BERG's arguments are based upon violations of Article 41 of the LCE. After review of the LCE, it is evident that the Investigating Authority complied with the legal requirements necessary to conduct its analysis of the bid award and complied with the requirements of the Antidumping Agreement, in particular in terms of article 3, by collecting the evidence and analyzing it in considerable detail.

*3. Did the Investigating Authority have sufficient evidence to make its findings?*

This Panel also points out that the Investigating Authority gathered extensive information about the bid award, the bid process, import volumes, prices, commercial practices in the industry and analyzed this information extensively in both the preliminary and final determination. The Investigating Authority officials were questioned at length during the public hearing and responded to the questions of the panel in writing to describe the evidence that formed the basis for the Determination. In addition, the Investigating Authority responded in writing to the order of the Panel issued on April 27, 2007, to identify the documents in the record where the evidence could be found by the panel.<sup>176</sup> This Panel is not allowed to include new evidence and can only determine whether the evidence was sufficient to support the findings made by the Authority. After analyzing the evidence described by the Authority, this Panel concludes without question the Investigating Authority had enough evidence to support its findings.

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<sup>176</sup> In this sense, several volumes of the proprietary record mentioned by the Investigating Authority were reviewed by the Panel.

*4. Was the Investigating Authority causation analysis proper under the law?*

This Panel also concludes that the Investigating Authority gathered substantial evidence that was reviewed in great detail in the administrative record and both the preliminary and final determination, in compliance with the provisions of Article 41 of the LCE and the provisions of the *Antidumping Agreement*. However, this Panel wonders whether the bid imports from the United States should have been considered in the injury examination and if the domestic producers could not reasonably be awarded. It will be evaluated in more detail below.

*5. Were the bid award and the shipments that resulted independent of the national market and therefore not subject to the antidumping provisions of Mexican law?*

BERG makes the allegation that because the Mexican producers could not qualify for the award of the 2001 contract, the bid process was independent of the national market. This Panel believes that is an incorrect interpretation. According to the *Antidumping Agreement*, it is clear that it refers only to domestic markets, not global markets. In this sense, the LCE concerns the functioning of the domestic market. Even if no domestic producers had bid on the 2001 contract, the imports would still enter the national market when they crossed the border and were sold to Mexican importers. So to exclude those sales as being outside the national market would be legal error, as well as logically unsound.

*6. If TUBACERO simply did not qualify to obtain the bid award, how could U.S. imports injure the national industry?*

The point of the Investigating Authority findings was that TUBACERO should have qualified to receive the contract award. This Panel points out that there is evidence that the Investigating Authority analyzed the reasons filed by the auditor explaining the evaluation of TUBACERO,<sup>177</sup> which was taken into account by SEMPRA in order to decide that TUBACERO was not qualified to win the bid for technical reasons. There is also evidence that the bid went to the low bidder, despite concerns with that bid as well.<sup>178</sup> As the panel mentioned above, the same auditing company made the reports to TUBACERO and the other bidders. In the audit report made to TUBACERO, it is very clear that the company was approved with concerns; and also, that the other bidder was approved even with a weak quality system. It is important to mention that the auditing company also verified and approved the company that TUBACERO proposed for making the liner. So the decision to purchase ultimately is made by the company management, relying upon, but not bound by the opinion of the auditor.

The fact that TUBACERO did not receive the award does not prevent injury to the company caused by the price effects of the large volume of subject imports that then entered the domestic market. The Investigating Authority analyzed the bid process and found that TUBACERO had to reduce its price because the other competitor at the end of the bid proposed a price 16.5 per cent lower than the price offered by TUBACERO in its first tender.<sup>179</sup> It is not for the panel to substitute its judgment for that of the expert agency, especially when the evidence is not compelling for a different finding. In this case, the evidence in the administrative record appears to permit the Investigating

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<sup>177</sup> Document 0400304, January 20, 2004, other answers, TUBACERO, Volume 23 proprietary record, Annex I B.

<sup>178</sup> *Id.*

<sup>179</sup> Point 148. Final Determination



Authority to support the findings that it made, despite the clear fact that the contracting entity, SEMPRA, did not qualify TUBACERO to win the contract award. Certainly the evidence supports the Investigating Authority decision. Therefore, and due to the absence of omissions or legal errors this Panel will not remand the Final Determination.

For all of the reasons described in the sections above, the Panel affirms the Final Determination of the Investigating Authority on this issue.

**B. Average Price of the United States imports.**

BERG alleged that the average U.S. price in 2001 was not distorted by price discrimination, but rather, that prices recuperated to the levels observed in 1999 due to common commercial practices in the international iron and steel market. Therefore, the prices in 2001 could not be injurious to the domestic Mexican industry. The behavior of imports from the USA indicated a reorganization of the level of the imports, so that there was no negative effect on the national production caused by the imported tubing. Additionally, the total imported tubing independent of its origin registered a lower level in the national market during the period of investigation.

The Investigating Authority argued that the behavior of the import price from the USA did not allow it to determine whether the imports were dumped or not. The Investigating Authority made a complete analysis in accordance with the Antidumping Agreement, resulting in imports from the USA with dumping margins of 6.77 and 25.43 percent. BERG described the behavior of import prices from the USA, explaining why in

1999 and 2001, the imported pipes included accessories and lining, resulting in a higher price<sup>180</sup>

The Investigating Authority pointed out that imports from the USA not only registered dumped prices below the price of national product, but also below prices from other sources. From a detailed analysis of imports, the Investigating Authority concluded that those from the USA registered a significant increase in relative and absolute terms, and also in relation to the size of the Mexican market.<sup>181</sup> Also, the Investigating Authority evaluated the effects of the dumped imports on the national prices, considering, among other elements, whether the import prices were below national prices and also in comparison to other sources, or whether the import prices had the effect to depress or suppress national prices.

After reviewing the arguments, and evidence identified by the Investigating Authority in its response to the Panel order issued on April 27, 2007, the Panel concluded that the Investigating Authority made an integrated analysis of all the factors that influence the national industry, including taking into account the argument mentioned by BERG related to the reorganization of the U.S. imports. This resulted in the determination of injury in terms of Articles 3 of the Antidumping Agreement, 41 of the LCE, and 64 of the RLCE. From a detailed analysis of imports, the Investigating Authority concluded that imports from the USA registered a significant increase in relative and absolute terms, and in relation with the size of the Mexican market (market share).<sup>182</sup>

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<sup>180</sup> Point 168, Final Determination

<sup>181</sup> Points 135-144, Final Determination

<sup>182</sup> Points 135-144 Final Determination. See volumes 1 and 2 of the record. Annex 4 and 7 Impact of the dumped imports in the National Consumption and in other elements.

In this sense, it is very important to mention that one of the important factors concerning injury was the closing of one of the Mexican producer companies and other factors that supported the injury finding, as described in detail in the Preliminary and Final Determinations. The Panel cannot substitute, with a different interpretation, the Investigating Authority's analysis based on the evidence in the record. Therefore, the Panel affirms the Investigating Authority Final Determination on this issue.

### **C. BERG Steel imports did not cause injury to the national industry**

According to BERG, the Investigating Authority failed to perform a causal analysis regarding the volume and prices of imports from BERG. Its exports did not cause the alleged injury because BERG exports represented only 0.8 percent of the total imports from the U.S. in 2001 and the average price of those imports was significantly higher than the sale price of the domestic industry. Allegedly, this was not considered by the Investigating Authority in its injury analysis.

The Investigating Authority made the analysis of the imports from USA and their possible effects on national prices and also on other indicators, without separating the imports from BERG in the analysis. The Authority argued that it took into account the overall imports including BERG's, for two reasons: 1) in accordance with article 3.1 of the Antidumping Agreement, the analysis shall be made considering the overall imports of like product; and 2) the collection of the antidumping duties should be done with no discrimination over the imports of the products from any source country.<sup>183</sup>

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<sup>183</sup> Art. 9.2 Antidumping Agreement

This Panel considers that the Investigating Authority performed a causal analysis based upon the legal provisions that govern its operations. Notwithstanding the low volumes of subject imports exported from BERG, the Investigating Authority would have committed legal error to separate those entries for special treatment. Even more, the low import volume rate argued by BERG, does not imply that the Investigating Authority has not taken into account these imports in its overall analysis. *De minimis* criteria, according to article 5.8 of Antidumping Agreement, applies to dumped imports from a country, which is this case; not for an individual company.<sup>184</sup> Therefore, there is no basis for the Panel to take any action other than to affirm the Investigating Authority's Final Determination on this issue.

**D. The Investigating Authority analysis was flawed because injury was caused by declining exports in 2001**

BERG noted that total exports of the national industry decreased by 6 percent in 2000 from 1999 levels, and 37 percent during the period of investigation with respect to 2000. The domestic companies allege that the decline in exports was due to a temporary antidumping measure applied on February 21, 2001 by the United States over Mexican exports of like products. BERG provided as a precedent WTO case WT/DS184/AB/R,<sup>185</sup> which found that the Investigating Authority must assure that the injury not attributable to the dumped imports should be appropriately analyzed as "other factors" of injury. The Investigating Authority, without such a distinct analysis, has no rational basis to conclude that the dumping conditions are in fact the cause of the injury.

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<sup>184</sup> Article 5.8 "The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member..."

<sup>185</sup> Op. Cit Número 27, p. 73

Contrary to what BERG argued, the Investigating Authority made a detailed analysis of injury and the causal link, including the elements that should be considered in accordance with articles 39 and 41 of the LCE, 64 and 69 of the RLCE and 3.5 of the Antidumping Agreement. The Investigating Authority analyzed the arguments filed by GASODUCTO and TUBACERO about the causes of the behavior in the exports of the national production<sup>186</sup>. The Investigating Authority found that the reduction in the exports of the national production was explained by the preliminary antidumping measure applied by the USA.<sup>187</sup> The Investigating Authority determined that the reduction in Mexican exports, added to the relative loss of market share suffered by the national production caused by dumped imports from the USA, increased the vulnerability of the domestic production to unfair trade practices.<sup>188</sup>

The Investigating Authority determined that other elements that could have affected the national industry, such the contraction in the national market (which is linked to the low demand generated by Pemex), should also have affected the like product from the USA, a situation that did not happen due to the increase in the import volume from USA and its growing participation in the national market.<sup>189</sup> Likewise, the Investigating Authority did not have knowledge that elements such as technology, competitiveness, and productivity could have explained the adverse behavior of the relevant indicators of the national production.

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<sup>186</sup> Points 189, 192 and 193, Final Determination

<sup>187</sup> Points 299, Preliminary Determination and 189, Final Determination

<sup>188</sup> Points 204-208, Final Determination.

<sup>189</sup> Points 224-232, Final Determination

Due to the above mentioned points, this Panel notes that the Investigating Authority made a detailed analysis of injury and causation, based upon the requirements that should be considered in accordance with the LCE and the RLCE. The Investigating Authority carefully reviewed other factors, except for some factors for which there was no relevant evidence on the record. Even if the Panel did not agree with the Investigating Authority findings, which is not the case here, the Panel would have no legal basis to remand the Determination, because the Investigating Authority did not commit legal error nor did it ignore evidence on the administrative record. When the agency finding is supported by evidence on the record – as the Panel could confirm with the evidence mentioned by the Investigating Authority in its response to the panel order of April 27, 2007<sup>190</sup> - and a reading of its reasons could reasonably lead to the conclusions they have reached, then the Panel should not interfere by substituting its judgment for that of the agency. Therefore, the Investigating Authority Determination is affirmed on this issue.

#### **E. Impact of sales indicators, production and installed capacity**

As alleged in BERG's Complainant Brief, Articles 3.4 of the Antidumping Agreement and 41 of the LCE mandate the Investigating Authority to consider all factors and economic indexes influencing the condition of the domestic industry. Accordingly, internal sales, installed capacity and national production influenced the behavior of domestic tubing production. The final resolution indicated the following:

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<sup>190</sup> Related to TUBACERO's exports, BERG in its response to the panel order, only pointed out that the evidences supporting its arguments were filed in its complaint before the panel (July 25, 2005). The decrease in TUBACERO's exports is an argument filed by GASODUCTO, a company that is not participating in this Panel review. The issue was only mentioned concerning the importance of the exports without any link with injury (Volume 22 of the administrative record. Answer of GASODUCTO to the Authority's requirement.)

- Domestic production decreased 40 percent from 1999 to 2000 and increased 37 percent in 2001.
- Internal sales increased 73 percent from 1999 to 2000 and decreased 1 percent in 2001.
- The installed capacity decreased 11 percent from 1999 to 2000 and increased in 2001.

Berg indicated that analyzing these facts, it can be concluded that the imports of steel pipes originating in the United States did not cause injury to the national industry. These facts show that while the national production and the installed capacity increased considerably, internal sales decreased 1 percent which cannot be considered injury according to the law. However, Berg argued that the Investigating Authority concluded in the final determination that the variation in these economic indicators showed an indication of injury to the domestic industry.

It should be noted that BERG did not agree with the Investigating Authority's use of a "point to point" analysis, because it must be complemented by an analysis which includes the intermediate years. BERG believes that the variation of the national production, internal sales and installed capacity during the investigated period, correspond to a decrease in Mexican industry exports during the period of investigation and can not be interpreted as an indicator of injury to the domestic industry.

The Investigating Authority analyzed the behavior of the indicators of the national production during all the years of the investigation period. Likewise, the authority analyzed injury in the context of the industry and the market as a whole.<sup>191</sup> The

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<sup>191</sup> Points 121-242, Final Determination

Investigating Authority evaluated dumped imports for at least three years in order to appreciate in a more clear way the trends during the period of investigation.<sup>192</sup> Additionally, the Investigating Authority argued that a determination of injury cannot be based solely on the behavior of the three indicators mentioned by BERG, but that Investigating Authority is required to consider other factors in the analysis.

This Panel observes that article 41, section III of the LCE provides the legal basis for the Investigating Authority to determine the impact on the domestic industry of dumped imports. The factors raised by BERG are reasonably related to the injury analysis, but they are not the only determining factors, as it is the agency that must weigh all of the factors to determine impact. The factors they must rely upon include volume effects, price effects, the impact of unfairly traded imports and other relevant factors.

After analyzing the administrative record, this Panel concludes that the Investigating Authority gathered extensive evidence on all of the factors that can help them to determine impact.<sup>193</sup> The Authority evaluated the evidence and provided clear analysis in its Final Determination. Therefore this Panel sees no basis for ask any modification to the injury analysis and remand the Determination to the Investigating Authority, who has the legal and economic expertise to make such determinations. In consequence, this Panel affirms the Investigating Authority Determination on this issue.

**F. The Investigating Authority erred by including the imports subject to the 2001 bid from the injury analysis**

Complainant alleges that when dealing with imports independent of the wholesale domestic market, the imports subject to the bids should have been excluded from the

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<sup>192</sup> Art 65, RLCE and point 246, Final Determination

<sup>193</sup> Evidence pointed out by the Investigating Authority in its response to the panel order. Volumes 1 and 2.



injury calculation by law. BERG argued that the products covered by the bids are directed to a completely different market than those of regular commerce, as only those products that meet certain requirements can participate in the bid market; thus the competition that results in this market is independent from the competition that results in normal commerce. Therefore, the transactions that take place within the temporary and sporadic bidding market only affect those companies that participated in the bid and not those companies that did not participate in it, even if they are part of the domestic industry of the investigated merchandise. Even if the Investigating Authority would have legally included such imports subject to the 2001 bids in the injury analysis, BERG considers that such imports did not justify the alleged injury because of the following:

- TUBACERO participated in the 2001 bids;
- TUBACERO did not comply with the technical, legal, logistical, and financial requirements that gave way to the 2001 biddings;
- The offers adjudicated in the 2001 bids contained higher prices than those offered by TUBACERO;
- Price was not a factor in the adjudication of the bids contract of GASODUCTO, it is evident that the imports that entered into Mexico during the period of investigation could not have caused the alleged injury, because the price of the imports did not have identifiable or adverse effects on the economic indicators, such as: production, sales, prices, inventories, etc, just as it did not have adverse effects in the financial indicators of the domestic industry.

Due to the above, this Panel observes that Berg's arguments in this question have been analyzed before and concluded that the Investigating Authority analyzed properly the

evidence because it did not find BERG's arguments that supported and explained clearly its reasons for the exclusion of the bid imports from the injury analysis, a situation that was clearly observed during the public hearing. For these reasons, along with those conclusions cited in the section above mentioned related to 2001 bid, the Panel affirms the Investigating Authority Determination on this issue.

## **XII. DECISION**

For all the reasoning aforementioned, this Panel finds as unfounded the alleged errors presented by BERG in the present Review and Dispute Resolution Mechanism in Matters of Antidumping and Antidumping Duties established by Article 1904 of Chapter 19 of NAFTA.

Consequently, the Final Determination released on May 17, 2005 and published in the *Diario Oficial de la Federación* of May 27, 2005, dealing with the Antidumping Investigation on Imports of *Tubería de Acero al Carbono con Costura Longitudinal Recta* Goods Classified in Sections 7305.11.01 and 7305.12.01 of the LIGIE, from the United States of America, Independent of the country of origin is affirmed.

Signed in original by:

Issued on: March 13, 2008.

James Holbein.

March 3, 2008

James Holbein.

Héctor Cuadra y Moreno.

March 4, 2008

Héctor Cuadra y Moreno.

Oscar Cruz Barney.

March 3, 2008

Oscar Cruz Barney.

Francisco José Contreras Vaca.

March 2, 2008

Francisco José Contreras Vaca.

## **FINAL DISSENT**

### **DISSENT**

Although I am not contesting the majority's affirmation of issues I, III, IV, and VI contained respectively in the majority's sections VI, VIII, IX, X and XI, I must respectfully dissent from their affirmation of issue II. I do so because I am unable to reconcile the Majority opinion with what I believe to be our obligation under the NAFTA AGREEMENT (NAFTA). The Majority's failure to strictly conduct this review, in accordance with Chapter 19 of the NAFTA, has resulted in an arbitral, rather than Binational Panel review of this antidumping investigation. Additionally, I am unable to join in the Majority's treatment of issue II, as it would have us confirm an illegality by failing to appreciate the relevance of Mexico's international commitments under its domestic law.

In my Dissent, I am mindful of the role of this Binational Panel, as well as the applicable law. Understanding the role of this Binational Panel requires an appreciation of its origins, as well as a functional understanding of the applicable standard of review. Similarly, understanding the applicable law requires familiarity with the relevant legal frameworks, as well as a functional understanding of their interaction.

### **Binational Panels and the Standard of Review**

The role of Binational Panels is best understood in light of its scope and the standard of review. The legal nature of Binational Panels is not something which is understood in light of facile comparisons made with courts and arbitral tribunals. Merely attaching conceptual labels to this mechanism is not likely to shed much light on understanding its purpose.

Chapter 19 did not have an existence which predated the Canada-United States Free Trade Agreement.<sup>1</sup> This alternative dispute resolution mechanism arose from the necessity of Parties to bridge an impasse over the harmonization of domestic trade laws. Initially, it was intended to act as a temporary, non-partisan, judicial review mechanism in countervailing and anti-dumping duty cases. As the present Parties were not able to subsequently harmonize or create a distinct trade law, Chapter 19 was made permanent under NAFTA.

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<sup>1</sup> Canada-US FTA

Chapter 19 of the NAFTA spells out review and dispute settlement in antidumping and countervailing duty matters. It provides that each Party shall replace judicial review of final antidumping and countervailing duty determinations with Binational Panel review.<sup>2</sup> While existing domestic judicial bodies are referenced, there are no references to arbitral bodies.<sup>3</sup> Chapter 19 does not label this mechanism as either a court or arbitral tribunal.

The NAFTA Agreement does outline the responsibilities of the panel, its obligations and restrictions:

#### Chapter One

Article 102. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

Article 103. The Parties affirm their existing rights and obligations with respect to each other under the *General Agreement on Tariffs and Trade* and other agreements to which such Parties are party.

#### 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:

- (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 the 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, ...

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<sup>2</sup> NAFTA, Chapter 19, Article 1904 (1).

<sup>3</sup> While the English and Spanish versions of the NAFTA refer to Binational Panels and the French version to "Binational Groupe". There is a Spanish reference to "limitaciones de revisiones arbitrales". See, the English, Spanish and French version of NAFTA Article 1904.14

## Article 1904

14. To implement the provisions of this Article, the Parties shall adopt rules of procedure by January 1, 1994. Such rules shall be based, where appropriate, on judicial rules of appellate procedure, and shall include rules concerning: the content and service of requests for panels; a requirement that the competent investigating authority transmit to the panel the administrative record of the proceeding...

### *Rules of Procedure*

#### Statement of General Intent

2. These rules are intended to give effect to the provisions of Chapter Nineteen of the Agreement with respect to panel reviews conducted pursuant to Article 1904 of the Agreement and are designed to result in decisions of panels within 315 days after the commencement of the panel review. The purpose of these rules is to secure the just, speedy and inexpensive review of final determinations in accordance with the objectives and provisions of Article 1904. Where a procedural question arises that is not covered by these rules, a panel may adopt the procedure to be followed in the particular case before it by analogy to these rules or may refer for guidance to rules of procedure of a court that would otherwise have had jurisdiction in the importing country. In the event of any inconsistency between the provisions of these rules and the Agreement, the Agreement shall prevail.

## Annex 1901.2 Establishment of Binational Panels

On the date of entry into force of this Agreement, the Parties shall establish and thereafter maintain a roster of individuals to serve as panelists in disputes under this Chapter. The roster shall include judges or former judges to the fullest extent practicable.

In order to carry out antidumping and countervailing investigations, the IA of the importing nation must be aware of the powers and limitations granted within the framework of the WTO/NAFTA. Therefore, the authorities that carry out an antidumping

investigation and the appellate courts of an importing country should harmonize their procedures with the country's international commitments.

The Majority, in its discussion of the Standard of Review, states that NAFTA created "an arbitral tribunal to review the relevant determinations rendered by domestic entities". As authority, it footnoted 1902.2 and 1903 and Article 1904. No where in the sections of those Articles of Chapter 19 - the Review of Final Antidumping and Countervailing Duty Determinations - is there authority for an "arbitral tribunal" to review the IA's Final Determination.

While the Majority refers to Binational Panel review, its decision is not consistent with its obligations under the NAFTA to review the administrative record in the manner of a binational panel. Instead, it approached the issue like an arbitral tribunal, giving weight and credibility to certain contested matters outside the administrative record.

The distinction between Binational Panels and arbitral bodies is extremely critical to a proper review. It is important to note that Binational Panels are powered and limited by NAFTA. There are substantial differences in the powers, obligations and procedures which adhere to Binational Panels relative to arbitral bodies. Mexico acknowledged this difference when it amended Article 238 of the *Codigo Fiscal de la Federacion* to specifically differentiate "arbitral bodies" from "Binational Panels".<sup>4</sup>

These differences are critical in understanding the nature and functions of Binational Panels. While arbitration bodies are guided by rules which were created by the parties, Binational Panels are subject to the rules which were established in advance by the Parties. These rules have at least two different regulatory schemes. The international scheme is made up of the provisions contained in NAFTA and are related to multilateral rules, such as the ones contained in GATT. The domestic scheme reflects the legal provisions dealing with unfair trade practices.<sup>5</sup>

Given this framework, the functions of Binational Panels are more akin to domestic review, rather than to arbitration. As such, Binational Panels must harmonize their faculties with the appellate procedures of the importing nations and resist the temptation to usurp the fact-finding powers normally associated with arbitral bodies.

Binational Panels are not national courts. Binational Panels do not have all of the characteristics, attributes, jurisdiction or powers of the *Tribunal Fiscal de la Federacion*. This Binational Panel is governed by NAFTA and the standard of review contained therein.<sup>6</sup> It is also governed by domestic Mexican law, to the extent that it is consistent

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<sup>4</sup> Article 238 was amended through the insertion of a final paragraph which reads, in relevant part, "Los órganos arbitrales o Paneles binacionales...". Published in the Diario Oficial December 30, 1996.

<sup>5</sup> See, MEX-96-1904-02.

<sup>6</sup> NAFTA, Chapter 19, Article 1904(3) and Annex 1911.

with NAFTA. As such, Binational Panel review is different than that carried out by the *Tribunal Fiscal de la Federacion*.

There is a two-part standard of review applicable to this case. The Panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing country would otherwise apply.<sup>7</sup> Annex 1911 states that in the case of Mexico, the standard of review for Mexico is the standard set out in Article 238 of the *Codigo Fiscal de la Federacion*, or any successor statutes, based solely on the administrative record.<sup>8</sup>

Article 238 states:

An administrative determination shall be declared illegal when any of the following grounds are demonstrated:

1. Lack of competence of the individual who issued, ordered or carried out the proceeding from which said resolution is derived;
2. Omission of the formal requirements provided by law, which affects an individual's defenses and impacts the result of the challenged resolution, including the lack of legal foundation or reasoning, as the case may be;
3. Procedural errors which affect an individual's defenses and impact the result of the challenged resolution.
4. If the facts which underlie the resolution do not exist, are different or were erroneously weighed, or if the resolution was issued in violation of the applicable legal provisions or if the correct legal provisions were not applied.
5. When an administrative determination issued in an exercise of discretionary powers does not correspond with the purposes for which the laws confer said powers.

The *Tribunal Fiscal de la Federacion* may declare violations *sua-sponte* because the incompetence of the authority to render the challenged determination, in the total absence of basis or motivation, are matters of public order.

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<sup>7</sup> NAFTA, Chapter 19, Article 1904(3).

<sup>8</sup> NAFTA, Chapter 19, Annex 1911.

Arbitral bodies or binational panels, derived from alternative dispute resolution mechanisms in unfair trade law, contained in agreements and international conventions subscribed to by Mexico, can not declare *sua-sponte* the violations referred to in this article.

Hence, I must respectfully dissent from the Majority opinion, which affirms the IA's violation of the ADA time limitation. The Majority's confirmation of the IA's determination, on this issue, stated that the Panel is not empowered to render Constitutionality opinions and therefore held that it would not rule on the Constitutional grounds for the antidumping duty investigation. But under the Constitution and provisions of NAFTA, it noted that the Panel is not empowered to reverse the IA, or render the FD a nullity. The Majority did acknowledge that the IA failed to issue its FD within the time frames set out in the ADA and the *Ley de Comercio Exterior*. However, it concluded that the delays were more attributable to the complexities of the investigation and the failure of the claimant at the panel review to prove that it was economically or legally prejudiced. The latter was not an issue in the IA's administrative record. I have found no reason, when constitutionality of legislation is not involved, why constitutional guidance may not be considered.

## *ANALYSIS*

The claimant argued that the IA violated Article 59 of the Ley de Comercio Exterior and Article 5.10 of the ADA. Article 59 of the Ley Comercio Exterior reads:

“Within a period of 210 days, from the day following publication in the *Diario Oficial de la Federación* of the Determination to Initiate the Investigation, the Secretaría shall issue the Final Determination...”

Article 5.10 of the ADA reads:



Salvo en circunstancias excepcionales, las investigaciones deberán haber concluido dentro de un año, u en todo caso en un plazo de 18 meses, contados a partir de su iniciación.”

Except for exceptional circumstances, the investigations shall be concluded within one year, and in every case in a period of 18 months, counted from its initiation.”

The reason that the Spanish version should be considered here is because the briefs of Berg and the IA were submitted in Spanish and orally argued in Spanish. Neither Berg or the IA suggested the verb “*deberan*”, in the futuro indicativo-future indicative, is translatable as “*deberian*”, the *potencial simple-conditional*. The speculation of the Majority on this matter is irrelevant and without merit. There is no Spanish grammatical authority holding *deberan* and *deberian* to be interchangeable. Further, there are no grammatical grounds permitting the IA or this panel to mentally delete “en un año,” and then apply the exceptional circumstances to the 18 months. Further, no where in international treaty law is there justification for national translations of language that are not harmonious.

It is important to emphasize that the NAFTA countries have made a commitment to abide by the antidumping and countervailing duty provisions of GATT, including the Uruguay Round agreements, which were incorporated into the WTO. Prior to the year 1995, the applicable time limit between the initiation of the investigation and the final resolution was contained in Article 5.5 of the ADA, which held without reservation:

Investigations shall, except in special circumstances, be concluded within a year.

During the Uruguay Round, the WTO Members, which includes the parties in NAFTA, determined that an open-ended period of time to reach a resolution in an antidumping and countervailing duty matter was unfair and detrimental, even under exceptional circumstances. Therefore, Article 5.5 was deleted and Article 5.10 was added to the ADA to indicate that, if exceptional circumstances are present, the initial one year period of the

investigation could be extended up to an additional 6 months, resulting in a maximum period of 18 months.

Although the IA, in its briefs, argued there were many situations that could amount to exceptional circumstances, its Final Determination (FD) did not mathematically demonstrate how such circumstances produced the delay that occurred. The Majority now concedes that the IA failed to issue the FD, in accordance with Article 5.10 of the ADA. However, it fails to mention where, in the NAFTA Agreement or its Rules of Procedure, it can make an arbitral finding of fact outside of the administrative record that the illegality should be affirmed because complainant had failed to prove loss of time and money.

The Majority bases its opinion on its interpretation of Article 238 of the *Codigo Fiscal de la Federacion*, which applies to a proper standard of review in Mexico, as provided by NAFTA's Annex 1911. The Majority establishes that, for a violation of paragraphs II and III of the *Codigo Fiscal de la Federacion*, the claimant must prove the actual harm caused by the alleged illegality. In that context, the claimant has to demonstrate: a) the existence of the alleged flaw or shortcoming in the procedure, b) that this flaw or shortcoming in the procedure has negatively affected its defenses; and c) that this situation has negatively affected the outcome of the challenged determination. It also cites *Rolled Steel Plates*, Mex-96-1904-02.

However, in the case of a violation of section IV of the same article, as here, the law does not require the claimant to prove actual harm. In this case it was a violation of the issuance of the FD outside the time period established by law. The violation, in and of itself, is sufficient proof of illegality. This was supported by the *jurisprudencia* submitted by Berg. The time limitation in the *Rolled Steel Plate*, cited by the IA and the Majority, concerned the timeless period of 5.5 with exceptional circumstance before *the* implementation of Article 5.10. Further, they chose to ignore the following statement within that panel decision, which looked forward to NAFTA/GATT/WTO and Article 5.10:

This Panel believes that in the absence of legislative and mandatory time limits on the investigative process, uncertainty, risk, excessive costs and loss business can result for all parties involved in a case. While the interests of domestic producers in any particular case may be opposed to those of the importers/exporters, all parties seek prompt decisions. The domestic industry, which is allegedly suffering injury from the dumped/ subsidized imports, clearly seeks an early decision in order to protect its domestic production from future damage. Importers and exporters likewise want an early decision in the investigation so they can market their goods free of concern about unexpected import penalties being imposed in order to remove uncertainty and minimize the very heavy costs now associated with bringing and defending antidumping and countervailing duties cases in many countries.

These do not appear to be examples of harmless error or none disabling illegality.

The complainants contend that the language in the applicable legal rules is strict and straightforward, not admitting any other interpretation. The Majority does acknowledge the issuance of the FD outside the time period and suggests that the IA incurred a procedural flaw. In this context, as established in the Mexican Federal Court of Appeal, through a jurisprudential thesis, an administrative determination is illegal when "... such procedural flaws or defects affect the defenses of the individual, as well as the scope or meaning of the challenged determination, and that they provoke a material harm."<sup>9</sup>

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<sup>9</sup> **ACTO ADMINISTRATIVO. SU VALIDEZ Y EFICACIA NO SE AFECTAN CON MOTIVO DE "ILEGALIDADES NO INVALIDANTES" QUE NO TRASCIENDEN NI CAUSAN INDEFENSIÓN O AGRAVIO.**

Si la ilegalidad del acto de autoridad no se traduce en un perjuicio que afecte al particular, resulta irrelevante tal vicio, en tanto que se obtuvo el fin deseado, es decir, otorgar la oportunidad al gobernado para que ofreciera pruebas y alegara lo que a su derecho conviniera. En consecuencia, es evidente que no se dan los supuestos de ilegalidad a que se refiere el artículo

The Majority does point out that the Mexican Supreme Court has established that, in contrast to section III, section IV of Article 238 of the *Código Fiscal de la Federación* refers to errors *in iudicando*. In this context, an allegation based on section IV applies to cases in which the administrative authority renders a determination based on legal grounds established in substantive law. That is the case here. Hence, the Majority panel erred because it failed to acknowledge section IV's as relevant substantive legislation. In contrast, an allegation based on section III could be made in cases in which the authority has erred in the application of the procedural and not the substantive norms.<sup>10</sup> In applying

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238, fracción III, del Código Fiscal de la Federación, ya que no se afectaron las defensas del particular, por lo que al no satisfacerse las condiciones legales para la eficacia de la ilegalidad en comento, resulta indebido, en el caso, declarar una nulidad cuando la ratio legis es muy clara, en el sentido de preservar y conservar actuaciones de la autoridad administrativa que, aunque ilegales, no generan afectación al particular, pues también debe atenderse y perseguir el beneficio de intereses colectivos, conducentes a asegurar efectos tales como una adecuada y eficiente recaudación fiscal, lo que justifica la prevención, clara e incondicional del legislador, en el sentido de salvaguardar la validez y eficacia de ciertas actuaciones. Y es así, que el artículo 237 del Código Fiscal de la Federación desarrolla el principio de presunción de legitimidad y conservación de los actos administrativos, que incluye lo que en la teoría del derecho administrativo se conoce como "ilegalidades no invalidantes", respecto de las cuales, por supuesto, no procede declarar su nulidad, sino confirmar la validez del acto administrativo. Luego entonces, **es necesario que tales omisiones o vicios afecten las defensas del particular y trasciendan al sentido de la resolución impugnada y que ocasionen un perjuicio efectivo**, porque de lo contrario el concepto de anulación esgrimido sería insuficiente y ocioso para declarar la nulidad de la resolución administrativa impugnada.

CUARTO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO.

Amparo directo 44/2004. Mauricio Chavero Blázquez y otros. 28 de abril de 2004. Unanimidad de votos. Ponente: Jean Claude Tron Petit. Secretaria: Claudia Patricia Peraza Espinoza.

Véase: Semanario Judicial de la Federación, Octava Época, Tomo VII, marzo de 1991, página 106, tesis I.2o.A.268 A, de rubro: "ACTOS ADMINISTRATIVOS, VICIOS LEVES DE LOS."

<sup>10</sup> **VIOLACIONES PROCESALES Y SUSTANTIVAS PREVISTAS EN EL ARTÍCULO 238, FRACCIONES III Y IV, DEL CÓDIGO FISCAL DE LA FEDERACIÓN. DIFERENCIACIÓN ESPECÍFICA.**

Cuando en un procedimiento administrativo se aplica como ordenamiento adjetivo supletorio uno diverso a aquel que conforme a las disposiciones correspondientes resulta aplicable, debe estimarse que se configura la causa de nulidad prevista en la fracción III y no la diversa prevista en la fracción IV, ambas del **artículo 238** del **Código Fiscal** de la Federación. Lo anterior es así, en tanto que la fracción III referida ubica de manera expresa, específica y clara, la hipótesis de que trata, como vicios del procedimiento que afecten las defensas del particular y trasciendan al resultado del fallo, mientras que la fracción IV refiere el supuesto de que se hayan dejado de aplicar las disposiciones debidas, y a pesar de la aparente concurrencia entre las hipótesis que se prevén en dichas fracciones, la diferencia específica estriba en que la primera de ellas se configurará como violación de procedimiento derivada de la indebida aplicación de una norma adjetiva, mientras que la segunda se origina en la indebida aplicación de una norma sustantiva, lo cual implica que en el caso de la hipótesis prevista en la fracción IV, para dictar la resolución en el juicio de nulidad ante ella planteado, la Sala **Fiscal** habrá analizado el fondo del asunto para

this distinction, the Majority insists that the alleged violation is, in fact, an error of procedure and not a violation of a substantive norm. That is correct in relation to section III. But the application of the admitted substantive norm contained in section IV can not ignored.

The Majority conclusion is not acceptable because Article 5.10 is not a simple error in procedure. It is a violation of a substantive norm and, therefore, an illegality that cannot be affirmed by this NAFTA Binational Panel. While Article 59 is part of the Title of the LCE that refers to procedures, Article 5.10 of the ADA does not make any distinction between

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arribar a la determinación de que la resolución combatida fue dictada con fundamento en una norma sustantiva diversa a la que debió haberse aplicado, mientras que en el supuesto que contempla la fracción III, se habrá visto impedida de estudiar el fondo del asunto porque existe un vicio de procedimiento que se lo impide, lo que sucede, por ejemplo, en el caso en que siendo regulable el procedimiento administrativo instaurado en contra de servidores públicos, de manera supletoria, por las disposiciones del **Código** Federal de Procedimientos Penales, la autoridad demandada lo haya desarrollado aplicando el **Código** Federal de Procedimientos Civiles. La diversidad entre ambas hipótesis tiene relación directa con la clasificación que doctrinalmente se ha definido como errores in judicando, que serían los correspondientes al supuesto previsto en la fracción IV, y los errores in procedendo, dentro de los que caben los señalados en la fracción III. Los errores o vicios del primer tipo se configuran cuando la autoridad aplica al caso una norma sustantiva que no contempla la hipótesis del caso a resolver, mientras que los del segundo tipo se actualizan cuando la autoridad equivoca la norma aplicable para regular el procedimiento instaurado. Si se incurre en una violación derivada de un error o vicio de este segundo tipo, es decir, in procedendo, en tanto que afecta directamente al procedimiento seguido para resolver el asunto planteado, se actualiza la hipótesis de la fracción III y no la de la fracción IV del **artículo 238** antes citado, porque el vicio procedimental cometido ha dejado sin defensa al quejoso, en tanto que le ha impedido que su defensa sea implementada mediante la oportunidad, temporalidad y valoración probatoria procedentes según el ordenamiento legal aplicable, lo que provoca que la resolución emitida no contenga, en sentido estricto, la verdad legal del caso planteado y, por tanto, impide que la Sala **Fiscal** realice el estudio de fondo del asunto. Por el contrario, si el vicio que en el caso se concrete se hubiera actualizado en la resolución misma al aplicar la norma sustantiva equivocada y no en el procedimiento que le dio origen, la Sala responsable hubiese podido, en estricto derecho, analizar el fondo del asunto planteado para determinar si conforme a la valoración de las probanzas efectuada por la mencionada responsable, la resolución de mérito era legal o procedía su anulación, porque su objeto de análisis sí habría sido la verdad legal a la que hubiese arribado la autoridad demandada y con base en ella podría haber determinado la legalidad o ilegalidad de la resolución.

#### DÉCIMO SEGUNDO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO.

Revisión fiscal 4292/2001. Titular del Área de Responsabilidades del Órgano Interno de Control en el Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado. 13 de septiembre de 2001. Mayoría de votos. Disidente: Hilario Bárcenas Chávez. Ponente: Jorge Arturo Camero Ocampo. Secretario: Alfredo Cid García.

Amparo directo 7072/2001. Roberto Damián Ríos. 13 de septiembre de 2001. Unanimidad de votos. Ponente: Roberto Avendaño. Secretaria: Minerva H. Mendoza Cruz.

procedural and substantive provisions. In fact, Article 1 of the ADA provides that, “The following provisions govern the application of Article VI of GATT 1994, in so far as action is taken under anti-dumping legislation or regulations.” In this context, the ADA is the instrument that regulates Article VI of the GATT. It is a substantive norm and, moreover, an international commitment to which Mexico has subscribed. As such, the case is amply made that the whole ADA is substantive and applies, in this case, as Mexican law.

It is important to highlight why the ADA applies as Mexican law in a NAFTA Chapter 19 case. This has been a relevant issue in different Binational Panel procedures reviewing Mexican determinations. The question is whether the ADA is part of the Mexican antidumping law for the purposes of NAFTA Chapter 19. In Chapter 19, Article 1902.1 holds that the antidumping and countervailing duty law include the relevant statutes, legislative regulations, administrative practice and judicial precedents. According to NAFTA’s Article 1904 (2), a Binational Panel must rely upon and rule consistently with domestic law, *i.e.*, it does not apply an *ad-hoc* set of international rules, but the importing Party’s own antidumping and countervailing duty law, which includes relevant statutes, legislative history, regulations, administrative practice and judicial precedents. When a Binational Panel reviews Mexican antidumping and countervailing duty determinations, it replaces the *Tribunal Fiscal de la Federacion*, with the limitations on its jurisdiction as provided in the text of NAFTA’s Chapter 19.

The IA relies upon the *Ley de Comercio de Exterior*,<sup>11</sup> and its Regulations, as the basis for its determinations. While some sources of antidumping and countervailing duty law, mentioned in NAFTA’s Article 1904 (2), such as legislative history, are completely alien to the Mexican practice, other concepts, such as judicial precedent, are fully applicable, as they are similar to the Mexican jurisprudential theses. In addition to the *Ley de Comercio Exterior*, there are other relevant statutes constituting Mexican antidumping law. Notably, NAFTA’s Article 1904 (3) and Annex 1911, limits the applicability of the *Codigo Fiscal de la Federacion* to the standard of review.

We must consider the international agreements concluded by the Mexican Executive. International Treaties are Mexican Law according to Article 133 of the Mexican Constitution, which states: “This Constitution, the laws of the Congress of the Union which emanate there from, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the

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<sup>11</sup> Title VII of the Mexican Foreign Trade Law.

Supreme Law throughout the Union.” The construction of this Constitutional provision leads to the conclusion that not only the *Ley de Comercio de Exterior*, but these international treaties dealing with antidumping and countervailing duty, are relevant statutes because in the language of the Constitution they are Mexican Law. In this context, the ADA is relevant Mexican Law.

Since the ADA is part of the Mexican Law, we now address jurisdiction to render a decision based on this Agreement. In different opinions, the Mexican Supreme Court has established that the only truly “Supreme Law” is the Constitution, since all the federal laws must emanate from it and all the international treaties must conform with the Constitutional text. With respect to the hierarchy of the international treaties relative to Federal statutes, the Supreme Court once held that they both had the same hierarchical level.<sup>12</sup> However, in more recent opinions, the Court overruled that previous thesis when it concluded, interpreting Article 133 of the Constitution, that the international treaties rank higher, in the legal hierarchy, than federal statutes.<sup>13</sup>

A *prima-facie* application of the Court’s interpretation of Article 133 of the Constitution leads to the conclusion that, in a case of conflict, the ADA is a body of law that pre-empts the *Ley de Comercio de Exterior*. The terms of Chapter 19 permit a Binational Panel to consider and rely upon the ADA as the basis for its review of a final determination made by the Mexican investigating authority. The *Fructose Panel*<sup>14</sup> applied and interpreted the ADA as an element of Mexican law. It based its decision both on the ADA and the *Ley de Comercio de Exterior*. Moreover, the *Fructose Panel*, for reasons of international comity, adopted the conclusions of a WTO dispute settlement body special group, rather than making an independent decision based upon review of the administrative record pursuant to Mexican law and legal norms. The holding, in *Urea*, is similarly instructive. In that review, though the violation of Article 59 was not denied, the IA argued that the additional time permitted by Article 5.10 of the ADA controlled the time limitation and the panel agreed.<sup>15</sup> See also this Panel’s discussion of hierarchy in Issue VIII.

Another relevant question was whether the IA can base a FD on the provisions of the ADA. The *Tribunal Fiscal de la Federacion* has expressed the opinion that it is not possible to do so.<sup>16</sup> It held that the WTO Agreements are treaties of non-direct application

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<sup>12</sup> “LEYES FEDERALES Y TRATADOS INTERNACIONALES, TIENEN LA MISMA JERARQUÍA NORMATIVA” Tesis P.C/92, Semanario Judicial de la Federación No. 60, Octava Época, diciembre de 1992, p.27.

<sup>13</sup> “TRATADOS INTERNACIONALES. SE UBICAN JERÁRQUICAMENTE POR ENCIMA DE LAS LEYES FEDERALES Y EN UN SEGUNDO PLANO RESPECTO DE LA CONSTITUCIÓN FEDERAL.” Novena Época, Pleno, Semanario Judicial de la Federación Tomo X, Noviembre de 1999. Tesis P. LXXVII/99, p. 46

<sup>14</sup> MEX-USA-98-1904-01. See the Executive Summary at pages 6 and 7 of the Spanish version, downloadable from the NAFTA Secretariat web page: <http://www.nafta-sec-alena.org>.

<sup>15</sup> MEX-USA-00-1904-01.

<sup>16</sup> Tesis: IV-TA-2aS-82

R.T.F.F. Año II. No. 20. Marzo 2000. Pág: 284

Aislada Cuarta Época.

Segunda Sección

Materia: COMERCIO EXTERIOR

(heteroaplicativos) and, as such, they cannot support the IA's determination. These agreements, according to this thesis, generate an obligation for the United Mexican States, as a member of the international community, to adopt the necessary measures for complying with these agreements at the domestic level. Those measures include the statutes and regulations that establish rights and obligations for the individuals, as well as powers and duties for the authorities. Nevertheless, the *Tribunal Fiscal de la Federacion* has held that these agreements are a privileged source to interpret those statutes and regulations, enacted as a consequence of Mexico's international obligations. The *Tribunal Fiscal de la Federacion* has made it clear that neither the Mexican Legislative power nor the Executive has the intention of violating such international agreements through the enactment of domestic legislation. The *Tribunal Fiscal de la Federacion* has concluded that, in this context, it is the task of the judges to interpret the relevant statutes and regulations harmoniously, with respect to the referred international agreements.

This thesis has been followed by other opinions of the *Tribunal Fiscal de la Federacion*, which harmoniously interpreted the *Ley de Comercio Exterior* provisions with the WTO Agreements.<sup>17</sup> These opinions support the conclusion that a harmonious interpretation

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TRATADOS HETEROAPLICATIVOS.- EL JUEZ ESTÁ OBLIGADO A INTERPRETAR LAS LEYES Y REGLAMENTOS EN FORMA ARMÓNICA CON LOS MISMOS.-

Los Códigos Antidumping, aprobados en el seno del GATT o de la OMC, son tratados heteroaplicativos y no pueden servir para fundar una resolución de la Secretaría de Comercio y Fomento Industrial. En ellos, los Estados Unidos Mexicanos se obligan a adoptar las medidas necesarias para su cumplimiento, por lo que son las leyes y reglamentos, que en su caso se expidan, los que directamente establecen derechos y obligaciones a los particulares y otorgan facultades e imponen deberes a las autoridades; sin embargo, los tratados heteroaplicativos son una fuente privilegiada para interpretar las leyes y reglamentos que como consecuencia de las obligaciones internacionales adquiridas por México, son promulgados, pues como es evidente ni el legislador mexicano ni el Presidente de la República pretenden, en una ley o reglamento, violar los compromisos internacionales que el país ha contraído, por lo que corresponde a los jueces interpretar las citadas leyes y reglamentos en forma armónica con los tratados heteroaplicativos. (6)

Juicio No. 100(20)-71/98/1883/96.- Resuelto por la Segunda Sección de la Sala Superior del Tribunal Fiscal de la Federación, en sesión de 12 de octubre de 1999, por mayoría de 3 votos a favor y 1 en contra.- Magistrado Ponente: Rubén Aguirre Pangburn.- Secretario: Lic. José Antonio Rodríguez Martínez.  
(Tesis aprobada en sesión privada de 12 de octubre de 1999)

PRECEDENTE:

IV-P-2aS-42

Juicio No. 100(20)4/96/17856/95.- Resuelto por la Segunda Sección de la Sala Superior del Tribunal Fiscal de la Federación, en sesión de 25 de agosto de 1998, por mayoría de 3 votos a favor, 1 con los puntos resolutive.- Magistrado Ponente: Rubén Aguirre Pangburn. Secretaria: Lic. Isabel Urrutia Cárdenas.

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CUOTAS COMPENSATORIAS PROVISIONALES DICTADAS CONFORME A LA LEY REGLAMENTARIA DEL ARTÍCULO 131 DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS EN MATERIA DE COMERCIO EXTERIOR, TIENEN UNA VIGENCIA DE SEIS MESES.-



compels the *Tribunal Fiscal de la Federacion* to apply Mexican law in a manner which is not contradictory to the relevant international agreement. In sum, regardless of the distinction made between self-executing and non-self-executing treaties, this thesis must be followed to conclude that the ADA is a source of Mexican law for the purposes of NAFTA Chapter 19 and, therefore, the *Ley de Comercio de Exterior* has to be interpreted harmoniously with respect to this international agreement.

In this context, the *Flat Coated Steel Products*, cited by the Majority, the Panel concluded that international agreements and treaties are considered domestic law under Article 133 of the Mexican Constitution, and it held:

The Mexican Supreme Court has ruled that international agreements and treaties are self-executing, so that national authorities are bound by them without the need for any implementing legislation. Thus, for the purpose of its application in Mexico, NAFTA is to be directly interpreted according to the rules laid out by the *Vienna Convention on the Law of Treaties*, to which Mexico is a party and which is part of Mexican domestic law.<sup>18</sup>

Like NAFTA, the ADA has to be interpreted according to the rules laid out by the *Vienna Convention on the Law of Treaties*, to which Mexico is a Party and which is part of Mexican domestic law. The Mexican Supreme Court has concluded that international treaties are interpreted through the application of Articles 31 and 32 of the *Vienna Convention on the Laws of Treaties*. Namely, by taking into account not only the literal content of a treaty provision, but also the objectives and goals established by the treaty as a whole.<sup>19</sup>

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IV-TA-2aS-81

Cuarta Época., R.T.F.F. Año II. No. 20. Marzo 2000., Pág. 283

Aislada, Segunda Sección

CUOTA COMPENSATORIA. LA REVISIÓN DE LA RESOLUCIÓN QUE LA ESTABLEZCA NO PUEDE CONFIRMARSE EN AUSENCIA DE EXPORTACIONES DEL PRODUCTO.-

IV-P-2aS-40

Cuarta Época., R.T.F.F. Año I. No. 5. Diciembre 1998., Pág. 191

Precedente, Segunda Sección.

<sup>18</sup> MEX-94-1904, paragraph 28.

<sup>19</sup>

**Registro No.** 185294

**Localización:**

Novena Época

Instancia: Segunda Sala

Fuente: Semanario Judicial de la Federación y su Gaceta

XVI, Diciembre de 2002

Página: 292

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In this context, it is impossible to conclude that the objectives of the ADA are simply to establish time periods in a procedure. The procedure is designed to provide legal certainty to the participants in an anti-dumping investigation and does not distinguish procedural from substantive rules. GATT Article VI is a substantive body of law and an international commitment subscribed to by Mexico. The ADA obligates member states to abide by these time frames and the IA's continuous violation of these time frames cannot be ignored by Binational Panels. It is clear that the objectives of the GATT and of the ADA are not purely procedural.

In this review, the IA went beyond both applicable time periods, the one established by the ADA and the one established by the *Ley de Comercio de Exterior*, without justification.

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Tesis Aislada

Materia(s): Constitucional, Común

**TRATADOS INTERNACIONALES. SU INTERPRETACIÓN POR ESTA SUPREMA CORTE DE JUSTICIA DE LA NACIÓN AL TENOR DE LO ESTABLECIDO EN LOS ARTÍCULOS 31 Y 32 DE LA CONVENCIÓN DE VIENA SOBRE EL DERECHO DE LOS **TRATADOS** (DIARIO OFICIAL DE LA FEDERACIÓN DEL 14 DE FEBRERO DE 1975).**

Conforme a lo dispuesto en los citados preceptos para desentrañar el alcance de lo establecido en un instrumento internacional debe acudirse a reglas precisas que en tanto no se apartan de lo dispuesto en el artículo 14, párrafo cuarto, de la Constitución General de la República vinculan a la Suprema Corte de Justicia de la Nación. En efecto, al tenor de lo previsto en el artículo 31 de la mencionada Convención, para interpretar los actos jurídicos de la referida naturaleza como regla general debe, en principio, acudirse al sentido literal de las palabras utilizadas por las partes contratantes al redactar el respectivo documento final debiendo, en todo caso, adoptar la conclusión que sea lógica con el contexto propio del tratado y acorde con el objeto o fin que se tuvo con su celebración; es decir, debe acudirse a los métodos de interpretación literal, sistemática y teleológica. A su vez, en cuanto al contexto que debe tomarse en cuenta para realizar la interpretación sistemática, la Convención señala que aquél se integra por: a) el texto del instrumento respectivo, así como su preámbulo y anexos; y, b) todo acuerdo que se refiera al tratado y haya sido concertado entre las partes con motivo de su celebración o todo instrumento formulado por una o más partes con motivo de la celebración del tratado y aceptado por las demás como instrumento referente al tratado; y, como otros elementos hermenéuticos que deben considerarse al aplicar los referidos métodos destaca: a) todo acuerdo ulterior entre las partes acerca de la interpretación del tratado o de la aplicación de sus disposiciones; b) toda práctica ulteriormente seguida en la aplicación del tratado por la cual conste el acuerdo de las partes acerca de su interpretación; y, c) toda norma pertinente de derecho internacional aplicable en las relaciones entre las partes; siendo conveniente precisar que en términos de lo dispuesto en el artículo 32 de la Convención de Viena sobre el Derecho de los Tratados para realizar la interpretación teleológica y conocer los fines que se tuvieron con la celebración de un instrumento internacional no debe acudirse, en principio, a los trabajos preparatorios de éste ni a las circunstancias que rodearon su celebración, pues de éstos el intérprete únicamente puede valerse para confirmar el resultado al que se haya arribado con base en los elementos antes narrados o bien cuando la conclusión derivada de la aplicación de éstos sea ambigua, oscura o manifiestamente absurda.

Amparo en revisión 402/2001. Imcosa, S.A. de C.V. 16 de agosto de 2002. Unanimidad de cuatro votos. Ausente: Guillermo I. Ortiz Mayagoitia. Ponente: Guillermo I. Ortiz Mayagoitia; en su ausencia hizo suyo el asunto Mariano Azuela Güitrón. Secretario: Rafael Coello Cetina.

In exceeding the time limits, the IA has acted illegally and is in violation of Article 238, section IV, of the *Codigo Fiscal de la Federacion*. The applicable law does not support the view that this illegality is purely procedural and does not negatively affect the complainant. Article 5.10 applies as Mexican law on this issue and it has to be interpreted as the Mexican Supreme Court mandates. That is, it must be interpreted in light of the principles established by the *Vienna Convention on the Law of Treaties*, taking into account not only the plain meaning of the treaty, but also its objectives and goals.

This view is further buttressed through Mexico's commitment to establish a time frame for the timely and adequate administration of trade investigations. Mexico commits to:

... 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: ...

(f) explicit and adequate timetables for determinations of the competent investigating authority and for the submission of questionnaires, evidence and comments by interested parties, as well as an opportunity for them to present facts and arguments in support of their positions prior to any final determination, to the extent time permits, including an opportunity to be adequately informed in a timely manner of and to comment on all aspects of preliminary determinations of dumping or subsidization<sup>20</sup>

The IA's actions fail to adhere to Mexico's commitments. The IA acknowledges that the *Ley de Comercio Exterior* does not establish an adequate time frame in the language of Annex 1904.15. Moreover, while the ADA may permit the extension of time, under special circumstances, the IA has failed not only to justify the extension, but it has also failed to provide the legal basis for going beyond the extension.

## CONCLUSION

I do not contest the Majority's support of the IA's contention that BERG did not fulfill the requirements established in Sections II and III of Article 238 of the *Codigo Fiscal de la Federacion*. However, Berg's contention regarding section IV of Article 238 is correct. Section IV establishes that an administrative decision will be illegal "if it was dictated in contravention to the applicable provisions," such as Article 5.10 of the ADA and Article 59 of the *Ley de Comercio Exterior*. This was done in the present case. The violation of the Section IV does not face the problems faced by Sections II and III.<sup>21</sup>

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<sup>20</sup> NAFTA's Annex 1904.15, Schedule of Mexico, paragraph (f).

<sup>21</sup> See, thesis registered as 185,344.

I agree that panels may not render decisions on the constitutionality of Mexican Law. Nevertheless, *jurisprudencia* on constitutional matters should be considered by the Panel as relevant factors to consider in the review. It is important to emphasize that the purpose of NAFTA was to establish a free-trade zone among its members, consistent with GATT/WTO, reaffirming the obligations emanating from GATT. Article 1904 was designed to provide for the review and solution of controversies in issues of antidumping and countervailing duties. Thus it created Binational Panels, not arbitral panels, in order to review the recorded findings in antidumping and countervailing duty matters, generally, in a manner as would an appellate court of the importing country reviewing a lower court.<sup>22</sup> Similar to what a court of appeals would apply in review, Binational Panels must adhere to the importance of international treaty obligations, the weight of *jurisprudencia*, together with the general principles of law that must be applied.<sup>23</sup>

It is also important to emphasize that in accordance with Article 1904 (8) of NAFTA, a Panel may affirm or remand a final determination in a matter of *antidumping* or countervailing duties. If the matter is remanded to the issuing authority, it may submit a remanded final determination not incompatible with the Binational Panel's decision. If the remanded determination continues to be incompatible, the Binational Panel can continue to remand. In *Fructose*, the Panel held:

Will there be circumstances in which the resolution of a binational panel could lead to the cancellation of the antidumping investigation? In the opinion of this Panel the answer to this question is affirmative, but not for the reasons alleged by the Complainants (in the sense that this panel is able to annul the act of the IA or order this to annul it) nor in an immediate way, but in cases in which the request for investigation has been presented by a person without legal standing to do so, or if the determination of injury or threat of injury made by the IA did not have support, cases in which the IA, after a remand dictated by the binational panel, would have to make its resolution compatible with the decision of the panel or, if this was not possible, terminate the investigation and return the countervailing duties collected. In any another case, the remand ordered by a binational panel should have the outcome of a new act by the IA, compatible with the resolution of the binational panel.<sup>24</sup>

I suggest that the majority consider the above opinion rather than underestimating the ability of a Binational Panel to address an illegal determination without the need to claim a nullity. I find nothing in the Majority's admissions of factual grounds claimed by Berg that can explain or justify an affirmation.

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<sup>22</sup> See, *Fructose*, *supra* note 14.

<sup>23</sup> See, Article 1904 (3) of the NAFTA.

<sup>24</sup> MEX-USA-98-1904-01.

A remand to the IA is necessary for it to demonstrate where, in the record, the exceptional circumstances required the entire 18 month time limit, and which extensions of record, if any, would authorize the further time. To the extent that the IA admits it went beyond the 18 month time limit, a remand would further require the IA to demonstrate a legal basis upon which it was legally permissible to continue the investigation beyond the prescribed 18 month time period. The remand back to the IA would be for a period of 30 days.

Respectfully submitted,

Dale P. Tursi

March 3, 2008.