

**IN THE MATTER OF:**

Polystyrene and Impact Crystal from  
the United States of America

MEX-94-1904-03

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## PANEL DECISION

### I. INTRODUCTION.

In accordance with the provisions of Chapter XIX of the North American Free Trade Agreement (hereafter “NAFTA”),<sup>1</sup> this Panel was established to review the final determination issued by the Secretaría de Comercio y Fomento Industrial (hereafter “Investigating Authority” or “SECOFI”) in the antidumping administrative investigation on imports of cristal and solid polystyrene from Germany and the United States of America.<sup>2</sup>

Upon full consideration of the Complaint, the briefs and all other written submissions, oral arguments presented by the parties, and on the basis of the standard of review contained in Article 238 of the Federal Tax Code (hereafter the “CFF”),<sup>3</sup> the Panel affirms the Final Determination.

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<sup>1</sup> North American Free Trade Agreement, issued on August 12, 1992, revised on September 6, 1992, signed on December 17, 1992, published in the Diario Oficial of the Federación (hereafter “DOF”) on December 20, 1993, went into effect on January 1, 1994, hereafter NAFTA.

<sup>2</sup> Final Determination of the Antidumping Administrative Investigation Proceeding Covering Imports of Polystyrene Crystal and limpact, as contained in tariff numbers 3903.19.02, 3903.19.99, 3903.90.05 y 3903.90.99 of the Harmonized Tariff System, from Germany and the United States of America, published in the DOF, on November 1994. Exp. Adm., Vol. 3, folio s/n (hereafter “Final Determination”).

<sup>3</sup> Código Fiscal de la Federación (Federal Tax Code), published in the DOF on December 31, 1981.

## **II. STATEMENT OF PROCEEDINGS**

### **A. Proceedings of the Administrative Investigation**

On January 4, 1993, Industrias Resistol, S.A. y Poliestireno y Derivados, S.A. de C.V. (hereafter "Resistol"), through their counsel, filed with SECOFI an antidumping complaint concerning imports of crystal and solid polystyrene from Germany and the United States of America.<sup>4</sup>

On March 5, 1993, a Notice of Initiation<sup>5</sup> of the administrative antidumping investigation (hereafter "antidumping investigation"), was published in the DOF without the establishment of provisional antidumping duties.<sup>6</sup>

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<sup>4</sup> Exp. Adm. Públ. Vol. 1, folio 0014. Citations to the administrative record are made in the following manner in accordance with the official index: "Exp. Adm." means administrative record, "Publ." means public, "Conf." means confidential; "Vol." means the volume in which the document is contained, and "folio" refers to the number of the document. All the references in this Decision are from public records.

<sup>5</sup> Pursuant to disposed what is in the Annex 1904.15 of the NAFTA, the Provisional determination that declares the initiation of the administrative investigation will be referred to hereafter as "Initial Resolution" and the "Resolution that revises the Provisional Resolution", will be "Provisional Resolution."

<sup>6</sup> Resolution that declares the initiation of the investigation covering imports of polystyrene crystal and impact, products included in the tariff numbers 3903.19.02, 3903.19.99, 3903.90.05 y 3903.90.99 of the Harmonized Tariff System from Germany and the United States, published in the DOF on March 5, 1993, at 28-31; Exp. Adm., Vol. 1, folio s/n, (hereafter "Initial Resolution").

On March 25, 1993, the Provisional Resolution was published in the DOF, in which provisional antidumping duties were established with respect to imports of crystal polystyrene from the United States of America. Provisional antidumping duties were not established with respect to imports of solid polystyrene from Germany, from either country, because of insufficient proof of injury to the domestic industry.<sup>7</sup>

On January 17, 1994, Muehlstein International. Ltd. (hereafter "Muehlstein") entered an appearance in the second stage of the antidumping investigation and filed a response to the official questionnaire.<sup>8</sup>

On November 11, 1994, a Final Determination was published in the DOF, which affirmed the Provisional Determination.<sup>9</sup> With respect to Muehlstein, SECOFI established an antidumping duty margin rate of 44.32% in connection with Muehlstein's imports of crystal polystyrene, as a result of the application of best information available. SECOFI determined that Muehlstein's response to the official questionnaire was incomplete, because Muehlstein's

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<sup>7</sup> Determination which reviews the provisional determination which declared the initiation of the administrative antidumping investigation covering imports of polystyrene crystal and impact, products contained in tariff numbers 3903.19.02, 3903.19.99, 3903.90.05 y 3903.90.99 of the Harmonize Tariff System, from Germany and the United States of America, published in the DOF, on November 25, 1993, at 29-38. Exp. Adm., Vol. 3, folio s/n. Hereafter "Provisional Resolution" para. 86, p.38.

<sup>8</sup> Exp. Adm., Vol. 3, folio 0343.

<sup>9</sup> Final Determination, para. 138, at 21.

domestic sales were not representative of its total sales, and because Muehlstein failed to provide other information as a basis for normal value.<sup>10</sup>

## **B. Panel Proceedings**

### **1. Chronology of Proceedings**

On December 9, 1994, Muehlstein requested a binational Panel review of the Final Determination,<sup>11</sup> in pursuant to Article 1904 of the NAFTA, and the article 1904 Rules of Procedure (hereafter "Rules of Procedure").<sup>12</sup> Notice of the request was published in the DOF,<sup>13</sup> and the Federal Register,<sup>14</sup> on December 19, 1994, and January 12, 1995, respectively.

On January 9, 1995, Muehlstein filed its Complaint.<sup>15</sup> Generally, Muehlstein alleges that SECOFI: a) incorrectly applied legal provisions, b) acted contrary to the objectives of the

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<sup>10</sup> Final Determination, para. 28 and 62, at 9 and 12.

<sup>11</sup> Rev. Rec. MEX-94-1904-03, Vol. 1, doc. 1. Citations to the record of the proceedings before this Panel, are made in the following manner: "Rev. Rec." means "review record"; "Vol." means volume, "doc." means the number of the document.

<sup>12</sup> Rules of Procedure of Article 1904 and of Extraordinary Challenged Committee of the NAFTA, published in the DOF on June 20, 1994.

<sup>13</sup> "Notice to Implement Paragraph (2) of the Rule 35 of the Rules of Procedure of article 1904 of the North American Free Trade Agreement." Secretaría de Comercio y Fomento Industrial. Published in the DOF, on December 19, 1994, p. 55; Rev. Rec., Vol. 1, doc. 25.

<sup>14</sup> North American Free Trade Agreement (NAFTA) Article 1904. Binational Panel Reviews: Request for Panel Review, 60 Fed. Reg. 2.942 (Notice of First Request for Panel Review) (Dept Comm., 1995).

<sup>15</sup> Rev. Rec., Vol. 1, doc. 26.



Foreign Trade Law when it determined that domestic sales were required to be representative in order to provide a basis for normal value, c) incorrectly determined that the Complainant's questionnaire response was incomplete, d) erred by not inform Muehlstein that the questionnaire response was incomplete; and, e) erred in its calculation that Muehlstein internal sales represented 1.5 % of total sales.<sup>16</sup>

On January 23, 1995, the Investigating Authority, Resistol and Nacional de Resinas, S.A. de C.V. (hereafter "Resinas")<sup>17</sup> entered their appearance.

On April 10, 1995, Muehlstein filed its Brief in Support of its Complaint (hereafter "Muehlstein's Brief").<sup>18</sup>

On April 28, 1995, the review was suspended<sup>19</sup> due to the resignation of a panelist.<sup>20</sup> On October 23, 1995, the review resumed upon the appointment of a substitute panelist.<sup>21</sup>

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<sup>16</sup> Idem.

<sup>17</sup> Investigating Authority, Rev. Rec., Vol. 2, doc. 31; Resistol, Rev. Rec., Vol. 2, doc. 32 Nacional de Resinas, Rev. Rec. Vol. 2, doc. 30.

<sup>18</sup> Rev. Rec., Vol. 4, doc. 43.

<sup>19</sup> Rev. Rec., Vol. 5, doc. 38.

<sup>20</sup> "Notice of the Suspension of the Panel Review of the Final Determination of the Antidumping Administrative Investigation Proceeding on the imports of polystyrene crystal and impact, from Germany and the United States of America, published in the DOF on May 9, 1995. Rev. Rec., Vol. 5, doc. 84.

On November 2, 1995, Muehlstein filed a Motion to Amend its Complaint (hereafter "Motion to Amend"). This Motion resulted in series of motions filed by the other parties, and the issuance of various orders by the Panel.<sup>22</sup>

On December 4, 1995, Resistol and the Investigating Authority filed their Response Briefs and presented arguments in opposition to Muehlstein's Brief.<sup>23</sup>

On December 19, 1995, Muehlstein filed a Reply Brief.<sup>24</sup>

On January 11, 1996, oral arguments were presented in relation to Muehlstein's Motion to Amend.<sup>25</sup>

On January 26, 1996, the Motion to Amend was denied.<sup>26</sup> On February 1, 1996, the Panel issued an Order notifying the parties its decision to review a *sua sponte* the competency of the Investigating Authority.<sup>27</sup>

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<sup>21</sup> "Notice of Conclusion of the Suspension of the Panel Review of the Final Determination of the Antidumping Administrative Investigation Proceeding on the imports of polystyrene crystal and impact, from Germany and the United States of America, published in the DOF on October 31, 1995. Rev. Rec., Vol. 5, doc. 130.

<sup>22</sup> To see the content of said Motions and Orders, see *infra* "Motions and Orders".

<sup>23</sup> Resistol, Rev. Rec. Vol. 6, doc. 222; Investigating Authority, Rev. Rec., Vol. 6, doc. 223.

<sup>24</sup> Rev. Rec., Vol. 7, 295.

<sup>25</sup> Rev. Rec., Vol. 10, doc. 396, Transcript.

<sup>26</sup> Rev. Rec., Vol. 11, doc. 403.

<sup>27</sup> Rev. Rec., Vol. 11, doc. 414.

On March 25, 1996, the Panel issued an Order concerning the Public Hearing,<sup>28</sup> which took place on April 18 and 19, 1996.<sup>29</sup>

## **2. Motions and Orders.**

During the review, the parties filed a number of motions which are summarized below:

### **a. Motion to Amend Complaint, November 2, 1995**

In its Motion to Amend Complaint, filed by Muehlstein<sup>30</sup> requested leave to amend the Complaint to include arguments regarding the competency of the Investigating Authority, and while included Steel Plate Decision.<sup>31</sup> The Panel denied the motion by way of an Order dated January 26, 1996, on grounds that it was untimely filed.<sup>32</sup>

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<sup>28</sup> Rev. Rec., Vol. 15, doc. 587.

<sup>29</sup> Rev. Rec., Vol. 16, doc. 676, Transcript.

<sup>30</sup> Rev. Rec. Vol. 5, doc. 159.

<sup>31</sup> Final Determination of the Antidumping Administrative Investigation Proceeding Covering Imports of Products of Steel Plate from United States of America, published in the DOF on September 11, 1995, (hereafter "Steel Plate Decision").

<sup>32</sup> Rev. Rec., Vol. 11, doc. 403.

**b. Motion to Strike the Motion to Amend the Complaint,  
November 24, 27, and 29, 1995**

The Investigating Authority, Resistol and Resinas, alternative filed motions in which they requested that the Motion to Amend the Complaint be denied and leave to amend briefs to an amended Complaint.<sup>33</sup> By way of an Order issued on December 15, 1995, the Panel decided to extend a previously established ten day deadline, and to deny the Motions to Strike. Pursuant to the Order, Resistol and the Investigating Authority presented additional information.<sup>34</sup>

**c. Order to Undertake a Sua Sponte Review, February 1, 1996**

The Panel notified the parties of its decision to undertake a *Sua Sponte* review of the competency of the Investigating Authority. In connection with that Order, the following motions were filed:

**i. Motion for Extension (Investigating Authority),  
February 2, 1996.**

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<sup>33</sup> Investigating Authority, Rev. Rec. , Vol. 6, doc. 183 y Rev. Rec., Vol. 6, doc. 214; Resistol, Rev. Rec., Vol. 6, doc. 198; Nacional de Resinas, Rev. Rec., Vol. 6, doc. 206.

<sup>34</sup> Resistol, Rev. Rec., Vol. 8, doc. 333, December 28, 1995; Investigating Authority, Rev. Rec. Vol. 8, doc. 325, December 26, 1995.

Motion filed by the Investigating Authority in which it requests a 10 day extension to present additional information, and a 5 day extension to respond to the submissions of the other parties.<sup>35</sup>

**ii. Motions to Revoke Order for *Sua Sponte* Review  
(Resistol and Investigating Authority) February 6, 15  
and 16, 1996.**

Motions filed by Resistol and the Investigating Authority in which they request that the Panel revoke its Order of February 1, 1996, extend the applicable time periods, and to specify the issues regarding competency that are subject to the *Sua Sponte* review.<sup>36</sup> In its Orders of February 6 and 20, 1996, the Panel defined the issues subject to the review, and extended applicable time periods for the parties to present information.<sup>37</sup> With respect to the request that the Panel revoke its prior Order, Resistol, the Investigating Authority and Muehlstein presented additional information requested by the Panel.<sup>38</sup>

**d. Motion to Terminate Review (Investigating Authority)  
March 8, 1996**

SECOFI presented a Motion requesting that the review be terminated on grounds that Muehlstein lacked legal interest.<sup>39</sup> The Panel denied the Motion on grounds that it was filed out of the time limits established in the Panel's Order of March 27, 1996.<sup>40</sup>

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<sup>35</sup> Rev. Rec., Vol. 11, doc. 428; Vol. 12, doc. 506.

<sup>36</sup> SECOFI, Rev. Rec., Vol 11, doc. 450; doc. 498; Resistol, Rev. Rec.. Vol. 11, doc. 442.

<sup>37</sup> Rev. Rec. Vol. 11, doc. 458 and Vol. 12, doc 514.

<sup>38</sup> Rev. Rec., Vol 13, doc 157, March 11, 1996; Rev. Rec. Vol. 14, doc 563, March 14, 1996; Vol 14, doc. 571: March 25, 1996, Rev. Rec. Vol. 13, soc. 555, March 12, 1996

<sup>39</sup> Rev. Rec., Vol. 13, doc. 539.

**e. Motion to Strike Muehlstein's Submission  
(Investigating Authority) May 24, 1996**

Motion filed by SECOFI requesting that the panel strike Muehlstein's written submission of April 26, 1996, which contained information Muehlstein claimed was requested during the Public Hearing.<sup>41</sup> By way of its Order of June 12, 1996, the Panel decided to strike all unsolicited written submissions presented after the Public Hearing.

**f. Motion to Strike Information contained in Muehlstein's  
Submission (Investigating Authority), August 23, 1996**

By way of its Order of August 30, 1996, the Panel decided to strike the material presented by the Complainant on July 8, 16, 1996, for not complying with Rule 68(1).

**g. Motion for Reconsideration of the Order (Muehlstein)  
September 4, 1996**

Motion filed by Muehlstein requesting reconsideration of the Panel's Order of August 30, 1996. By Order of September 11, 1996, the motion was denied.

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<sup>40</sup> Rev. Rec., Vol. 15, doc. 608.

<sup>41</sup> Rev. Rec., Vol. 18, doc. 687.

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

#### **A. Article 1904 of the NAFTA**

The purpose of this Binational Panel Review is to review pursuant to the antidumping laws of the Mexico the Final Determination issued in connection with the antidumping duty investigation on imports of crystal and solid polystyrene from Germany and the United States of America (Article 1904(2) of the NAFTA).<sup>42</sup> The antidumping laws of Mexico consist of those laws,<sup>43</sup> legislative histories, Regulations, administrative practice, and relevant judicial precedents, which the Federal Tax Court (TFF)<sup>44</sup> would otherwise apply in an antidumping judicial review.<sup>45</sup>

The standard of review that must be applied in the binational panel review is established under article 1904 (3), and Annex 1911 of NAFTA. Article 1904 (3) provides that a binational panel must apply the standard of review pursuant to Annex 1911, as well as general principles of law that a domestic tribunal would otherwise apply when reviewing a final antidumping determination of the investigating authority.<sup>46</sup> General principles of law includes principles of standing of legal interest, due process of law, rules on construction, issues without legal validity, and exhaustion of remedies.<sup>47</sup>

Annex 1911 provides that the standard of review applicable in the review the Criteria provided in Article 238 of the CFF, as amended.

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<sup>42</sup> North American Free Trade Agreement of América of the North, edited 12 of August of 1992, inspected 6 of September of 1992, signed 17 of December of 1992, published in the DOF 20 of December of 1993, in force from 1 of January of 1994, in thereafter NAFTA.

<sup>43</sup> Ley Reglamentaria del artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en materia de Comercio Exterior, (Regulatory Law of Article 131 of the Political Constitution of the Mexican United States in foreign trade matters), published of the DOF 13 of January of 1986.

<sup>44</sup> In the Mexican Law the TFF has jurisdiction for reviewing final determinations regarding antidumping matters, Ley Orgánica del Tribunal Fiscal amended on December 15, 1995, see Article 11 section XI.

<sup>45</sup> NAFTA Article 1904(2)

<sup>46</sup> NAFTA. Article 1904(3)

**B. Article 238 of the Federal Tax Code**

Pursuant to Annex 1911 of Chapter XIX of the NAFTA, in the case of Mexico, the standard of review is expressed in Article 238 of the CFF, as amended. Article 238 provides that a Final Determination will be declared illegal upon one of the following elements:

- I. Incompetence of the official that dictated or conducted the proceeding;
- II. Omission of a formal legal requirement, which affects the defenses of the particular, and which affects the substance of the challengey determination, including the absence of findings of fact and conclusions of law;
- III. Defects in the proceeding that affected the defenses of the particular, and which affected the substance of the challenged resolution;
- IV. If the facts upon which the determination is based did not occur or they were different or were appraised in wrong form, or if was issued in infringement of the applicable provisions or omit to apply the appropriate ones.
- V. The administrative determination is based on an exercise of discretionary authority that do not correspond to the proposes of the law which conferred such discretionary authority.

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<sup>47</sup> NAFTA, Article 1911



After this review was initiated, during 1995, the CFF was amended by the Mexican Congress.<sup>48</sup> Specifically the Article 238 of the CFF was amended to include an additional paragraph. This paragraph establishes that:

On the basis of public interest, the Court may *sua sponte*, on the basis of public interest, declare an authority incompetent to issue the challenged resolution, and the total absence of findings of fact and conclusions of law.

In accordance with NAFTA Article 1904(3) and Annex 1911, this panel must apply the review criteria of the standard of review expressed in Article 238 of the CFF, as amended. Therefore, the paragraph added to Article 238 forms part of standard of review applicable in this case.<sup>49</sup>

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<sup>48</sup> Decreto por el que se expiden nuevas leyes fiscales y se modifican otras (Decree which contains amendments of outstanding tax laws and regulation and issuance of new tax laws and regulations) hereafter decree, published in the DOF on december 15, 1995, in effect from January 1st of 1996.

<sup>49</sup> The reason of the application of this paragraph is discussed in the title V (1) and subsequent of this resolution.

#### IV. REVIEW OF ANTIDUMPING ISSUES

##### A. Introduction

Muehlstein challenges SECOFI's final determination which established company specific antidumping duty margins for Muehlstein of 44.32% *ad valorem* for imports of crystal polystyrene, and 29.98% *ad valorem* for imports of solid polystyrene.<sup>50</sup>

Generally, Muehlstein alleges in its complaint that the final determination was contrary to law on the following grounds: SECOFI applied a "representativeness" test not provided for by law; SECOFI erred in its determination that Muehlstein's questionnaire response was incomplete; SECOFI failed to notify Muehlstein that its questionnaire response was incomplete, and failed to provide it with an opportunity to submit additional information; the findings of fact and conclusions of law set forth in the final determination are legally insufficient; the "representativeness" test calculations were incorrect.

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<sup>50</sup>See Final Determination, page 21, paras. 141 y 145.

**B. Summary Conclusion**

Upon review of the Complaint, the briefs and other written memoranda filed by the parties, the oral arguments presented by the parties, the law applicable to this case, and on the basis of the standard of review criteria expressed in Article 238 of the CFF, the Panel affirms the final determination with respect to the allegations contained in Muehlstein's complaint.

**C. The Final Determination**

The underlying antidumping duty investigation<sup>51</sup> was initiated on March 5, 1993, and notice of the initiation ("Initial Resolution") was served on the governments of the United States and Germany.<sup>52</sup> Subsequent to the publication of the Initial Resolution, a number of interested parties entered appearances in the investigation and submitted questionnaire responses and other information to SECOFI. On November 25, 1993, SECOFI published in the Diario Oficial a Provisional Resolution.<sup>53</sup>

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<sup>51</sup> Initial Resolution, p. 28.

<sup>52</sup> See *Id.* at 31, paras. 28-30; Final Determination at 7, para. 14.

<sup>53</sup> Provisional Resolution, page 29.

Muehlstein entered an appearance in the investigation on January 17, 1994, and submitted a questionnaire response which included sales and price data for transactions in the United States and Mexico.<sup>54</sup> It did not provide third-country sales data or cost of production information. Apart from its initial submission, Muehlstein made no further written submissions during the investigation.

For purposes of the final determination, SECOFI rejected Muehlstein's questionnaire response on grounds that it was incomplete.<sup>55</sup> Specifically, SECOFI determined, on the basis of a "representativeness test" (hereafter "representative test") that Muehlstein's U.S. home market sales did not permit a valid comparison to sales in Mexico and could not be used as the basis for normal value. SECOFI determined that since the U.S. sales were not comparable, Muehlstein should have submitted third-country sales data, or cost or production information, pursuant to applicable regulations.<sup>56</sup> Under SECOFI's criterion for representative, there being no data in the questionnaire response on which to base normal value, SECOFI rejected the questionnaire response as incomplete:

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<sup>54</sup>Pub. Admin. Rec. Vol. 8, doc. no. 1343. Citation to the administrative record is as follows: "Pub." signifies that the document cited is public or nonconfidential; "Non-Pub." signifies that the document cited is not public, or confidential; "Vol." signifies the volume in which the document is located; "doc. no." signifies the document, or folio, number of the document.

<sup>55</sup>Final Determination at 9, paras. 28, 62-63.

<sup>56</sup>Article 2, section II of the Unfair International Trade Practices Regulations (hereafter "regulations").

As mentioned in subsection 28 of this determination, this company did not answer completely the official questionnaire. Particularly, the company did not provide normal value options to domestic sale prices, specifically, third countries sales data or cost of production information. Pursuant to Article 2, subsection II of the Regulations against Unfair International Trade Practices, the Secretariat rejected the domestic sales data because the sales of this company in the United States are not representative of its total sales, due to the fact that those sales represent 1.5 per cent of its total sales volume and, therefore, those do not permit a valid comparison with the Mexico exportation prices.<sup>57</sup>

Having rejected Muehlstein's questionnaire response, SECOFI established company specific antidumping duty margins for Muehlstein of 44.32 percent for solid polystyrene, and 29.98 percent for crystal polystyrene, on the basis of best information available consisting of the highest antidumping duty margin received by an investigated company.<sup>58</sup>

#### **D. The Complaint**

Muehlstein alleges in five counts that the final determination was erroneous and contrary to law, and requests that this Panel remand to SECOFI with instructions to correct the determination.

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<sup>57</sup>Final Determination at 11-12, para. 62.

<sup>58</sup>Final Determination at 12, para. 63.

First, Muehlstein alleges that SECOFI erred when it applied a “representative” test to determine whether its U.S. home market sales were an appropriate basis for normal value. Muehlstein argues that the rejection of its U.S. sales data was erroneous because Mexican law does not expressly require that home market sales be “representative” in order to form the basis for normal value.<sup>59</sup> Muehlstein reasons that because SECOFI applied a legal requirement that does not exist, the final determination is contrary to law under section II of Article 238 of the CFF.<sup>60</sup>

Second, Muehlstein alleges that, in accordance with sections II and IV of Article 238 of the CFF, the Panel should find that the final determination is contrary to law on the basis that SECOFI failed to set forth findings of fact and conclusions of law that adequately support the final determination.<sup>61</sup> Muehlstein argues that assuming SECOFI correctly applied the representative test, it failed to provide in the final determination a definition for “representative” which corresponds with the objectives and intent of the antidumping law, and to set forth the basis on which it determined that Muehlstein’s U.S. home market sales were not representative.

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<sup>59</sup>Muehlstein Brief in Chief at 8-11, April 10, 1995 (hereafter referred to as "Muehlstein Brief").

<sup>60</sup>Muehlstein Brief at 10.

<sup>61</sup>Idem at 12-14.

Third, Muehlstein alleges that SECOFI erred in its determination that Muehlstein's questionnaire was "incomplete" because it did not contain third-country sales data, or cost of production information.<sup>62</sup> In support, Muehlstein notes that the questionnaire response does not require that cost of production information be submitted.<sup>63</sup> Muehlstein argues that the questionnaire did not define the term "representative," and that it was obligated to interpret and define the meaning of the term. On the basis of its interpretation, Muehlstein determined that its U.S. home market sales were "representative," and that it was not required to submit third-country sales or cost of production data: that its questionnaire response was complete. Muehlstein argues that SECOFI's determination that the questionnaire response was incomplete is contrary to law pursuant to the section II of Article 238 of the CFF.<sup>64</sup>

Fourth, Muehlstein alleges that SECOFI erred by not notifying Muehlstein that its questionnaire response was incomplete, and by not giving it the opportunity to submit additional information.<sup>65</sup> Muehlstein claims that SECOFI informed Muehlstein's legal counsel during an informal meeting that additional information was not required,<sup>66</sup> and that during the ten month period between the submission of its questionnaire response and the publication of

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<sup>62</sup>Id. at 12-14.

<sup>63</sup>Id. at 13.

<sup>64</sup>Id. at 14.

<sup>65</sup>Id. at 14-15.

<sup>66</sup>Id. at 14.

the final determination, SECOFI sought and received information from other parties. Muehlstein claims that had it been afforded a similar opportunity, it would have provided additional information. On the basis of SECOFI's failure to inform it that the response was incomplete, Muehlstein claims that the final determination is contrary to law under section III of Article 238 of the CFF.<sup>67</sup>

Fifth, Muehlstein alleges that SECOFI erred in its determination that Muehlstein's U.S. home market sales constituted 1.5 percent of its total sales.<sup>68</sup> Muehlstein notes that its own calculation indicates that its U.S. home market sales accounted for 3.72 percent of total sales. Muehlstein claims that this error is significant to the extent the Panel rules that the "representative" standard is between 1.5 and 3.72 percent.<sup>69</sup> Muehlstein argues that, in any event, the Panel should find under section IV of Article 238 of the CFF that the final determination is contrary to law on the basis of the SECOFI's calculation error.<sup>70</sup>

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<sup>67</sup>Id. at 15.

<sup>68</sup>Id. at 15-16.

<sup>69</sup>Id. at 20.

<sup>70</sup>Id. at 16.



## **E. Analysis**

In accordance with the standard of review expressed in Article 238 of the CFF, the Panel examines whether SECOFI's use of the representative test was contrary to law; whether SECOFI's determination that Muehlstein's questionnaire response was incomplete was contrary to law, whether SECOFI erred by not notifying Muehlstein that its response was incomplete, whether the final determination is supported by sufficient findings of fact and conclusions of law, and whether SECOFI erred in its calculation under the representative test.

### **1. Representativeness Criteria**

The core of Muehlstein's complaint is that the representative test does not legally exist because it is not expressly provided, *i.e.* written out, in a law or regulation.

A fundamental principle of law is that a government authority may not take action that is not founded in law.<sup>71</sup> Here, neither the law nor regulations expressly require that SECOFI apply a representative test to determine whether an exporter's home market sales are

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<sup>71</sup>See *e.g.* Article 16 of the Constitución Política de los Estados Unidos Mexicanos (hereafter "Mexican Constitution").

comparable with export price. That a criterion or standard is not written out in a law, however, does not negate its legal existence. An administrative authority may be authorized by law to exercise discretionary authority to adopt criteria and standards that it deems relevant and necessary to discharge its legal mandate. Administrative authorities routinely apply criteria and standards that are not set forth within the black letter of a law or regulation. Indeed, in matters which are highly complex and technical and require specialized expertise and knowledge, such as an antidumping duty investigation, it is common for an administering authorities to be granted discretionary authority with respect to the criteria and standards it will rely on to carry out its responsibilities.

In this case, the Panel must determine whether SECOFI had discretionary authority to adopt and apply the representative test.<sup>72</sup> If the Panel decides that SECOFI had such discretionary authority, the Panel must then decide whether the application of the representative test was otherwise contrary to law.

The legal basis for the representative test is found in Article 2 of the Regulations:<sup>73</sup>

For the purposes of determining the dumping margin, the Secretariat will compare the normal value of the foreign product with the price of the product upon import to the Mexican market.

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<sup>72</sup>SECOFI argues in its Response Brief that it had such discretionary authority. SECOFI Response Brief, December 4, 1995, page 22, 24 (hereafter "SECOFI Response Brief") .

<sup>73</sup>Article 2 of the Regulations.

The Secretary will consider the normal value of a product:

- I. The comparable price, in the course of the normal trade relations, of an identical or similar product destined for consumption in the country of origin;
- II. When sales of identical or similar products made in course of normal commercial operations in the domestic market, do not permit a valid comparison, the following shall be considered as normal value:
  - A. The higher comparable price for the identical or similar export products sold to third-countries in the course of the normal commercial operations, provided that the price of such sales are representative; or
  - B. On the basis of cost of production in the country of origin...

Under the regulation, an exporter's sales in its home market must be used as the basis for normal value provided that two conditions are met. First, the sales under consideration must have been made in the course of normal commercial operations and consist of sales of merchandise that is identical or similar to the merchandise that is the subject of the investigation.<sup>74</sup> Second, the sales must permit a "valid comparison." If one of these conditions is not met, the home market sales are deemed not to constitute an appropriate basis for normal value, and normal value must be based either on third-country sales, or costs of production.

To determine whether Muehlstein's reported U.S. home market sales permitted a "valid comparison," SECOFI employed a representative test under which it calculated the percentage

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<sup>74</sup>Whether Muehlstein's home market sales were made in the course of normal commercial operations, or were of products similar or identical to the products subject to the investigation is not at issue in this case.

of Muehlstein's world wide sales (total sales) accounted for by Muehlstein's reported U.S. sales.<sup>75</sup> SECOFI reportedly utilizes the representative test to ensure that the prices compared with export price reflect general prevailing price conditions in the exporter's home market.<sup>76</sup> In addition, the representative test is used to ensure that the volume of transactions in the home market is sufficiently large to minimize the risk of using prices that are influenced by factors that do not reflect normal commercial conditions of sale.<sup>77</sup>

The representative test is also used to determine the viability of third-country sales as the basis for normal value.<sup>78</sup> In such instances, the test is used to determine whether the sales in the third-country with the highest price permit a valid comparison with the export price to Mexico.<sup>79</sup> Should an exporter not have sales in third-countries, or if its third-country sales do not permit a valid comparison with export price in Mexico, normal value must be based on costs of production.<sup>80</sup>

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<sup>75</sup>Final Determination at 12, para. 62.

<sup>76</sup>SECOFI Response Brief at 22.

<sup>77</sup>SECOFI Response Brief at 32.

<sup>78</sup>See Article 2, section II, para. A of the Regulations (third- country price must be representative).

<sup>79</sup>SECOFI Response Brief at 22.

<sup>80</sup>Article 2, section II, para. B of the Regulations.

## **2. Discretionary Authority of the Investigating Authority**

This Panel finds that SECOFI has discretionary authority for purposes of conducting antidumping duty investigations. The Constitution provides that the executive branch of the government is responsible for implementing and executing the laws passed by the legislature.<sup>81</sup> The Constitution also provides that the legislature may authorize the executive branch to undertake any matter related to regulation of international trade.<sup>82</sup>

The Implementing Law of Article 131 of the Mexican Constitution for Foreign Trade Matters expressly authorizes the executive branch authority to establish the procedures for the regulation or restriction of exports and imports through the establishment of provisional and definitive compensating [antidumping and countervailing] duties in connection with unfair trade practices.<sup>83</sup> The law specifically delegates to SECOFI authority to conduct matters related to unfair trade practices.<sup>84</sup>

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<sup>81</sup>Mexican Constitution, Article 89 section 1.

<sup>82</sup>Mexican Constitution, Article 131, second paragraph.

<sup>83</sup>Implementing Law of Article 131 of the Mexican Constitution for Foreign Trade Matters, Chapter 1, Article 1, section 1 and paragraph c (hereafter "Implementing Law"). Although repealed by the enactment of the Foreign Trade Law, the Implementing Law was in effect during all times material hereto.

<sup>84</sup>Implementing Law, Article 2 section II, and the second paragraph. Although not applicable in this case, the Panel notes that the Foreign Trade Law was enacted in September 1993 to, among other things, regulate

The Federal Public Administration Organic Law provides that SECOFI is authorized to administer and conduct the following matters: formulate and implement general international trade policy; review and establish import and export restrictions; study and formulate general rules respecting international trade and special import duties.<sup>85</sup>

The regulations also affirm the statutory delegation of authority to SECOFI to conduct antidumping duty investigations.<sup>86</sup>

The foregoing constitutional, statutory, and regulatory provisions establish that SECOFI is legally empowered to conduct antidumping proceedings. As such, this Panel finds that SECOFI is authorized to exercise discretion in the establishment and development of rules, standards, and criteria, necessary to conduct antidumping proceedings.

Under section II of Article 238 of the CFF, a final determination is contrary to law if it is not based on formal requirements established by law. The Panel finds that the representative

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international trade. For administrative purposes, the executive branch, through SECOFI, is responsible for the interpretation and application of the provisions contained in the Foreign Trade Law. Foreign Trade Law, Articles 1 and 2.

<sup>85</sup>Federal Public Administration Organic Law, Article 34, sections I, V, and VI.

<sup>86</sup>See Preamble and Article 2 of the Regulations.

test is based on discretionary authority delegated to SECOFI under formal requirements established by law. As such, the Panel affirms the final determination with respect to SECOFI's adoption of the representative test to determine whether an exporter's home market sales are comparable to export price.

The Panel next considers whether SECOFI exceeded its discretionary authority, or otherwise acted contrary to law, in the application of the representative test in this case.

### **3. Discretionary Authority of the Investigating Authority to Apply the Representativeness Criteria.**

An administrative authority authorized to exercise discretion is free to establish and develop criteria and standards which are reasonably aimed to accomplish the legal objectives delegated to it by law or regulation.<sup>87</sup> To be lawful, therefore, an exercise of a discretionary act

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<sup>87</sup>Discretionary Authority Definition:

The discretionary authority appears within the administrative laws as a consequence of the execution of an express faculty. Said authority is founded in a law or a regulation which gives to the executive branch free appreciation faculties to decide either to act or not, when to act, how to act and which would be the subject of the act and which would be the subject of the act, as referred by Bonnard: the Discretionary Authority consists on the free faculty even to the administrative branch to decide what is appropriate to do.

The Discretionary Authority consists in powers of the state agencies to decide whether to act or not, establishing the limitations and subjects of the acts, considering the appropriateness, the necessity, the technique, the justice and the equality, or the reasons to act in one way or another, accordance to the limitations established by law.

by an administrative authority must have a basis in law or regulation. An administrative authority may not exceed the scope of its discretionary authority,<sup>88</sup> or engage in acts that have no rational basis in law or regulation.<sup>89</sup>

Under section V of Article 238 of the CFF, an antidumping duty final determination is contrary to law to the extent that it is based on a discretionary act that is inconsistent with the objectives and purposes of the antidumping law.

The representative test is based on an regulatory provision which requires SECOFI to determine whether sales used as the basis for normal value permit a valid comparison with

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Diccionario Jurídico, Instituto de Investigaciones Jurídicas, UNAM, México DF, 1985, editorial UNAM Porrúa.

<sup>88</sup> See ejecutoria: Instancia: Tribunales Colegiados de Circuito  
Fuente: Semanario Judicial de la Federación  
Época: 8A  
Tomo: VIII-Octubre  
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ITEM: DISCRETIONARY AUTHORITY, OBLIGATIONS THAT SHOULD BE FULFILLED WHEN THE EXECUTION OF

TEXT: When the administrative authority executes the discretionary authority has a wider freedom to decide, this does not grant a ilimited power, having the obligation, under correct administration, to follow in its authority acts certain principles or limitations as reasonables which can only be or limitations as reasonables which can only be founded in adecuate findings of fact and conclusions of law even more precise that when its acts are founded in specifics legal provisions with the objective of showing legality of said act: likewise, the act should be founded or should consider true or in public and notorious facts, contained in the case file, and finally to be proportional between the used measure and pretended objective.

CUARTO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO



export price. As the regulation does not expressly provide a definition or standard for determining whether prices are comparable, SECOFI properly established such criteria.

In addition to being based on a regulation, the purpose of the representative test is consistent with the purposes and objectives of the antidumping law. The representative test is designed to ensure that prices used to compare with export price accurately reflect general pricing conditions in the foreign market. This purpose is consistent with the objectives of the antidumping law which is to establish the imposition of antidumping duties which accurately reflect the extent of dumping in Mexico.<sup>90</sup> The Panel, therefore, finds that SECOFI neither abused, nor exceeded, its discretionary authority by the application of the representative test in this case.<sup>91</sup> Hence, in accordance with section V of Article 238 of the CFF, the Panel affirms the final determination with respect to the use and application of the representative test.

The Panel next reviews whether SECOFI's determination that Muehlstein's questionnaire response was incomplete was contrary to law.

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<sup>89</sup>See Amparo en revisión 1214-91 Justo Ortego Ezquerro, 13 de junio de 1991. Unanimidad de votos. Potente: Hilario Bárcenas Chávez. Secretario: Fernando A. Ortiz Cruz.

<sup>90</sup>See *e.g. generally* GATT Antidumping Code.

<sup>91</sup>As noted *infra* (at Section G), the Panel does not reach a decision concerning the actual percentage criteria adopted by SECOFI under the representative test.

#### **4. Determination that Muehlstein's Questionnaire Response was Incomplete**

Muehlstein alleges that SECOFI erred when it determined that its questionnaire response was incomplete. As grounds, Muehlstein asserts, without reference to law or regulation, that SECOFI should have defined the word "representative" in its questionnaire.<sup>92</sup> Muehlstein contends that had a definition been provided, that additional data would have been submitted.

Under section II of Article 238 of the CFF, this Panel is required to find that the final determination is contrary to law if it determines that SECOFI omitted to apply applicable formal requirements established by law, that the omission affected Muehlstein's defenses, and that the omission formed a basis for the determination.

The Panel determines that SECOFI followed applicable legal requirements in making its determination that Muehlstein's response was incomplete. SECOFI was required under the regulation to determine whether Muehlstein's reported U.S. sales data permitted a valid comparison with export price. Having determined under its discretionary authority that a valid

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<sup>92</sup>Muehlstein Brief at 13.

comparison could not be made, SECOFI was required by the regulations to base normal value on third-country sales or cost of production information. Since Muehlstein did not submit third-country sales or cost of production data, SECOFI's conclusion that the questionnaire was incomplete was in accordance with the regulations.

Muehlstein's argument that it reasonably relied on its own definition for the term "representative" is not convincing. Words and phrases used in antidumping statutes and regulations have special and distinct meanings. A party in an antidumping investigation is obligated to submit data in a timely fashion, and in the form by the regulations and the questionnaire. This means, among other things, that a party has a base level of responsibility with respect to the content, accuracy, and completeness of the information it submits, which includes the responsibility to seek clarification of unfamiliar terms and words.<sup>93</sup>

Muehlstein should have been alerted that the word "representative," as used in the regulation and the questionnaire, bore special technical significance. The regulation expressly provides that if an exporter's home market sales are not "comparable," normal value must be

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<sup>93</sup>The Panel rejects SECOFI's argument that its "administrative practice" has been to disregard internal market sales as the basis for normal value when these sales are less than fifteen percent of worldwide sales. SECOFI confuses an administrative act with an "administrative practice." An administrative practice is formed overtime through a series of administrative acts (such as an interpretation of a regulation or application of a discretionary act) which are consistent and uniform in their application and which provide a basis by which parties in an antidumping proceeding may know precisely how SECOFI will respond in particular situations, or to a particular set of facts. Administrative practices create certainty and transparency to antidumping proceedings. The Panel does not find that such an administrative practice was in place at the time of the underlying investigation.

based upon third-country prices, or cost of production information.<sup>94</sup> The questionnaire clearly states that in the event that home market sales “are not representative,” third-country sales data must be provided.<sup>95</sup>

Despite that the special significance of the word “representative” virtually leaps from the texts of the regulation and questionnaire, Muehlstein used an American dictionary to define the word and, on the basis of that definition, concluded that it was not required to report third-country sales data.<sup>96</sup> Muehlstein’s decision to consult an American dictionary to interpret a Spanish word that was contained in a Mexican regulation, and in a questionnaire issued by a Mexican administrative authority in the course of a Mexican administrative proceeding, was not reasonable. Moreover, the definition that Muehlstein came to rely on—“one that serves as an example for others of the same classification”—bears no rational application in the context of an antidumping investigation.<sup>97</sup> Muehlstein does not explain how, on the basis of the definition it discovered in the American dictionary, it determined that it was not required to submit third-country sales data or cost of production information.

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<sup>94</sup>Article 2, section II of the Regulations.

<sup>95</sup>Official Questionnaire section 3.2, Public Admin. Rec., Vol. 8, Doc. 150, folio 0343.

<sup>96</sup>Muehlstein Brief at 13.

<sup>97</sup>Muehlstein Brief at 13.

Muehlstein contends that exporters are not required by law to guess correctly the unique definitions which SECOFI applies to “common, every-day terms” such as representative.<sup>98</sup> The argument that the word “representative” as used in the context of the antidumping duty investigation is a common every-day term is absurd and *post-hoc* rationalization. Although the law does not require Muehlstein to guess how SECOFI defines the term “representative,” it is precisely for that reason that Muehlstein should have asked SECOFI to clarify the meaning of the word: if a party is unsure as to the meaning of a term or word that is obviously technical in nature, at minimum, it must ask SECOFI for a clarification.<sup>99</sup>

In addition, as a party to an antidumping duty proceeding, Muehlstein should have been alerted by other factors that the word “representative” was a technical term and deserved careful consideration. First, the underlying investigation was not the first time that the representative test was used. In two prior cases, SECOFI articulated its use of the representative test to determine whether an exporter’s home market sales were comparable with export price in Mexico.<sup>100</sup> Second, new regulations were issued in December of 1993, approximately fifteen days before Muehlstein submitted its questionnaire response.<sup>101</sup> The new

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<sup>98</sup>*Id.*

<sup>99</sup>Muehlstein Brief at 13.

<sup>100</sup>Homopolimeros de los Estados Unidos, Diario Oficial, 23 diciembre 1993, punto 68, página 41 ( donde SECOFI determino que . . . ); Lamina Galvanizada de los Estados Unidos, Diario Oficial, 2 agosto de 1994, punto 31, página 5 (donde SECOFI determino que . . . )

<sup>101</sup>Foreign Trade Law Regulations, published in the Diario Oficial December 30, 1993.

regulations specifically provide that a representative test will be used to determine whether an exporter's home market sales permit a valid comparison with export price.<sup>102</sup> The new regulations did not retroactively apply to the underlying investigation, but the new regulations were a clear warning to Muehlstein that its interpretation of the word "representative" was incorrect.

Accordingly, the Panel finds that SECOFI's determination that Muehlstein's response was incomplete was based on a formal requirement established by law and the determination that Muehlstein's response was incomplete is affirmed.

The Panel next considers whether SECOFI erred by not notifying Muehlstein that its reported U.S. sales were not representative and would not be used as the basis for normal value.

#### **5. Muehlstein's Argument Regarding Secofi's Obligation to Notify that Its Response was Incomplete**

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<sup>102</sup>See Article 42 of the Foreign Trade Law Regulations (sales do not permit a valid comparison if they are not representative).

On the basis of Article 27 of the regulations and section III of Article 238 of the CFF, Muehlstein urges the Panel to find that SECOFI erred by not notifying Muehlstein that the questionnaire response was incomplete, and by not giving it an opportunity to submit additional information.

In order to declare that a final determination is contrary to law under section III of Article 238 of the CFF, this Panel is required to find that an actual procedural requirement was violated.<sup>103</sup> Muehlstein claims that SECOFI violated Article 27 of the regulations because SECOFI's failure to notify it that its response was incomplete prevented it from submitting additional data.

The Panel finds that Article 27 of the regulations does not apply in this case. Article 27 provides that a party *may* submit information at any time during the course of an antidumping proceeding. There is no evidence in the administrative record that SECOFI refused to accept information from Muehlstein, or that Muehlstein submitted additional information. Indeed, it is uncontroverted that there is no legal requirement that SECOFI notify interested parties in the

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<sup>103</sup>VICIOS DE PROCEDIMIENTO

Los vicios de los actos procesales consisten en lo que hay en ellos contrario a las normas jurídicas que rigen la formación del acto. Este ha de llevarse a cabo de acuerdo con dichas normas, y si tal cosa no se realiza, el acto adolece de un vicio que le resta eficacia jurídica, en mayor o menor grado, según las circunstancias.

Diccionario de términos procesales, Eduardo Pallares, Editorial Porrúa, México DF, 1978.

final stage of an antidumping investigation that the information they have submitted is incomplete or deficient.<sup>104</sup>

Whether or not SECOFI would have refused to accept additional information from Muehlstein is speculative and does not provide a basis for a legal claim under section III of Art. 238 of the CFF. The Panel may not base its decision on speculation, or on procedural requirements that do not exist. Given that Article 27 of the regulations does not apply in this case, and given that Muehlstein fails to cite to any other actual procedural requirement that it believes was violated, the Panel determines that Muehlstein has failed to state a claim on which relief can be granted under section III of Article 238 of the CFF.<sup>105</sup> Notwithstanding the failure to state a claim, the Panel considers whether SECOFI was otherwise obligated to inform Muehlstein that its response was incomplete and to solicit additional information from Muehlstein.

Muehlstein asserts that SECOFI informed it during an informal meeting that further information was not required. Muehlstein cites to a letter wherein Muehlstein's Mexican

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<sup>104</sup>Counsel for Muehlstein conceded during oral argument that there is no such statutory or regulatory requirement. See Transcript of Public Hearing, April 18-19, 1996, at 223-225.

<sup>105</sup>Rule 39 of the Rules of Procedure require that a complaint set forth the precise nature of the complaint, including the applicable standard of review, and allegations of errors of fact or law. Rule 39 (2)(b) of the Rules of Procedure for Article 1904 Binational Panel Review, published in the Diario Oficial June 20, 1994 (hereafter Rules of Procedure).



counsel purportedly informs a U.S. attorney about the meeting. This offer of proof is without merit. There is no evidence in the administrative record that the meeting took place, or as to what transpired during the meeting.<sup>106</sup> In addition, the letter is not part of administrative record and is not subject to consideration by this Panel.<sup>107</sup> In any event, the letter is not probative, as it does not establish that SECOFI had already reviewed Muehlstein's response, or determined that the U.S. sales were not representative.

Muehlstein further asserts that SECOFI treated it unequally by requesting and accepting additional information from other interested parties. Muehlstein offers no proof that SECOFI would not have accepted additional information from Muehlstein had it been submitted, or that SECOFI intended to discriminate against it.

With respect to Muehlstein's argument that SECOFI had sufficient time to review its response and accept additional data because the final stage of the proceeding extended over a period of eleven months, there is no evidence in the administrative record that SECOFI or any of the interested parties knew at the beginning of the final stage of the investigation that eleven months would lapse before publication of the final determination. From the date of

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<sup>106</sup>NAFTA Annex 1904.15(l) requires "the preparation of summaries of *ex parte* meetings held between the competent investigating authority and any interested party and the inclusion of in the administrative record of such summaries." During oral argument, SECOFI did not deny that a meeting between Muehlstein and SECOFI official occurred. The absence of a summary of that meeting is troublesome.

<sup>107</sup>This panel's decision must be based entirely on the administrative record. NAFTA Article 1904.

publication of the preliminary determination, SECOFI has 30 working days to review its preliminary determination,<sup>108</sup> and four months to publish the final determination.<sup>109</sup> It is not uncommon for the final determinations to be published beyond the four months,<sup>110</sup> a fact that is indicative of the tremendous pressure on SECOFI's resources during the period between the preliminary and final determinations.

With the exception of Muehlstein, all of the interested parties participated in the preliminary stage of the investigation.<sup>111</sup> The preliminary stage affords interested parties a number of procedural safeguards to ensure that the information they have submitted is

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<sup>108</sup>Article 20 of the Regulations.

<sup>109</sup>See *generally* Articles 13 through 20 of the Regulations.

<sup>110</sup>See Resolución Final de la Investigación Antidumping sobre las Importaciones de Aditivos para Gasolina, mercancía comprendida en las fracciones arancelarias 3811.11.99 y 3811.19.99 de la Tarifa de la Ley del Impuesto General de Importación, originaria de los Estados Unidos de América independientemente del país de procedencia (July 5, 1995 - ); Resolución Final de la Investigación Antidumping sobre las Importaciones de Cerraduras de Pomo o Perilla mercancía comprendida en la fracción 8301.40.99 de la Tarifa de la Ley del Impuesto General de Importación, originaria de la República Popular de China (May 2, 1994 - August 14, 1995); Resolución Final de la Investigación Antidumping sobre las Importaciones de Carne de Bovino y despojos comestibles, mercancía comprendida en las fracciones 0201.30.01, 0202.30.01, 0206.21.01, 0206.22.01 y 0504.00.01 de la Tarifa de la Ley del Impuesto General de Importación, originaria de los Estados Unidos de América.

<sup>111</sup>Generally, an antidumping duty investigation has two stages which, for purposes of this resolution, are called the preliminary stage, which consists of the period between publication of the notice of initiation and preliminary determination, and the final stage, which consists of the period between publication of the preliminary and final determinations.

complete and accurate.<sup>112</sup> As noted above, the final stage is conducted under more restrictive time restraints, and is dedicated primarily to correcting the preliminary determination.

Muehlstein entered its appearance in the final stage of the investigation.<sup>113</sup> Parties that voluntarily enter the final stage of an investigation seek to establish for the first time a company specific dumping margin. They do not have the benefit of the various safeguards to correct data that are afforded to parties during the preliminary stage. It behooves them, therefore, to ensure that the information they submit is complete and accurate.

Antidumping duty investigations are by their nature complex and technical. In order to achieve dumping duties that accurately reflect general pricing conditions, SECOFI should ensure that its calculations are based on accurate and complete data. To this end, SECOFI should, whenever possible, notify parties as to deficiencies in the data they have presented.<sup>114</sup> Indeed, the law recognizes that dumping margins should be based on accurate information and

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<sup>112</sup>For example, during the preliminary stage, parties may submit comments regarding data presented by other parties; submit supplemental or additional information either voluntarily or in response to a request by SECOFI; participate in the verification process, including submission of supplemental or additional information pursuant to verification; meet with SECOFI officials; and present arguments in support of their positions. See e.g. Final Determination at 8.

<sup>113</sup>Admin. Pub. Rec., Doc. No. 0343, January 17, 1994.

<sup>114</sup>Under NAFTA Annex 1904.15(f), parties involved in a Mexican antidumping duty proceeding are to be provided an opportunity "to present facts and arguments in support of their positions prior to any final determination, to the extent time permits . . ." While the provision arguably applies to the preliminary stage of antidumping investigations, the provision evokes a spirit of transparency and fair play which the Panel finds absent in this case.

it provides various safeguards to ensure that the information submitted is accurate and complete, and that the parties have an opportunity to cure deficiencies in the information they have submitted.<sup>115</sup>

Notwithstanding those safeguards, there is no requirement that SECOFI ensure that each party has exercised each of its available options, or that each party is satisfied that the information it has provided is complete. Such a requirement would place an undue, if not impossible, administrative burden on SECOFI, in particular during the final stage of an investigation. Parties to antidumping duty proceedings bear a responsibility to submit whatever information they deem necessary to protect their interests, and to ensure that the information they submit is accurate. While SECOFI should facilitate the submission of information, and duly consider all information submitted in proper form and within the appropriate time periods, it is not SECOFI's responsibility to decide for a party what information it should submit: the law does not require SECOFI to hold the hand of each interested party throughout each stage of an antidumping proceeding.

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<sup>115</sup>The regulations require, for example, verification, the publication of a preliminary determination which contains findings of fact and conclusions of law which underlie its determination with respect to each party. Articles 11, 13 of the Regulations; Articles 13, 16, 17, 18, 21 of the Implementing Law. In addition, the Antidumping Code requires that each party be afforded an opportunity to present information. Article 6.1 of the GATT Antidumping Code.

In accordance with the criteria expressed in section III of Article 238, the Panel finds that SECOFI did not violate a procedural requirement established by law by not informing Muehlstein that its reported U.S. sales were not representative.

## **6. Findings of Fact And Conclusions of Law**

Muehlstein alleges that the final determination is contrary to law on the grounds that the findings of fact and conclusions of law set forth in the determination are legally insufficient.<sup>116</sup> As grounds, Muehlstein asserts that the findings of fact and conclusions of law are deficient because they do not define the term "representative," and they fail to set forth how the representative test was used to determine that Muehlstein's U.S. home market sales were not comparable.<sup>117</sup>

In accordance with section II of Article 238 of the CFF, this Panel must find that the final determination is contrary to law on the following basis:

- Omission of a formal requirement established by law

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<sup>116</sup>For purposes of the English translation of this opinion, the term "fundamentación y motivación" as used in section II and the last paragraph of Article 238 of the CFF is translated into English as "findings of fact and conclusions of law." While those terms do not have the same specific meaning, they both generally refer to the underlying factual and legal bases which determinations must articulate.

<sup>117</sup>Muehlstein Brief at 12.

- which affects the defenses of the concerned party
- and which formed part of basis on which the challenged determination was founded
- including the absence of findings of fact and conclusions of law.<sup>118</sup>

Article 16 of the Mexican Constitution provides the fundamental basis for the requirement that a final determination must set forth sufficient findings of fact and conclusions of law. Article 16 of the Constitution provides that no one shall be disturbed in his person, family, domicile, documents, or possessions except by virtue of a written order by competent authority which states the legal grounds and justification for the action taken.<sup>119</sup> The purpose of the requirement is to allow a person whose interests have been affected by an administrative act to understand the factual and legal basis for the action taken against him. Without such an understanding, an affected person would be left without a basis by which to redress the action or seek a legal remedy. Hence, to be sufficient, findings of fact and conclusions of law should cite the legal basis under which the authority is authorized to act; the law or regulation upon which the act is based; special facts or circumstances which were taken into consideration; and the legal rational or reasoning which led to the conclusion that the act should be taken.<sup>120</sup> In the context of an antidumping proceeding, the final determination should

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<sup>118</sup>Article 238, section II, of the CFF.

<sup>119</sup>Article 16 of the Mexican Constitution.

<sup>120</sup>Instancia :Segunda Sala

set forth findings of fact and conclusions of law that inform interested parties of the underlying factual and legal basis on which the final determination is based so that the parties, among other things, may effectively challenge the final determination.

The Panel finds that the findings of fact and conclusions of law set forth in the final determination are legally sufficient. First, it is evident to the Panel that the final determination

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**RUBRO: FUNDAMENTACION Y MOTIVACIÓN DE.**

**TEXTO:** Para que la autoridad cumpla la garantía de legalidad que establece el artículo 16 de la Constitución Federal en cuanto a la suficiente fundamentación y motivación de sus determinaciones, en ellas debe citar el precepto legal que le sirva de apoyo y expresar los razonamientos que la llevaron a la conclusión de que el asunto concreto de que se trata, que las origina, encuadra en los presupuestos de la norma que invoca.

**PRECEDENTES:**

Sexta Época, Tercera Parte:

Vol. CXXXII, pg. 49. Amparo en revisión. 8280-67. Augusto Vallejo Olivo. 24 de junio de 1968. Unanimidad de 5 votos. ponente: José Rivera Pérez Campos.

Vol. CXXXIII, pg. 63. Amparo en revisión. 9598-67. Oscar Leonel Velasco Casa. 1 de julio de 1968. Unanimidad de 5 votos. Ponente: Alberto Orozco Romero.

Vol. CXXXIII, pg. 63. Amparo en revisión. 7228-67. Comisariado Ejidal del Poblado San Lorenzo Tezonco, Ixtapalapa, D.F. y otros. 24 de julio de 1968. Unanimidad de 5 votos. Ponente: Pedro Guerrero Martínez.

Séptima Época, Tercera Parte:

Vol. 14 pg. 37. Amparo en revisión. 3717-69. Elia Chain. 20 de febrero de 1970. Unanimidad de 5 votos. Ponente: Pedro Guerrero Martínez.

Vol. 28, pg. 111. Amparo en revisión. 4115-68. Emeterio Rodríguez Romero y Coags. 26 de abril de 1971. Unanimidad de 5 votos. Ponente: Jorge Saracho Alvarez.

does contain findings of fact and conclusions of law. As a result, the Panel does not find that the final determination is contrary to law on the basis that there is an “absence” of findings of fact and conclusions of law.

In addition, the Panel finds that the final determination cites the legal authority upon which it is based; the legal authority which authorizes SECOFI to act in antidumping proceedings;<sup>121</sup> the law and regulation upon which SECOFI based its determination;<sup>122</sup> special circumstances,<sup>123</sup> and the factual and legal reasoning underlying SECOFI’s final determination.<sup>124</sup> The findings of fact and conclusions of law are sufficient to provide notice of the legal and factual basis for the action undertaken by SECOFI, including for purposes of challenging the final determination. As such, the Panel affirms the final determination on the basis that the findings of fact and conclusions of law set forth therein are legally sufficient.

Muehlstein’s assertion that the final determination should have defined the term “representative,” and that it should have described the process used in applying the

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<sup>121</sup>See Final Determination at 8, para. 23 (citing Articles 16 and 34 of the Federal Public Administration Organic Law; Article 1, section II, subsection c., Article 2, section II, and Article 13 of the Implementing Law; Article 28 of the Regulations and Articles 1, 2, 3, 4, 6, y 33 section I of SECOFI's Internal Regulations).

<sup>122</sup>*Id.*; see also Final Determination at 12, para. 62 (citing Article 2, section II of the Regulations).

<sup>123</sup>*Id.* at 11 and 12, para 62-63 (sets forth the circumstances peculiar to Muehlstein).

<sup>124</sup>*Id.* at 9 para. 28, 11-12 para. 62-63, and 21 para. 141 (explains the basis for dumping margin established for Muehlstein).



representative test, is without merit. Muehlstein fails to cite to a law or regulation which requires that an antidumping final determination to achieve that high level of detail. Indeed, any requirement that SECOFI define in the final determination all of its technical terms, e.g. volume of imports, dumping margins, selling expenses, export price, normal value, packing, domestic market, selling price, would place an undue administrative burden on SECOFI and not serve any practical or reasonable purpose. In any event, the Panel finds that the final determination contains an explanation of the representative test sufficient to describe its characteristics, purpose, and use. More is not required in this case.

## **7. Calculation of Representativeness**

Muehlstein alleges that SECOFI erred when it calculated that Muehlstein's U.S. home market sales constituted 1.5 percent of total sales.<sup>125</sup> In support, Muehlstein notes that its own calculation shows that the U.S. home market sales accounted for 3.72 percent of its total sales.<sup>126</sup> Muehlstein asserts that the error is significant to the extent that the Panel determines that the standard for "representative" is above 1.5 percent and below 3.72 percent.<sup>127</sup>

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<sup>125</sup>Muehlstein Brief at 15-16.

<sup>126</sup>SECOFI in its response brief acknowledges that it made a ministerial error in its determination that Muehlstein's U.S. sales accounted for 1.5 percent of its total sales. SECOFI's asserts that the correct percentages are 1 percent for poliestireno cristal and 5 percent for poliestireno impacto. See SECOFI Response Brief at 5-6.

<sup>127</sup>Muehlstein's Brief at 16.

Muehlstein's claim is not relevant given that the Panel does not determine that the standard for representativeness is between 1.5 and 3.27 percent, and, the Panel does not reach a decision as to the percentage criteria under the representative test. Muehlstein's complaint does not challenge the legality of the cut-off percentage criteria used by SECOFI to determine representativeness: the complaint does not challenge the final determination on the basis that its U.S. sales, whether 1.5 or 3.72 or some other percentage, should have been deemed "representative." As such, the Panel does not review whether the final determination is contrary to law on the basis of an alleged calculation error by SECOFI.

#### **F. CONCLUSION**

On the basis of the foregoing, the Panel affirms the final determination with respect to the allegations set forth in Muehlstein's complaint.

## V. ISSUES REGARDING THE COMPETENCY OF THE INVESTIGATING AUTHORITY

### A. Introduction

On February 1, 1996, the Panel notified the parties that pursuant to the last paragraph of Article 238 of the CFF, the panel decided to consider issues concerning the competency of the investigating authority. The decision of the Panel to conduct the *sua sponte* review was based on several factors.

Muehlstein filed its brief-in-chief on April 10, 1995.<sup>128</sup> Eighteen days later the Panel review was suspended due to the resignation of a panelist.<sup>129</sup> On August 30, 1995, during the period of suspension, the first NAFTA Article 1904 binational panel decision (hereafter "Steel Plate Decision") concerning a Mexican antidumping duty final determination was issued.<sup>130</sup> The Steel Plate Decision generated considerable public attention because it was the first NAFTA panel review of a Mexican antidumping duty determination, and because the Panel in

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<sup>128</sup>Rev. Rec., Vol. 4, doc. 43.

<sup>129</sup>Rev. Rec., Vol. 5, doc. 58. The panel review was suspended until October 23, 1995. Rev. Rec. Vol. 5, doc. 130.

<sup>130</sup>See Revisión de la Resolución definitiva de la investigación antidumping sobre las importaciones de productos de Placa de Acero en Hoja Originarios y Procedentes de los Estados Unidos de América, Expediente No. Mex: 94-1904-02 (hereafter "Steel Plate Decision").

this case determined that the investigating authority lacked competency during certain phases of the underlying antidumping duty investigation.<sup>131</sup> Out of general interest various panelists were aware of the competency issues addressed in the Steel Plate Decision.

On November 2, 1995, Muehlstein moved to amend its complaint to include allegations that the investigating authority lacked competency during certain phases of the underlying investigation.<sup>132</sup> Muehlstein argued in its motion that the same factual circumstances underlying the Steel Plate Decision existed in the present case and attached a copy of the Steel Panel Decision to its motion.<sup>133</sup>

On December 4, 1995, Resistol, submitted a response brief wherein it argued that SECOFI was competent during all phases of the underlying investigation.<sup>134</sup> Noting that Muehlstein did not address competency issues in its brief, Resistol stated that it was necessary to express an opinion on competency in order to provide an exhaustive review of the standard

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<sup>131</sup> *Id.* at 75-94.

<sup>132</sup> Muehlstein Motion to Amend The Complaint, November 2, 1995 (hereafter "Motion to Amend"). Review Record Vol.5, doc. 84.

<sup>133</sup> *Id.* at 10.

<sup>134</sup> Resistol *et al.* Brief December 4, 1995 (hereafter "Resistol Response Brief"), at 18-20.

of review criteria.<sup>135</sup> Resistol concluded that there was no basis or reason by which it could be determined that the investigating authority in this case was not competent.<sup>136</sup>

After receiving briefs and hearing oral arguments, the motion to amend was denied on the basis that the motion was filed out of time.<sup>137</sup> Notwithstanding the dismissal of the motion, the Panel remained deeply concerned of the possibility that the final determination before it was contrary to law by virtue of lack of competency of the investigating authority.

As noted in the preceding section, Article 238 of the CFF, which constitutes the standard of review applicable in this case, was amended in the latter part of 1995, and an additional paragraph was added to Article 238 which provided *sua sponte* authority to declare a final determination contrary to law by reason of lack of competency of the administrative authority.<sup>138</sup>

The amendment raised a number of novel issues concerning *sua sponte* authority in the context of NAFTA Article 1904 binational panel reviews. Those issues were particularly significant in this case due to the competency issues raised by Muehlstein and Resistol.

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<sup>135</sup>Id. at 18.

<sup>136</sup>Id. at 20.

<sup>137</sup>See Order of the Panel, January 26, 1996, Rev. Rec. Vol. 11, doc. 403.

<sup>138</sup>The amendments to the CFF were published in December 1995 and became effective January 1, 1996.

NAFTA binational panels replace judicial review of final antidumping duty determinations.<sup>139</sup> As a result, the Panel recognized that if it did not review the competency issues to the extent permissible under the last paragraph of Article 238 of the CFF, there was a risk that it would affirm a potentially illegal final determination, a circumstance which would be contrary to public interest; result in prejudice to Muehlstein; and affect the credibility and integrity of the NAFTA binational panel process.

The Panel also considered that it was undertaking a review of competency issues, as opposed, for example, to new issues involving an antidumping technicality such as the application of best information available. Competency constitutes the legal foundation upon which action taken by government authorities may or may not be valid. Hence, whether an antidumping duty final determination is the result of action taken by a competent investigating authority is an issue that is subsumed in all panel reviews. This is evident in NAFTA Article 1904 which provides that the purpose of a panel review is to determine whether, on the basis of an administrative record, a final antidumping and countervailing duty determination of a *competent* investigating authority of an importing Party was in accordance with the antidumping and countervailing duty laws of the importing Party.<sup>140</sup> The definition for

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<sup>139</sup>NAFTA Article 1904(1).

<sup>140</sup>NAFTA Article 1904(2). The term "competent investigating authority" is used throughout NAFTA Chapter 19. See e.g. Article 1904(3), (4), (7), (14); and Annex 1904.15 (f), (k), (o), (q).

“competent investigating authority” provided for in NAFTA Chapter XIX<sup>141</sup> manifests the legal formality that competency, as a legal principle fundamental to all action taken by government authorities, has in practically all aspects of Mexican law.<sup>142</sup>

Accordingly, in addition to the factors mentioned above, the Panel based its decision to undertake a *sua sponte* review of competency issues on the following considerations:

- a. questions concerning the competency of an investigating authority are transcendent in the law, and are matters of public interest,
- b. the competency of all administrative authority is a basic legal presumption so that the precepts they declare, order, or process, may be valid,
- c. the competency of the investigating authority is fundamental to the dispute resolution process established under Chapter 19 of the North American Free Trade Agreement,
- d. the competency issues could be determinative in this case.<sup>143</sup>

Aware that it was confronted with issues addressed for the first time by a panel,<sup>144</sup> the Panel decided that in addition to examining issues related to the competency of the

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<sup>141</sup>Annex 1911 provides that, in the case of Mexico, "competent investigating authority" means the **designated authority** within SECOFI or its successor. Whether a designated authority is competent requires a detailed legal analysis. Compare with the definitions provided with respect to the United States and Canada for which specific governmental agencies or officials are already deemed competent: the Department of Commerce and the United States International Trade Commission, and the Canadian Trade Tribunal or the Deputy Minister of National Revenue for Customs and Excise.

<sup>142</sup>Article 16 of the Mexican Constitution.

<sup>143</sup>See Order of the Panel, "Resolucion Incidental," February 20, 1996.

investigating authority, that it would also review the extent of its own authority to conduct a *sua sponte* review in this case. As part of the review, the Panel requested the parties to submit briefs,<sup>145</sup> and to present oral arguments,<sup>146</sup> regarding the competency of the investigating authority, and the competency of the Panel to conduct a *sua sponte* review.

**B. Applicability of the Last Paragraph of Article 238 of the Federal Tax Code.**

**1. Amendment of Article 238 of the Federal Tax Code**

The Article 238 of the Federal Tax Code was amended by a the decree published in the DOF on December 15, 1995, to add a last paragraph which:

The Tribunal would be entitled to enforce by its own initiative, for been of public order, the legal incompetence of the authority to declare the challenge resolution and the no accordance to law.

Persuant to the NAFTA provisions cited above in the decision,<sup>147</sup> which establish the Article 238, the admendment to Article 238 forms part of the standard of review.

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<sup>144</sup>To date, this Panel has no notice that the Tribunal Fiscal de la Federación has yet to apply the last paragraph of Article 238.

<sup>145</sup>The parties were given over 60 days to provide briefs and additional time to submit responses to the briefs filed by the parties.

<sup>146</sup>Oral arguments on competency issues were presented at hearings held on April 18, 1996.

<sup>147</sup> Article 1904(3) and annex 1911.



## **2. Retroactive Application of the Last Paragraph of Article 238 of the Federal Tax Code**

The amendment to Article 238 of the CFF provides in section VIII, of the fifth transitory article that administrative trials commenced prior January 1<sup>st</sup>, 1996 are to be instruct in accordance with CFF provisions that were in effect prior to that date.

The transitory provision does not limit this Panel's ability to apply the last paragraph of article 238, as the transitory article refers to the judge instruction of administrative dispute trials presented before the Federal Fiscal Tribunal (TFF). The instruction stage of a panel review is governed by Rules of Procedure, and not by the instruction provisions of CFF. That binational panels replace the TFF in reviews of final antidumping duty determinations does not mean that the reviews before panels follow the same provisions of the TFF. The Rules of Procedure that apply to binational panels are those agreed and established by the NAFTA Parties, and which constitute the rules of procedure applicable to this review pursuant to Article 1904 and Annex 1911 of the NAFTA.

Pursuant to the NAFTA, Article 238 of CFF constitutes the standard of review applicable to binational panel review, and does not constitute the instruction stage.

Article 238 of the CFF, does not contain instruction provision. The criteria set forth in this Article to declare the illegality of an administrative determination, are not instruction criteria.

By amendment of the CFF, the legislator did not intend that the limitations expressed in the fifth transitory article, were applicable to the instruction stage of binational panel reviews; to state the opposite would be an extrem interpretation of the CFF provisions.

For these reasons, the arguments by SECOFI by the domestic products regarding the retroactive application of the amended of Article 238 of the CFF<sup>148</sup>, are not supported by resort to paragraph VIII of the fifth transitory article, as only the procedural guidelines for trials before the TFF are subject to that transitory article.

Pursuant to the constitutional right regarding the non-retroactive application of laws, the Supreme Court of Justice has held<sup>149</sup> that the retrocative effect of a regulation exists when the law changes, modifies or extinguishes personal rights acquired under the law that was in effect prior to the amendment.

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<sup>148</sup>See for Secofi and Resistol Submission of. February 6, 15 and 16, 1996.

In this case, the vested rights of the Investigating Authority, or of the domestic producers which are affected by the application of the additional paragraph of article 238. Must be identified at best, the parties had a right prior to the amendment that consisted a lack of power by the TFF to undertake a sua sponte review of the competency of an authority; that is, that means that no benefits were acquired by the prior benefit consisted of a lack of power of the TFF.

To affirm that the Investigating Authority had a vested right to act without competency, or that the domestic producers had a vested right for the Investigating Authority Act without competency, would be contrary to public interests, certainly, no one can possess a right for the competency of the Authority to be non-reviewable. In conclusion it cannot be alleged that a vested right was affected as no right existed. Why the law prior to and after, the amendment.

To ? an authority cannot act without competence, is contrary to public interest.

Certainly, one cannot have a right that the competency of the Investigating Authority not be reviewable, without establishing if it had or not sufficient faculties for it.

In conclusion, the argument thus then exist a right which was affected in grounders, as neither prior to nor after the amendment such a right exists.

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<sup>149</sup>Tesis 922. Law Retroactivity.- The private persons cannot acquire rights in dispute with the public interest; When some regulation affects this public interest, there is no retroactivity even when the right exists before the regulation.

**C. Authority to Conduct a Sua Sponte Review of The Competency of the Investigating Authority**

The Panel reviews the extent of its authority to conduct a *sua sponte* review of the competency of the investigating authority. In particular, the Panel reviews whether it is prohibited under Rule 7 of the Rules of Procedure from undertaking a *sua sponte* review in accordance with the terms of the last paragraph of Article 238 of the CFF. In addition, the Panel examines whether it may apply the last paragraph of Article 238 of the CFF to this case.

## 1. Rule 7 of the Rules of Procedure

SECOFI and Resistol objected to the Panel's decision to conduct a *sua sponte* review of competency issues on the basis that the Panel was exceeding its authority under Rule 7 of the Rules of Procedure.<sup>150</sup>

Rule 7 of the Rules of Procedure provides that Panel reviews are to be limited to the procedural and substantive issues raised by the parties.<sup>151</sup> Rule 7 provides in pertinent part that:

7. A panel review shall be limited to
  - (a) the allegations of error of fact or law, including challenges to the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review; and
  - (b) procedural and substantive defenses raised in the panel review.<sup>152</sup>

The purpose of Rule 7 is to ensure that a panel has before it the information necessary to make an informed decision, and that the parties have an opportunity to be heard on issues upon which a panel's decision may rest. Rule 7 is designed to eliminate prejudice caused to

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<sup>150</sup>SECOFI Brief, March 13, 1996, at 28, Transcript of Hearing at 82.

<sup>151</sup>Rule 7, Reglas de procedimiento del artículo 1904 y del Comité de Impugnación Extraordinaria del Tratado de Libre Comercio de América del Norte, published in the Diario Oficial on June 20, 1994, at 13.

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

parties that are surprised by the addition of issues that they neither had time nor opportunity to address in their briefs or oral arguments. By requiring that parties be timely heard on issues that will form the basis of the decision, Rule 7 prevents a panel from making decisions on issues not related to the final determination which is the subject of the review.

In the case of ***Certain Softwood Lumber Products From Canada***, a U.S.-Canada Free Trade Agreement binational panel proceeding, the Panel interpreted Rule 7 in accordance with its purpose.<sup>153</sup> In that case, the U.S. Department of Commerce argued that the Panel lacked authority under Rule 7 to decide certain issues on grounds that the Canadian Complainants did not cite the issues in their complaint.<sup>154</sup> The Panel found that Rule 7(a) was:

...designed to assure that when a major procedural or substantive issue was brought before the Panel, the other Parties will have a timely opportunity to respond in such a manner to assure that the Panel has before it all necessary information to make an informed decision.<sup>155</sup>

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<sup>153</sup> ***Certain Softwood Lumber Products From Canada***, USA-92-1904-01, May 6, 1993. Rule 7 of the United States-Canada Free Trade Agreement Rules of Procedure For Article 1904 Binational Panel Reviews is identical to Rule 7 of the NAFTA Rules of Procedure. See *Binational Panel reviews and Extraordinary Challenge Committee; United States-Canada Free-Trade Agreement*, 53 Fed. Reg. 53,211 (Notice) (Dept. Comm. 1988), as amended, 54 Fed. Reg. 53,165 (1989); 57 Fed. Reg. 26,698 (1992); 59 Fed. Reg. 5,892 (1994).

<sup>154</sup> *Id.* at 108-109

<sup>155</sup> *Id.*, citing, ***New Steel Rail, Except Light Rail, from Canada***, U.S.A. 89-1904-07-07 at 21. In ***New Steel Rail***, the panel refused to consider issues raised for the first time in post-hearing briefs that were submitted twelve days after the hearing, and where no attempt was made to amend the complaint, and no concrete arguments were presented that the issues were relevant to the issues before the panel.

The panel rejected the Department of Commerce's arguments on grounds that the purpose of Rule 7(a) had been fulfilled as all parties had a timely opportunity to respond in a manner that allowed the Panel to make an informed decision, and prevented prejudice to the parties.

In this case, the purpose of Rule 7 has been satisfied. The competency issues were raised early in the proceedings in a context that demonstrated a relationship with the final determination under review; the parties were not prejudiced as they had the opportunity to be heard; and the Panel had before it the information necessary to make an informed decision.

Muehlstein first raised the competency issues in its motion to amend wherein it argued that the Steel Plate Decision applied to this case.<sup>156</sup> Muehlstein does not claim, nor does the Panel find, that it was prejudiced by the Panel's decision to undertake a *sua sponte* review.

Resistol raised competency issues in its response brief with arguments that SECOFI was competent during the investigation.<sup>157</sup> Resistol's arguments demonstrate that it was

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<sup>156</sup> See Motion to Modify.

<sup>157</sup> See Resistol Response Brief at 18-20.

familiar with, and concerned about, issues concerning the competency of the investigating authority. It, too, was not surprised or prejudiced by the Panel's decision to undertake a *sua sponte* review.

As a result of its participation in the Steel Plate review, SECOFI was intimately familiar with the issues concerning its competency.<sup>158</sup> SECOFI was neither surprised or prejudiced by the Panel's decision to conduct a *sua sponte* review.

Once the Panel issued its decision to undertake a *sua sponte* examination of competency issues, the parties were provided with ample opportunity to study and present their respective positions.<sup>159</sup> The parties submitted briefs, response briefs, and reply briefs, and participated in a full day of oral argument devoted solely to competency issues.

In conclusion, in this case, rule 7 from conducting a *sua sponte* review the Panel was not prohibited by, pursuant to the last paragraph 238 of the CFF.

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<sup>158</sup>SECOFI asserted that allowing Muehlstein to amend its complaint would cause it prejudice in that it would be deprived of the opportunity to present an adequate response or defense to competency allegations. See SECOFI Brief In Response to Motion to Amend, February 6, 1996, and 15

<sup>159</sup>The Panel's decision was issued on February 1, 1996. A short period was provided for the parties to submit briefs, which was extended several times. Overall, the parties had a period of over 60 days to present briefs and prepare for oral argument. In all, a period of over four months elapsed from the time Muehlstein filed its motion to amend the complaint to the day the hearing on competency issues was held.



**D. Competency of the Investigating Authority**

**1. Competency Criteria**

**a. Competency Under the NAFTA**

Article 1904 of the NAFTA contemplates that final antidumping and countervailing duty determinations that are subject to review are those that have been issued by a competent investigating authority. Indeed, paragraphs 2, 3, 4, 7, and 8 of Article 1904 all refer to the investigating authority as competent. Accordingly, final determinations are reviewable only in those cases where the concerned investigating authority is competent, and, a binational panel may undertake a review only if the involved investigating authority is competent.

In accordance with the foregoing, it would be highly irresponsible for a binational panel in the course of a review of a final determination to recognize the competency of the investigating authority without determining whether such competency actually exists, in particular in cases where issues regarding such competency have been raised.

For its part, NAFTA Annex 1911 expressly provides that, in the case of Mexico, “competent investigating authority” refers to the designated authority within SECOFI, and that “final determination” refers to a final determination by SECOFI in accordance with Article 13 of the Ley Reglamentaria, as amended.<sup>160</sup>

It is evident, therefore, that binational panels are empowered under the NAFTA to review final determinations solely in cases where the concerned investigating authority is competent, and, as a result, panels have an obligation to ensure that the investigating authority, whose final determination is subject to the review, is competent.

Pursuant to the aforementioned provisions of the NAFTA, in this case there is no question that the “competent investigating authority” is SECOFI, and that the authorities it has designated within with respect to the issuance of final determinations are the authorities which represent it in accordance with Mexican law.

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<sup>160</sup>See also Final Determination, para. 23, at 8.

**b. Competency Under Mexican Law**

In accordance with the above cited NAFTA provisions, and fully aware that its decision to consider whether the investigating authority is competent has been the subject of diverse scholarly opinions, the Panel has determined (consistent with the conclusions the Panel reached concerning the application of the last paragraph of Article 238 of the CFF) to consider these issues in accordance with Mexican law.

Article 90 of the Constitution provides that the Federal Public Administration, pursuant to organic law passed by Congress, shall assign to the nation's Ministries the administrative matters of the Federation. The Panel finds that, on the basis of the aforementioned constitutional provision, and in accordance with the applicable secondary law, the Ley Orgánica de la Administración Pública Federal, within each Ministry there exists a Secretary whom, with respect to those matters for which he is competent, is assisted by an Under Secretary and other officials, as provided by law. In addition, Article 16 of the aforesaid Ley Orgánica establishes that the Secretaries of the Ministries are primarily authorized for undertaking and discharging all matters for which they are competent, and may for organizational purposes delegate that authority to other officials (including the Under

Secretaries), except for such authority which the law provides can only be exercised by a Secretary.<sup>161</sup>

In addition, the Panel must in this review take into account the Ley Reglamentaria (cited above in relation to NAFTA Annex 1911, although its was repealed under transitory Article 2 of the Foreign Trade Law). NAFTA Annex 1911, *in fine*, refers to the Ley Reglamentaria, which applies to this case. In any event, both the Ley Reglamentaria, at Article I, sections 1 and 2, and the Foreign Trade Law, at section VII of Article 5, provide that SECOFI is authorized to undertake and resolve unfair trade practice investigations, and to establish compensating duties as a result of those investigations.<sup>162</sup>

There is no question that the Final Determination was dictated and issued by SECOFI. The Final Determination manifests that SECOFI initiated the investigation; published the notice of initiation in the DOF; notified the exporters and importers named in the case; requested that the named exporters and importers and all other interested parties appear and present information; notified the Governments of the United States and Germany; issued

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<sup>161</sup> See Section E.2, of this decision.

<sup>162</sup> See *supra* note # 85.

questionnaires; analyzed the information submitted during the preliminary investigation; and issued the Final Determination.<sup>163</sup>

The last paragraph of Article 238 of the CFF contemplates the possibility of a *sua sponte* review of the competency of the investigating authority to dictate a resolution, such as the one challenged in this case. The Panel finds that the issuance of the Final Determination, was a culmination of the procedure undertaken by SECOFI in connection with the underlying administrative investigation.

In addition, the last paragraph of Article 238 of the CFF permits a *sua sponte* determination of a complete absence of findings of fact and conclusions of law in the challenged determination. In this case, it is clear that there is no such absence, much less a complete absence.

The competency of the investigating authority exists *prima facie*, and defects or legal deficiencies are not evident in, nor can be attributed to, the Final Determination.

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<sup>163</sup>See Final Determination at 1, 8-9, 22.

On the basis of the foregoing, the Panel finds, without reservation, that the investigating authority which acted in this case was competent, in particular with respect to the issuance of the Final Determination. In addition, it cannot be determined, as established in other parts of this decision, that there was an absence, much less a complete absence, of findings of fact and conclusions of law in the Final Determination. These are the only two matters which the Panel may, in its opinion, review *sua sponte*, and this decision emphasizes that the Panel's determination which resulted from the its *sua sponte* review that the investigating authority is competent, and that the Final Determination contains sufficient findings of fact and conclusions of law.<sup>164</sup>

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## **VI. PANEL ORDER**

Regarding with the above the Panel Confirms the final determination.

Issued in Mexico, Distrito Federal, September 12, 1996.

Jimmié V. Reyna

Jimmié V. Reyna

Miguel Y. Estrada Sámano

Miguel Y. Estrada Sámano

Héctor Cuadra y Moreno

Héctor Cuadra y Moreno

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**THE NORTH AMERICAN FREE TRADE AGREEMENT  
ARTICLE 1904 BINATIONAL PANEL**

**IN THE MATTER OF:** )  
 )  
**POLIESTIRENO CRYSTAL** ) Secretariat File. No.  
**e IMPACTO FROM THE** ) **MEX-94-1904-3**  
**UNITED STATES AND GERMANY** )

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**CONCURRING OPINION OF PANELIST ROSCH**

**SEPTEMBER 12, 1996**

**MUEHLSTEIN INTERNATIONAL, LTD.**  
**Complainant**

**v.**

**SECRETARIA DE COMERCIO y FOMENTO INDUSTRIAL**  
**Respondent**

*Before:*

*Clemente Valdes Sanchez, Chairman*  
*Hector Cuadra y Moreno*  
*Miguel Estrada Samano*  
*Jimmie V. Reyna*  
*Maureen Rosch*

*Appearances:*

*Juan Francisco Torres Landa, for Muehlstein International, Ltd.*  
*Ruperto Patino Manffer, for Industrias Resistol, S.A. y Poliestireno y Derivados, S.A. de C.V.*  
*Javier Villanueva Iglesias, for Nacional de Resinas, S.A. de C.V.*  
*Gustavo Uruchurtu Chavarin, for SECRETARIA DE COMERCIO y FOMENTO INDUSTRIAL*  
*Gisela Bolivar Villagomez, for SECRETARIA DE COMERCIO y FOMENTO INDUSTRIAL*



**CONCURRING OPINION OF PANELIST ROSCH**  
**MEX-94-1904-3**

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## I. INTRODUCTION

Although in agreement with the result reached by the majority opinion, this panelist departs from that opinion with respect to the majority's analysis of whether SECOFI properly exercised its discretionary authority in the application of its representative test. It is this panelist's opinion that the majority should have examined whether SECOFI's application of its representative test was in compliance with the basic due process guarantees contained in Articles 14 and 16 of the Mexican Constitution<sup>165</sup>. By failing to do so, the majority misconstrues the standard of review that should be applied by Chapter XIX binational Panels – a misconception that could lead to perverse results if applied by future Panels.

With respect to the standard of review, the majority's approach ignores the basic principle of the NAFTA that Chapter XIX Panels should decide cases in the same manner as the local court which it is replacing would have done – in this case, the Mexican Tribunal Fiscal<sup>166</sup>. Since that court would have applied constitutional scrutiny to SECOFI's acts had it heard this case, it is this panelist's view that this Panel should have done the same.<sup>167</sup>

With respect to future cases, a panel's failure to consider basic constitutional guarantees could lead to a number of perverse consequences. First, binational Panels would likely develop a body of "NAFTA jurisprudence" on Mexican antidumping law different from that decided by the Mexican courts – a result clearly contrary to that envisioned by NAFTA's drafters. Second, the binational Panels would be unable to rely on the vast bulk of Mexican law interpreting the NAFTA-mandated criteria of review – Article 238 of the Fiscal Code – since the law discusses the Article 238 criteria in constitutional terms. This would inevitably lead to inconsistent results as each Panel adopts its own interpretation of Article 238. Finally, and perhaps most damaging, a Panels' refusal to consider constitutional guarantees would effectively frustrate the NAFTA scheme of granting parties adversely affected by antidumping or countervailing duties the option of appeal to a binational Panel, since any party who wished to argue that a Mexican duty determination violated its basic constitutional rights would be forced to appeal to the Mexican courts.

Finally, with respect to the issue of whether SECOFI's actions here rose to the level of a constitutional violation, in particular a violation of the right to *audiencia*, this panelist believes that the Investigating Authority did not cross that

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<sup>165</sup> In particular, this panelist's opinion departs from that of the majority with respect to sections IV.E.4 and IV.E.5, and with respect to sections III and IV.E.3 in that they do not address constitutional issues.

<sup>166</sup> This fundamental principle was expressly recognized by the only Chapter XIX Mexican Panel decision handed down to date.

See Memorandum Opinion and Order of the Majority, [(“Steel Panel”)] *In the Matter of the Mexican Antidumping Investigation into Imports of Cut-to-Length Plate Products from the United States*, MEX-94-1904-02, issued August 30, 1995 (“Steel Panel Memorandum Opinion”) at 11-17.

<sup>167</sup> By the same token, since the Tribunal Fiscal may not consider the constitutionality of Mexican laws or regulations, neither may the binational panels. This means, of course, that neither the Tribunal Fiscal nor the binational panels are “Constitutional Courts”.

threshold under the very specific facts of this case. Although this panelist in this case affirms the agency's Definitive Resolution, my opinion could be markedly different under a different set of facts.

## II. CRITERIA OF REVIEW

### A. Chapter XIX Panels Must Decide Cases in the Same Manner as the Relevant Local Court

NAFTA Article 1904(2) requires a Chapter XIX binational panel ("Chapter XIX Panel" or "Panel") to review "an antidumping or countervailing duty determination of a competent investigating authority . . . to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party." The Article further provides that antidumping 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."<sup>168</sup>

NAFTA Article 1904(3) requires that Panels, in determining whether a Final Determination<sup>169</sup> was rendered in accordance with an importing Party's antidumping law, "apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority."<sup>170</sup> The standard of review for Mexico set out in Annex 1911 is Article 238 of the *Codigo Fiscal de la Federacion* ("Federal Fiscal Code"). "General legal principles" are defined by NAFTA Article 1911 to include "standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies."

Based on the literal wording of the Panel's treaty mandate, then, Chapter XIX Panels in Mexico are to take the place of the Mexican court which decides appeals against antidumping and countervailing duties -- the *Tribunal Fiscal de la Federacion* ("Tribunal Fiscal" or "TFF").<sup>171</sup> To meet this mandate, the Panel must apply the same statutes, legislative

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<sup>168</sup> NAFTA Article 1904(2). (emphasis added).

<sup>169</sup> Note that the terms "Definitive Resolution" and "Final Determination" are used interchangeably in this document.

<sup>170</sup> Article NAFTA 1904(3). (emphasis added).

<sup>171</sup> See Organic Law of the Tribunal Fiscal, Article 11 (XI) and Foreign Trade Law, Article 95.

history, regulations, administrative practice, judicial precedents<sup>172</sup> and general legal principles that the Tribunal Fiscal would apply, in the same manner as the Tribunal Fiscal would apply them<sup>173</sup>.

## **B. SECOFI's Power to Exercise Discretionary Authority**

As discussed in sections III, IV.E.1 and IV.E.2 of the majority opinion, the *Secretaria de Comercio y Fomento Industrial* (“SECOFI” or “Investigating Authority”) is legally empowered by the Constitution, statute, and regulations of the United Mexican States to conduct antidumping proceedings. To do so, the Investigating Authority has discretionary authority to devise the administrative practices it deems necessary, which would include the authority to devise a test for representativeness<sup>174</sup>. The *jurisprudencia* on this point seems clear:

REGULATED AND DISCRETIONARY POWERS. THEIR DISTINCTION. When the authorities or powers which an administrative organ possesses are established by law, not only indicating the competent authority to act, but also its obligation to act and how to do it, in a form which does not leave any margin for the subjective judgment of the functionary about the circumstances of the act, we are in the presence of totally regulated authorities or powers – their exercise being completely tied to the law. In contrast, when the administrative organ is invested with authorities or powers to act when it deems it to be appropriate, or to operate according to its best judgment, seeking the most complete satisfaction of the collective necessities which constitute the purpose of its actions, when the law grants either of these possibilities in an explicit or implicit manner and with a great or lesser margin of action, then we are dealing with the exercise of discretionary powers<sup>175</sup>.

<sup>172</sup> According to articles 192 and 193 of the Law of Amparo, all *jurisprudencias* issued by the Supreme Court or by the Collegiate Circuit Courts are binding authority for the TFF, as opposed to decisions of the Unitary Circuit Courts, which cannot create *jurisprudencia*. This opinion will therefore consider relevant case law of the Supreme and Collegiate Circuit Courts, as well as, of course, the case law issued by the Tribunal Fiscal itself.

<sup>173</sup> It is worth noting that this view is in accord with that taken by the only other Mexican Chapter XIX panel to have issued an opinion to date. See the Steel Panel Memorandum Opinion at 15-16:

“[w]hile binational panels are intended to ‘replace’ judicial review of agency determinations, they are not intended to apply a different substantive law than would be applied by the local court, nor are they intended to apply a different standard of review than would be applied by the local court”. (emphasis in original).

<sup>174</sup> See, generally, majority opinion of the Panel, Sections III, IV.E.1 and IV.E.2.

<sup>175</sup> Jurisprudencia No. 165 of the Sala Superior of the Tribunal Fiscal

Revision No. 363/80. Resuelta en sesion de 20 de mayo de 1982, por mayoria de 6 votos, 1 mas con los resolutivos y 1 en contra.

Revision No. 440/82. Resuelta en sesion de 25 de enero de 1983, por unanimidad de 8 votos. (emphases added).

This discretionary power, while broad, must be properly exercised if the administrative authority is to avoid a *desvio de poder*, or misuse of authority<sup>176</sup>. Proper limits on the use of administrative discretionary power are framed by the law granting the power, by the Constitution, and by “reasonableness”. As one authority has written:

An administrative act issued by virtue of discretionary powers must be in accordance with the individual guarantees or civil rights contained in the dogmatic part of the Constitution, as is the case with any other act of public power . . . It is pertinent, however, to emphasize for this purpose articles 13, 14 and 16 of the Constitution.

The articles mentioned above contain a series of guarantees or rights in favor of the governed which, of course, must be respected by the [administration’s] discretionary acts if those acts are not to be irregular. Those guarantees or rights are: equality before the law, due process, correct application of the legal order, the legal competence of the issuing organ, a duly empowered public servant, the written form of the act, that the act be well-founded legally and factually.<sup>177</sup>

The Mexican Supreme Court has held in a number of cases that discretionary acts can be struck down when they violate a constitutional right or are patently unreasonable<sup>178</sup>. It seems clear, therefore, that although SECOFI has the right to exercise limited discretionary powers, it must do so reasonably and in accordance with the basic individual guarantees enshrined in the Constitution.

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<sup>176</sup> Martinez Morales, *Derecho Administrativo* (1994), at 303, notes that *desvio de poder* is distinguished in Mexican doctrine from *abuso de poder*, which is an act taken in the absence of authority to do so.

<sup>177</sup> *Id.* at 304. (emphasis added).

<sup>178</sup> *See, e.g.*, Sexta Epoca, Tercera Parte.

Vol. IV, pag. 120. A.R. 6489/55. Fabricas de Papel de San Rafael y Anexas, S.A. 4 votos.

Vol. VIII, pag. 55. A.R. 3294/56. Farmaceuticos Lakeside S.A. 5 votos.

Vol. VIII, pag. 55. A.R. 4249/52. Internacional de Comercio S.A. 4 votos.

Vol. XIX, pag. 57. A.R. 4862/58. Adrian Garcini Navarro. 4 votos.

Vol. XIX, pag. 59. A.R. 136/57. Antonio Mardegain Simeon. 4 votos.

Vol. CXXXVI, pag. 21. A.R. 2282/68. Maria Dolores Aguilar de Becerra. 5 votos.

Quinta Epoca, Vol. LXXIII, pag. 5522. A.R. 4753/42. Bonnet Rodolfo. Unanimidad 4 votos.

### **C. Scope of the Tribunal Fiscal's Review of Discretionary Administrative Acts**

#### **1. Applicable Law and Limitations**

Binational Panels are directed by the NAFTA to apply the relevant law of the importing country in the same manner as the local courts would apply such law. This Panel's ability to consider arguments alleging constitutional violations by SECOFI, an administrative agency, is thus equal to that of the Tribunal Fiscal. The Tribunal Fiscal's ability is limited in at least two respects:

First, the Tribunal Fiscal may not consider the unconstitutionality of laws, regulations, or decrees, a limitation recognized by *jurisprudencia* issued in 1986 by the *Sala Superior* of the Tribunal Fiscal:

COMPETENCE – THE TRIBUNAL FISCAL DE LA FEDERACION LACKS IT TO DECIDE CONTROVERSIES ABOUT THE CONSTITUTIONALITY OF LAWS, REGULATIONS OR DECREES. – In accordance with articles 103 and 107 of the Political Constitution of the United Mexican States, only the Courts of the Federal Judicial Branch may analyze and decide controversies concerning the constitutionality of laws or regulations. Therefore, the Tribunal Fiscal de la Federacion lacks competence [to decide such cases].<sup>179</sup>

Second, although the Tribunal Fiscal may consider the constitutionality of administrative acts (such as SECOFI's Final Determinations in antidumping investigations), such consideration is generally limited to violations of Articles 14 and 16 of the Constitution. As expressed by the Third Collegiate Court in Administrative Matters for the First Circuit in a very recent *Jurisprudencia*:

[T]he jurisdiction of the Tribunal Fiscal is of an ordinary nature and has as its fundamental purpose the safeguarding and control of the legality of administrative acts. Given that the legality of administrative acts is elevated in our country to the level of an individual guarantee by means of articles 14 and 16 of the Constitution, the Fiscal Courts have often had the duty to hear cases concerning irregularities claimed to be violations of constitutional principles. However, as is evident from the jurisprudential thesis issued by the Second Chamber of the Supreme Court of Justice of the Nation and published as [jurisprudential thesis] number three hundred twenty-six in the Third Part of the most recent Appendix to the *Semanario Judicial* de

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<sup>179</sup> Jurisprudencia No. 258

Revision No. 1108/81.– Resuelta en sesion de 21 de febrero de 1985, por unanimidad de 7 votos.

Revision No. 2129/84.– Resuelta en sesion de 12 de marzo de 1986, por unanimidad de 9 votos.

Revision No. 1241/84.– Resuelta en sesion de 20 de marzo de 1986, por unanimidad de 6 votos.

(Texto aprobado en sesion de 22 de agosto de 1986).

R.T.F.F. Ano VIII, No. 81, septiembre 1986, p. 178

This *jurisprudencia* overruled the *jurisprudencia* issued by the Tribunal Fiscal in 1939 to the effect that the Tribunal Fiscal could not decide issues related to the constitutionality of laws, but could do so with respect to regulations and administrative acts. See C.S. entre No. 24546/37 y 2089/38 – Resuelta el 30 de octubre de 1939, por 8 contra 6. R.T.F. 1937-48, p. 191.

la Federacion under the title of “TRIBUNAL FISCAL DE LA FEDERACION, POWERS OF, TO EXAMINE THE CONSTITUTIONALITY OF AN ADMINISTRATIVE ACT,”<sup>180</sup> and the precedents which created that *jurisprudencia*, the unconstitutionality of administrative acts that the Tribunal Fiscal can consider is derived from the lack of observance of the essential procedural formalities referred to by Articles 14 and 16 of the Constitution, inasmuch as they are part of the cause of annulment set out in section II of the version of article 238 of the Fiscal Code currently in force. In sum, the Tribunal Fiscal’s jurisdiction in terms of the causes of annulment set out in [article 238] is limited to the issue of legality, although this may be reflected in a violation of the mentioned constitutional guarantees.<sup>181</sup>

As noted by the court in the above case, the criteria set out in Article 238 express the core guarantees enshrined in Articles 14 and 16 of the Constitution. Therefore, it follows that the Tribunal Fiscal can consider legal guarantees contained in Articles 14 and 16 because they are also directly expressed in Article 238<sup>182</sup>.

Subject to the limitations discussed above, it is clear that the TFF can consider the constitutionality of administrative acts such as the Definitive Resolution at issue in this case – a power which has repeatedly been recognized by the Mexican courts. Although not yet binding as *jurisprudencia*, the following Circuit Court *tesis* is illustrative of the Tribunal Fiscal’s authority to consider constitutional violations when judging the exercise of discretionary power:

ABUSE OF DISCRETION AND OTHER CAUSES OF NULLIFICATION OF DISCRETIONARY ACTS OF THE ADMINISTRATION. APPLICATION OF CLAUSE V OF ARTICLE 238 OF THE FISCAL CODE OF THE FEDERATION IN

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<sup>180</sup> The jurisprudential thesis referred to states:

TRIBUNAL FISCAL DE LA FEDERACION, POWERS TO EXAMINE THE CONSTITUTIONALITY OF AN ADMINISTRATIVE ACT. In accordance with article 202, paragraph b) of the Fiscal Code, the omission or non-compliance with the formalities which the challenged resolution or proceeding should have afforded are causes of annulment [of the resolution or proceeding]. The Court in this area [i.e., the Tribunal Fiscal] is empowered to annul an act of a governmental authority if [such act] does not fulfill the requirements set out in the norm, as is the case when the essential procedural formalities required by the Constitution have been omitted.

Note: [appears in original] Article 202(b) of the previous Fiscal Code became article 238, section II of the current code.

Sexta Epoca, Tercera Parte:

Vol. XXXIII, Pagina 34. A.R. 2125/59. Antonio Garcia Michel. 5 votos.  
 Vol. LV, Pagina 54. A.R. 5752/61. Antonio Perez Martin. Unanimidad de 4 votos.  
 Vol. LV, Pagina 54. R.F. 47/61. Eulalio Salazar Cruz. Unanimidad de 4 votos.  
 Vol. LXXIV, Pagina 55. R.F. 210/63. Samuel Nieto Enciso. 5 votos.  
 Vol. CXXX, Pagina 80. R.F. 415/61. Hoteles Nacionales, S.A. 5 votos

<sup>181</sup> Gaceta del Semanario Judicial de la Federacion, Octava Epoca, No. 80 (Agosto 1994), tesis numero I.30.A. J/46, p. 35. (emphasis added).

<sup>182</sup> As discussed in section II.D. below, the TFF is also limited to a consideration of legal violations alleged by the parties.

FORCE. The acts in which the administrative authorities enjoy discretion do not escape the control exercised by the courts. The courts, including the Tribunal Fiscal of the Federation, may invalidate said acts for reasons of illegality, unconstitutionality, or based on the ground for nullification applicable specifically to [discretionary acts] known as abuse of discretion. . . [Discretionary acts] shall be declared unconstitutional when the authority has violated the guarantees enshrined in the Constitution, in favor of the entire population, such as fundamentacion, motivacion, and the right to a hearing, among others. The same shall occur when [the discretionary act] contravenes a general principle of law, because the authority's decision appears illogical, irrational, or arbitrary, or because it violates the principle of equality before the law.<sup>183</sup>

This case asserts that constitutional guarantees can be considered by the Tribunal Fiscal not only as guarantees enshrined in the Constitution but also as “general principles of law”, the same basis of authority explicitly recognized by the NAFTA for binational panels.

Finally, the Tribunal Fiscal's own case law unequivocally confirms that court's power to consider cases on constitutional grounds. In a *tesis* published in 1990, the Tribunal Fiscal held:

TRIBUNAL FISCAL OF THE FEDERATION. MAY BASE DECISION THAT AN ACT IS NULL ON THE CONSTITUTION. Given that the Constitution is the fundamental norm upon which our legal system rests, we must conclude that when the examination of an administrative act's legality is called for [in a case], we must first analyze [the act's] compliance with said norm [the Constitution] and, only after this, determine if [the act] is in accordance with the other legal norms which must necessarily govern it.<sup>184</sup>

Moreover, there are any number of cases in which the Tribunal Fiscal has applied constitutional norms without discussing its recognized right to do so<sup>185</sup>. It is thus clear that the Tribunal Fiscal not only may but must judge challenged administrative acts based on their conformity with the guarantees contained in Articles 14 and 16 of the Constitution.

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<sup>183</sup> Amparo directo 297/86, published in the Supreme Court's 1986 Report, Third Part, Collegiate Courts, p. 102. (emphases added).

<sup>184</sup> Revision No. 1649/87. Resuelta en sesion de 14 de febrero de 1990, por unanimidad de 7 votos. Magistrado Ponente: Jose Antonio Quintero Becerra. Secretario: Lic. Mario Bernal Ladron de Guevara.

<sup>185</sup> See, e.g., Revision No. 310/86. Resuelta en sesion de 6 de abril de 1988, por unanimidad de 7 votos. Magistrado Ponente: Carlos Franco Santibanez. Secretario: Lic. German Canseco de la Fuente. RTFF. Ano I, No. 4, Abril 1988, p. 11.

Revision No. 1914/87. Resuelta en sesion de 11 de mayo de 1990, por unanimidad de 8 votos. Magistrado Ponente: Margarita Lomeli Cerezo. Secretario: Lic. Javier Gomez Cortes  
RTFF. Ano III, No. 29, Mayo 1990, p. 33.

Jurisprudencia No. 303 of Sala Superior of Tribunal Fiscal

Juicio Atrayente No. 36/93/14421/92. Resuelto en sesion de 22 de octubre de 1993, por mayoria de 4 votos, 2 con los resolutivos y 1 en contra. Magistrado Ponente: Carlos Franco Santibanez. Secretaria: Lic. Guadalupe Camacho Serrano.



## **2. Actions of Administrative Authorities Which Can be Reviewed**

An examination of the Tribunal Fiscal's precedents reveals that, with respect to the actions of an administrative authority that are subject to review, the TFF can judge not only the administrative act itself (i.e., in this case the Definitive Resolution), but also the propriety of acts that led up to the issuance of a challenged administrative act.<sup>186</sup> This Panel's examination of the propriety of the acts leading up to the Definitive Resolution, in this case SECOFI's use and application of its representative test, is therefore warranted.

## **3. Binational Panels and the Review of Mexican Constitutional Guarantees -- Policy Considerations**

There are those who would assert that Chapter XIX Panels lack the authority to reach the issue of the core safeguards enshrined in Mexican constitutional guarantees under *any* circumstances, because they are not Mexican courts. Such a prohibition would lead to absurd results<sup>187</sup>.

If Panels were precluded from reaching issues regarding basic constitutional guarantees, Panel decisions would be based on different law and legal standards than those applied by the Mexican courts. Such a result would expressly violate NAFTA Article 1904(3), which states that the Panel must "apply the standard of review" set out in Annex 1911 and the "general legal principles that a court of the importing country would apply . . ." <sup>188</sup>In Mexico, these are the standards of

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<sup>186</sup> See, e.g., Revision No. 791/87. Resuelta en sesion de 29 de marzo de 1989, por unanimidad de 8 votos. Magistrado Ponente: Alfonso Cortina Gutierrez. Secretario: Lic. Hector Fernando Pineira Sanchez.

RTFF. 3a Epoca, Ano II, No. 15, Marzo 1989, p. 28: -- ("TRIBUNAL FISCAL OF THE FEDERATION. POSSESSES THE COMPETENCE TO JUDGE ISSUES RELATED TO THE FORMALITIES OF INSPECTIONS").

### Jurisprudencia No. 72 of Sala Superior of Tribunal Fiscal

Juicio de Competencia Atrayente No. 74/90. Resuelta en sesion de 5 de diciembre de 1990, por unanimidad de 8 votos. Magistrado Ponente: Armando Diaz Olivares. Secretario: Lic. Adalberto G. Salgado Borrego.

RTFF. Ano III, No. 36, 3a Epoca, Diciembre 1990, p. 12. -- ("VISITATION ORDER. ITS *FUNDAMENTACION AND MOTIVACION* IN ACCORDANCE WITH ARTICLE 16 OF THE CONSTITUTION. In accordance with article 38, section III of the Fiscal Code of the Federation and article 16 of the Constitution, every act of authority issued to an individual must be adequately based [*fundado y motivado*]").

<sup>187</sup> For example, imagine a case, similar to the case before us, where the Investigating Authority applied a completely unknown and new test for representativeness in an investigation and refused to disclose its standard under repeated, appropriately documented requests from participants. Clearly, such administrative action would violate basic due process principles enshrined in articles 14 and 16 of the Mexican Constitution. Precluding a Panel from addressing these principles would yield the absurd result of affirming a discretionary authority which abuses the most fundamental rights underlying all Mexican law.

<sup>188</sup> NAFTA Article 1904(3). (emphasis added).

review and general legal principles that the Tribunal Fiscal would apply<sup>189</sup>, and we must look to decisions of that body for guidance so as to arrive at the same result that the court would have reached had an affected exporter chosen to file suit in that forum. If Panels were to act otherwise, a separate body of “NAFTA” jurisprudence would result, an outcome which contradicts that intended by the agreement’s drafters<sup>190</sup>.

Moreover, since the Tribunal Fiscal cases decided under Article 238 almost always refer to Articles 14 and 16, and since judicial decisions and doctrinal works concerning principles like those expressed in 238 discuss the concepts in Constitutional terms, precluding the Panels from considering violations of the Constitutional guarantees would be akin to prohibiting them from consulting the vast bulk of the law that interprets the Article 238 standard of review.<sup>191</sup> Panels would consequently need to judge any SECOFI act not expressly prohibited by the Foreign Trade Law or regulations based on their own subjective interpretation of the words in Article 238, yielding inconsistent opinions, at best.

Finally, if constitutional issues could be raised only at the Tribunal Fiscal, complainants would be essentially deprived of their right to a choice of forum, since the Chapter XIX forum would be rendered useless in any case where constitutional guarantees were at issue.

For these reasons, it is clear that binational panels must have the authority to reach constitutional issues raised by the parties in a review of an antidumping or countervailing duty determination.

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<sup>189</sup> Article 238 and Articles 14 and 16 of the Constitution.

<sup>190</sup> Binational panels are obliged to interpret local antidumping law in the same manner as a local court would interpret it, using the same standards and jurisprudence. In the Statement of Administrative Action to the North American Free Trade Agreement Implementation Act, *reprinted in* H. Doc. 103-159, Vol. 1, 103d Cong., 1<sup>st</sup> Sess. At 195, the U.S. Congress clearly acknowledges this obligation:

“[T]he participation of panelists with judicial experience would help to ensure that, in accordance with the requirement of Article 1904, panels review determinations of the administering authority precisely as would a court of the importing country, by applying exclusively that country’s AD and CVD law and its standard of review. In addition, the involvement of judges in the process would diminish the possibility that panels and courts will develop distinct bodies of U.S. law.” (emphases added).

<sup>191</sup> Ironically, the majority opinion implicitly acknowledges this point in section IV.E.(6) opinion, which interprets Article 238(2) based on Constitutional jurisprudence, thus apparently violating the majority’s own standard of review. See footnote 120 of the majority opinion. Nevertheless, the majority analysis does not consider these principles as part of the criteria of review described in section III, nor do they apply them in section IV.E.(3) in the discussion of the application of SECOFI’s discretionary authority.

#### **D. Application of the Constitutional Criteria in This Case**

Rule 7 of the NAFTA Rules of Procedure (“Rule 7”), binding on Chapter XIX Panels, and the principles of *Congruencia* and *No Suplencia de la Queja*<sup>192</sup>, binding on the Tribunal Fiscal, require that these bodies analyze and resolve only those issues raised by the parties. They may not consider issues that the parties have chosen not to address, except in the limited number of cases when they are permitted by law to raise an issue *sua sponte*<sup>193</sup>.

However, the Tribunal Fiscal may examine issues *implicitly* raised in the complaint, as established in the following *jurisprudencia* issued by that court:

*SUPLENCIA DE LA QUEJA. WHEN CONCEPTS IMPLICIT IN THE COMPLAINT ARE EXAMINED THIS DOES NOT OCCUR.* The *Suplencia de la Queja* occurs when arguments that the plaintiff did not make are introduced into the litigation [by the court], but it does not occur when the court makes arguments based on its study of the arguments that were in fact made [by the plaintiff] and on the application and interpretation of the law, even when said arguments were not made expressly [by the plaintiff] but were implicitly contained in the arguments advanced in the Complaint.<sup>194</sup>

This panelist believes that constitutional scrutiny must be applied in this case for several reasons. First, at least two of the five allegations raised in Muehlstein’s original complaint filed on January 9, 1995 (“Complaint”), assert that SECOFI failed to notify Muehlstein of the standards SECOFI would utilize to determine whether Muehlstein’s U.S. sales were representative.

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<sup>192</sup> The distinction between *congruencia* and *no suplencia de la queja* is that the former requires the court to render its decision based on the points raised by the parties, while the latter prohibits the court from “adding” arguments to a party’s brief. The practical effect of the two appears to be the same.

<sup>193</sup> See, e.g., Steel Panel Memorandum Opinion at 49-50 (“[t]he court is strictly limited to a study and review of the controverted points”).

Juicio No. 13/88 – Sentencia de 19 de abril de 1988, por unanimidad de votos – Magistrado Instructor: A. Guillermo Lopez Velarde H. – Secretaria: Lic. Mygdalia A. Rodriguez A. de Bastidas. R.T.F.F. Tercera Epoca, Año II, No. 13, enero 1989, p. 64 (“JUDGMENTS OF THE COURT – THEY MAY NOT DECLARE ADMINISTRATIVE ACTS TO BE NULL BASED ON ARGUMENTS NOT MADE IN THE COMPLAINT”).

<sup>194</sup> Jurisprudencia No. 293

Revision No. 533/81. Resuelta en sesion de 1 de julio de 1982, por unanimidad de 6 votos, 1 mas con los resolutivos y 1 en contra

Revision No. 714/84. Resuelta en sesion de 16 de enero de 1985, por unanimidad de 8 votos.

Revision No. 1418/84. Resuelta en sesion de 31 de enero de 1986, por unanimidad de 7 votos y 1 mas con los resolutivos.

(Texto aprobado en sesion de 7 de abril de 1987).

R.T.F.F. Año VII, No. 88, Abril 1987, p. 804.

Muehlstein was thereby deprived of the opportunity to defend itself against SECOFI's determination that its U.S. sales were not representative.

These allegations, the third and fourth respectively, were included in the following arguments:

At no point in the proceedings did SECOFI ever inform Complainant of SECOFI's unique definition of "representative" in the context of Complainant's internal market sales. SECOFI in essence kept secret its meaning of "representative", and then unlawfully penalized Complainant for not correctly guessing SECOFI's interpretation of tha(t) term.<sup>195</sup>

Neither the Regulations, the questionnaire, nor any other communication from SECOFI during the proceedings put Complainant on notice that its internal market sales would be deemed unrepresentative by SECOFI unless the volume of those sales equaled some percent of [Muehlstein's] sales to all markets<sup>196</sup>.

...

SECOFI's failure to notify Complainant of its use of a legal standard not in the Regulations, and its unique interpretation of "representative," or of SECOFI's view that Complainant's internal market sales were not representative, severely prejudiced Complainant, and thus are in violation of Article 238 (ii), (iii), (iv), and (v) of the Federal Fiscal Code.<sup>197</sup>

Although Muehlstein does not explicitly argue in its complaint that SECOFI's actions violated the guarantee of *audiencia*, the language used tracks that of the constitutional guarantees enshrined in Article 14. Further, Muehlstein does explicitly argue that SECOFI's failure to notify it of the standards of the representative test violates Article 238, which restates the principles of the constitutional guarantees, including that of *audiencia*. Therefore, Muehlstein's allegations as raised in its complaint clearly implicate the guarantee of *audiencia*.

Second, Muehlstein explicitly alleges in its reply brief of December 19, 1995 ("Muehlstein Reply") that SECOFI's acts violated the Article 14 guarantee of *audiencia* and the Article 16 guarantee of legality. These arguments are advanced in direct rebuttal<sup>198</sup> to the defense that SECOFI put forth in its Opposition Brief filed December 4, 1995 ("SECOFI Opposition") – the defense that it acted within its discretionary authority in utilizing its representative test<sup>199</sup>. One passage from Muehlstein's Reply effectively summarizes the nature of these alleged violations:

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<sup>195</sup> Complaint Section C.(3).1. (emphasis added).

<sup>196</sup> Complaint, Section C.(4).7. (emphasis added).

<sup>197</sup> Complaint, Section C.(4).13. (emphasis added).

<sup>198</sup> Rule 57.3 of the NAFTA Rules of Procedure limits the contents of reply briefs to "rebuttal of matters raised in the briefs filed" by participants opposing the allegations of a complaint.

<sup>199</sup> See, generally, SECOFI Opposition at 22-25.

Assuming without granting that SECOFI had the authority to determine that Muehlstein's sales were not "representative", SECOFI should have so advised my client, as the only way for Muehlstein to have learned of SECOFI's criterion on the limits of "representativity" (absent an express legal provision) was precisely for SECOFI itself to so notify it . . . [T]he manner in which SECOFI acted, not advising Muehlstein that its internal sales were not "representative", is against all basic elements of procedural equity and even against all the principles set forth in the Guarantee of Legality stated in Article 16 of the Constitution.<sup>200</sup>

In its Opposition Brief, for the first time during its investigation of Muehlstein, SECOFI publicly revealed that 15 percent of worldwide sales was the applicable standard by which the agency would determine whether internal market sales were representative.<sup>201</sup> In response to this revelation, Muehlstein noted in its Reply:

On page 30 of its Brief, SECOFI states that Muehlstein has argued that its reported sales are "representative". Muehlstein has never proposed such argument. Muehlstein simply indicates that neither the Law nor the Regulations set this requirement of "representativity" and, even if it did, neither the Law nor SECOFI has provided its legal definition or even advised Muehlstein that its internal sales should account for 15 percent of its sales to all markets in order to be "representative".<sup>202</sup>

These passages, among others, show clearly that Muehlstein is arguing that if it were within SECOFI's discretionary authority to use a representative test, the failure of SECOFI to notify Muehlstein of the standards it would employ in applying that test constituted a misuse of that discretion. Since Rule 7 permits a panel to review not only allegations raised in the complaint, but also any "procedural and substantive defenses raised in the panel review"<sup>203</sup>, Muehlstein's brief replying to SECOFI's constitutional defense can only be seen as part of that review.<sup>204</sup> The alleged violations of Articles 14 and 16 were, therefore, adequately raised in Muehlstein's briefs.

Finally, this panelist finds persuasive the reasoning of the Steel Panel, which determined that a binational Panel has the authority to decide issues relating to fundamental Mexican constitutional principles that impact the "scope and meaning" of Mexico's antidumping law and/or Article 238:

[T]he Fiscal Tribunal has the authority under Articles 238(1) and 239 to declare an agency determination to be a "nullity" in situations where fundamental principles are at stake, particularly when basic constitutional provisions, incorporated through Article 238, are deemed to have been violated. In these

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<sup>200</sup> Muehlstein Reply at 10.

<sup>201</sup> SECOFI Opposition at 30.

<sup>202</sup> Muehlstein Reply at 9, footnote 3.

<sup>203</sup> NAFTA Rule 7(b) of the Rules of Procedure. (emphasis added).

<sup>204</sup> The practice of the TFF does not help us here, since reply briefs are filed by right in a binational panel proceeding, as opposed to before the Tribunal Fiscal, where they are only filed if the court so grants permission.

situations, binational panels need to have a similarly effective remedy for such violations. If Article 1904(8) were read to limit the ability of the binational panel in this regard, a panel might find itself in the unacceptable position, once having determined that fundamental constitutional provisions had been violated by the Investigating Authority, that it had no effective remedy for such violation.<sup>205</sup>

Here, the fundamental constitutional principle of due process, or guarantee of *audiencia*, is articulated in NAFTA Article 1911 as being one of the “general legal principles” that a binational panel should consider. The general legal principle of due process is incorporated in Article 238. Under these circumstances, a Chapter XIX Panel would – and should – have the authority to examine whether the fundamental procedural rights to which individuals are entitled under the Mexican Constitution have been observed by the Investigating Authority.

In sum, since constitutional guarantees were implicitly raised by Muehlstein in its initial complaint, and explicitly raised in its reply brief, and since the fundamental constitutional principle of due process or *audiencia* is articulated in NAFTA Article 1911 as being one of the “general legal principles” that a binational Panel should consider, the Panel may, and indeed, must, examine the Investigating Authority’s acts in terms of constitutional guarantees, without violating Rule 7.

### **III. THE PROPRIETY OF SECOFI’S USE OF DISCRETION AS APPLIED TO MUEHLSTEIN IN THE INVESTIGATION UNDER REVIEW**

#### **A. Guarantees Contained in Article 14 of the Constitution**<sup>206</sup>

Article 14 of the Mexican Constitution enshrines four individual guarantees in its four paragraphs: the prohibition against the retroactive application of the law, the guarantee of *audiencia*, the guarantee of legality in criminal cases, and the guarantee of legal security in civil cases. The guarantee relevant in Muehlstein’s case is the guarantee of *audiencia*, which can be translated into American terms as due process.

The guarantee of *audiencia* offers two principal procedural protections to people whose rights may be affected by governmental action. The first is the opportunity to mount a defense, which is met if the affected party is notified of the demand against him and granted the opportunity to respond. The second is the opportunity to offer evidence, which is met if the affected party is permitted to offer evidence in his defense during the proceeding<sup>207</sup>. The courts have ruled that the

<sup>205</sup> Steel Panel Memorandum Opinion at 23.

<sup>206</sup> This panelist will not address whether SECOFI in fact violated the Article 16 Guarantee of Legality because I am in agreement with the majority’s determination that the findings of fact and conclusions of law set out in SECOFI’s Final Determination are legally sufficient. The same reasoning is applicable here, and need not be repeated.

<sup>207</sup> Burgoa, Ignacio, *Las Garantías Individuales* 550-551 (1988).

opportunity to offer a defense must be real, not a mere formality<sup>208</sup>, and that the guarantee applies to administrative proceedings<sup>209</sup>, whether the law grants the basic procedural right or not<sup>210</sup>.

Moreover, the courts have held that authorities may not dispense with the requirements of the guarantee of *audiencia* on the basis of their discretionary authority. As the First Administrative Court of the Third Circuit held in a *tesis*:

AUDIENCIA, GUARANTEE OF: The guarantee of audience enshrined in article 14 of the Constitution requires that a person be given the opportunity to allege and prove what he wishes before he is deprived of a right. This implies that he must be fully informed of all the facts and elements upon which the act of authority is based, since if this is not done it will be very difficult for him to defend himself in an adequate and congruent manner. [The guarantee of audience] must always be respected by the administrative authorities, even when the law governing the act does not provide or establish legal due process, and even though they consider that they possess discretionary authority to act<sup>211</sup>.

In sum, it is clear that SECOFI has the duty, in accordance with the guarantee of *audiencia*, to inform parties of the facts and elements upon which its acts of authority are based.

### **B. Did SECOFI Violate the Guarantee of *Audiencia* in the Case of Muehlstein**

The question to be resolved is whether SECOFI's failure to make known to Muehlstein the standard by which it determines the representativeness of an exporter's home market sales violated Muehlstein's guarantee of *audiencia*.

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<sup>208</sup> Id. at 551.

<sup>209</sup> See, e.g. Tesis jurisprudencial 314 del Apendice 1975, Segunda Sala.

<sup>210</sup> Sexta Epoca, Tercera Parte:  
Vol. LXXXVIII, Pag. 30, A.R. 831/64. Mercedes de la Rosa Puenta. 5 votos.

Septima Epoca, Tercera Parte:  
Vol. 26, Pag 122. A.R. 2462/70. Poblado "Villa Rica", Mpio de Actopan Ver. 5 votos.  
Vol. 26, Pag 122. A.R. 4722/70. Poblado de las Cruces, hoy Francisco I. Madero, Mpio de Lago de Moreno, Jal. 5 votos.

Vol. 63, Pag 25. A.R. 3372/73. Carmen Gomez de Mendoza 5 votos.  
Vol. 63, Pag 25. A.R. 2422/73. Adolfo Cardenas Guerra 5 votos.

Published in Apendice al Semanario Judicial de la Federacion 1917-1975, tercera parte, segunda sala, tesis 339, p. 569.

<sup>211</sup> Septima Epoca, Vols. 103-108, sexta parte, p. 36, primer circuito, primero administrativo, Amparo en revision 607/77, Julio Cesar Aguilera Saavedra, 20 de septiembre de 1977, unanimidad de votos. (emphasis added).

See also, Septima Epoca, Vol. 8, sexta parte, p. 20, Quinto Circuito, Amparo en revision 322/69, Manuel de Jesus Vazquez Felix, 14 de agosto de 1969, unanimidad de votos.

SECOFI, in its Final Determination, disregarded Muehlstein's submitted domestic sales as the basis for normal value because they were not considered to be "representative" since they comprised only 1.5% of Muehlstein's total worldwide sales, by volume.<sup>212</sup> As a result, an "all other" antidumping duty rate of 44.32% was assigned by SECOFI to future imports of Muehlstein's product into Mexico<sup>213</sup>, allegedly shutting the company out of the Mexican market.

Muehlstein argues in its complaint that SECOFI erred in failing to inform it of SECOFI's "unique definition" of the term representative, and that SECOFI should have defined the term in its questionnaire<sup>214</sup>. Muehlstein contends that had a definition been provided, additional data would have been submitted by it, its questionnaire response would not have been determined to be incomplete, and it would have avoided the punitive antidumping duty rate<sup>215</sup>.

At the outset, this panelist, being in agreement with the majority Opinion, rejects Muehlstein's contention that it did not and could not have known that SECOFI would employ *some* test to determine whether Muehlstein's sales in the United States were sufficient to permit a valid comparison to its sales in the Mexican market. The law empowering SECOFI to conduct antidumping investigations mandates that SECOFI determine whether a "valid comparison" can be made between the prices of an exporter's domestic market sales and the prices of its sales in Mexico. It seems apparent that SECOFI would need to apply some test to make this determination.

The dispositive question is whether the information available to Muehlstein was sufficient to alert it that its U.S. sales were not "representative," and that it therefore would need to submit either third-country sales data or cost of production information.

SECOFI asserts that its questionnaire clearly states in section 3.2 that if "sales are not made in the internal market or when these sales are not representative, list the sales for the three largest export markets comparable in terms of volume to the Mexican market."<sup>216</sup> Although SECOFI was not able to provide the Panel with any published notice or explanation that internal market sales needed to equal at least 15 percent of total sales in order to be representative, it defended its actions in the present case on the grounds that the application of its representative test was based on longstanding

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<sup>212</sup> *Diario Oficial*, November 11, 1994 at 11-12, paragraph 62.

<sup>213</sup> *Id.* at 12, paragraph 63.

<sup>214</sup> Muehlstein Reply at 13.

<sup>215</sup> Complaint at C.(3)-C.(5).

<sup>216</sup> SECOFI Opposition at 23. (emphasis added).



administrative practice<sup>217</sup>. To support its position, SECOFI cites to two cases which were decided prior to Muehlstein's submission of its questionnaire response on January 17, 1994, and three cases which occurred after Muehlstein's submission<sup>218</sup>.

An antidumping investigation Final Determination published in 1989 made known the fact that submitted sales comprising 9 percent and 12 percent of total sales were not considered by SECOFI to be representative<sup>219</sup>. Another Final Determination which might have alerted Muehlstein to the fact that there was a test for representativeness under which it would not pass muster was published in December of 1993, several weeks prior to Muehlstein's submission<sup>220</sup>.

In addition, new Regulations of the Foreign Trade Law, published on December 30, 1993, clearly stipulated the use of the 15 percent standard by SECOFI:

[C]omparable prices of identical or similar goods in the internal market, or, as applicable, those of exports to a third country, will be considered as representative when they account for at least 15 percent of the total sales volume of the goods under investigation<sup>221</sup>.

Although these regulations were not retroactive to cases filed before December 1993, and therefore not applicable to Muehlstein's investigation, they should have alerted Muehlstein that there was a distinct danger that U.S. sales totaling a small percentage of its total worldwide sales would not be considered to be representative by the Investigating Authority<sup>222</sup>.

This panelist believes that the information made available by SECOFI in its questionnaire and its case precedent was sufficient to notify Muehlstein that SECOFI would be applying some standard to determine the representativeness of Muehlstein's U.S. sales, and that its submission of U.S. sales totaling even 3.72 percent of its worldwide sales would not

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<sup>217</sup> SECOFI Opposition at 34-36 and 55.

<sup>218</sup> This panelist is not persuaded that the cited decisions which were published after the time of Muehlstein's filing, and, indeed, even after the Final Resolution was issued in this case, have any bearing on the present review. These resolutions were published on June 23, 1994, August 2, 1994, and April 18, 1995. Muehlstein filed its submission on January 17, 1994. The Final Resolution was issued on November 11, 1994.

<sup>219</sup> Final Resolution of imports of iron bands or cold rolled steel sheet strips from the Federal Republic of Brazil, Diario Oficial de la Federacion ("D.O.") October 10, 1989, at 4, Section I.b. ("due to lack of representativity on the invoices submitted by the accused exporters, which cover only 9% and 12% of their total sales").

<sup>220</sup> Final Resolution of imports of homopolymer imports originating from the United States of America, D.O. December 23, 1993. Point 68, page 41.

<sup>221</sup> Regulation of Foreign Trade Law, Article 42.

<sup>222</sup> It is important to note that all of the allegations raised by Muehlstein would have been rendered moot if SECOFI had simply made known in a clear fashion its standard or test for representativeness. This simple step would have eliminated all of the guesswork without imposing any additional administrative burdens on the Investigating Authority. With the passage of the new regulations in December 1993, which do define the representative test utilized by SECOFI, this issue will not arise again. SECOFI should be complimented for finally setting forth its practices in an unambiguous manner

meet that standard<sup>223</sup>. Therefore, this panelist finds that SECOFI's failure to make known its exact test for representativeness did not violate the general principles contained in Articles 14 and 16 of the Constitution, since there was enough information provided for Muehlstein to defend its interests against the demands of the agency. A different result, however, might have been warranted if Muehlstein's U.S. sales had totaled more than twelve, but less than fifteen, percent of its worldwide sales.

#### **IV. CONCLUSION**

For the reasons stated above, this panelist concurs with the result of the majority's opinion, but departs from it in its failure to analyze Complainant's allegations of due process violations in the Investigating Authority's application of a test of representativeness applied to internal market comparison sales. This panelist, therefore, joins in the majority in affirming the Investigating Authority's Definitive Resolution.

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Maureen Rosch

(Date)

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<sup>223</sup> Muehlstein contends that its U.S. sales totaled 3.72% of its worldwide sales, not 1.5% as stated by SECOFI in its Final Determination. SECOFI concedes that the 1.5% total was in error.