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

REVIEW OF THE FINAL DETERMINATION OF THE ANTIDUMPING INVESTIGATION IN THE MATTER OF ROLLED STEEL PLATE IMPORTS ORIGINATING IN OR IMPORTED FROM CANADA

CASE MEX-96-1904-02

DECISION OF THE PANEL

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I. INTRODUCTION

According to Article 1904 and Annex 1901(2) of the North American Free Trade Agreement ("NAFTA"), this Binational Panel was established in order to review the Final Determination issued by the *Secretaría de Comercio y Fomento Industrial* (Secretariat of Industrial Trade and Industrial Promotion) ("the Investigating Authority" or "SECOFI"), published in the *Diario Oficial de la Federación* (Official Gazette of the Federation, "*Diario Oficial*") on December 30, 1995, as a the result of the administrative investigation filed as 33/93 and carried out by the *Unidad de Prácticas Comerciales Internacionales* (International Trade Practices Unit) ("UPCI") of the Secretariat of Trade and Industrial Promotion.

The administrative procedure was to determine the existence of dumping on Rolled Steel Plate imports originating in or imported from Canada, among other countries. The merchandise ("Investigated Product") was covered by custom tariff classifications 7208.12.01 and 7208.22.01 of the *Tarifa de la Ley del Impuesto General de Importación* (Tariff Schedule Pursuant to the General Import Tax).

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II. BACKGROUND

1. Administrative Investigation Procedure. Chronology of the Proceedings

On August 4, 1993, the companies *Altos Hornos de México, S.A. de C.V.* ("AHMSA") and *Hylsa, S.A. de C.V.* ("HYLSA") ("the domestic industry") through their counsel of record , appeared before SECOFI to request the application of a compensatory quota regime and the beginning of an antidumping and countervailing duties investigation on Rolled Steel Plate imports originating in or imported from the Federal Republic of Brazil, Canada, the Republic of Korea, the United States of America, the Republic of South Africa and the Republic of Venezuela.[1]

On September 13, 1993, the Investigating Authority requested the domestic industry (AHMSA and HYLSA) to submit additional information in relation to the application for an investigation.[2]

On September 27, 1993, AHMSA and HYLSA, answered the additional information requirement, submitting more evidence, data and arguments in relation to export prices in third countries, information on normal value and justification for the confidentiality of the submitted information.

[1] Administrative Record, Confidential Version ("CV"), Vol.s 1-11, Nº 1, File 9303690.
[2] Administrative Record, CV, Vol. 12, Nº 8, Folio 9304369.

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On October 28, 1993, the Decision accepting the application was published in the *Diario Oficial* and the antidumping investigation and countervailing duties investigation on Rolled Steel Plate was initiated. The period from January to December of 1992 was chosen as the period of investigation.[3]

On November 24, 1993 the companies The Titan Industrial Corporation ("TITAN") of the United States of America, Algoma Steel Inc. ("ALGOMA"), Dofasco Inc. ("DOFASCO") and Stelco Inc. ("STELCO") of Canada ("the Complainants"), were notified of the initiation of the investigation in question, requiring them to submit specific information, as well as to complete the antidumping questionnaire, which TITAN submitted on January 11, 1994.[4]

On December 8, 1993, the domestic industry submitted to the Investigating Authority "Document of Comments to the Resolution of the Beginning of the Investigation Against Unfair International Trade Practices on Rolled Steel Plate".

On April 18, 1995, the Investigating Authority issued the Preliminary Determination which was published in the *Diario Oficial* and decided to continue with the administrative

[3] Administrative Record, CV, Vol. 10, Nº 14, Folio 35-93/RIP.
[4] Administrative Record, CV, Vol. 14, Nº 158, Folio 9400178.

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investigation without imposing compensatory quotas in relation to Rolled Steel Plate originating in or imported from Canada.[5]

The Complainants did not submit comments on the Preliminary Determination, within the time granted for this in accordance with Article 53 of the *Ley de Comercio Exterior* (Foreign Trade Law) ("LCE").

On June 7, 8 and 9, 1995, SECOFI carried out the *in situ* verification of AHMSA.

On June 21, 22 and 23, 1995, SECOFI carried out the *in situ* verification of HYLSA.

On July 7, 1995, the Public Hearing before SECOFI of the administrative investigation of the investigated product was carried out.

On July 12, 1995, HYLSA submitted further allegations relating to rolled steel plate imports.

On December 28, 1995, the Final Determination, which imposed definitive antidumping duties on Rolled Steel Plate imports originating in or imported from Canada was published in the *Diario Oficial*, as follows:

[5] Administrative Record, CV, Vol. 18, Nº 470, File RESP.PRELI.PR.

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“**E.** Se imponen cuotas compensatorias definitivas a las importaciones de placa en rollo, originaria de Canadá y clasificada en las fracciones arancelarias citadas en el primer párrafo de este punto resolutivo, en los siguientes términos: **a.** Para las importaciones de placa en rollo procedente de cualquier empresa exportadora de Canadá: 31.08 por ciento”.	“**E.** Definitive compensatory quotas to Rolled Steel Plate, originating in Canada and covered by the customs tariff classifications cited in the first paragraph of this Decision as follows: **a.** For the Rolled Steel Plate imports originating from any exporting Canadian company: 31.08 percent.” [6]

2. Procedure Before the Panel

A) Chronology of the Proceedings

On January 29, 1996, DOFASCO, STELCO, ALGOMA and TITAN, through their common counsel of record requested, based on Article 1904 of NAFTA and its Rules of Procedure (“Rules of Procedure”), the review of the Final Determination of the antidumping and countervailing duties investigations on Rolled Steel Plate imports originating in Canada, published in the *Diario Oficial* on December 28, 1995.[7]

On February 28, 1996, the Complainants submitted before the Mexican Section of the

[6] Administrative Record, CV, Vol. 25, Nº 751, File 35-93/RFP.
[7] Application of a Review Before a Panel, Administrative Record, CV, Vol. 1.

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Secretariat of the North American Free Trade Agreement ("Secretariat") their Complaints by presenting the notification certificate.[8]

On May 13, 1996, the company Hubbell International Trading Company ("HUBBELL"), submitted its Notification of Appearance, joining in the allegations of fact and law argued by the Complainants.[9]

The Panel did not consider HUBBELL in the present review, since this company made no further filings or submissions in accordance with Articles 39(1) and 57(1) of the Rules of Procedure.[10]

On March 8, 1996, SECOFI, through the *Director General de Asuntos Jurídicos* (General Director of Legal Affairs), submitted the Notification of Appearance, opposing each of the arguments stated by DOFASCO, STELCO, ALGOMA and TITAN in their Complaint.[11]

On March 8, 1996, through their counsel of record, HYLSA submitted its Notification of Appearance, opposing each of the arguments stated by DOFASCO, STELCO, ALGOMA and TITAN in their Complaint.[12]

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[8] Complaints, Administrative Record, CV, Vol. 1, Doc. Nº 14.
[9] Brief of the Investigating Authority, July 26, 1996, p. xxii.
[10] *Ibid.*
[11] Administrative Record, CV, Vol. 1, Doc. Nº 16.
[12] Administrative Record, CV, Vol. 1, Doc. Nº 15.

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On March 12, 1996, through their counsel of record, AHMSA submitted its Notification of Appearance, opposing each of the arguments made by DOFASCO, STELCO, ALGOMA and TITAN in their Complaint.[13]

The Complainants through their counsel of record, joined their Complaints pursuant to Rule 57 (5) of Rules of Procedure, and filed their Brief on May 28, 1996.[14]

On July 26, 1996, SECOFI, through the *Director General de Asuntos Jurídicos*, filed its Brief.[15]

On July 26, 1996, HYLSA submitted its Brief and on August 19, 1996, filed the Annexes to it.[16]

On July 29, 1996, AHMSA submitted its Brief and on August 19, 1996, filed the Annexes to it.[17]

On August 13, 1996, the Complainants submitted the Reply to HYLSA's Brief, the

[13] Administrative Record, CV, Vol. 1, Doc. Nº 18.
[14] Administrative Record, CV, Vol. 4, Doc. Nº 31.
[15] Administrative Record, CV, Vol. 4, Doc. Nº 42.
[16] Administrative Record, CV, Vol. 4, Doc. Nº 43.
[17] *Ibid.*.

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Reply to the Investigating Authority's Brief and the Reply to AHMSA's Brief, and on August 23, 1996, they filed the Annexes to their Brief.

On September 10, 1996, according to Rule 42 of the Rules of Procedure, the Binational Panel of the case in question was established with Gustavo Vega Cánovas as Chair,[18] Martin H. Freedman,[19] Lucía Reina Antuña,[20] Gilbert R. Winham[21] and Rodolfo Terrazas Salgado[22] as Members.

On September 24, 1996, Panelist Martin H. Freedman resigned due to lack of time in his agenda to perform the duties of a Panelist.[23]

On September 25, 1996, a Notification of Suspension of the Panel was published, due to problems that emerged with the appointment of some Panelists.[24]

On October 11, 1996, the Notification of Suspension of the Panel was sent to the American and Canadian Secretaries, and was published in the *Diario Oficial*.[25]

On November 8, 1996, Panelist Gilbert R. Winham withdrew due to conflicting duties with the government of his country.[26]

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[18] Administrative Record, CV, Vol. 4, Doc. Nº 70.
[19] Administrative Record, CV, File Nº SMSTLC-1996-J-520 .
[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] Administrative Record, CV, Vol. 6, Doc. Nº 58.

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According to paragraph 9 of Annex 1901(2) of NAFTA, the governments of Canada and Mexico advised on January 13, 1997, that D.M.M. Goldie and W. Roy Hines were designated as substitute Panelists of the Panel.[27]

The case in question was reactivated when the Panel was definitively established with Gustavo Vega Cánovas as Chair, D.M.M. Goldie, Lucía Reina Antuña, W. Roy Hines and Rodolfo Terrazas Salgado as members. Peter N. Mantas,[28] Hernán García Corral,[29] Rocío E. Álvarez[30] y Eduarda María Días Oliveira Matos[31], Arturo Reina Celaya[32], Rafael Dueñas Hernández[33], Gabriela Rodríguez Huerta[34] and Francisco J.J. Castro y Ortíz[35] were named as assistants with access to confidential information.

After some delays, the Public Hearing took place on July 18, 1997, in which the

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[24] Administrative Record, CV, Vol. 6, Doc. Nº 61.
[25] Administrative Record, CV, Vol. 6, Doc. Nº 62.
[26] Administrative Record, CV, Vol. 6 Doc. Nº 65.
[27] SECOFI, *Subsecretaría de Negociaciones Comeciales Internacionales* (Sub-secretary of International Commercial Negotiations), File Nº 511.04.01.97.
[28] Administrative Record, CV, Vol. 6, Doc. Nº 71.
[29] Administrative Record, CV, Vol. 9, Doc. Nº 113.
[30] Administrative Record, CV, Vol. 6, Doc. Nº 72.
[31] Administrative Record, CV, Vol. 9, Doc. Nº 119.
[32] Administrative Record, CV, Vol. 6, Doc. Nº 71.
[33] Administrative Record, CV, Vol. 12, Doc. Nº 155.
[34] Administrative Record, CV, Vol. 6, Doc. Nº 71.
[35] Administrative Record, CV, Vol. 6, Doc. Nº 71.

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Complainants, SECOFI and the domestic industry presented their case.[36]

B) Motions and Orders

During the review procedure the Panel issued various orders, most of them in response to motions made by the Parties. However, others were issued by the Panel *sua sponte* in exercise of its powers. The foundation and motivation for each motion is set out below. The Panel decided that, in addition to the specific foundation of each order, all the orders that were issued in response to the motions were founded on Rule 63 of the Rules of Procedure.

On March 14, 1997, the Panel issued an order in which the dates of the Public Hearing and of the Final Decision of the Panel were extended, based on Rule 20 of the Rules of Procedure, due to the delay in establishing the new Panel. The date for the Public Hearing was set for June 15, 1997, and the date for issuance of the Final Decision of the Panel was to be October 14, 1997.[37]

The Panel ordered on April 1, 1997, that SECOFI grant within a period not greater than 10 days after the date of the Order, access authorization to Confidential Information, without requiring the granting of any other guarantee or additional requirement envisaged in

[36] Administrative Record, CV, Vol. 6, Doc. Nº 71.
[37] Administrative Record, CV, Vol. 6, Doc. Nº 73.

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the *Ley de Comercio Exterior* or in the Rules of Procedure, to Francisco Fuentes Ostos as counsel of record of the Complainants, in response to the Motion concerning confidential information access put forward by them on May 28, 1996.[38] In the same Order, the Panel authorized the Complainants to submit documents and additional allegations, if these resulted from the review of the confidential information.[39]

On April 7, 1997, the Panel issued an Order[40] rejecting the Motion submitted by the Complainants on November 7, 1996, requesting that the allegations and documents the Investigating Authority had submitted to the Panel on October 24, 1996, be rejected.[41] The Panel decided that the Investigating Authority did not violate the Rules of Procedure 52 (2), 59 and 61 by submitting to it the Decisions of the Panel MEX-94-1904-01 and MEX-94-1904-03, since these are not precedents according to Article 1904 (9) of NAFTA.

That same day, the Panel issued a Order[42] accepting the Motion submitted by the Investigating Authority of July 12, 1996 rejecting the arguments of the Complainants in relation to expert opinions attempting to verify that the products exported by one of the Complainants came under the category of identical or similar merchandise classification, since these arguments did not comply with Rules 39 and 40. Further, the Panel empowered

[38] Administrative Record, CV, Vol. 3, Doc. Nº 30.
[39] Administrative Record, CV, Vol. 6, Doc. Nº 75.
[40] Administrative Record, CV, Vol. 7, Doc. Nº 77.
[41] Administrative Record, CV, Vol. 6, Doc. Nº 64.
[42] Administrative Record, CV, Vol. 7, Doc. Nº 79.

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the Complainants to submit new arguments that emerged after the review of the confidential information within thirty days after the issuance of the Order in question.[43]

On April 18, 1997, according to Rules 2, 49 (2) and 63 (3) of the Rules of Procedure, the Panel rejected the Motion submitted by the Investigating Authority on April 10, 1997 in which it sought to preclude the Complainants' rights of access to confidential information or to submit new arguments.[44]

On April 21, 1997, the Panel issued an Order[45] to correct the name of AHMSA in a previous Order and to reject the Motion of the Investigating Authority requesting the Panel to reconsider its Order of April 1, 1997, in which SECOFI was ordered to grant access to confidential information to Francisco Fuentes Ostos as counsel of record of the Complainants.

On May 12, 1997, the Panel issued an Order by which it accepted the Complainants' Motion of April 2 requesting the Investigating Authority to authorize access to confidential information, and allowing the Investigating Authority until May 15, 1997, to issue this authorization.[46] The Panel also extended the date of the Public Hearing until July 18, 1997.

[43] Administrative Record, CV, Vol. 7, Doc. Nº 79.
[44] Administrative Record, CV, Vol. 7, Doc. Nº 87.
[45] Administrative Record, CV, Vol. 8, Doc. Nº 89.
[46] Administrative Record, CV, Vol. 8, Doc. Nº 97.

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On May 21, 1997, the Panel issued an Order rejecting the Motion of the Investigating Authority of May 13, 1997, requesting the rescission of the Panel's Order of May 12, 1997.[47]

On July 10, 1997, the Panel issued an Order determining the agenda of the Public Hearing to be held on July 18 at *El Colegio de México, A.C.*[48]

On September 17, 1997, the Panel issued an Order requiring the Investigating Authority to file with the Secretariat certain information classified as "privileged" on or before September 24, 1997, and stating that such information was for the exclusive use of the Panelists and their assistants. It also chose November 17, 1997 as the new date to issue its Final Decision.[49]

On October 17, 1997 the Panel issued an Order[50] rejecting the Motion of the Investigating Authority of September 23, 1997, which requested the Panel to rescind its requirement of September 17, 1997 that access to the privileged information be provided to the Panel members and its assistants, within 24 hours. The Panel warned the Investigating Authority that, in case it did not fulfil this requirement, it would issue its Final Decision taking into account the "best available information".

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[47] Administrative Record, CV, Vol. 9, Doc. Nº 105.
[48] Administrative Record, CV, Vol. 10, Doc. Nº 125.
[49] Administrative Record, CV, Vol. 12, Doc. Nº 151.
[50] Administrative Record, CV, Vol. 12, Doc. Nº 154.

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On October 29, 1997, the Panel issued an Order by which it deferred the date of issuance of its Final Decision to December 17, 1997.[51]

C) Resolution of Pending Motions

a) Motion of July 8, 1997

i) Background

On July 8, 1997 the Investigating Authority, in accordance with Rule 61 (1) of the Rules of Procedure submitted a motion to the Panel requesting it to preclude the Complainants' rights to present additional arguments in the present review.

The Investigating Authority argued that the Complainants' right to present a new brief related to the confidential information, to which they had access since May 22 1997, which expired because the Complainants did not exercise the right that was given to them by the Panel on May 21 1997.

[51] Administrative Record, CV, Vol. 12, Doc. Nº 164.

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The motion of the Investigating Authority is valid since it is based on Rule 61 of the Rules of Procedure. This Panel, after referring to rules 2 and 63 (1) of the Rules of Procedure, and after having analyzed the rights and the arguments of the Parties, orders as follows:

ii) ORDER

The motion of the Investigating Authority presented on July 8 1997 is denied based on the following considerations:

First.- The Panel considers that the facts upon which the Order of May 21 1997 was based have been overtaken by events.

Second.- This Panel considers that given the facts set out in the injury section[52] of this Decision, the need to modify the order of May 21 1997 is evident in order to allow the Complainants access to the administrative file on which the Investigating Authority will issue a determination responding to the Panel's remand. Accordingly, the rights of the Complainants will be preserved in the event that in its response to the remand Order, the Investigating Authority decides to supplement the administrative file.[53]

[52] See: the implications of the request for remand of the Investigating Authority developed in the injury section of this Decision.
[53] See: Section VII of this Final Decision, regarding the Panel's Order related to the Complainants, *infra.*

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b) Motion of July 18, 1997

i) Background

On July 18, 1997, during the Public Hearing, the Investigating Authority, in accordance with Rule 61 (1) of the Rules of Procedure, filed a Motion to have the issue of accumulation, which was brought forward during the hearing, dismissed as a part of the review.

The Investigating Authority alleged that this Panel must dismiss the accumulation issue because it lacked a foundation in the Rules and in NAFTA. According to the Investigating Authority, this issue was raised by Panelist W. Roy Hines through his questions and enlarged upon by counsel for the Complainants in their reply to that motion. The ground to dismiss was that the accumulation issue was not alleged by the Complainants in their Complaint or Brief and, by virtue of Rule 7(a) of the NAFTA Rules of Procedure, could not be reviewed by this Panel.

In their reply to the Motion of the Investigating Authority, the Complainants requested the Panel to dismiss the Motion of the Investigating Authority since they argued that each had put forward in its Complaint or in their joint Brief the issue of accumulation. The Complainants affirmed they had established that the issues in litigation put forward by them in relation to TITAN-DOFASCO encompassed the calculation of injury in the Final Determination.

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According to the Complainants, if the Investigating Authority had taken into account TITAN's information, it would have had to conclude the imports from Canada should not have been accumulated for injury determination since they were insignificant. In conclusion, the Complainants requested this Panel to include the effect of the issue of accumulation of import volumes of rolled steel plate to Mexico from Canada in the Final Decision.

In its rejoinder, or reply to the reply of the Complainants, the Investigating Authority maintained that the arguments put forward by Panelist W. Roy Hines and the Complainants regarding the accumulation of imports from Canada should be dismissed because they did not constitute part of the *litis*, and because in its opinion, including these issues would leave the Investigating Authority in a state of defenselessness and the principle of fairness would be breached.

On August 13, the Complainants filed a reply to the rejoinder of the Investigating Authority in which they requested its dismissal because they considered it to be a breach of Rule 62 of the Rules of Procedure, which, according to them, does not provide any right to rejoin or reply to the replies of a motion.

On August 20, the Investigating Authority requested the dismissal of the Complainants reply as it considered the Complainants request unlawful since they expressly

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agreed that the Panel should allow the Authority to file the reply to the rejoinder.

The Motion of the Investigating Authority is lawful as it is provided for in Rule 61 of the Rules of Procedure. This Panel has jurisdiction to rule upon it pursuant to Rule 2, 63 (1) of the Rules of Procedure, and after analyzing the facts and arguments of the Parties, orders as follows:

ii) ORDER

The Motion filed by the Investigating Authority on July 18 is dismissed based on the following considerations:

First.- The Panel considers the arguments of the Complainants to be well founded in the sense that SECOFI's error regarding TITAN resulted in the Investigating Authority reaching erroneous conclusions regarding the injury that imports from Canada caused to the domestic industry.[54] This error and the imports allegedly credited to Complainants other than TITAN have resulted in the establishment of a price discrimination margin for all of Canada. This directly affects the Complainants as well as any other potential Canadian exporters. SECOFI, when recognizing its error, has introduced in the *litis* all aspects of the injury

[54] See: the implications of the Investigating Authority's error, which this Panel addresses in the injury section of this Decision.

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determination, including accumulation, which must be made by the Investigating Authority in its determination on remand. From this perspective, this Panel considers that it is subsection (b) and not subsection (a) of Rule 7 of the Rules of Procedure that is applicable in the present case, since the issue of accumulation has become a possible substantive defense during the Panel review.

Second.- This Panel considers that the arguments of the Investigating Authority are unfounded when claiming that the issue of accumulation was improperly mentioned by Panelist W. Roy Hines during the public hearing in violation of Rule 7 (a) of the Rules of Procedure. Panelist Hines neither argued in favour or against the issue of accumulation during the Public Hearing. What he did was to formulate questions on the Panel's behalf in respect of the apparent contradictions in the Final Determination regarding the evaluation of the data used by SECOFI. These questions were set forth in direct relation to the Final Determination, where numerous references to accumulation can be found.

III. STANDARD OF REVIEW AND POWERS OF THE PANEL

A NAFTA Chapter XIX binational panel, like any other arbitral or jurisdictional body, is governed by a legal framework which endows it with specific powers, limits its

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functions, standardizes the proceeding upon which it must decide, and provides the standard of review which the Panel must follow in issuing its final decision.

The standard of review this Panel must apply, and the scope of its powers are important for the present review, and this Panel considers that an adequate treatment of these topics requires a careful analysis of the following issues:

1. Legal Nature of the Binational Panel

The Complainants argued that the legal nature of the binational panel was irrelevant and what was important was that this Panel stood in place of the court of the importing party, thus having to apply the legislation in the way a Court does. The Complainants even say the Panel possesses powers to declare the absolute nullity of a challenged Final Determination. The Investigating Authority, instead, asserted that the binational panel is an arbitration body with limited powers that in no way can be compared to a court of the importing party with powers to nullify the determination of the Investigating Authority.

This panel agrees with the Investigating Authority in the sense that a binational panel has features that characterize it as an arbitration body. However, it is important to recognize that its nature as an arbitration body is *sui generis*, for the following reasons:

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a) Without doubt, the arbitral character of a binational panel is indisputable, since the NAFTA contracting States obliged themselves to have their respective investigating authorities abide the jurisdiction of a Panel, in the event the alternative dispute settlement mechanism, contained in chapter XIX of the NAFTA Agreement, was chosen by a party with a right for them to prefer this proceeding to even the one normally followed before jurisdictional tribunals of the importing Party.

b) There is a substantial difference in the procedure followed by a binational panel, compared to ordinary arbitration. In the latter, parties participate in the selection or elaboration of the procedural rules that must be applied, which in the former, such rules are established in advance by the NAFTA contracting parties. These rules reflect at least two different regulatory schemes: the international one, which is composed of the provisions contained in the Agreement, and are related to multilateral rules such as those set out in GATT and its Codes of Conduct; and the domestic one, which reflects the legal provisions dealing with unfair trade practices, which must be followed by binational panels.

c) Based on the foregoing, we conclude the particular characteristics of binational panels make them seem more like jurisdictional tribunals than arbitral tribunals. In fact, given their review powers regarding the proceedings concluded by an investigating authority, they are much more like the relationship between a court of appeal with respect to a first

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instance court. This follows from the fact that a final decision of the Panel is provided for in paragraph 11 of NAFTA Article 1904, and a challenge may only proceed in an extraordinary manner before a special Committee established according to the Rules of Procedure of the NAFTA Agreement, standing out as a special characteristic is the fact that, according to paragraph 14 of Article 1904, provided that the NAFTA Rules, **where appropriate, will be based on judicial rules of appellate procedure**. This confirms the conclusion that we are in the presence of an arbitral body whose functions are closer to those of a jurisdictional court of appeal.

2. Nature of the Review Process Before the *Tribunal Fiscal de la Federación* (Federal Fiscal Court) and Before a Binational Panel

From the foregoing this Panel concludes that it is neither similar to the Federal Fiscal Court nor does it have the same characteristics, attributes and jurisdiction of that court.[55] While the jurisdiction and attributes of the Federal Fiscal Court are governed by Mexican law, particularly by many legal provisions of the Federal Fiscal Code, the jurisdiction and attributes of this Panel are ruled by NAFTA in the first place, and secondly by Mexican law but only in the way NAFTA establishes. Therefore, as a consequence a binational panel review differs from that carried out by the Federal Fiscal Court.

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[55]According to paragraph XI of article 11 of the *Ley Orgánica del Tribunal Fiscal de la Federación* published in the *Diario Oficial de la Federación* on December 15, 1995, the internal judicial review of the final determination on compensatory quotas corresponds to this tribunal.

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Thus in order to define the characteristics of the proceedings before this Panel, which distinguishes it from one before the Federal Fiscal Court, it is important to bear in mind the legal provisions established in paragraph 1 of Article 1904 of NAFTA, which states:

> "As provided in this Article, each party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review."

From this paragraph it is important to point out that each one of the parties must replace the internal judicial review of a Final Determination regarding antidumping and countervailing duties with the review made by a binational panel. It follows that, once the alternative dispute settlement mechanism referred to in Article 97 of the LCE is chosen, it is evident that the proceedings and courts of the importing Party are excluded.

In other words, more than a replacement or substitution (which grammatically means the same thing), strictly this is about what jurisprudence refers to as exclusion of the domestic forum. This alternative mechanism constitutes a proceeding that eliminates the jurisdiction of the domestic courts, because the signatory Parties as public law entities, cannot be subject to any domestic jurisdiction, in order to safeguard their sovereignty. In the same way, paragraph 11 of Article 1904, expressly prohibits the importing party from commencing a judicial review of a Final Determination which is subject to a proceeding before a Panel, or to establish in its internal legislation the possibility of challenging before its tribunals a determination issued by a binational panel.

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In conclusion, according to NAFTA Chapter XIX, the alternative mechanism is a legal way to settle an international dispute originating when a review of a Final Determination before a binational panel is requested. This Panel acts as an impartial third party applying the standards established in Article 1904 and its Rules, and excluding the jurisdictional proceeding and the national courts of the importing party, in order to issue a just, inexpensive and speedy decision which is in accord with the objectives of NAFTA.

3. Standard of Review to be Applied by the Panel

The standard of review applicable to this proceeding is also determined by NAFTA. This Panel must apply the standard of review set out in NAFTA Article 1904 (3) and Annex 1911. It is a two-part standard review. The first part is

> "the standard set out in Article 238 of the Federal Fiscal Code (*Código Fiscal de la Federación*), or any successor statutes, based solely on the administrative record".[56]

Article 238 of the Federal Fiscal Code states:

"Se declarará que una resolución administrativa es ilegal cuando se demuestre alguna de las siguientes causales: **I.** Incompetencia del funcionario que la haya dictado u ordenado o tramitado el procedimiento del que deriva dicha	"An Administrative determination shall be declared illegal when one of the following grounds are demonstrated: **I.** Lack if competence of the official who issued, ordered, carried out the proceeding from which the said resolution is derived.

[56] NAFTA, Annex 1911.

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resolución. **II.** Omisión de os requisitos formales exigidos por las leyes, que afecte las defensas del particular y trascienda al sentido de la resolución impugrnada, inclusive la ausencia de fundamentación o motivación, en su caso. **III.** Vicios de procedimiento que afecten las defensas del particular, y trasciendan al sentido de la resolución impugnada. **IV.** Si los hechos que la motivaron no se realizaron, fueron distintos o se apreciaron en forma equivocada, o bien si se dictó en contravención de las disposiciones aplicadas, o dejó de aplicar las debidas. **V.** Cuando la resolución administrativa dictada en ejercicio de facultades discrecionales no corresponda a los fines para los cuales la ley confiera dichas facultades. El Tribunal Fiscal de la Federación podrá hacer valer de oficio, por ser de orden público, la incompetencia de la Autoridad para dictar la resolución impugnada y la ausencia total de fundamentación o motivación en dicha resolución."	**II.** Omission of the formal requirements provided by law, which affects an individual's defences and impacts the result of the challenged resolution, including the lack of legal foundation or reasoning, as the case may be. **III.** Procedural errors which affect an individual's defences and impact the result of the challenged resolution. **IV.** If the facts which underlie the resolution do not exist, are different or were erroneously weighed, or if (the resolution) was issued in violation of applicable legal provisions if the correct provisions were not applied. **V.** When an administrative determination issued in an exercise of discretionary powers does not correspond with the purposes for which the law confers the said powers. The Federal Fiscal Tribunal may declare sua sponte, because it is a matter of public order, the incompetence of the authority to render the challenged determination and the total absence of basis or motivation of this determination."[57]

Under the second part of the standard of review, we may also consider:

[57] This last paragraph of Article 238 was inserted through ammendment published in the *Diario Oficial* on December 5, 1995, and entered into force on January 1, 1996.

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“los principios generales de derecho que de otro modo un tribunal de la Parte importadora aplicaría para revisar una resolución de la autoridad investigadora competente”.	“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”.[58]

On the other hand, this Panel has jurisdiction to grant only those remedies that are authorized by NAFTA Article 1904 (8). This provision states:

“El Panel podrá confirmar la resolución definitiva o devolverla a la instancia anterior con el fin de que se adopten medidas no incompatibles con su decisión.”	“The Panel may uphold a Final Determination, or remand it for action not inconsistent with the Panel’s decision”.

The Complainants have argued before this Panel that we must consider Article 239 of the Federal Fiscal Code as an integral part of the standard of review. It is noteworthy that a binational panel in a previous case accepted this point of view.[59] Nevertheless, this Panel respectfully disagrees with that position, because the inclusion of Article 239 in the standard of review would constitute an undue amplification of its jurisdiction and powers. This Panel is subject to the jurisdiction and powers established by Article 1904(8) of NAFTA, which empowers it to confirm SECOFI’s Final Determination, or to remand it. It does not empower it to nullify that resolution, a power which Article 239 specifically gives to the Federal Fiscal Court.

[58] NAFTA, Article 1904 (3).
[59] See: the Final Decision MEX-94-1904-02.

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Therefore, this Panel dismisses the arguments presented to it that Article 239 of the Federal Fiscal Code should be included in the standard of review of this Panel. If the governments of Mexico, the United States and Canada had intended to empower during the review proceeding, in the same way that the Federal Fiscal Court is under Article 239, they would have included that Article in the standard of review, and would have drafted Article 1904 (8) of NAFTA, in a different manner.

In other words, this Panel is convinced that the present text of NAFTA does not give it the same jurisdiction conferred upon the Federal Fiscal Court, so it must act according to the *express* limits of the jurisdiction conferred on it.[60]

Therefore, this Panel believes the intention of the negotiating parties of NAFTA was to establish Article 238 of the Federal Fiscal Code as the only standard of review in the case of Mexico. This does not mean --as the Investigating Authority presumes-- that binational panels cannot interpret the legal content of that Article. While it is true that paragraph 2 of Article 1904 of NAFTA establishes that Panels must perform their duties in the same way as a Court of the importing party, this does not lead to the conclusion that they must apply, in a mechanical way, the causes of illegality included in Article 238. On the contrary, the application of this Article in an antidumping investigation is a complex procedure that raises

[60] For similar reasons, Article 237 of the Federal Fiscal Code is not part of the standard of review that this Panel must apply.

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issues that affect the national economy as a whole, commercial relations between two countries, national producers and workers, and importers of foreign products. This Panel cannot apply the standard of review as if it were dealing with administrative resolutions related to tax and other fiscal measures which consist, generally speaking, in matters of the State versus a person regarding with that person's fiscal obligations.[61]

In other words, a binational panel is always in a position to interpret the legal framework that governs it. When intepreting NAFTA, the Rules of Procedure or any other international legal instrument, the panel must follow the criteria included in Section 3, entitled INTERPRETATION OF TREATIES of the Vienna Convention on the Law of Treaties.[62] This contains three general rules of interpretation:

a) good faith;

b) the literal sense of the provisions, and;

c) the object and ends of the corresponding treaty.

Focusing on this last rule, the objectives of NAFTA are made clear in its Article 102. Paragraph 1, which establishes that NAFTA's objectives must be developed in relation to its general principles which include those of national treatment, most favoured nation treatment

[61] As an example, recall the economic implications that can be found in paragraph II of Article 238 of the Federal Fiscal Code, implications to which this Panel refers in section V on Issues in Litigation, subsection 5, which corresponds to "Extemporaneiety of the Issuance of the Preliminary and Definitive Resolutions".

[62] This important instrument of international law is part of Mexican positive law, since, according to the applicable constitutional and legal provisions, was adopted by Mexico on May 23, 1969, was ratified on

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and transparency. In addition, among those objectives is the following found in subrule **e)**, to **create effective proceedings for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes**.

On the other hand, if the legal provisions on antidumping and countervailing duties of the Importing Party must be interpreted, as established by paragraph 2 of Article 1904, the binational panel must follow the interpretive rules that are commonly used by the jurisdictional bodies of the country in question. If this is not done, the principle of legal certainty of a state of law would be violated.[63]

4. The Applicable Legal Framework to be Applied by the Panel

The legal provisions that the Panel must apply in order to issue its decision according to paragraph 2 of Article 1904 in the matter of countervailing and antidumping duties, consist of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents,[64] to the extent that a court of the importing party would rely on such materials in reviewing a Final Determination.

September 25, 1974, and was published in the *Diario Oficial* on February 14, 1975. It entered into force on January 27, 1980.

[63] The criteria or methods of legal interperetation most commonly used in Mexico are: the logical, the systematical, the authentical and the causal teleological. For more details See: Ignacio Burgoa, *Las Garantías Individuales*, México, Porrúa, 1991, pp. 575 y 576.

[64] It is evident that article 1904 excludes the Constitution of each country, that consequently cannot be a an applicable provision in matters of countervailing and antidumping duties, since article 1911 contains it in the definition of internal law, but it is only established for the purposes of article 1905.1, this means it is invoked

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As was already pointed out in a previous paragraph, this Panel notes that in the Mexican legal system includes two regulatory schemes: the international, consisting of the provisions of NAFTA and other related provisions such as GATT and its Codes of Conduct; and the domestic, which consists of special legal provisions such as the *Ley de Comercio Exterior*[65] and its regulation, the Organic Law of the Federal Public Administration (*Ley Orgánica de la Administración Pública Federal* [“LOAPF”]) that relates in matters of jurisdiction of the authorities, as well as the internal regulations of SECOFI and the delegatory directives that derive from these regulations.

As well, this Panel believes that the legislative history contained in the archives of the Congress of the Union, including the reasons for the initiatives and decisions of the Houses, and the debates of the Members of Congress should be considered. Also to be considered are the administrative practices of the Executive branch pursuant to its delegated powers. These consist in the execution of material acts, or acts that decide individual legal cases. These are defined by the Mexican writer of treatises Gabino Fraga,[66] who refers to the administrative

only for the effects of the safeguard of the review system. So the Constitution should not be a direct source of the grounds that the Panel uses to issue its final decision.

[65] It is important to note that the *Código Fiscal de la Federación* might eventually become a part of the legislation whose compliance must be safeguarded by the Panel, to the extent that article 85 of the *Ley de Comercio Exterior* recognises in it a supplementary character in the following terms: “In the absence of an express provision in this law in what relates to administrative procedures in the matter of unfair international trade practices and safeguard measures, supplementary the *Código Fiscal* will be applied, in accordance with the nature of this proceeding. This provision will not be applied in what relates to notices and verification visits”.

[66] Fraga Gabino, *Derecho Administrativo*. Mexico, Porrúa, 1968, at 62.

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acts carried out by the State in the exercise of its powers, applicable to a specific case.

Judicial precedents that a Panel in Mexico may or must apply are understood in two ways: those that imply a simple precedent or illustration, but do not bind the tribunal and cannot govern the determination of specific cases but rather may be cited as a persuasive reference, that have not attained the status of *jurisprudencia*.[67] In the opinion of Dr. Ignacio Burgoa,[68] "*Jurisprudencia* can be explained as the interpretation and construction of uniform legal considerations carried out by a judicial authority, empowered to this effect by the law, and regarding one or several special and determined points of law, that arise from a certain number of specific cases that are alike, considering that interpretations are binding on the hierarchical subordinates of the mentioned authorities, as are expressly mentioned by the law". This *jurisprudencia* is a source of Mexican Law,[69] since the Mexican legal system grants the thesis, presented in the determinations of certain judicial authorities, a binding character that should be observed by other judicial authorities of lower rank. For example, the *jurisprudencia* of the Supreme Court of Mexico which might be created by both the entire court or its chambers, compels the court itself, as well as the lower courts and that of the *Tribunal Fiscal de la Federación* that is created by the Superior Chamber.[70] In antidumping

[67] *Jurisprudencia* is to be distinguished from the principle in the common law known as *stare decisis*. *Jurisprudencia*, when established, is binding on a court of coordinate or lower rank in the judicial hierarchy. When established, it is also a source of Mexican law. *Jurisprudencia* is established when a certain number of specific decisions of a judicial authority designated by law to have the effect, are alike with respect to one or more points of law.
[68] Burgoa Ignacio, *El Juicio de Amparo*. Mexico, Porrúa, 1981, at.819.
[69] See: García Maynez, Eduardo. *Introducción al Estudio del Derecho.* Mexico, Porrúa, 1992. at 68.
[70] Art. 260 of the CFF.

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and countervailing cases, there is binding jurisprudence issued by the circuit courts, and the *Tribunal Fiscal de la Federación* by it superior chambers. In Mexico, *jurisprudencia* may provide law where there is a *vacuum* or *lacuna* in the law, but only to the extent that it fulfils the purpose of occupying the *vacuum* of law or *lacuna*.

Finally, concerning the orders and final decisions issued by other Panels, it is clear from paragraph 9 of NAFTA Article 1904, that while these cannot be invoked as binding precedents, they may be referred to a useful guide in order to clarify certain issues.

In summary, this is the legal framework that in accordance to paragraph 2, Article 1904 of NAFTA, a binational panel is obligated to apply in the same measure as a court of the importing party would do in order to decide if the determination of the investigating authority was issued in accordance to legal provisions in antidumping an countervailing matters.

In the following paragraphs of this opinion, the Panel examines each one of the issues raised by the Complainants or arising in the review as well as the responses to these issues. The Panel has applied the standard of review in the terms defined above to each one of these issues and defences, and examines the way in which the intermediate acts of the Investigating Authority and the Final Determination would be declared illegal according to the standard of review, and will issue its decision in the terms allowed by Article 1904(8) of NAFTA.

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IV. JURISDICTION OF THE PANEL

The Panel has jurisdiction to review the Final Determination issued by the Investigating Authority based on Articles 1904 and 1906 of NAFTA, and Articles 97 and 98 of the *Ley de Comercio Exterior*.

V. ISSUES IN LITIGATION

1. JURISDICTION OF THE *DIRECCIÓN GENERAL ADJUNTA TÉCNICA JURÍDICA*

TITAN, ALGOMA, STELCO and DOFASCO raised issues of competence individually through their Complaints in this Panel proceeding. These Complainants say that the *Dirección General Adjunta Técnica Jurídica* ("DGATJ") performed certain administrative acts in the conduct of the proceeding, despite the fact that it lacked competence to carry out those acts. They claim that under Article 16 of the Mexican Constitution the administrative unit carrying out those actions must have had competence to do so. Under Article 16, that competence requires that the acting authority be legally created by law or regulation and that the entity must only act in accordance with the express authority granted by Mexican law.

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They argue further that since these requirements were not fulfilled in this situation, the Final Determination should be declared illegal under paragraph I of Article 238 of the Federal Fiscal Code. The Investigating Authority, in turn, in its response and during the public hearing, argued that the DGATJ had legal existence, in terms of Mexican law, and was legally empowered to carry out its acts during the proceeding.

The Panel believes that the issues of competence presented to it require a detailed analysis of the applicable legal provisions and the arguments raised by the parties. The main elements of this analysis will be reviewed in the following order

A) Jurisdiction of the Administrative Authorities in the Framework of the Mexican Legal System
B) Acts Specifically Challenged by the Companies
C) Legal Existence and Powers of the *Unidad de Prácticas Comerciales Internacionales*
D) Guidance from *Amparo* Judgments in Recent Years

A) Jurisdiction of the Administrative Authorities in the Framework of the Mexican Legal System

The LOAPF, which establishes the different departments and ministries, including SECOFI, specifies the jurisdiction and powers of subordinate entities within each ministry and secretariat. Articles 14, 16 and 18 of this law stated, at the relevant time:

Artículo 14. — "Al frente de cada Secretaría habrá un Secretario de Estado, quien para el despacho de los asuntos de su	**Article 14. —** "At the head of each Ministry, there shall be a Minister of State who will be assisted in matters under his jurisdiction by

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competencia se auxiliará por los subsecretarios, oficial mayor, directores, subdirectores, jefes y subjefes de departamento, oficina, sección, mesa, y por los demás funcionarios que establezca el reglamento interior respectivo y otras disposiciones legales.”	under secretaries, a chief of staff, directors, deputy directors, and directors and subdirectors of areas, offices, sections and subsections, and all other authorized persons mentioned in the appropriate internal regulation and in other legal provisions.”
Artículo 16. — “Corresponde originalmente a los titulares de las Secretarias de Estado y Departamentos Administrativos el trámite, y resolución de los asuntos de su competencia, pero para la mejor organización del trabajo podrán delegar en los funcionarios a que se refieren los artículos 14 y 15, cualesquiera de sus facultades, excepto aquellas que por disposición de la ley o del reglamento interior respectivo, deban ser ejercidas precisamente por dichos titulares... Los propios titulares de las Secretarías de Estado y Departamentos también podrán adscribir orgánicamente las unidades administrativas establecidas en el reglamento interior repectivo, a las subsecretarías, oficialía mayor, y a las otras unidades de nivel administrativo equivalente que se precisen en el mismo reglamento interior. Los acuerdos por los cuales se deleguen facultades o se adscriban unidades administrativas se publicarán en al *Diario Oficial de la Federación* .”	**Article 16. —** “The Secretaries of State and the heads of the Administrative Departments are responsible for the processing and resolution of matters within the jurisdiction of their respective ministries and agencies. However, in order to better organize their work, they may delegate any of their powers to the officials referred to in Articles 14 and 15, except for those powers that by law or in accordance with the respective internal regulation must be exercised personally by the Secretaries of State and the heads of the Administrative Departments... The Secretaries of State and the heads of the Administrative Departments may allocate organically the administrative units established in their respective internal regulations to the Under-secretaries, Chief of Staff, and other administrative units at an administrative level equivalent to those set out in such internal regulations. The agreements through which the powers are either delegated or granted to administrative units shall be published in the "*Diario Oficial de la Federación* .”
Artículo 18. — “En el reglamento interior de cada una de las Secretarías de Estado y Departamentos Administrativos, que será expedido por el Presidente de la República, se determinarán las atribuciones de sus unidades administrativas, así como la forma en que los titulares podrán ser suplidos en sus ausencias.”	**Article 18. —** “The functions of the administrative units of the Ministries and administrative departments, together with the manner in which they can be substituted during absences, are determined by the internal regulations of each Ministry or Administrative Department, which will be issued by the President of the Republic.” (Emphasis added)

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Thus, if an administrative unit within SECOFI is exercising powers, the functions of the unit must come from a "law" or from an "internal regulation" or "decree" issued by the President of the Republic.[71] A delegation of powers **to an administrative unit** must be published in the *Diario Oficial de la Federación* .[72] Secretaries of State may delegate their powers, except those that must be exercised personally, to the heads of administrative units that have been lawfully created, and to **other officials within those same units**.[73]

The LOAPF is based on, and implements, Article 90 of the Federal Constitution of Mexico, which states:

Artículo 90.— "La Administración Pública Federal será centralizada y paraestatal, conforme a la ley orgánica que expida el Congreso, la cual distribuirá los negocios del orden administrativo de la Federación que estarán a cargo de las Secretarías de Estado..."	**Article 90.—** "Federal Public Administration shall be centralized and decentralized according to the Organic Law issued by Congress, which shall distribute the business of the administrative order of the Federal Government, which shall be under the charge of the Secretaries of State..."

In addition, Article 89 of the Constitution confers related powers on the President of the Republic:

Artículo 89.— "Las facultades y obligaciones del Presidente son las siguientes:	**Article 89.—** "The power and duties of the President are the following:

[71] LOAPF, Article 16, 18.
[72] *Ibid.*, Article 16.
[73] *Ibid.*, Article, 14, 16.

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I. Promulgar y ejecutar las leyes que expida el Congreso de la Unión, proveyendo en las esfera administrativa a su exacta observancia; ...”	I. To promulgate and execute the laws enacted by the Congress of the Union providing for their exact observance in the administrative sphere; ...”

Mexico's Supreme Court has ruled that only a law, or the President of Mexico, acting through an Internal Regulation or a decree, may create or establish legal organisms of public administration, as can be seen in the following thesis:

“**FACULTAD REGLAMENTARIA. INCLUYE LA CREACION DE AUTORIDADES Y LA DETERMINACION DE LAS QUE ESPECIFICAMENTE EJERCITARAN LAS FACULTADES CONCEDIDAS.**	“**THE REGULATORY POWER ENCOMPASSES THE POWER TO CREATE AUTHORITIES AND TO DETERMINE WITH PRECISION THOSE THAT WILL EXERCISE GIVEN POWERS.**
Está dentro de la facultad concedida al Presidente de la República por el artículo 89, fracción I, de la Constitución, crear autoridades que ejerzan las atribuciones asignadas por la ley de la materia a determinado organismo de la administración pública; igualmente, se encuentra dentro de dicha facultad el determinar las dependencias u órganos internos especializados a través de los cuales se deben ejercer las facultades concedidas por la ley a un organismo público... Además, al tratarse de un organismo que forma parte de la administración pública, aun cuando sea un organismo descentralizado, es precisamente el	It is within the regulatory power bestowed by Article 89 Section 1 of the Constitution on the President of the Republic, to create authorities which exercise the powers assigned by an applicable law to a particular organ of public administration. Similarly, it is within that power to determine the entities or specialized internal bodies through which the powers given to public bodies are to be exercised. . . . Furthermore, where a body which is part of the public administration is involved, even if it is a decentralized entity, it is precisely the President of the Republic, head of public administration, who is empowered by the Constitution to determine

[74] Segunda Sala. Semanario Judicial de la Federación. 8a. época, tomo III, primera parte, p. 277. Amparo en revisión 6458/85. Francisco Javier Vázquez Balderas. 10. de febrero de 1989. 5 votos. Ponente: Manuel Gutiérrez de Velasco. Secretaria: Rosalba Becerril Velázquez. Amparo en revisión 1129/88. Compañía Mexicana de Ingeniería, Sociedad Anónima. 8 de junio de 1988. Unanimidad de votos. Ponente: Atanasio González Martínez. Secretaria: Alicia Rodríguez Cruz de Blanco (8a. época, tomo I, primera parte 1, p. 223). Amparo en revisión 480/84. Compañía Minera Río Colorado, S. A. 23 de agosto de 1984. Unanimidad de 4 votos. Ausente: Santiago Rodríguez Roldán. Ponente: Carlos del Río Rodríguez. Secretaria: Diana Bernal Ladrón Guevara (7a. época, vols. 187-192, tercera parte, p. 65)

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Presidente de la República, titular de esa administración pública, quien constitucionalmente está facultado para determinar los órganos internos que ejercerán las facultades otorgadas por la ley, a efecto de hacer posible el cumplimiento de ésta."	the internal organs which will exercise the powers granted by the law, in order to carry out such law."[74]

According to this thesis, there is a serious question whether the DGATJ had legal existence as an independent legal entity within SECOFI. The DGATJ is not expressly mentioned in any law or in any internal regulation or decree issued by the President of the Republic.

The Investigating Authority argues, however, that according to Mexican law, general directorates can be created in generic form in the laws issued by Congress, especially by the LOAPF in Article 14.[75]

This Panel disagrees with this argument by the Investigating Authority, because the Supreme Court and other Mexican courts have clearly established the requirement that the existence of an administrative authority must be provided expressly in a law, internal

[75] This same position was adopted by the Binational Panel in Case MEX-96-1904-03. For the reasons offered above, this panel respectfully disagrees with this opinion.

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regulation or decree of the President. It is incorrect to conclude that administrative authorities can be created in a generic form.

This requirement has been ratified in recent years in several *amparo* proceedings by the Fourth Federal District Judge of the Federal District. The federal judge granted protection under the *amparo* law to several US steel exporters against a Final Determination issued by SECOFI in an antidumping investigation[76]. In these *amparo* proceedings, the companies argued the lack of competence of two administrative units of SECOFI (the *Dirección General de Prácticas Comerciales Internacionales* ["DGPCI"] and the *Dirección de Cuotas Compensatorias* ["DCC"]). In his decisions the federal judge confirmed the lack of competence of both units because they were not expressly contained in a legal document.[77]

SECOFI, however, also argued in its brief and in the public hearing that **all** the acts challenged by the Complainants were acts carried out by the International Trade Practices Unit or UPCI, the administrative unit with competence to conduct antidumping investigations, and that the director of the DGATJ acted on behalf of UPCI with express delegation of powers by UPCI.[78] The Complainants argued that no official or administrative unit could act on behalf of another administrative unit, or be delegated powers to act on its behalf, unless it

[76] See:, *Amparos* 193/93; 194/93 y 195/93

[77] One of these *amparo* decisions has recently been upheld on appeal. The court in this appeal upheld an *amparo* based on the lack of competence of the administrative unit because it was not listed in the applicable Internal Regulation of SECOFI. Quinto Tribunal Colegiado en Materia Administrativa del Primer Circuito. Amparo en_revisión 3005/94 (*Amparo* Decision No. 194/93), June 24, 1996

[78] See: the English version of the transcript of the Public Hearing, pp. 74, *ff*.

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expressly had legal existence in some legal provision.

Regarding this issue, this Panel believes that an interpretation of Articles 14 and 16 of the LOAPF permit it to reach the conclusion that an administrative unit, lawfully established and with competence to act in certain areas can validly delegate certain powers to **officials (*funcionarios*) who belong** to the same administrative unit which delegates. To this extent it is possible for the director of the DGATJ to have acted lawfully as a delegate of UPCI.

In support of this conclusion this Panel will examine: **B)** the specific acts challenged by the companies; **C)** the legal existence and powers of the *Unidad de Prácticas Comerciales Internacionales* (UPCI); and **D)** guidance from past *amparo* decisions in recent years.

B) Acts Specifically Challenged by the Companies

The specific acts as shown in the administrative record are of the following types:

a) Resolutions accepting the petition of the domestic industry and several notifications informing of the initiation of the antidumping proceeding;[79]

b) Resolutions acknowledging the receipt of various pleadings and submissions from the Complainants, AHMSA, HYLSA, and other interested parties;[80]

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c) Notices sent to the exporters informing them of the initiation of the antidumping proceeding, and enclosing an antidumping questionnaire. In addition, these notifications purported to state a deadline by which a response to the questionnaire was required and warned of certain consequences if responses were not submitted;[81]

d) Resolutions granting a deferral for submitting information;[82]

e) Resolutions requiring additional information;[83]

f) Resolutions giving notification of the Preliminary Determination;[84]

g) Notifications regarding access to confidential information;[85]

h) Notifications regarding the treatment and classification of privileged information, and several resolutions refusing to grant the treatment of privilege to information submitted;[86]

i) Notifications informing all interested parties of the date for the public hearing;[87] and

j) Notifications informing all the interested parties of the Final Determination.[88]

All of the above documents in these categories begin by identifying the following entity:

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[79] See: Administrative Record, CV, Nos. 15, 17, 19, 20, 22, 24, 25, 28, 30, 32, 35, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 56, 58, 60, 61, 62, 63, 64, 66, 68, 72, 74, 75, 76, 77, 78, 79, 81, 82, 84, 85, 87, 89, 90, 92, 93, 95, 97, 98, 99, 100, 101, 102, 103, 104, 105, 107, 110, 112 y 114.
[80] *Ibid.*, Nos. 118, 148, 150, 151, 154, 156, 157, 161, 162, 164, 167, 168, 171, 173, 176, 178, 180, 184, 186, 187, 188, 190, 193, 196, 197, 199, 201, 203, 205, 207, 210, 214, 215, 235, 247, 248, 251, 253, 255, 256, 261, 263, 265, 268, 272, 304, 306, 313, 316, 318, 320, 480, 482, 505, 514, 565, 567, 584, 618, 630, 634, 635, 638, 676, 679, 687, 689, 691, 693, 698, 702, 704, 706, 711, 742, 745 y 747.
[81] *Ibid.*, Nos. 213, 218, 220, 221, 222, 223, 225, 227, 229, 232 y233.
[82] *Ibid.*,Nos. 115, 179 y 213.
[83] See: the Administrative Record, Public Version ("PV"), Nos. 302, 303, 308, 309, 310, 352, 354, 356, 358, 360, 362, 364, 366, 369, 373, 375, 377, 379, 383 and 384.
[84] *Ibid.*, Nos. 418, 419, 420, 421, 422, 423, 424, 426, 428, 430 and 432.
[85] See: Administrative Record, CV, Nos. 238 and 241.
[86] *Ibid.*, Nos. 243, 244 and 245.
[87] See: the Administrative Record, PV, Nos. 644, 646, 648, 650, 652, 654, 662 and 663.

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"UNIDAD DE PRÁCTICAS COMERCIALES INTERNACIONALES".

In some of these documents, the following name is added to the *Unidad de Prácticas Comerciales Internacionales*:

"DIRECCIÓN GENERAL ADJUNTA TÉCNICA JURÍDICA"

In all of the notifications regarding the Final Determination, the following name is added to the name of the two former administrative entities:

"DIRECCIÓN DE PROCEDIMIENTOS Y PROYECTOS"

C) Legal Existence and Powers of the *Unidad de Prácticas Comerciales Internacionales*

After carefully analyzing all of the above documents, this Panel believes that they can be considered as acts carried out by UPCI, and that this entity delegated to the official that signed them, the legal powers to issue them as well.

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[88] *Ibid.*, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740 and 741.

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Our position is based upon the following:

First, Article 33 section 1 of the April 1, 1993, internal regulation of SECOFI gives to UPCI the express powers, "to investigate, carry out and determine the investigation and administrative procedures on unfair international trade practices..." Likewise, paragraph IV of the same article gives UPCI the power to "request documents from the ... exporters".

Second, all of these documents appear as documents of UPCI. This is the first administrative entity that is mentioned in each one of these documents. Immediately after the date of each document, there is a code number identifying the verification order as an UPCI document. For example, the verification order of November 5, 1993, to Productos Estampados de México, S.A. de C.V., is identified as Document No. UPCI.211.93.3741. Also, the two officials mentioned in these documents are described as officials of UPCI.[89]

Third, there were two legally valid provisions during the time of the investigation that delegated power to the Directors of UPCI and its officials to "sign requests for information, data and documents, and in general to issue official administrative documents related to the activities that are under their responsibility". The first was the *Acuerdo* [Agreement] *que Adscribe Unidades Administrativas y Delega Facultades en los Subsecretarios, Oficial Mayor, Directores Generales y Otros Subalternos de la SECOFI*, dated September 12, 1985, and the second was the *Acuerdo que Adscribe Orgánicamente unidades Administrativas y Delega Facultades en los Subsecretatios,*

[89] Mr. Velázquez Elizarrás is the one who signs all the Doc.s, with the exception of the notifications of the Final Determination, which is signed by Mr. Juan Saldaña.

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Oficial Mayor, Jefes de Unidad, Directores Generales y Otros Subalternos de SECOFI, published in the *Diario Oficial* on March 29, 1994. The first of the previously mentioned "Acuerdos" contained an Article 6 which established that:

"A fin de agilizar el despacho de los asuntos **dentro de las unidades administrativas competentes, se faculta a los Directores y Subdirectores de Area, Jefes y Subjefes de Departamento, Jefes de Oficina, Delegados, Subdelegados y Jefes de Departamento de las Delegaciones Federales**, para que firmen las formas en que se determinan los derechos que se causen; las órdenes de inspección y visitas domiciliarias; <u>los requerimientos de informes, datos, documentos y, en general, los oficios de trámite relacionados con las actividades que tengan a su cargo</u>."	"In order to facilitate matters **pertaining to the competent administrative units, powers are bestowed upon Area Directors and Subdirectors, Departmental Chiefs and Subchiefs, Office Chiefs, Delegates, Subdelegates and Departmental Chiefs of Federal Delegations**, in order for them to sign the forms that establish any fees to be charged, orders regarding inspections and domiciliary visits, <u>requests for information, data and documents, and in general to issue official administrative documents related to the activities that are under their responsibility</u>."[90] (Emphasis added).

At the same time the validity of this agreement was ratified by the *Acuerdo de Adscripción Orgánica y de Delegación de Facultades* published in the *Diario Oficial* on April 3, 1989.[91] The latter *Acuerdo* states (in the second transitional provision):

[90] See: *Acuerdo que adscribe unidades administrativas y delega facultades en los Subsecretarios, Oficial Mayor, Directores Generales y otros subalternos de la Secretaría de Comercio y Fomento Industrial*, published in the *Diario Oficial*, on Thursday, September 12, 1985, p. 19.

[91] See: *Acuerdo por el que se adscriben orgánicamente las unidades administrativas de la Secretaría de Comercio y Fomento Industrial*, published in the *Diario Oficial* on Monday April 3, 1989, p. 22.

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"Los Acuerdos publicados en el *Diario Oficial de la Federación* los días 12 de septiembre de 1985 y 5 de abril de 1988, los que respectivamente delegan facultades en los Subsecretarios, Oficial Mayor, Directores Generales y otros subalternos de la Secretaría de Comercio y Fomento Industrial y determinan la Organización de las Delegaciones Regionales y Federales de la Secretaría de Comercio y Fomento Industrial y establecen sus facultades, seguirán en vigor en lo que no se opongan al Reglamento Interior de esta Secretaría y al presente Acuerdo..."	"The Agreements published in the *Diario Oficial* on September 12, 1985, and April 5, 1988, which respectively delegate authority to the Subsecretaries, Chiefs of Staff, General Directors and others from the Secretaría de Comercio y Fomento Industrial and determine the organization of the Federal and Regional Delegations of SECOFI and establish their powers, will continue to be in force as long as they do not contravene the Internal Regulation of this Secretariat and the present Agreement..."

The 1985 *Acuerdo Delegatorio* remained in effect until it was superseded by the second transitional provision of the *Acuerdo Delegatorio* of SECOFI, published in the *Diario Oficial de la Federación* on March 29, 1994:

"Se abroga el Acuerdo que adscribe Unidades Administrativas y delega facultades en los Subsecretarios, Oficial Mayor, Directores Generales y otros Subaltemos de la Secretaría de Comercio y Fomento Industrial, publicado en el *Diario Oficial de la Federación* el 12 de septiembre de 1985, y sus reformas."	"This abrogates the Agreement that assigned Administrative Units and delegated powers to Subsecretaries, Chiefs of Staff, Directors General and other lower ranking officials of the Secretariat of Commerce and Industrial Development, published in the Official Gazette of the Federation on the 12th of September, 1985, and its amendments." [92]

This same *Acuerdo* of 1994, however, established in Article 5, Section VIII, that all the powers granted to the Chief Officer of UPCI were delegated to the *Director General Adjunto*

[92] See: *Diario Oficial*, 29 de marzo de 1994, p. 12.

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Técnico Jurídico, and in his absence, in the *Director de Procedimientos y Proyectos*.

Consequently, according to the *Acuerdo* of 1985 and its reforms, and of the *Acuerdo* of 1994, the *Director General Adjunto Técnico Jurídico* and the *Director de Procedimientos y Proyectos* had the power to issue the acts challenged by the Complainants in their Brief.

The language of the September 12, 1985 *Acuerdo Delegatorio*, and of the 1994 *Acuerdo* is important. These texts expressly delegate the power to:

"los requierimientos de informes, datos, documentos y, en general, los oficios de trámite relacionados con las asctividades que tengan a su cargo",	"sign requests for information, data and documents, and in general to issue official administrative documents related to the activities that are under their responsibility",

and to:

"expedir los oficios, notificaciones, acuerdos y comunicaciones relacionados con el trámite y resolución de los procedimientos administrativos de investigación en materia de prácticas desleales de comercio internacional..."	"issue the notifications, resolutions and communications related to the conduct and resolutions of the administrative proceedings on matters of unfair trade practices...",[93]

respectively, in the Directors of UPCI as its officials. In addition, **the text does not delegate the authority to other administrative units such as Directorates (*Direcciones*). Instead, the**

[93] And in general, all other powers bestowed in the Chief Officer of UPCI. See: Acuerdo Delegatorio of 1994, article 5, section VIII, subsections a) to r).

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delegation is made to individuals such as Directors (*Directores*) and Chiefs (*Jefes*) and, in the case of the 1994 *Acuerdo*,

"**[al] Director General Adjunto Técnico Jurídico y en su ausencia al Director de Procedimientos y Proyectos**".	"**to the General Adjunct Legal Technical Director, and in his absence to the Director of Procedures and Projects**". (Emphasis added)

One can argue that according to the *Acuerdo Delegatorio* of 1985, which was confirmed by that of 1994 one, the Officials authorized to conduct the investigation were the Area Director and Subdirector, and that Mr. Velázquez Elizarrarás, in conducting the investigation during April 1993, the time when the Interior Regulations of SECOFI appeared, and March 1994, the time in which the new *Acuerdo Delegatorio* was published, acted as *Director General Adjunto* and not Area Director. In this respect, it is important to take into account the third transitional provision of the Internal Regulation of SECOFI of April 1993, which provides:

"en aquellos casos en que algún ordenamiento haga referencia a unidades administrativa cuya denominación haya sido cambiada o haya sufrido alguna fusión o modificación en los términos del presente reglamento, la competencia específica se entenderá a favor de la unidad administrativa con la denominación establecida en dicho reglamento o de la que conforme al mismo asuma la función correspondiente".	"in those cases in which any legal provision makes reference to an administrative entity whose name has been changed, or has undergone a merger or reorganization in terms of the present regulation, the specific competence will be understood to have been adopted by the new administrative entity with the new name established in the present internal regulation, or to the one which, according to this regulation, will carry out the corresponding functions".

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It is clear that before the appearance of this internal regulation, the administrative unit with competence to investigate unfair trade matters delegated the authority to conduct proceedings to Area directorates or Subdirectorates. When UPCI appeared, it began to delegate authority in officials whose name changed to Directores Generales Adjuntos, and these assumed the roles of the former Area Director. This interpretation is confirmed if we take into account that when the new *Acuerdo Delegatorio* of 1994 appeared, it clearly established that the legal powers of the Chief Officer of UPCI were delegated to the *Directores Generales Adjuntos*.

While it is true that, normally, a Director is the person in charge of a separate administrative unit, such as a Directorate (*Dirección*) or a Department (*Departmento*), we are not, however, aware of any jurisprudence that requires that a delegation from one lawfully established unit be made **only to a second lawfully established entity**. Instead, it appears that a proper delegation may **also** be made by a lawfully established unit to any official who is also **within that same administrative unit**. The LOAPF thus provides:

Artículo 14.— "Al frente de cada Secretaría habrá un Secretario de Estado, quien para el despacho de los asuntos de su competencia se auxiliará por los subsecretarios, oficial mayor, directores, subdirectores, jefes y subjefes de departamento, oficina, sección, mesa, **y por los demás funcionarios que establezca el reglamento interior respectivo y otras disposiciones legales**."	**Article 14.—** "At the head of each Ministry, there shall be a Minister of state who will be assisted in matters under his jurisdiction by under-secretaries, a chief of staff, directors, deputy directors, and by directors and subdirectors of areas, offices, sections and subsections, **and all other authorized persons mentioned in the appropriate internal regulation and in other legal provisions**."
Artículo 16.— "Corresponde originalmente a los titulares de las Secretarías de Estado y	**Article 16.—** "The Secretaries of State and

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Departamentos Administrativos el trámite, y resolución de los asuntos de su competencia, pero para la mejor organización de trabajo **podrán delegar en los funcionarios a que se refieren los articulos 14 y 15**, cualesquiera de sus facultades, excepto aquellas que por disposición de la ley o del reglamento interior respectivo, deban ser ejercidas precisamente por dichos titulares..."	the heads of the Administrative Departments are responsible for the processing and resolution of matters within the jurisdiction of their respective ministries and agencies. However, in order to better organize their work, they **may delegate** any of their powers **to the officials referred to in Articles 14 and 15**, except for those powers that by law or in accordance with the respective internal regulation must be exercised personally by the Secretaries of State and the heads of the Administrative Departments..." (Emphasis added).

Both Articles 14 and 16 contemplate a delegation to individuals as well as to administrative units. There is no requirement that an official to whom powers are delegated must be in a **different** administrative unit. Rather, the official may be in the same administrative unit, as is the case here with UPCI.

In summary, Mr. Velázquez and Mr. Saldaña were officials of UPCI , and had been delegated by UPCI the authority to carry out acts challenged by the Complainants.

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D) Guidance From *Amparo* Judgments in Recent Years

In a preceding paragraph the Panel made reference to the *amparo* decisions of a federal judge that declared the incompetence of two administrative units of SECOFI. This Panel does not consider these decisions as applicable to the present case, since the challenged acts in those cases came from officials within administrative units that lacked legal existence. In the present case, the challenged acts were carried out by a legally established administrative entity (UPCI), which delegated authority, clearly established in two *Acuerdos Delegatorios*, to two officials working within UPCI. We believe this interpretation is consistent with a principle of interpretation expressly recognized by the Mexican courts, which requires that whenever there are two possible contradictory principles of interpretation, the court shall use the one that results in the least legal uncertainty. If one is to accept that the delegation of powers can only take place between two independent administrative units,[94] then one would be forced to accept that the *Acuerdos Delegatorios* lacked legal rationale, since precisely what they do is to establish delegation of powers on officials within the same administrative unit and thus it could not actually be applied.[95]

[94] This principle was cleary recognised by the majority of the Binational Panel in case MEX-94-1904-02. For the reasons mentioned above, this Panel respectfully disagrees with this interpretation.
[95] See: the *Ejecutoria*: "Seguro Social. Notificaciones en el recurso de inconformidad ante él". *Instancia*: segunda sala. *Fuente*: Semanario Judicial de la Federación. Época: 6 A. Vol.n: XIV - página: 74.

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2. LATE ISSUANCE OF THE NOTIFICATION OF THE INITIATION OF THE INVESTIGATION

At paragraph 6.A.(1) of the Allegations of Errors of Fact or Law presented by the Complainants,[96] they state that the Investigating Authority violated Constitutional Articles 14 and 16,[97] LCE Article 53[98] and Article 142 of its Regulations,[99] and GATT Antidumping Code Article 6.6,[100] by not notifying the Complainants on time of the decision to initiate the investigation, and by omitting formal requirements that substantively affected their defences.

The Complainants stated, in their Brief, that "the Investigating Authority was obliged to notify them within thirty days following the publication of the Initial Determination."[101]

Notwithstanding the foregoing, in the Reply to the Investigating Authority's Brief,

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[96] Claims of TITAN, ALGOMA, DOFASCO and STELCO, p.. 3.

[97] **Article 14.-**

"[...]

Nobody may be deprived from life, freedom, properties, possessions or rights, but by means of a suit filed before the established courts, in which the essential formalities of procedure are fulfilled, and according to the laws issued before the fact."

Article 16.- "Nobody may be disturbed in his person, family, domicile, papers or possessions, but by virtue of a written notice given by a competent authority, that grounds and motivates the legal cause of the procedure."

[98] **Article 53.** "From the date in which the Initial Determination of the Investigation is published at the Federal Official Gazette, the Ministry must notify interested parties know to it, so that they may appear before it and present their position. To this end, the interested parties shall be granted a thirty day term, counted from the date of publication of the Initial Decision at the Federal Official Gazette, to submit their defence and the Doc.s upon wich they shall rely.

Along with the notice, the authority shall send a copy of the submitted application, and the attachments that do not contain confidential information or, as the case may be, the corresponding Doc.s related to investigations".

[99] **Article 142.** "The Ministry must notify on time and in writing to the interested parties the determination regarding the procedures referred herein."

[100] **Article 6.6.** "When the competent authorities are satisfied that there is sufficient proof to justify the commencement of an antidumping investigation according to Article 5, it shall notify the party or parties whose products will be subject to investigation, the interested exporters, importers that the investigating authority is aware of and the petitioners, and it shall publish the corresponding notice."

[101] Complainant´s Brief, p. 24.

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and to one of the Petitioners' Brief (AHMSA), the Complainants stated that they "do not allege the illegal notification of the Initial Determination, and therefore they ask the Panel members to not consider such argument..."[102] They then set forth that, "if the notification of the Initial Determination was not changed as illegal, it is because the Complainants considered it legal".[103] Finally, they argued that, "It is important for the Complainants to draw to the attention of the Panel members that they never alleged the illegality of the notification of the Initial Determination, therefore, the Panel must not take into account the arguments of AHMSA[104] in relation to this issue.

The Panel believes that, as was stated by the Investigating Authority,[105] and by one of the Petitioners (AHMSA),[106] the Authority published the Initial Determination of the Investigation in the *Diario Oficial* on October 28, 1993, prior to the notification given to the Complainants, and thus complied with all of the provisions related to procedures regarding notifications in this investigation as required by LCE Articles 52, Paragraphs I[107] and 53. It also complied with the principles of certainty and legality as set forth in Constitutional Articles 14 and 16, since, as was demonstrated in the administrative record, the Complainants[108] had the

[102] Answer to the Investigating Authority's Brief, p. 20.
[103] *Op. cit.*, p. 21.
[104] Answer to AHMSA's Brief, p. 7.
[105] Investigating Authority's Brief, p.s 72, 73 and 74.
[106] AMHSA's Brief, p.s 11, 12 and 13.
[107] **Article 52.** "Within a thirty day term from the filing of the petitions, the Ministry shall:
I. Accept the petition and shall declare the beginning of the investigation through the corresponding decision that shall be published at the *Diario Oficial*".
[108] See: footnote at the Investigating Authority's Brief, p. 73.

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opportunity to file arguments and evidence, in defence of their interests. Accordingly, paragraph II of Article 238[109] of the FFC, invoked by the Complainants, was not breached.

If the Complainants considered the notification of the Initial Determination an irregularity, they could have raised this defence within thirty days following the publication of the Initial Determination in the *Diario Oficial*, as set forth in LCE Article 53. By not doing so, the notifications were presumably agreed to, and therefore, are valid.

Finally, as indicated above, the Complainants considered the Initial Determination to be legal, and thus, contradicted themselves in their original Claim and in their Brief.

Accordingly, the Panel has concluded that the allegation of the Complainants is not legally founded, and that the Investigating Authority complied with the formal requirements set forth by the LCE, by adequately giving notification of the Initial Determination. Therefore, paragraph II of Article 238 of the FFC was not breached.

[109] **Article 238.** "An administrative decision shall be declared illegal when one of the following causes is demonstrated:
[...]
II. Omission of the formal requirements obliged by law that affects the defences of the persons and goes beyond the sense of the disputed decisions including, as the case may be, the absence of foundation and motivation."

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3. ACCEPTANCE OF THE REQUEST FOR THE INITIATION OF THE INVESTIGATION BEYOND THE DEADLINE

In the Allegations of Errors of Fact or Law presented by the Complainants in their Claims,[110] they state that the Investigating Authority, by untimely accepting the request of the initiation of the investigation filed by the Petitioners, infringed LCE Article 52, GATT Antidumping Code Article 1[111] and the NAFTA principle of transparency established for any procedure.

The Complainants stated that on August 4, 1993, the Petitioners, through their legal counsel, appeared before the Investigating Authority to request the application of an antidumping duty regime, and of the initiation of antidumping and countervailing duty investigations over the imports of plate originating and coming from, among other countries, Canada.

On October 28, 1993, the decision accepting the request and declaring the initiation of the antidumping and countervailing duty investigation over the imports on plate was published in the *Diario Oficial* ("Initial Determination").

The Complainants state that by calculating time pursuant to the terms established in

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[110] Claims of TITAN, ALGOMA, DOFASCO and STELCO, p. 5.

[111] **Article 1.** "The establishment of an antidumping right is a measure that only has to be adopted in the circumstances set forth in Article VI of the General Agreement by virtue of the beginning of an investigation carried out according to the provisions of this Code. The following provisions shall rule the application of

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the relevant LCE article, the error of the Investigating Authority was clear, because it accepted the Petitioners request when it was out of time. The deadline to issue the Initial Determination was on September 15, 1993, and it was in fact issued on October 28, 1993. Therefore, the Complainants argue that they were left defenseless, because they did not know of the existence or result of the request.

By virtue of the foregoing, the Complainants argue that the Investigating Authority, by admitting beyond the time limit the request for investigation filed by the Petitioners, did not comply with the formal applicable legal requirements, and thus seriously affected the defence of the Complainants, and moreover, breached paragraph II of Article 238 of the FFC.

In the reply to the Investigating Authority's Brief,[112] and to the Petitioners' Briefs,[113] the Complainants reserved their right to verify the facts described in pages 12 and 13 of AHMSA's Brief, 25 of HYLSA's Brief, and 91 and 92 of the Investigating Authority's Brief, upon receipt of access to the confidential information.

Regarding confidential information, the Panel notes that the Investigating Authority granted access to the Complainants to see the confidential information. Legal counsel of the Complainants did not examine the confidential information, as expressly stated during the

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Article VI of the General Agreement provided that they take measures according to the antidumping laws or regulations."

[112] Answer to the Investigating Authority's Brief, p.s 28 and 29.

[113] Answer to HYLSA's Brief, p. 8 and Answer to AHMSA's Brief, p. 7.

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public hearing[114] and, accordingly, the Complainants lost the opportunity to verify the facts contained in the pages set forth at the above paragraph of the Investigating Authority's Brief and of the Petitioners' Briefs.[115]

Notwithstanding the foregoing, this Panel reviewed in detail the administrative record and accepts what was argued by the Investigating Authority and by the Petitioners; namely, that the Initial Determination was within the time limits. The Complainants made an incorrect interpretation of LCE Article 52 and of GATT Antidumping Code Article 1. Even though the petition was not accepted within the 30 days established in Article 52, the Complainants did not take into consideration paragraph II of Article 52,[116] which states that the Investigating Authority can request the Petitioners to provide additional proof or data, and that this must be provided within a 20 day period, and if the Petitioners provide such information, the Investigating Authority then has another 20 day period to accept the request, and to declare the initiation of the investigation through a decision that must be published in the *Diario Oficial*.

[114] English Version of the Public Hearing, p. 134.

[115] With the exceptions expressed by this Panel in the Resolution of the Pending Motion of July 8, 1997. See: *supra*, Section on Resolution of Pending Motions.

[116] **Article 52.** "Within a thirty day term from the filing of the petitions, the Ministry shall:

I. Accept the petition and shall declare the beginning of the investigation through the corresponding Decision that shall be published at the Federal Official Gazette.

II. Require to the petitioner more evidentiary or data elements, which should be furnished within a term of 20 days counted from the reception of the request. If the request is satisfactorily complied with, in a twenty day term the Ministry shall proceed pursuant to the above mentioned fraction. If the elements are not furnished in abandoned time and manner required, the petition should be considered as abandoned and the petitioner shall be personally notified, or..."

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In fact, the Petitioners, first, filed the petition of the initiation on August 4, 1993.[117] Secondly, the Investigating Authority, by means of the official letters UPCI.93.211.2983 and UPCI.93.211.2984 dated September 13, 1993,[118] required from the Petitioners additional information related to the application of the reconstructed value as a normal value. This requirement was fulfilled within the 30 day period set forth in Article 52 of the Foreign Trade Law. Thirdly, the Petitioners provided the information mentioned on September 27, 1993.[119] Fourthly, the 20 day period to comply with the stated requirements expired on October 12, 1993. Fifthly, the Investigating Authority issued the Initial Determination on October 15, 1993, which was published in the *Diario Oficial* on October 28, 1993,[120] *i.e.*, within the 20 business days stated in LCE Article 52.

Taking into account the foregoing, the time that can elapse between the request for additional information and the publication of the initiation may extend to 70 business days. If the request for the initiation of the investigation was submitted on August 4, 1993 and on October 28, 1993, the Initial Decision was published in the *Diario Oficial* the time period was 60 days.

The Panel concludes that the allegation raised by the Complainants has no legal

[117] See: Administrative Record, CV, Vols. 1-11, Nº 1, Folio 930690.
[118] See: Administrative Record, CV, Vol. 12, Nº 6.
[119] See: Administrative Record, CV, Vol. 12, Nº 8, Folio 9303 690.
[120] See: Administrative Record, CV, Vol. 10, Nº 14.

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foundation and is therefore invalid. The Investigating Authority complied with the formal requirements set forth in LCE Article 52 and GATT Antidumping Code Article 1. Therefore, paragraph II of Article 238 of the FFC relied on by the Complainants was not breached.

4. LATE ISSUANCE OF THE NOTIFICATION OF THE PRELIMINARY AND FINAL DETERMINATIONS

In their Brief, the Complainants state that the Investigating Authority violated Constitutional Articles 14 and 16, LCE Articles 57 and 59[121] and Article 142 of its Regulations, and GATT Antidumping Code Article 7.7,[122] by serving the notifications of the Preliminary and Final Determination to the Complainants beyond the time deadline, and by omitting the formal requirements that substantively affected their defences.

The Preliminary and Final Determination were published in the *Diario Oficial* on the following dates:

a) On April 18, 1995, the Preliminary Determination was published and in that,

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[121] **Article 57.-** [last paragraph] "The Preliminary Determination must be notified to the interested parties and must be published at the Federal Official Gazette."
Article 59.- [last paragraph] "The Final Determination must be notified to the interested parties and must be published in the Federal Official Gazette."
[122] **Article 7.7.** "When according to what it is set forth in paragraph 1 of this Article an antidumping investigation is suspended or concluded or when a commitment expires, this fact shall be officially noticed and shall be published. In the corresponding notices, at least the basic conclusions should be stated and a summary of the reasons that justify such conclusions".

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determination the Investigating Authority decided to continue with the investigation, without imposing an antidumping duty related to the imports of the investigated product originating in and coming from, among other countries, Canada.

b) On December 28, 1995, the Final Determination regarding the imports of the investigated product originating in and coming from, among other countries, Canada, was published.

The Investigating Authority notified the Complainants of the Preliminary and Final Determinations on April 20, 1995, and on January 9, 1996, respectively.

The Preliminary and Final Determinations must be published in the *Diario Oficial* according to Articles 52, 57 and 59 of the LCE.

The Claimants state that according to Articles 57 and 59, the Investigating Authority is obliged to give personal Notification of the Preliminary and Final Determination to the Parties before publication in the *Diario Oficial*.

Nevertheless, in accordance with Articles 57 and 59 of the LCE, this Panel concludes that the publication of the respective Determinations in the *Diario Oficial* is enough for them

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to enter into legal force, independent of whether the notification of them (personal notification is not compulsory) is done before of after publication.

It is worth noting that the notifications were done on time and in form to all Parties, and as such the Complainants were never left in a state of legal defenselessness. If the Complainants believed the notification of the Preliminary Determination was an irregularity, this could have been raised within thirty days following the publication of this Determination, as set forth in its paragraph 357. By not doing so, the notifications were presumably consented to and therefore are valid.

Therefore, paragraph II of Article 238 of the FFC was not breached. The Investigating Authority complied with all the formal requirement of the LCE and its Regulations, and the defence of the Complainants was not affected.

5. LATE ISSUANCE OF THE PRELIMINARY AND FINAL DETERMINATIONS

The Complainants stated in their Claims[123] that the Investigating Authority seriously infringed Constitutional Articles 14 and 16, FTL Articles 57 and 59,[124] and GATT

[123] Claims of TITAN, ALGOMA, DOFASCO and STELCO, p. 4.
[124] "**Article 57.** Within 130 days term, counted from the date following the publication of the initial Decision of the investigation at the Federal Official Gazette, the Ministry shall issue the preliminary Decision, by means of which it may: ..."
"**Article 59.** Within 260 days term, counted from the date following the publication of the initial Decision of the investigation at the Federal Official Gazette, the Ministry shall issue the final Decision ..."

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Antidumping Code Articles 5.5 and 6.7,[125] by not issuing the Preliminary and Final Determinations on time. They also argued that the Investigating Authority also infringed paragraph III of Article 215 of the Criminal Code[126] because the competent officer of the Investigating Authority abused his authority by not issuing the Preliminary and Final Determinations on time.

The Complainants stated that between the date of the notice of the initiation of the investigation published in the *Diario Oficial* on October 28, 1993, and the date of issuance and publication of the Preliminary Determination on April 18, 1995, more than 130 days elapsed. They also stated that more than 260 days elapsed between the date of the decision to initiate the investigation and the issuance and publication of the Final Determination on December 28, 1995.

The Investigating Authority in its Brief[127] noted that the reason for exceeding the time limits set forth in LCE Articles 57 and 59 was because GATT Antidumping Code Article 5.5 permitted the extension of time limits to issue the Preliminary and Final Determinations in exceptional circumstances. Notwithstanding the foregoing, during the Public Hearing,

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[125] "**Article 5.5.** Except for exceptional circumstances, the investigations must be concluded within a year counted from the date of its initiation."

[126] "**Article 215.** Official servants commit the offence of abusing of their authority when they incur in some of the following infractions:

[...]

III. When they unduly retard or deny the particulars the protection or the service that they are obliged to grant them or hinders the submittal or the course of a petition;"

[127] Investigating Authority's Brief, pp. 74-80.

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counsel for the Investigating Authority recognized that such exceptional circumstances were not brought to the Complainants' attention.

Moreover, the Investigating Authority and the domestic industry stated that the investigation due to unfair legal practices of the investigated product was characterized as a complex process for the following reasons:

a) It was a dumping and countervailing duties investigation.

b) The process was carried out jointly with two other steel investigations (cold rolled steel and hot rolled steel plate).

c) In the three steel investigations, several exporters from nine countries were investigated.

d) There were about twenty importers involved.

e) There was a need to obtain numerous documents of various types of subsidies from the governments of the United States of America, Venezuela and Brazil.

f) The end of the investigation was affected by two more events following the public hearing; an expert proof applied for by the enterprise Hogoverns Groep B.V. and SIDOR; and the submission and analysis of price commitments promoted by the last enterprise.

Under these conditions, the investigation of price discrimination and subsidies could

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not be subject to the regular time limits of a normal investigation and, given the extraordinary characteristics of the investigation procedures carried out, this procedure was subject to Article 5.5. of the GATT Antidumping Code.

This Panel considers that although the Investigating Authority in its Brief invoked GATT Antidumping Code Article 5.5., such argument is dismissed by this Panel. In the view of the Panel, the Investigating Authority had to base its Final Determination in Article 5.5 and it failed to do so.

The Panel concludes that there was always certainty with respect to the legal situation of the Complainants.

Regarding the Initiation decision, the Complainants were notified of the initiation of the investigating procedure, and they were given the opportunity to appear before the Investigating Authority to support their interests and rights.

In paragraph 112 of the Initiation decision a 30 day period, from the date upon which that decision took effect, was allowed the importers, exporters, foreign juridical persons that had an interest in the result of the investigation to appear before SECOFI to argue their interests and file their questionnaires.

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Notwithstanding the foregoing, the Complainants ALGOMA, STELCO and DOFASCO did not appear before the Authority, and only TITAN completed the questionnaire requested by SECOFI.

Regarding the Preliminary Determination issued on April 18, 1995, it is also clear the Complainants had legal certainty, as the Investigating Authority decided not to impose provisional countervailing duties, but continued with the administrative investigation. At paragraph 357 of the Preliminary Determination, the Complainants were granted a 30 day period, counted from the publication in the *Diario Oficial* so that the interested parties could submit additional evidence and arguments. None of the Complainants did this. Thus, it is clear the Complainants were not left defenseless.

This Panel notes that by giving timely notice to the Complainants of the Initiation decision and Preliminary Determination, these firms were able to appear before SECOFI. The legal counsel of record for the Complainants, Mr. Francisco Fuentes Ostos, who, notwithstanding his appearance before SECOFI, considered it unnecessary for his clients to answer the questionnaires directed to ALGOMA, STELCO and DOFASCO. He expressly stated this at the Public Hearing held on July 18, 1997.[128]

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[128] English version of the transcript of the Public Hearing, p. 133.

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Since, Mr. Francisco Fuentes Ostos appeared at the hearing before SECOFI during the administrative investigation, and as he is and has been the legal representative of all the Complainants throughout, it cannot be said that the Complainants other than TITAN were left in a state of legal defenselessness.

The Investigating Authority timely notified in writing the interested parties of the Initiation, and Preliminary Determination, as appears from the administrative record and gave the opportunity to the parties to file their defences before it. Regarding the Final Determination, although it was not notified within time, the Complainants were not left in a state of legal uncertainty as they possessed sufficient knowledge to elect the review which resulted in this proceeding. In summary, this Panel concludes that the Complainants were not left in a degree of legal uncertainty that would constitute a breach of paragraph III of Article 238 of the FFC.[129]

Notwithstanding that the Panel considers that, in this particular case, the defences of the Complainants were not affected by the Investigating Authority, this Panel notes that Article 5.5. of GATT Antidumping Code provides that "Investigations shall, except in special circumstances, be concluded within one year after their initiation." In opinion of this Panel, the inclusion of Article 5.5 in the Code was intended to ensure that administrative authorities in

[129] "**Article 238.** An administrative Decision shall be declared illegal when one of the following causes is demonstrated:
[...]
III. Vices of procedure that affect the defences of the private person and goes further in the sense of the disputed Decision."

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member countries did not unduly extend investigations as a means of mitigating potential negative impacts on trade.[130]

NAFTA Article 1904(2) specifically provides that for the purpose of Panel reviews "the antidumping and countervailing duties statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made part of this Agreement." Further, Article 1904(15), concerning amendments to domestic laws, is particularly important in respect of the requirements to be adopted by each Signatory Party to fulfil their NAFTA commitments. Paragraph (f) of the schedule for Mexico is most significant in this instance since it required Mexico to amend its antidumping/countervailing duties statutes to provide "explicit and adequate timetables for determinations of the competent investigating authority ..." The time frames set out in Articles 52, 53, 57 and 59 of the LCE appear to be consistent with this requirement. It is relevant to note in this connection that the timeframes provided for in the NAFTA essentially mirror comparable provisions found in the laws of both Canada and the United States and would appear to be in keeping with one of the underlying objectives of NAFTA (Article 1902(2) (d) (ii).[131]

The investigation of imports of steel plate from Canada was initiated in the fall of 1993, shortly after the time limits were adopted in the NAFTA (July 27, 1993) and just prior to the

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[130] This provision was reinforced in the negotiation of the WTO Uruguay Round that regulates the application of GATT Article VI of 1994. Article 5.10 of this Agreement establishes a term of 18 months during which the antidumping investigations shall be concluded. This Agreement is effective as of January 1, 1995.

[131] NAFTA Article 1902 (2) (d) (ii) states that "the object and the purpose of this Agreement and this Chapter, which is to establish fair and predictable conditions for the progressive liberalisation of trade between the Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices, such object and

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coming into force of NAFTA on January 1, 1994. Moreover, the maximum time limit for investigations provided for in the new WTO Agreement appears to be applicable only to investigations initiated after January 1, 1995. As it seems clear that since this investigation was initiated before these new international agreements took effect, their time limits do not apply in this case. The first indication that the Investigating Authority intended to rely on GATT Code Article 5.5 rather than in NAFTA to justify it's lengthy investigation was only provided in response to the Brief submitted by the Complainants on July 26, 1996.

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

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purpose to be ascertained from the provisions of this Agreement, its preamble and objectives, and the practices of the Parties."

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Lengthy antidumping investigations often had the effect of a non-tariff barrier due to the uncertainty created for importers and exporters of the products concerned especially since the allegations of dumping and injury, in many instances, were not supported by the facts. On a more general level, lengthy investigations can have a negative effect at the economy of the importing country as a whole by mitigating the competitive advantages associated with freer trade.

In summary, we consider it important to emphasize that in this case the Complainants did not prove they suffered any economic or legal injury because of the late issuance by the Investigating Authority of the Preliminary and Final Determinations. We are aware that such injury may be caused to other Complainants in future administrative investigations if time limits are not met, and this Panel considers that it is the obligation of the Investigating Authority to adhere to the time limits established in the Articles of the LCE mentioned above. In case of special circumstances requiring the extension of time limits, express mention of the reasons should be made known during the investigating procedure.

Regarding the Complainants' invocation of the negative answer principle in Article 37 of the FFC,[132] this Panel considers that such is not well founded. *Negativa ficta* in Mexican

[132] "The Petitions made before the Fiscal Authorities must be resolved in a period of three months; after that period, without the Resolution being notified, the interested Party may consider that the Authority resolved against, and thus may interpose any defence at any time after that period, even if the Resolution has not been issued; or she may wait until the Resolution is issued."

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law is considered as a legal fiction in the sense that if the tax authority is silent regarding a formal request from an individual or juridical person for three months, the interested party may treat that silence as the authority's denial of the request. Thereupon a remedy is available. In this proceeding, the Complainants did not file any request nor were they ever in a position to claim the benefit of *negativa ficta*.[133] It is evident that Complainants elected to wait until the Investigating Authority had issued its determinations before taking any steps.

Finally, regarding the Complainant's argument that the Investigating Authority is subject to the application of the provisions of Article 215 of the Criminal Code for the Federal District,[134] which establishes the offences against the administration of justice committed by public officers, this Panel considers that it has no jurisdiction to investigate offences committed by public officers, since Article 21 Constitution establishes the Public Prosecutor as the primary authority for the prosecution of such offences. This argument is dismissed as it was not filed before the competent authority.

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[133] See: *Negativa Ficta* y *Negativa Expresa.* See: Contradicción de tesis 27/90. Suscitada entre el Sexto y Primer Tribunales Colegiados en Materia Administrativa del Primer Circuito y los Tribunales Cuarto y Quinto en Materia Adminstrativa del mismo Circuito. 16 de junio de 1995. Cinco votos. Ponente: Juan Díaz Romero. Secretario: Jacinto Figueroa Salmorán. Tesis de Jurisprudencia 26/95. Aprobada por la Segunda Sala de este alto Tribuanl, en sussión pública de dieciséis de junio de mil novecientos noventa y cinco, por unanimidad de cinco votos de los señores Ministros: Presidente Juan Díaz Romero, Genaro David Góngora Pimentel, Mariano Azuela Güitrón, Guillermo I. Ortiz Mayagoitia y Sergio Salvador Aguirre Anguiano. Segunda Sala, Semanario Judicial de la Federación y su Gaceta, Novena Época, 11, julio, 1995, Tesis 2a./J.26/95, página 77.
[134] Claimant's Brief, p.s 41 and 42.

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VI. INJURY

The investigation by SECOFI of injury attributable to imports of rolled steel plate from Canada was based on the assumption that all such imports, with the exception of those shipped by ALGOMA to AHMSA, were dumped[135] and, when accumulated with imports from other sources, were determined to be injurious to domestic producers. It is important to note that this investigation was concerned with actual injury caused by imports during the investigation period, *i.e.*, 1992, and not a threat of injury.[136]

In making its determination, SECOFI proceeded on what it considered to be the best information available. This approach was adopted since the Complainants ALGOMA, STELCO and DOFASCO had not responded to the questionnaires, or provided any other relevant information, and because the information that had been received from TITAN was not taken into account. SECOFI decided that the margin for this "trading company" must be the same as that estimated for the producer of the goods.[137] In fact, the data used to support the decision on price discrimination against Canadian producers was obtained from the domestic industry.[138]

In their brief, and at the public hearing, the Complainants argued, among other

[135] Mr. Uruchurtu, p. 66, Transcript of Public Hearing, English version.
[136] Mr Uruchurtu, p. 84, Transcript of Public Hearing, English version
[137] paragraph 110, Final Determination.
[138] paragraph 114, Final Determination and Mr Uruchurtu, p. 67 Transcript of Public Hearing, English version.

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things, that SECOFI mistakenly assessed the relationship between TITAN and DOFASCO, did not adequately assess the similarity of the imported and domestic products, and omitted to take into account in their injury evaluations the increases in installed capacity and production of rolled steel plate by domestic producers, the effects of the devaluation of the peso exchange rate in 1994, the investment activities of the domestic producers, and certain developments in the domestic economy after the period of investigation.

The Panel has reviewed each of these allegations and SECOFI's responses to them.

The Panel concurs with the view of SECOFI that the peso devaluation and the economic situation that prevailed subsequent to 1992 are not relevant to the injury decision taken in this instance. Under the law, discretion is provided to SECOFI to decide in any particular case if the facts warrant a determination of injury alone, or whether it should also include the "threat of injury". As indicated above, the decision in this case related to actual injury not a threat of injury and, as such, the injury assessment due to the dumped imports must be limited to the period of investigation, *i.e.*, 1992.

At paragraphs 509 and 510 of the Final Determination, it is noted that more than 50% of the rolled steel plate imports from Canada were purchased by firms who were direct clients of the domestic industry. Based on this data and an examination of the tariff

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classifications applied to the imported goods, it was concluded by SECOFI that the imported product was similar to the domestic product, and that it was marketed through the same channels of distribution. Further, at paragraph 533, it is stated that during the 10 months of 1992, imports from Canada increased 13%, amounting to 14% of total imports and 4% of the apparent domestic consumption. As a result, SECOFI in accordance with Article 67 of the Foreign Trade Regulations determined that imports originating in Canada were significant during this period, and that they should be accumulated with imports of similar products from Brazil, USA and Venezuela for the purposes of assessing injury.[139]

Paragraphs 549 to 627 of the Final Determination provide a detailed report on the factors taken into account by SECOFI in its decision on injury. In this regard, the Panel notes that the issues of domestic production, installed capacity and inventories, employment, profits, prices together with other relevant factors were all examined by SECOFI in the process of making the Final Determination. Further, it is noted that SECOFI in its written response to the Complainants' brief and orally at the public hearing addressed each of the points raised by the Complainants, arguing that its analysis took these points into account.

The Panel notes that the law and the regulations requires that a decision on injury must be based on an examination of the impact of a variety of factors on domestic production and, in this context, the significant requirement is that the investigating authorities evaluate all of the relevant factors. As a result of its analysis, SECOFI concluded that imports originating in the

[139] Paragraphs 534 and 543, Final Determination

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four countries caused damage to domestic production of rolled steel plate due to a considerable growth of dumped imports, in both absolute and relative terms, and substantially lower import prices than domestic prices which, in turn, caused a decrease in domestic price levels, a loss of clients and domestic industry´s participation in the market, and adverse effects on domestic industry production, income, profits and inventories during the investigation period.[140]

In the Panel's view, SECOFI complied with the provisions of Article 39 of the LCE in concluding that injury was caused to domestic production due to the accumulated imports carried out under conditions of price discrimination.

The main outstanding issue raised by the Complainants in this context which, in the Panel's view, has a direct bearing on the injury decision against Canadian exporters, relates to the position of TITAN, and the admission by SECOFI that it erred in not establishing a specific margin of price discrimination for this firm.

In this connection, the Panel sought clarification at various points in the public hearing in relation to the statistics covering imports from Canada during the investigation period. Faced with incomplete statistical data, the Panel undertook a careful examination of the figures included in the administrative record. Based on this analysis, the Panel has concluded the following:

[140] Paragraph 633, Final Determination

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a) There is no information in the administrative record to indicate that ALGOMA, STELCO or DOFASCO exported rolled steel plate directly to Mexico in 1992.

b) The Commercial Information System indicates that steel plate imports from Canada in 1992 amounted to approximately 14,400 tons of which 711 tons were imported by AHMSA from ALGOMA.

c) An examination of the actual invoices covering TITAN's shipments to Mexico in 1992 revealed an amazing coincidence of volumes between its shipments and those attributed by SECOFI to Canada as a whole. Indeed, based on the administrative record, the Panel has concluded that the total volume of imports claimed by SECOFI as originating in Canada could only have been exported by Titan and not other Canadian suppliers.

d) Some of the Titan invoices clearly indicate that some of the goods shipped were "seconds" rather than first quality goods.

Accordingly, as the Panel's examination of the administrative record indicates that the only supplier of rolled steel plate from Canada to Mexico in 1992 was TITAN, a new

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decision by SECOFI relating to the margin of price discrimination, if any, for TITAN may also result in a major change in the Final Determination as it relates to injury and the margin, if any, appropriate for other potential Canadian suppliers.

In this regard, it is relevant to note that a dumping/injury determination can only be made against goods which are, in fact, found to be dumped. All other imports must be ignored by the authorities in assessing this crucial causal relationship. Thus, the existence of dumping, the dumping margins involved, and the volume of dumped imports are inextricably linked in all injury determinations. In this case, SECOFI admitted an error in not establishing a price discrimination margin for TITAN in the Final Determination. Whatever margin is established for this firm must, of course, be based on the administrative record and, at this stage, the Panel has no way of knowing whether all or any of the imports from TITAN were, in fact, dumped. Some of these goods may not have been dumped, some may only have a *de minimis* margin, and others may require differentiated treatment because they were second quality goods. By extension, the volume of dumped goods from TITAN that was factored by SECOFI into its decisions relating to accumulation, whether the imports from Canada were significant, and the injury determination *per se* may well have been incorrect.

This situation is further compounded by the fact that the Panel's review of the administrative record confirms that subject goods from Canada were only supplied by

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TITAN during 1992. Counsel at the public hearing implied that other Canadian producers also shipped product to Mexico during the period of investigation[141] and, as a result, a country-wide margin of price discrimination was established at 31.08%. Given that only exports from TITAN were involved, and as SECOFI did not establish acceptable volume and value calculations for this firm, it appears to the Panel that all calculations relating to imports of rolled steel plate from Canada are also suspect.

In the circumstances, it is the view of the Panel that any new price discrimination margin decision relating to TITAN must clearly indicate the precise volume of TITAN's exports that were dumped in 1992, the volume of seconds involved, and the dumping margins, if any, applicable to both. Once this determination has been made, SECOFI must proceed to factor this new data into its decision as to whether the dumped imports continue to be "significant", and whether their accumulation with imports from other sources continues to be appropriate for the purpose of determining injury. Further, since TITAN was the sole supplier of these goods to Mexico in 1992, and since its margin must be recalculated, it seems obvious that the need for a country-wide determination, and the level of the margin of price discrimination appropriate to other Canadian exporters, should be reassessed.

It will be apparent from the foregoing that, in the Panel's view, all aspects of injury during the period of investigation are open to question given the Investigating Authority's

[141] P. 152, Transcript of Public Hearing, English version

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request for a remand to determine a margin for TITAN.

1. The Request for a Remand by the Investigating Authority

With regard to the request for a remand by the Investigating Authority, the Panel notes the following:

(a) The Investigating Authority in its Final Determination dated December 19, 1995, declined to establish a specific price discrimination margin for the complainant TITAN, arguing that it played a similar role to the sales department of the producer of the goods.

(b) TITAN and the other three Complainants (ALGOMA, DOFASCO and STELCO) each timely filed on December 28, 1995, a complaint under Rules 35 and 39 of the Rules of Procedure alleging errors of fact and law by the Investigating Authority in failing to establish a specific antidumping margin for TITAN.

(c) The Complainants timely filed on May 28, 1996, a joint brief with grounds and arguments supporting the allegations in their complaints. The issue regarding the relationship between TITAN and DOFASCO was stated as follows:

> "**4. RELATIONSHIP BETWEEN DOFASCO AND TITAN**
> SECOFI mistakenly understood the facts. Since the answer to the Initial Determination filed on January 11, 1994 TITAN proved that it was a corporation incorporated in the USA and that it was independent from

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DOFASCO. Therefore, TITAN answered in time the questionnaire and argued (and proved) that the reconstructed value principle that respondents requested to be applied was not right, due to the provision of Article 32 of the law. All TITAN's operations were done so to "allow it to cover the cost of production and general expenses incurred during the normal course of business". Based on the above, normal value of TITAN's operations must had been determined based on the second paragraph of Article 31 of the Law, as requested by TITAN in its answer to the Initial Determination".[142]

(d) SECOFI, in its brief timely filed on July 26, 1996, in reply, accepted as an issue its failure to determine a specific price discrimination (antidumping) margin for TITAN and stated:

> "On the other hand, the Investigating Authority admits that it erred in the Final Determination by not assessing TITAN with a specific antidumping duty. Therefore, it respectfully requested that the Panel remand the administrative file according to Article 1904.8 of NAFTA [...] in order to analyze the information contained within the administrative file, and in due course, to determine a specific antidumping duty for TITAN".[143]

(e) SECOFI also requested the following in concluding its Brief

> "**PART V. POINTS OF REQUEST:**
>
> [...]
>
> **FIFTH.-** To remand the Final Determination to the Investigating Authority in order to proceed to assess the information and evidence in the administrative file, and to determine a specific antidumping duty for TITAN.
>
> **SIXTH.-** In accordance with Article 1904.8 NAFTA to uphold all

[142] See: Complainants' Brief of May 28, 1996, Spanish version, p. 25.
[143] See: the Investigating Authority's Brief of July 26, 1996, pp. 86-87.

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> other points of the Final Determination for imports of rolled plate from Canada".[144]

With respect to the above two points of the Request, the Panel notes that the purpose of the Rules is to secure the just, speedy and inexpensive review of Final Determinations in accordance with the objectives and provisions of Article 1904. Since July 26, 1996, SECOFI has wished to correct the Final Determination as it relates to TITAN. However, it has not told the Panel or the Complainants what its mistake was, how it would correct that mistake, and what effect the correction would have. Nevertheless, it asks that the Panel uphold all other points of the Final Determination. It would thus be allowed to change the Final Determination but leave the Complainants with no real right of reply. This would amount to a denial of due process, a fundamental rule of procedure. The Panel cannot agree to grant a remand on these terms.

Moreover, the administrative record to which SECOFI refers is defined in Article 1911 as follows:

> "**Article 1911.** Definitions
>
> For the Purposes of this Chapter:
>
> administrative record means, unless otherwise agreed by the Parties and the other persons appearing before a Panel:
>
> **(a)** all documentary or other information presented to or obtained by the competent investigating authority in the course of the administrative proceeding, including any governmental memoranda pertaining to the case, and including any record of *ex parte* meetings as may be required to be kept;
>
> **(b)** a copy of the Final Determination of the competent investigating authority, including reasons for the determination;
>
> **(c)** all transcripts or record of conferences of hearings before the competent investigating authority; and
>
> **(d)** all notifications published in the official journal of the importing

[144] *Ibid.*, p. 172.

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Party in connection with the administrative proceeding;"

Therefore, the administrative record is widely defined to include documents or other information from the public domain (non-confidential), documents or other information of a proprietary character (confidential), documents or other information that are privileged (privileged), and sources of which a complainant has no knowledge.

SECOFI may consult all four of these components of the administrative record in correcting its mistake. Equality of treatment entitles the Complainants to access the same sources of information.

VII. ORDER OF THE PANEL

In view of the foregoing and pursuant to the NAFTA Article 1904(8), the Final Determination is hereby remanded for action by the Investigating Authority so that it may issue a new Final Determination, within 60 days from the notification of this Order, not incompatible with the following:

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1. REGARDING TITAN

In making a new Final Determination, the Investigating Authority shall:

A) Establish, based solely on the information contained in the administrative record, whether Titan was the only exporter of Canadian made rolled steel "plate" to Mexico in 1992;

B) Establish definitively the volume of rolled steel plate exports attributable to TITAN during 1992 and indicate how much, if any, were second quality goods;

C) Assess, based on the analysis resulting from (A) and (B), whether the total imports from Titan were significant for the purposes of accumulation in accordance with paragraph 2 of Article 67 of the Foreign Trade Law Regulations;

D) Evaluate, based on the results of the foregoing and the administrative record including any accumulation considerations involved, the injurious impact of TITAN's 1992 exports from Canada on producers in Mexico; and,

E) Substantiate the conclusions respecting points (A) to (D) through the identification of the relevant supporting evidence in the administrative record.

Consistent with the request received from the Investigating Authority in its brief dated July 26, 1996, the Panel remands the Final Determination to enable the Investigating Authority to

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assess the information and evidence in the administrative record and, taking into account the results of its examination of the points raised in points **A)** to **E)** above, to establish, if appropriate, a specific margin of price discrimination in respect of imports from TITAN.

2. REGARDING CANADIAN EXPORTERS OTHER THAN TITAN

As indicated above, except for the specific shipment of steel plate from ALGOMA to AHMSA, the Panel could find no evidence in the administrative record of exports of rolled steel plate to Mexico from these producers, or any other Canadian producers during 1992. All the evidence indicates that TITAN was the sole supplier of these goods to Mexico during the period of investigation. Accordingly, we order that the countrywide price discrimination margins against Canadian producers must be reassessed.

3. REGARDING THE COMPLAINANTS

If the Investigating Authority supplements the administrative record on remand and the Complainants' wish to challenge the Determination on remand, pursuant to Rule 73(2)(b) of the Rules of Procedure, the Complainants may do so without re-opening their case, and by

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filing a written submission in accordance with Rule 73(2)(b), and for this purpose may have access to the confidential record. The Panel's Order of May 21, 1997, is amended accordingly.

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Issued on December 17, 1997.

Signed in the original by:

December 17, 1997.	Gustavo Vega Cánovas
Date.	Gustavo Vega Cánovas, Chairman of the Panel.
December 17, 1997.	D.M.M. Goldie.
Date.	D.M.M. Goldie.
December 17, 1997.	Lucía Reina Antuña.
Date.	Lucía Reina Antuña. Attaching a concurring opinion regarding Part III of this Final Decision.
December 17, 1997.	W. Roy Hines.
Date.	W. Roy Hines.
December 17, 1997.	Rodolfo Terrazas Salgado.
Date.	Rodolfo Terrazas Salgado. Attaching a concurring opinion regarding Part III of this Final Decision.

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I N D E X

CONCURRING OPINION OF PANELISTS LUCIA REINA ANTUÑA AND RODOLFO TERRAZAS SALGADO REGARDING THE APPLICATION OF THE STANDARD OF REVIEW, THE POWERS OF THE PANEL AND GENERAL PRINCIPLES OF LAW, CORRESPONDING TO PART III OF THE FINAL DECISION

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After having considered the analysis of the Standard of Review, the Powers of a Binational Panel in Mexico and the application of General Principles of Law as referred to in paragraph 3 of NAFTA article 1904, in accordance with Rule 72 of the Rules of Procedure of the article above mentioned, the authors have decided to present a:

CONCURRING OPINION OF PANELISTS LUCIA REINA ANTUÑA AND RODOLFO TERRAZAS SALGADO REGARDING THE APPLICATION OF THE STANDARD OF REVIEW, THE POWERS OF THE PANEL AND GENERAL PRINCIPLES OF LAW, CORRESPONDING TO PART III OF THE FINAL DECISION

Certainly these are controversial issues, and it is necessary to pronounce upon this review procedure, in the following terms:

1.- Binational Panel's Location in International Law

To begin, we accept the uniform criteria sustained by doctrine[1], in the sense that when dealing with international dispute settlement there are two existing legal processes: arbitration and the procedure before an International Court of Justice.

We agree with the view that arbitration process is designed to settle international conflicts in which two States (or individuals) normally, submit their differences to a person (arbitrator) or several persons (arbitration commission) freely designated by them to arrive at a decision based on the Law or the rules previously agreed to by the parties[2].

On the other hand, we notice that authors of treatises of the intellectual stature of César Sepúlveda[3], affirm that while arbitration is in essence different from judicial tribunals, there is no support for this view, because arbitration entails a binding decision

[1] Ortiz Ahlf, Loretta, *Derecho Internacional Público*. Mexico, Harla, 1993, at 173-182.
[2] Seara Vázquez, Modesto, *Derecho Internacional Público*. Mexico, Porrúa, 1994, at 321.
[3]Sepúlveda, César, *Derecho Internacional*. Mexico. Porrúa, 1996, at 399-400.

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resulting of a voluntarily accepted compromise by the litigants. It is a procedure of a jurisdictional nature, because it implies settling a legal position between the parties.

We notice that there is a coincidence between the different authors[4], with respect to the general characteristics of international arbitration, both public and private, which are restated below in order to compare them with the particular situation confronting the Binational Panel in this case. Thus, we find that:

A) An arbitration body deciding the controversy is not a body with a formal jurisdictional character. It's made up of decision makers selected by the contending parties;

B) The procedure is governed by legal rules established by the parties to the conflict;

C) The decision is based on legal rules and on the substance of the case that the parties have determined or that are applicable according to International Law;

D) To have a dispute submitted to arbitration, the consent of the parties to that effect is necessary;

E) Consent to submit a dispute to arbitration can be submitted in part or in whole;

F) The arbitration body can be composed of one or several persons, as determined by the parties that agree to submit a dispute to arbitration;

[4] Arellano García, *Derecho Internacional Público,* México, Porrúa, 1983, at 216-217.

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G) To submit a dispute to international arbitration, it is necessary to do so by treaty through an arbitration agreement, or for that matter, a compromisory clause that can cover controversies between States or between individuals, on the understanding that exceptions on issues that will not be submitted to arbitration can be established, and that in practice are called reservations;

H) Normally the parties agree on the following in bringing a dispute to arbitration:

a) The number of arbitrators;
b) The manner of their appointments;
c) The procedural rules to be followed, and
d) The rules applicable to the substance of the conflict to be resolved.

I) The arbitrators must not exceed the limits that have been set in the arbitration agreement, and

J) Among States, remedies are only allowed against the award if they have been agreed otherwise the award is final. Among individuals, they must recognize challenges to the awards when the arbitrators exceed their powers, subject to the applicable provisions of international treatises.

In accordance with the above, it is evident that a binational panel has many similar features to a *sui generis* arbitration body for the following reasons:

- It was established to settle a conflict between parties with respect to a specialized matter, even though its members are not all required to be jurists, whose mission consists of applying the law to a particular case and deciding whether the authorities acted within the law.[5] Paragraphs 2 and 3 of NAFTA article 1904, categorically establish that with respect

[5] According to Gilbert R. Winham, the motive that prevailed to establish the character of Binational Panels in NAFTA, was exactly the same that was invoked for the Free Trade Agreement between Canada

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to a final determination review, a panel shall apply the legal provisions in the case, **to the extent that a court of the importing Party would rely on such materials,** as well as the respective standard of review and the general legal principles, **that a court of the importing Party otherwise would apply.** In other words, the NAFTA provisions recognize the jurisdictional nature to a binational panel's function, which compel it to behave procedurally as a jurisdictional tribunal of the country where the investigation took place. In that regard, Gilbert R. Winham[6] states that the obligation of the Panel consists in studying the administrative record of the challenged case and deciding, in a general manner, if the administrative determination complies with the domestic law and has sufficient evidence and support it.

- There is a substantial difference in the procedure followed by a binational panel as compaired to ordinary arbitration, in that, while in the latter, the parties participate in the selection or elaboration of the procedural rules that must be applied, in the former such rules are established in advance by the NAFTA contracting parties. These rules reflect at least two different regulatory schemes: the international one, which is composed of the provisions contained in the agreement, and are related to multilateral rules such as those set out in GATT and its Codes of Conduct; and the domestic one, which affects the legal provisions according with uniform Trade practices, which must be followed by binational panels when issuing decisions. In this regards, we consider that NAFTA's intentions are clear since [7] panels do not have powers to create independent laws, and, must act in accordance with those of the importing country. Therefore, while a dumping or subsidy determination can vary from one country to another, that decision will always be made by the issuing administrative authority in accordance with its domestic law. In this

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and the United States (FTA), stating that: " ... the parties agreed that the judicial review of the determinations issued by national agencies regarding the application of antidumping or countervailing duties would be performed by Binational Panels to serve those individuals that, would otherwise, be authorized to request judicial review, under domestic laws." ("The Mechanism for the Resolution of Disputes in the North American Free Trade Agreement and the Free Trade Agreement between Canada and the United States" in *México, Estados Unidos, Canadá, 1993-1994.* Gustavo Vega Cánovas de., Mexico, El Colegio de México, Centro de Estudios Internacionales, 1995, *op. cit.,* at 130).

[6] Idem.

[7] *Id.* at 131.

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connection, it is relevant to note that under the binational panels rules, a very particular balancing of interest is achieved by virtue of the fact that the Investigating Authority is obliged to participate in the panel dispute settlement mechanism when the individual complainants selects it, but the latter does not participate in the selection of the rules since they were decided by the NAFTA contracting parties.

- It is evident the binational panel lacks powers to enforce their final decisions; however, that does not necessarily mean that it conforms to an arbitral body. The lack of power to enforce, can be a characteristic of any tribunal, which operates within the kind of powers the law confers to it, whether it is of simple annulment or full jurisdiction. In the case of a binational panel, paragraph 8 of NAFTA Article 1904 establishes that when issuing its final decision it may uphold the final determination or remand it for action not inconsistent with its decision. It is undoubted two very important legal aspects are being recognized with relation to a binational panel: a) that the panel's decision is obligatory that is, that for the parties its compliance is imperative and unavoidable[8], and b) that the panel has jurisdiction to annul in the sense that it has the power to determine the invalidity of the challenged act, for the purpose of having the investigating authority substitute a new action to replace its previous act, in accordance with the guidelines of the judicial decision. Basically as set out in paragraph 2 of the Agreement's Article 1904, which provides that the Panel must review the final determination to determine whether it was or not in accordance with the antidumping or countervailing duty law of the importing party.

[8] As a matter of fact, we must remember that paragraph 9 of NAFTA Article 1904, points out that the decision of a panel will be binding for the involved parties with respect to the particular matter between the parties, provision that is explained by Hugo Perezcano Díaz, in the following terms: "Obligatoriness must not be confused with the lack of coercitivity. As mentioned previously, any decision in a procedure of this nature is obligatory. However, a third impartial party lacks the power to order the forceful enforcement of the decision. In procedures between States, the compliance of the determination comes to a sovereign decision of the country against of which the award was issued. For this reason, the non-compliance of the decision, can only raise to compensation mechanisms or political pressure. In all other cases, the internal recognition and enforcement of decision procedures must be followed, before the competent domestic tribunals, to have enforcement ordered employing the power of the state." ("Dispute Settlement in the framework of the North American Free Trade Agreement" in *El Futuro del Libre Comercio en el Contitnente Americano. Análisis y Perspectivas*. Sergio López Ayllón (*coord).* Mexico, UNAM, 1997, at 280).

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- The binational panel, due to its mixed character presents particular analytical difficulties. Mexico has a certain tradition regarding public and private arbitration, and, while, it has not been a stranger to the evolution of the alternative dispute settlement procedures, the incorporation of mechanisms between individuals and the State is recent. Other arbitration mixed tribunals such as the International Centre for the Settlement of Investment Disputes (ICSID) has a mixed character due to the participation of a State and an individual as parties in the procedure; this gives rise to problems of a particular nature regarding the way in which the mixed arbitration tribunals are established, the way in which they issue their decisions and the applicable law to solve the dispute,[9] as well as the character of the litigating parties that intervene before them. In the binational panel review, all individuals, domestic or foreign and States, which have a legal interest and have been affected by the imposition of antidumping or countervailing duties in a determination issued by the investigating authority may intervene.[10]

2.- Alternative Dispute Settlement Mechanism

To define the alternative mechanism it is important to note that the procedure which takes place in the first instance before the investigating authority is a specialized administrative procedure, in virtue of which it should be recognized in the same a principle of deference. This procedure is within the competence of the *Secretaría de Comercio y Fomento Industrial,* and this competence is recognized by the panel. In other words, the procedure is of a technical character whose purpose is intended to investigate if the standards that resulted in the imposition of antidumping or countervailing duties have been met. Basically, the procedure followed in the second instance is a review before a panel

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[9]For a deeper analysis see: Toope, Stephen J., *Mixed International Arbitration. Studies in Arbitration between Estates and Private Persons*. Cambridge University Press, 1990.

[10]There are people that prefer to classify Binational Panels as intermediate or hybrid arbitral bodies, explaining that the reason of their origin and evolution is the need of individuals to come to their governments for the defense of their interests derived from international agreements, against the breach of another State, without the possibility to assert them on their own, which has caused the relatively recent appearance of intermediate or hybrid procedures, in which active and passive subjects are respectively, individuals and the State.

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in which the parties choose this the alternative mechanism of international trade dispute settlement. The object of which is established in paragraph 2 of NAFTA Article 1904.

Given the foregoing, we conclude that the procedure carried out before the investigating authority is purely administrative while the one carried out before the panel is materially jurisdictional.

Now, when determining which are the characteristics of the present procedure, we consider it important to understand completely the provisions set out in paragraph 2 of NAFTA Article 1904.

In Mexico, those who appear before the Federal Tax Court, do so in their defense of a legal interest that has been damaged by a typical authoritarian act. The work of Federal Tax Court not only studies tax issues, but also other contentious issues originated in the administrative activity of the State. Thus, a litigation in which one of the parties has *imperium*, is submitted before said instance, which means that under the character of public authority in the exercise of legal functions, it materialized one or several acts that injured the legal sphere of a private person that, consequently, appears before the jurisdictional instance to try to demonstrate that the acts of said authority transgressed certain legal regulations.

We emphasize the procedure that must be followed before a binational panel because, if this procedure is chosen, its excludes the alternative provided by the Federal Tax Court. The objective pursued by the alternative dispute settlement mechanism expressed at paragraph 2 of NAFTA article 1904 regarding final determinations regarding antidumping and countervailing duties is that a binational panel, as an impartial third party decides if the investigating authority's final determination was in conformance with the legal regulations governing the subject matter. This is a kind of legality control of an administrative act challenged for some cause of presumed normative breach.

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The above helps to clarify why both before the Federal Tax Court and a binational panel, the complainants advance as error of law, the breaching of articles 14 and 16 of the Constitution, because said constitutional regulations safeguard the legality principle that must guarantee a Binational Panel, so every presumed breach consisting in procedural unlawfulness, in the noncompliance of the essential formalities of the procedure and in the lack of competence of the administrative authority, translates into the Mexican legal system, as standards of unlawfulness that if proved, result in a declaration of the nullity of the challenged acts by the Federal Tax Court, or an order for the remand of the administrative record to the competent authority by the binational panel in order to adopt an action not inconsistent with the panel's decision, as provided for in paragraph 8 of NAFTA Article 1904.

Consequently, as sustained by the *jurisprudencia* of the Mexican Federal Judicial Branch, the Federal Tax Court has to deal with this kind of legal pleadings, without having in any case or for any reason, an assumption that it deals with constitutional issues, nor set itself as an *amparo* tribunal, because, the possible breaching of constitutional articles 14 and 16, when it may constitute an indirect breach of the Constitution, **it is in fact a direct breaching of the secondary law provisions**, whose observance must be safeguarded by the importing party tribunal and, consequently, by the Binational Panel that may eventually be established to know about these kind of statements.

In our view the above reasoning, may be applied in order to support the considerations stated above, the following *jurisprudencia* thesis states that it may be equally applied to a binational panel.

> **"*FEDERAL TAX COURT*. WHEN CAN IT HEAR ON THE UNCONSTITUTIONALITY OF AN ADMINISTRATIVE ACT".-** The litigious-administrative jurisdiction adopted by the Mexican legal system by influence of foreign legal systems, basically the French, corresponds to the imperious demand of the contemporary State to preserve the lawfulness of the administrative acts, this is, the submission of the

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administrative authorities to the laws issued by the Legislative Power because they are the direct source of the validity and legitimacy of their acts. Because of this, the jurisdiction of the Federal Tax Court is of an ordinary nature and does not have as a fundamental purpose other than to safeguard and control the lawfulness of the administrative acts. Due to the fact that the lawfulness of administrative acts has been raised in our Country to the rank of an individual guarantee by effect of constitutional articles 14 and 16, it has been preached in several occasions, which can be explained, that the duty of the Fiscal Chambers is to know even about irregularities stated as violations to constitutional regulations. However, as it may be proved by the *jurisprudencia* thesis of the Second Chamber of the Supreme Court of Justice of the Nation which appears at number three hundred and twenty six of the Third Part of the last Appendix to the *Semanario Judicial de la Federación* under the heading of "*FEDERAL TAX COURT*, FACULTIES OF, TO EXAMINE THE CONSTITUTIONALITY OF AN ADMINISTRATIVE ACT", and the precedents that gave origin to it, the unconstitutionality of the administrative acts which may be known to this Tribunal, is the one derived from the nonobservant of the essential formalities of the procedure referred to in constitutional articles 14 and 16, regarding the annulment standard provided for in subparagraph II of article 238 of the Tax Code in force. In short, the jurisdiction of the Tax Court in terms of the standards of annulment provided in the cited paragraph, is constrained to the subject matter of legality, even though this is reflected in every case as a violation of the above mentioned constitutional guarantees, there its jurisdiction may not be extended up to the point of obliging it to know about violations of another kind of Constitutional Guarantees, not even when such violations may be attributed not to a law but to an administrative act, because this would mean to invest it with faculties owned by the constitutionality control system, which of course it lacks as provided for in articles 103, 104 and 107 of the Constitution.

THIRD COLLEGIATE TRIBUNAL FOR ADMINISTRATIVE MATTERS OF THE FIRST CIRCUIT.

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Octava epoque:

Amparo directo 413/89. Hospital Santaelena, S.A. April 27, 1989. Unanimous Vote.
Amparo directo 513/89. Edificios y Estructuras, S.A. de C.V. May 23, 1989. Unanimous Vote.
Amparo directo 153/93. Video Bruguera, S.A. de C.V. February 11, 1993. Unanimous Vote.
Amparo directo 53/94. Industria Mexicana de Personal, S.A. de C.V. March 16, 1994. Unanimous Vote.
Amparo directo 23/94. Densímetros Robsan, S.A. de C.V. March 25, 1994. Unanimous Vote.

It follows from the above that, when solving disputes under the alternative dispute settlement mechanism, the panel must decide on the lawfulness or unlawfulness of administrative acts that have been claimed in accordance with the standard of review established on article 238 of the FFC.

3.- Powers of the Panel regarding the Standard of Review

We accept that the panel's jurisdiction is legally limited by what is provided by NAFTA Article 1904, as well as by the Rules of Procedure that derive from such provision, which according to its item 2, have as their objective the application of the review procedure before the Panels and to assure that such review is carried out in a just, speedy and inexpensive manner.

Likewise, it is noted that paragraph 3 of NAFTA Article 1904, grants powers to a panel and, at the same time, imposes on the panel, an obligation to apply the standards of review set out in Annex 1911, which in the case of Mexico is article 238 of the Federal Tax Court, or any other law substituted it for, based solely on the record,[11] as well as the

[11] It is important to mention that the phrase "based solely in the record" that is literally expressed in subrule c) of the 1911 Annex, must not be understood to be referred exclusively to what the diverse article 1911 of the NAFTA defines as "administrative record", since though this latter is vital for the Panel to be in a position to review the lawfulness of the performance of the Investigating Authority, it is also true that there is a record that might be called "jurisdictional" and that is conformed by virtue of the same review

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general principles of law that otherwise a court of the importing party would apply to review the determination of the competent Investigating Authority.

Undoubtedly, the latter on its merit deserves to be divided into pieces:

On the issue of whether or not the standard of review should be limited exclusively to the standards provided by Article 238 of the Tax Code, or by any other law that substituted it for, we consider this to be the case, since upholding something different would mean to interpret a provision contained in an international treaty incorrectly, especially when the Vienna Convention on the Law of Treaties, in paragraph 1 of article 31, specifies that "A treaty must be interpreted in good faith according to the current sense that is attributable to the terms of the treaty in the context of such terms and bearing in mind its purpose and ends". It follows that to intend to include within the standard of review other legal provisions not expressly foreseen in the norm of the mentioned treaty, would be to divert completely from the current sense that is of the manner in which NAFTA is drafted. Not being an impediment for the latter conclusion, the fact of asserting that the referred article 238 of the Tax Code, cannot be applied in isolation, since precisely, this was the purpose of the negotiating parties of the NAFTA, because it is a standard of "review" rather than of "determination", this means, it is the standard based upon which the Panel must analyze the determination of the Investigating Authority, but it does not imply the standard that the Panel must use to decide the dispute. This latter consideration, is useful as well to challenge that articles 237 (that in fact refer to the requirements that the judgment issued by the Federal Tax Court must comply with) and 239 of such code, are indispensable for the Panel to precise the sense of its Final Decision. In effect, since what pertains to the first of them, putting it forth is unlawful since there is an express rule that processes the requirements that the Final Decision of a Panel must contain,[12] while the second provision is inapplicable as well, since the same NAFTA

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before the Panel. Such record contains the complaints, replies, briefs, motions and orders that rule the latter, as well as all the evidence and annexes submitted by the parties, obviously including, the transcript of the public hearing.

[12] "72. The decision of the Panel will be issued in writing and will be grounded..."

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Article 1904, provides in paragraph 8, what could be understood as "standard of determination" or rather, the possible senses in which a final decision can be issued, such as: the confirmation of the Final Determination (when there is no unlawfulness standard conformed) or its remand in order for the Investigating Authority to adopt measures that are not incompatible with the final decision (when a standard of unlawfulness is updated); provisions that are interpreted according to the current sense of the literal terms in which they where conceived, exclude the possibility of an express declaration of the panel of the absolute nullity of the challenged administrative determination, since in the case that the lawfulness of the corresponding determination is credited, the decision on remand implies that the authority has the discretionary power to determine the manner in which it will comply with the decision, when the adopted measures are not incompatible with it, because if these were the case, the affected party has the right to have the same Panel review the measures that the investigating authority has adopted as a result of the remand, and consequently, the issuance of a decision in this regard.

4.- Application of General Principles of Law

A fundamental aspect of paragraph 3 of Article 1904 of NAFTA is with regard to the authority it grants to a binational panel to apply not only the applicable standard of review, but also the General Principles of Law that otherwise a court of the importing party would apply to review a determination of the investigating authority; furthermore while the final decisions of previous Panels have not made an in-depth study of this issue, probably because of the difficulty of analyzing a matter so linked to legal philosophy and which has not been extensively studied in Mexico by legal authors nor by the jurisprudence. [13]

[13] Indeed, the Panel that decided the case MEX-94-1904-01, limited itself to sustain asserting the Standard of Review that a panel must apply "has two parts", the first one established by Article 238 of the Federal Tax Code, or any other law that is substitute for it, based only in the record, and the second one, as General Principles of Law that otherwise a court of the importing party would apply to review a determination of a competent investigating authority. Nevertheless, it does not explain why the stated principles shall be understood as a "second part of the Standard of Review". The Panel that decided the case MEX-94-1904-02 affirmed that for a "Mexican case of antidumping, the binational panels shall apply the standard of review and the general principles of law that the Tax Tribunal would apply in

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Nevertheless, in our opinion, the clarification of this issue is a matter of utmost importance, because it establishes a substantial difference between the powers that a binational panel enjoys compared with those of other jurisdictional bodies in Mexico. The last paragraph of Article 14 of the Constitution[14] and on its interpretation both legal and jurisprudential, can only be referred in cases when there is an absence of an applicable legal provision. In other words, in the Mexican legal system, the general principles of law are only applicable when facing what is known as a legal vacuum, and through them the law is integrated but not interpreted, because only an existing legal provision can be interpreted.[15]

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reviewing the same final determination issued by SECOFI..." adding that the General Principles of Law are also defined by the treaty (NAFTA Article 1911), but not in a limiting way, so that all principles a court of the importing country would apply must be taken into consideration. The Panel that decided the case MEX-94-1904-03, after admitting the applicability of the General Principles of Law, limited itself to stating that they "include principles such as: the legal standing, due process, rules of interpretation of Law, issues without legal value and the exhaustion of remedies" all of them, based on Article 1911 NAFTA. Finally the Panel that dealt with the case MEX-96-1904-03 also limited itself to stating the General Principles of Law are a "second part of the Standard of Review", but without elaborating on the reason for its' statement. Nevertheless, the Final Decision admitted explicitly that "The General Principles of Law aforementioned have guided this Panel in its' Revision Process".

[14] "...In civil suits the final judgment shall be according to the letter of or the judicial interpretation of the law; in the absence of those, it shall be based on general principles of law". This constitutional provision is applied in all legal matters with exception to the penal laws. In Mexico those not admit of any form of legal interpretation.

[15] Furthermore, regarding the general principles of law, the Supreme Court of Justice of the Nation has sustained the following jurisprudential thesis which is quoted in order to illustrate the above considerations.

> **"GENERAL PRINCIPLES OF LAW. THE FEDERAL CONSTITUTION IN ITS ARTICLE 14 ADMITS THE APPLICABILITY OF THEM**. In order to fix the concept of general principles of law, the Supreme Court of Justice of the Nation has sustained two criteria:
>
> 1.- In the first one, in relation to positive law, it stated that "they are the principles contained in some of our laws, understanding as such not only those that have been issued after 1917, but also those before the 1917 Constitution. Fifth Époque, Volumes XIII, 1924 and XLIII, 1935, pages 995 and 858.
>
> 2.- In the second one, which we can refer to as the philosophical one, it states that "they are notorious legal truths, of general character undoubtedly, as their own name points out, made or selected by the legal science in such a manner that a judge can decide in the same way as a legislator would have reached if he had been present or would have established if he had foreseen the case, with the condition that it does not harmonize or are in contradiction with the body of legal norms whose vacuums are supposed to filled. Fifth Époque, Volume LV, 1938, page 2,641" (Góngora Pimentel,

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In the case of a binational panel, it should be kept in mind that the general principles of law referred to by paragraph 3 of Article 1904 NAFTA should not be considered a "second part" of the standard of review referred to in this paragraph and provided for in Annex 1911 of NAFTA. In other words, the standard of review has a unique character which must be treated as a whole supported in this concurring opinion, to attempt to include within this criteria other provisions or principles not specifically provided for in the referred Annex 1911, would result in a break from the common meaning granted to it by NAFTA. This would imply a breach to the rule of interpretation contained in paragraph 1 of Article 31 of the Vienna Convention on Law of the Treaties. That is, for panels that are constituted in Mexico, the only valid legal reference that can be applied as the standard of review is the one provided for in Article 238 of the Federal Tax Code. It is an exclusive provision which was intended by the NAFTA negotiating parties, because it is a standard of review but not a judgmental issue. This is, the basis on which a panel's decision relating to the determination of the investigating authority must be analyzed.

Furthermore, a literal interpretation of paragraph 3 of Article 1904 NAFTA leaves no doubt that by using the conjunctive "y" (and) whose purpose is to join words or clauses in an affirmative statement and whose grammatical purpose is the same,[16] the intention was to include both concepts, the standard of review and the general principles of law even though they are different in substance.

Given the foregoing, in the opinion of the signatories, the inclusion of the general principles of law in the text of NAFTA flows from the elementary premise that the task is to judge and solve a specific controversy, does not solely involve making logical conclusions that begin from written legal standards. In other words, the application of law

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Genaro David y Miguel Acosta Romero, Political Constitution of the United States of Mexico. Doctrine, Legislation and Jurisprudence, Mexico, Porrua, 1987, pages 328 and 329).

[16] Dictionary for the Spanish Language. Spanish Royal Academy, Madrid, Spain, 1992

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cannot be limited to the legal provisions that should be applied, because legal standards affect social behavior which is continuously changing and being transformed. Thus legal texts are never drafted with a limited view to particular time and place and judges find themselves applying the Law in a flexible manner reflecting the essential standards of justice and equity.

Had the negotiators of NAFTA wished to omit giving a binational panel power to apply the general principles of law, they would have made an inexcusable error, since many important instruments of international character have made reference to them, such as: The Bylaws of the Permanent Court of International Justice and the International Court of Justice of 1829 and 1945 respectively, the Universal Statement of Human Rights of 1948, the European Economic Community Incorporation Treaty and the Euratom Treaty both in 1957 and the International Agreement on Civil and Political Rights of 1966[17].

Therefore, in the opinion of several legal authors[18], the general principles in international law can be classified in three categories: a) those extracted from the idea of law itself (because legal standards must be reasonable); b) those implied by certain legal institutions (because all agreements imply a free acceptance with a legal purpose), and c) those generally contained in the internal positive law of sovereign nations (for example, good faith, unlawfulness profiting without cause, the authority of res judicata, the prohibition of abuse of a right, and the obligation to indemnify for the breach of legal obligations, among others).

Notwithstanding the above, the signatories consider that in order for the general principles of law to be applied in the international area, it is necessary that three requirements be met: a) that they are agreed to in domestic law of civilized nations; b)

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[17] Azua Reyes, Sergio T., Los Principios Generales de Derecho. Mexico, Porrua, 1986, pages 16-19

[18] Enciclopedia Juridica Omeba, V. XXIII, Buenos Aires, Argentina, Driskill, S.A., 1995, pages 156 and 157

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that they are accepted by the international community; and c) that they are common to all the member states regardless of the legal system to which they belong.[19]

In this context, in our judgment, reference to the general principles of law contained in paragraph 3 of Article 1904 NAFTA can not be minimized, to give them a lesser value and put, in jeopardy, the entire concept of the basis for the administration of justice. If this was not the case there would be no point in mentioning them in Article 1911[20] NAFTA.

For us it is not unusual that a panel formed in Mexico to deal with the traditional conception of the general principles of law in which their application is only allowed in the absence of a specific legal statue. Nevertheless, we consider important to highlight the different functions that the principles can perform.

According to Manuel Atienza Rodriguez[21], the general principles are not used only to fill vacuums, but also used to interpret the law, to develop new standards, etc.; furthermore, Maria Jose Falcon y Tella[22] quoting Norberto Bobbio, distinguishes three specific functions of the general principles of law: a) interpretative, which consists in untangling the complex character of a legal standard; b) integrating, which consists in

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[19] This last element is of the utmost importance. The countries that constitute NAFTA, belong to different legal systems. Canada (except, as the civil law, Quebec) and the United States are members of the Anglo-Saxon or Common Law, which is based on history and tradition due to its' origin in customs and practice of primitive English communities, which as time passed, they transformed in legal customs norms by virtue of the findings of tribunals through the operation of the adversarial system and the amendments to positive legislation thus three essential elements are necessary for its formation: a) a custom; b) the precedents and c) legislation; Mexico is counted among the Roman-Germanic or Civil Law, which is characterized for being a legislated law in which legal norms are made and ordered with precision having to be applied by judges in accordance to its clear and expressed text of the law. It is a legal system that its provisions are organized in codes, in which legislation and its judicial interpretation play a relevant role because they need to be in accordance with the social, economic and political thoughts of the époque.

[20] It needs to be said that Article 1911 of NAFTA include in not a limited manner some of these principles such as: legal standing, due process, rules for interpretation of law, matters without legal value, and exhaustion of administrative remedies.

[21] Atienza Rodriguez, Manuel, Sobre la Analogia en el Derecho. Ensayo de Analisis de un Razonamiento Juridico. Madrid, España. Civitas, S.A., 1986, page 185

[22] Falcon y Tella, Maria Jose, El Argumento Analogico en el Derecho. Madrid, España, Civitas, S.A. 1991 page 142.

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creating a rule or norm that is non-existent but is necessary in order to solve a controversy, and c) directive, this is, guiding the legislator at the time of legislating.

Due to the above, for us it appears that a panel formed in Mexico can assume that the general principles of law were incorporated in NAFTA in order to fulfill the first two functions. We do not accept that a literal interpretation of paragraph 3 of Article 1904 limits it to applying them only and exclusively when faced with a legal vacuum because notwithstanding that the text being analyzed may lack clarity, in the light of a correct grammatical interpretation, it does not necessarily lead us to the conclusion that its purpose was for a panel to apply them in " the same manner as",("as it would" or "in the same manner in which") a court of the importing party[23].

On the contrary, to agree that the double function of interpretation and integration of the general principles of law is totally in accordance with NAFTA's objectives and purposes, which also constitutes a mandatory rule of interpretation, as stated by Article 31 of the Vienna Convention, is evident that the flexible and dynamic nature of these general principles of law allow a panel to fulfill paragraph 1 of Article 102 of the Treaty, in the sense that the procedure for the solution of a controversy derived from Chapter XIX is actually efficient.

In conclusion, a binational panel can and must apply directly the general principles of law whenever the panel considers such action warranted. This does not mean that it would transform itself to a kind of equity court that may disregard express judicial provisions whose observance are obliged to safekeep. On the contrary, the use of these

[23] From the grammatical interpretation of this provision, two possibilities can be derived: From a reading of the text itself (the intent of the words used in this wording) it is read: "The panel will apply to standard of review stated in Annex 1911 and the general principles of law which a court of the importing party would apply...", meanwhile form a reading of the connotation of the text (intent of the writing contained in this sense) it is read: "The panel will apply the standard of review stated in Annex !911 and the general principles of law that, in the circumstance it would be possible (viable, valid, etc.) a court, to which the importing party submits, would apply". The two readings result in the conclusion that from a (semiological) view, both readings say the same, therefore, the universality of the document is restricted and its particularity expanded, thus it is possible to draft it with greater or lesser number of words.

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principles in their double functional aspect, this is, of interpretation, and of integration of law, allows the panel to weight all particular and special circumstances that surround a given case in order to reach a fair and balanced decision to a controversy that had been presented to it[24].

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[24] For merely illustrative purpose, we consider it interesting to summarize the concepts that over time have been issued: "Principles of Natural Law, principles identified with justice, principles dictated by reason and admitted by Law, universal rules of reason to give particular, fair and balanced solutions; universal common law created by nature and subsidiary by its function, applied as complement to legal vacuums, normative guides or directives of what if should be. Also they have been considered as principles admitted by practice, principles of Roman law, principles that build and give life to objective law, invitation of the law to the judge to create law, scientific law, supreme criterion fill the vacuums, fundamental norms or basic science norms, 'building blocks' necessary for the existence of an effective system, guiding norms or cardinal principles which point the ethical-political orientation of a system; indirect norms, normative compass or directives of what should be, furthermore, this principles have been understood as a mean used by legal authors to free themselves from the texts that do not answer to the prevailing legal opinion. (Azua Reyes, Sergio T., Los Principios Generales de Derecho, op. cit., pages 81 and 82).

On the other hand, the legal (standards) that are commonly called upon by Mexican courts as general principles of law are the following: "1 Ignorance of the law is not an exemption to its fulfillment; 2, the ancillary follows the path of the principal; 3. What is not forbidden, is allowed; 4. He who affirm is compel to prove; 5. There is no sentence without law; 6. He who can do the most, can also do the lesser; 7. Denied facts do not need prove; 8. There is no tax without a law; 9. First in time is first in right; 10. He who does not do what he is obliged to, does what he should not do; 11. When law makes no distinction, there is no need to distinguish; 12. Prove is to be borne by the complainant; 13. Void the payment of tax, void should be declared the fine and penalty; 14. Force majeure is like a necessity and it even exempts the fulfillment of the law; 15. No one is obliged to do the impossible; 16. Where there is the same reason, the same legal provision should apply; 17. No one is liable for someone else's' acts; 18. No agreement exempts the fulfillment of the law. 19. There are no witnesses other than a written document; 20. He who grants a proxy must be considered as having acted himself; 21. No one can be judge and a party of the same cause; 22. No one is allow to take justice on his own hands; 23. Doubt is to the benefit of the defendant; 24. Not twice over the same thing; 25. Where there is no ambiguity there can not be interpretation; 26. What is null does not produce any effect; 27. The fulfillment of law admits no excuses; 28. Any one's right deserves the respect of the others; 29. Seizures are only a guaranty, without implying prejudice of rights; 30. Seizure does not modify the condition of the right; 31. Facts belong to the parties, law is a function for the judge or magistrate; 32. He who does not do what he should, can be sanctioned; 33. Who is late in delivery falls in penalty; 34. Interpretation that leads to the absurd is inadmissible; 35. Counterclaim is a right of the accused not an offense to the complainant; 36. Sentence is only binding to the parties; 37. New laws respect acquired rights; 38. Obligations are not presumed, they need to be proven; 39 Things that have been done by someone are not to benefit or prejudice others; 40. Profit without a cause is forbidden; 41. Bad faith should never lead to a profit; 42. Good faith is always presumed, bad faith needs to be proven; 43. There is no crime without a law; 44. Agreements must be met; 45. No one shall be sentence for being a suspect; 46. What it is specific supersedes the generality; and 47. Bad faith is not presumed" (Carrasco Iriarte, Hugo, Lecciones de Practica Contenciosa en Materia Fiscal, Mexico, Themis, 1996, pages 109 -111).

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Finally it need to be said that for the signatories: Lucia Reina Antuña and Rodolfo Terrazas Salgado, it is gratifying to see that the judicial position on the sense and reach of the general principles of law have been changing, thus we allow ourselves to quote as a judicial precedent, the most recent thesis on this issue that has been sustained by the Judicial Power of the Federation.

> **GENERAL PRINCIPLES OF LAW, THEIR FUNCTION IN JUDICIAL ORDER**. Traditionally it has been considered by the Mexican Judicial System that judges, in order to decide matters brought to them, are subject to follow not only the positive-legal law, but also the general dogmas that conforms and give coherence to the entire judicial order, which are known as general principles of law, as they were gathered by the Constituent in Article 14 of the Fundamental Chart. The operation of these principles in their entire extension -for some as the source from which emanates all legal provisions, for others as their guide toward its objective- has not been understood as restricted to civil matters as could be derived from the cited constitutional provision through its strict interpretation, but even without its positivization to other type of matters, it is frequently admitted as the measure in which they are taken as the most general statement of the values incorporated in today's conception of law. Their function is not extinguished by the task of filling legal vacuums. It is mainly applicable to the interpretation of the law and its' application. Thus courts are empowered, and in many cases, obliged to issue their decisions having them in mind, in addition to the content of the law which are always limited by their own generality and abstraction, the content of the general principles of law, because they are the authentic and clear manifestation of the aspiration of community's justice.

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THIRD COLLEGIATE COURT FOR THE FIRST CIRCUIT ADMINISTRATIVE MATTERS.

Queja 93/89. Federico Lopez Pacheco. April 27, 1989. Unanimity of votes. Speaker: Genaro David Gongora Pimentel. Secretary: Adriana Leticia Campuzano Gallegos.

Fifth Epoque, Instancia: Third Section. Source: Semanario Judicial de la Federacion. Volume LV. Page 2641."

Signed in the original by:

On December 17, 1997	Lucía Reina Antuña .
Date	Lucía Reina Antuña
On December 17, 1997	Rodolfo Terrazas Salgado .
Date	Rodolfo Terrazas Salgado

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