

IN THE MATTER OF:

Imports of Cut-to-Length Plate
Products from the United States

MEX-94-1904-02

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This Binational Panel ("Panel") was constituted pursuant to Chapter Nineteen of the North American Free Trade Agreement ("NAFTA")^{1/} to review the final determination of the *Secretaría de Comercio y Fomento Industrial* (the "Investigating Authority" or "SECOFI") in the Cut-to-Length Plate Imports Antidumping Investigation,^{2/} which commenced in December 4, 1992.^{3/} In this Final Determination, the Investigating Authority determined that cut-to-length plate^{4/} produced by various U.S. producers and originating from the United States was being sold at less than normal value and that such dumped sales had caused injury to the domestic industry. These U.S. producers included, among others, Bethlehem Steel Corporation ("Bethlehem") and U.S. Steel Group, a unit of USX Corporation ("USX"), the complainants in this panel review ("Complainants").^{5/}

1/ North American Free Trade Agreement ("NAFTA"), drafted Aug. 12, 1992, revised Sept. 6, 1992, signed by the President of Mexico, Dec. 17, 1992, approved by the Mexican Senate, Nov. 22, 1993, published in the *Diario Oficial de la Federación* ("D.O."), December 20, 1993, entered into force January 1, 1994, and reprinted in 32 I.L.M. 605 (1994) and in Editorial Porrúa, S.A. in 1994. [In this Courtesy English Translation, all references to the text of the NAFTA are to the official English language version thereof.]

2/ Definitive Resolution Regarding the Antidumping Investigation into Imports of Cut-to-Length Plate from the United States, made on July 29, 1994 and published in the D.O., August 2, 1994 ("Final Determination").

3/ Under Article 1906(a) of the NAFTA, the binational panel review mechanism applies prospectively to "final determinations of a competent investigating authority made after the entry into force of this Agreement." Thus, although the investigation was begun prior to the entry into force of the NAFTA, the Final Determination was issued after the NAFTA's entry into force, satisfying the requirements of Article 1906(a). In the case of Mexico, the "competent investigating authority" is defined in Annex 1911 of the NAFTA as the designated authority within the SECOFI.

4/ As stated in the Final Determination, the subject goods are known in Mexico as *placa en hoja* or *plancha de acero en hoja* and in the United States as *cut-to-length steel plate*, *plate*, *heavy plate* and *medium plate*. See Final Determination, at 2.

5/ Bethlehem and USX, the *complainants* in this panel review proceeding, were *respondents* in the underlying administrative proceeding. For consistency sake, however, the Panel will refer throughout this Opinion to these two companies as the "Complainants."

As a result of SECOFI's findings, the Final Determination imposed definitive antidumping duties at the following rates on the Complainants:

USX 76.00 percent

Bethlehem 46.18 percent

The Complainants have challenged this affirmative determination on numerous specific grounds, which loosely fall into three broad categories: (1) jurisdictional and technical errors; (2) errors in the calculation of the dumping margin; and (3) errors in the findings of causation and injury.^{6/}

For the reasons set forth more fully below, a majority of the Panel (“Majority”) ^{7/} concludes that SECOFI, in carrying out this administrative proceeding, failed to comply with basic constitutional and other applicable legal principles, and on the basis of the administrative record, the applicable law, the written submissions of the parties, and the oral argument held on May 3-4, 1994, at which all participants were heard, the Panel remands this proceeding back to SECOFI for action consistent with this Opinion.

^{6/} A summary of the challenges by the Complainants to the Final Determination appears in Part IV of this Opinion.

^{7/} Panelists Ramírez, Lutz and Endsley make up the Panel majority.

II. PROCEDURAL HISTORY ^{8/}

A. Administrative Investigation Procedure

This case was begun, at the administrative level, on December 4, 1992 when Altos Hornos de México, S.A. de C.V. ("Petitioner" or "AHMSA") filed an antidumping petition against imports of cut-to-length plate originating from the United States. This petition^{9/} was filed by AHMSA with the *Dirección General de Prácticas Comerciales Internacionales* (DGPCI), an administrative subunit of SECOFI. On December 11, 1992, DGPCI, acting through its own administrative subunit, the *Dirección de Cuotas Compensatorias* (DCC), accepted receipt of said petition, which document was signed by the DCC's Director, *Mr. Miguel Angel Velázquez Elizarrarás*.^{10/}

Thereafter, having determined that the antidumping petition was a sufficient basis upon which to proceed with a full investigation, the Investigating Authority issued its Provisional Determination^{11/} against the U.S. producers of cut-to-length plate, including the Complainants, which was published in the *Diario Oficial de la Federación* ("D.O.") on December 24, 1992.^{12/} This Provisional Determination was ordered by the Secretary of Commerce and Industrial Development, *Mr. Jaime Serra Puche*, but was signed in his absence by the Undersecretary of Foreign Commerce and Investment, *Mr. Pedro Noyola*.^{13/}

^{8/} Citations to documents on the non-confidential administrative record (the public record) will be designated as "Volume __, P.R. ____." Citations to documents on the confidential administrative record will be designated as "Volume __, C.R. ____."

^{9/} Complaint Against Unfair Trade Practices (December 4, 1992) (Volume 1, P.R. 2529).

^{10/} Notice of Receipt of Petition (December 11, 1992) (Volume 1, P.R. DGPCI.92.1902).

^{11/} See Provisional Resolution Declaring the Opening of the Administrative Investigation of Imports of Cut-to-Length Plate from the United States ("Provisional Determination"), D.O. (December 24, 1992) (Volume 1, P.R. s/n) The letters "s/n" mean no number (*sin número*).

^{12/} The merchandise covered by the Provisional Determination includes Harmonized Tariff System items 7208.32.01, 7208.33.01, 7208.42.01 and 7208.43.01.

^{13/} See Article 31 of the 1989 SECOFI Internal Regulations, discussed *infra*.

On February 3, 1993, DGPCI issued a series of notifications to various domestic companies, notifying them of the Provisional Determination and requesting their response to the annexed questionnaire.^{14/} These notifications were signed by *Mr. Velázquez*, as Director of DGPCI's subunit, the DCC.

Thereafter, on February 8, 1993, DGPCI issued a series of similar notifications to various U.S. steel producers, including the Complainants.^{15/} These notifications again were signed by *Mr. Velázquez*, as Director of the DCC. These notifications also required extensive information and documentation to be submitted in response to the annexed questionnaire and in Paragraph XIII thereof required that all correspondence be submitted to "Dr. Alvaro Baillet, Director General de Prácticas Comerciales Internacionales, Secretaría de Comercio y Fomento Industrial."

On March 8, 1993, the Complainants filed responses to the foregoing questionnaires with DGPCI,^{16/} and on the same date also submitted comments regarding injury and threat of injury.^{17/}

On April 28, 1993, SECOFI issued its Preliminary Determination, which was published in the D.O.^{18/} The Preliminary Determination determined that the imports under investigation had been sold at less-than-normal value and that such imports were causing or threatening to cause material injury to the Mexican cut-to-length plate industry.

^{14/} See, for example, Notice of Provisional Determination issued to Aceros, R.G.C., S.A. (February 3, 1993) (Volume 1, P.R. DGPCI.93.100).

^{15/} See Notice of Provisional Determination issued to USX (February 8, 1993) (Volume 1, P.R. DGPCI.93.124) and to Bethlehem (February 8, 1993) (Volume 1, P.R. DGPCI.93.133).

^{16/} Responses of Bethlehem and USX to the official questionnaire (March 8, 1993) (Volume 2, P.R. 705 and 702, respectively).

^{17/} Information about injury and threat of injury (March 8, 1993) (Volume 2, P.R. 708).

^{18/} See Revision of the Provisional Resolution Regarding the Antidumping Investigation of Imports of Cut-to-Length Plate from the United States ("Preliminary Determination") (April 29, 1993) (Volume 3, P.R. s/n). SECOFI calculated a dumping margin of 16.42% for Bethlehem and 44.92% for USX.

The Preliminary Determination was communicated to Complainants by means of official letters issued by the *Dirección General Adjunta de Técnica Jurídica* (DGATJ) of the *Unidad de Prácticas Comerciales Internacionales* (UPCI) of SECOFI.^{19/} In these letters, the Complainants were granted a period of time up to May 31, 1993 to reply and comment. UPCI also issued letters notifying the Ambassador and Commercial Counselor of the American Embassy of the publication of the Preliminary Determination.^{20/}

In a letter dated March 10, 1993, the Complainants requested a disclosure conference with SECOFI officials to discuss the methodologies for SECOFI's dumping calculations and its findings of injury and threat of injury.^{21/} By letter dated May 14, 1993, SECOFI fixed the date of May 24, 1993 as the date of the disclosure conference.^{22/}

On May 18, 1993, the Complainants requested an extension of 14 days for the period in which to issue comments on the Preliminary Determination and a new date for the holding of the disclosure conference.^{23/} In an official letter dated May 21, 1993, the requested 14-day extension was granted by the *Dirección de Procedimientos y Proyectos* (DPP), a subunit of the DGATJ, which also re-set the disclosure conference for May 31st and June 1st, 1993.^{24/}

On June 15, 1993, Complainants filed further comments regarding injury and the threat of injury with SECOFI.^{25/}

^{19/} See letter to Bethlehem (April 30, 1993) (Volume 3, P.R. UPCI.93.1414), and letter to USX (April 30, 1993) (Volume 3, P.R. UPCI.93.1404).

^{20/} See letter to Ambassador (April 29, 1993) (Volume 3, P.R. UPCI.211.93.1425) and letter to Commercial Counselor (April 29, 1993) (Volume 3, P.R. UPCI.211.93.1426).

^{21/} See letter to SECOFI (March 10, 1993) (Volume 3, P.R. 1975).

^{22/} See letter to Complainants (May 14, 1993) (Volume 3, P.R. UPCI.211.93.1571).

^{23/} See letter to SECOFI (May 18, 1993) (Volume 3, P.R. 2084).

^{24/} See letter to Complainants (May 21, 1993) (Volume 3, P.R. UPCI.211.93.1601).

^{25/} See letter to SECOFI (June 15, 1993) (Volume 3, P.R. 2753).

By means of official letters dated July 13 and 14, 1993, the DPP notified the Complainants that verification visits would be carried out at their respective premises later that month.^{26/} During the period from July 23-31, 1993, SECOFI carried out these verification visits.^{27/} At the conclusion of each daily visit, SECOFI, according to normal practices, issued a daily verification certificate (*Acta Circunstanciada*), the collectivity of which the Panel will refer to herein as a “Verification Report.” In each Verification Report, the respective Complainant was granted a period of 7 business days in which to present in writing to SECOFI any clarifications to the content of the Verification Report, as well as to present any information requested by SECOFI during the course of the verification visit.

On September 7, 1993, Complainants held a disclosure conference with SECOFI officials to discuss the manner in which SECOFI had reached its findings in the Preliminary Determination. Following that conference, on September 22, 1993^{28/} and again on October 26, 1993,^{29/} Complainants filed written comments with SECOFI on the disclosure conference.

On August 2, 1994, SECOFI issued its Final Determination, which found both dumping by the Complainants and material injury to the Mexican cut-to-length plate industry.^{30/} This Final Determination was ordered by the Secretary of Commerce and Industrial Development, but was signed in his absence by the Undersecretary of Foreign Commerce.^{31/} The Final Determination imposed antidumping duties for cut-to-length plate products on USX at the rate of 76 percent and on Bethlehem at the rate of 46.18 percent.

^{26/} See letter to USX (July 13, 1993) (Volume 13, C.R. UPCI.211.93.2289) and letter to Bethlehem (July 14, 1993) (Volume 13, C.R. UPCI.211.93.2344).

^{27/} The verification visits for USX were conducted on July 23-24 and 26-27, 1993 (Volume 13, C.R. s/n) and the verification visit for Bethlehem was conducted on July 28-31, 1993 (Volume 13, C.R. s/n).

^{28/} See letter to SECOFI (September 22, 1993) (Volume 15, C.R. 4297).

^{29/} See letter to SECOFI (October 26, 1993) (Volume 5, P.R. 4828).

^{30/} See Final Determination (August 2, 1994) (Volume 5, P.R. s/n).

^{31/} The Final Determination was signed by *Undersecretary Pedro Noyola* in the absence of *Secretary Jaime Serra Puche*.

On September 1, 1994, Complainants filed Requests for Panel Review with the Mexican Section of the NAFTA Secretariat^{32/} and on October 3, 1994 filed formal complaints with that office.^{33/} Then on October 12, 1994 Complainants filed amended complaints.^{34/} Thereafter, on November 2, 1994, the Investigating Authority filed the administrative record with the NAFTA Secretariat.

B. Procedure Before the Panel

Several procedural motions were made to, and considered by, the Panel during the pendency of this review. The orders made by the Panel in response to those motions are briefly summarized below:

February 24, 1995^{35/}

In response to a motion by Complainants, the Panel unanimously ordered that the Public and Confidential Records be supplemented as to certain letters identified by Complainants and by SECOFI in their motion papers, but denied Complainants' request that non-confidential summaries of certain confidential documents be placed in the Public Record.

February 24, 1995^{36/}

In response to a motion by SECOFI, the Panel unanimously denied SECOFI's request that the

^{32/} See Bethlehem Request for Panel Review (September 1, 1994) (Volume 1, S.C.R. 1) and USX Request for Panel Review (September 1, 1994) (Volume 1, S.C.R. 2). Citations to documents on the non-confidential Secretariat record will be designated as "Volume __, S.P.R. __." Citations to documents on the confidential Secretariat record will be designated as "Volume __, S.C.R. __."

^{33/} See USX Complaint (October 3, 1994) (Volume 2, S.P.R. 51) and Bethlehem Complaint (October 3, 1994) (Volume 2, S.P.R. 52).

^{34/} See USX Amended Complaint (October 12, 1994) (Volume 3, S.P.R. 59) and Bethlehem Amended Complaint (October 12, 1994) (Volume 3, S.P.R. 58).

^{35/} Volume 8, S.P.R. 161.

^{36/} Volume 8, S.P.R. 169.

Complainants be compelled to file their case brief in a single volume as opposed to its filing in multiple volumes; denied SECOFI's request that Complainants' case brief be amended to eliminate certain references that fall outside the administrative record; denied SECOFI's request that the Complainants be required to "clarify" their case brief in certain respects; and denied SECOFI's request for an extension of time in which to file a response brief.

April 5, 1995^{37/}

In response to a motion by AHMSA, the Panel unanimously denied AHMSA's request that the Complainants be compelled to their case brief in a single volume as opposed to its filing in multiple volumes; denied AHMSA's request that Complainants' case brief be amended to eliminate references to U.S. producers that were not party to this particular proceeding; denied AHMSA's request that Complainants' case brief be amended to eliminate certain references that fall outside the administrative record; and denied AHMSA's request that Complainants be required to "clarify" their case brief in certain respects.

April 7, 1995^{38/}

In response to a motion by SECOFI, the Panel unanimously ordered that Lic. Luis Manuel Pérez de Acha, counsel of record for the Complainants, file powers of attorney issued by his respective clients establishing his authority to represent those clients.

April 20, 1995^{39/}

Of its own motion, the Panel unanimously ordered that the preceding order be amended in certain respects.

^{37/} Volume 14, S.P.R. 284.

^{38/} Volume 14, S.P.R. 298. In addition to signing the order of the full Panel, Panel Member Ramírez provided additional views regarding the issues addressed in that order.

^{39/} Volume 15, S.P.R. 345.

April 28, 1995^{40/}

In response to a motion by the Complainants, the Panel unanimously ordered that SECOFI issue an authorization granting Lic. Luis Manuel Pérez de Acha, counsel of record for the Complainants, access to information contained in the Confidential Record without any requirement for the posting of a bond or financial guaranty.

May 12, 1995^{41/}

Of its own motion, the Panel issued a new order related to the preceding order.

^{40/} Volume 15, S.P.R. 367. In addition to signing the order of the full Panel, Panel Member Ramírez provided additional views regarding the issues addressed by the Panel in that order.

^{41/} Volume 16, S.P.R. 408.

III. THE STANDARD OF REVIEW^{42/}

A. The Treaty Requirements

This Panel derives its authority from Chapter 19 of the NAFTA, a treaty between Mexico, Canada and the United States which came into force in all three countries on January 1, 1994.^{43/} Pursuant to Article 133 of the Political Constitution of the United Mexican States (the "Constitution"), international treaties signed by the President of the Republic and approved by the Senate (*Camara de Senadores*)^{44/} are the Supreme Law of Mexico.^{45/} Moreover, in contrast to the situation in Canada and the United States, international treaties are of direct application; they are self-executing and thus directly integrated into the corpus of Mexican law without the necessity of enabling legislation or judicial action. The Supreme Court of Justice of the Nation ("SCJN" or "Supreme Court") has confirmed this principle in a very recent ruling.^{46/} Thus, this Panel derives its essential authority directly from the Treaty itself and it is permitted, indeed compelled, to apply that Treaty language.

As had been the case with respect to Chapter 19 of the Canada-U.S. Free Trade Agreement

^{42/} Panelists Vega and Barton do not join in this portion of the Opinion.

^{43/} See Art. 2203 ("This Agreement shall enter into force on January 1, 1994, on an exchange of written notifications certifying the completion of necessary legal procedures.") See also Poder Ejecutivo, Secretaría de Relaciones Exteriores, D.O., Dec. 8, 1993 (declaring Mexican Senate approval of the NAFTA and accompanying agreements).

^{44/} Article 76, Section I, of the Mexican Constitution provides in pertinent part: "The exclusive powers of the Senate are: ...[T]o approve the international treaties and diplomatic conventions made by the Executive of the Union."

^{45/} Article 133 of the Mexican Constitution provides in pertinent part:

Article 133.—This Constitution, the laws of the Congress of the Union which emanate therefrom, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union.

^{46/} See Contradicción de Tesis 3/92, Pleno de la Suprema Corte de Justicia, sesión del 2 de marzo de 1994 (international treaties are to be directly applied even if inconsistent with pre-existing internal rules).

("CFTA"),^{47/} which chapter was incorporated into the NAFTA without significant change, Chapter 19 of the NAFTA provides that judicial review of final antidumping and countervailing duty determinations may be *replaced* with binational panel review of such determinations.^{48/} In the case of Mexico, binational panel review replaces judicial review by the *Tribunal Fiscal de la Federación* ("Fiscal Tribunal").^{49/}

Pursuant to Article 1904(3) of the NAFTA, each binational panel must "apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority." (Emphases added). Therefore, in a Mexican antidumping case, binational panels must apply the standard of review and the general legal principles that the Fiscal Tribunal would have applied when

^{47/} Canada-U.S. Free Trade Agreement, *done* January 2, 1988, *entered into force* January 1, 1988, and *reprinted in* 27 I.L.M. 281 (1988).

^{48/} NAFTA, Article 1904(1).

^{49/} The Fiscal Tribunal is an administrative court, with full powers to render decisions and issue orders, and with its organization and attributes established by the Organic Law of the Federal Fiscal Tribunal (*Ley Orgánica del Tribunal Fiscal de la Federación*). The jurisdiction of the Fiscal Tribunal is not limited to matters of a fiscal character, but also covers other areas of administrative law. Most pertinently, Article 15(VII) of its Organic Law grants jurisdiction to the Upper Division of the Fiscal Tribunal to resolve disputes under Article 95 of the new Foreign Trade Law ("Resolver los juicios en materia de comercio exterior a que se refiere el artículo 95 de la Ley de Comercio Exterior"). The latter provision (unofficial translation) states:

Art.95.- The purpose of the administrative appeal referred to in this Chapter shall be to revoke, modify, or uphold the contested administrative determination and the decisions which are rendered shall contain the joinder of the issue, the legal grounds upon which such administrative act are based, and the resolute points.

The administrative appeal for revocation shall proceed and be resolved in accordance with the provisions of the Federal Fiscal Code, and shall be exhausted before any judicial proceedings before the Upper Division of the Fiscal Tribunal shall commence.

Administrative decisions issued to resolve the appeal for reversal and revocation, or those decisions that hold that no appeal, in effect, has been filed, shall be considered final for purposes of bringing a legal action before the Upper Division of the Fiscal Tribunal, through a judicial proceeding prosecuted pursuant to the final paragraph of article 239 bis of the Federal Fiscal Code.

The administrative determinations set forth in Article 94 not appealed within the time limit set forth in the Federal Fiscal Code shall be deemed accepted and may not be challenged before the Fiscal Tribunal.

reviewing a final determination by SECOFI.

As noted, the term "standard of review" is defined in the treaty itself (Annex 1911), which points to separate statutory review standards for each of the three NAFTA Parties. In the case of Mexico, Annex 1911 states that the applicable standard of review 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."^{50/}

The phrase "general legal principles" is also defined in the Treaty. Article 1911 provides that the term "includes principles such as standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies." By its terms, this is not a wholesale adoption of local legal principles, but rather an adoption of those legal principles that have been developed by the Mexican Courts with respect to the specified (or similar) subject matters.

For its part, the term "administrative record" is defined in Article 1911 to mean generally (a) the documentary and other information presented to or obtained by the investigating authority in the course of the administrative proceeding; (b) a copy of the final determination; (c) all transcripts or records of conferences or hearings; and (d) all notices published in the official journal (*e.g.*, the D.O.) in connection with the administrative proceeding.

In summary, therefore, this Panel is required to examine and faithfully apply the Mexican standard of review set out in the Treaty and to apply, as and when appropriate, one or more of the principles encompassed by the term "general legal principles," but to confine its review strictly to the facts and information contained in the administrative record.

With these requirements in mind, the Panel acknowledges its central task and objective to be

^{50/} In the case of Canada, the applicable standard of review is "the grounds set out in subsection 18.1(4) of the *Federal Court Act*, as amended, with respect to all final determinations" and, in the case of the United States, it is, in most instances, "the standard set out in section 516A(b)(1)(B) of the *Tariff Act of 1930*, as amended...."

that of determining whether the Investigating Authority's Final Determination is or is not in accordance with the antidumping law of Mexico.^{51/} The Treaty guides the Panel as to what constitutes Mexican antidumping law for this purpose. Article 1904(2) of the official English version of the NAFTA states that "the antidumping ... law [of Mexico] consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of [Mexico] would rely on such materials in reviewing a final determination of the competent investigating authority."^{52/}

Although the quoted language is unambiguous on its face, one aspect of this provision deserves further mention, and that is its technical failure to specifically mention international treaties of direct application as a source of Mexican antidumping law. Treaty law, such as Article VI of the original General Agreement on Tariffs and Trade ("GATT")^{53/} and the GATT 1979 Antidumping

^{51/} Article 1904(2) specifically requires the Panel to "review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party."

^{52/} For purposes of a panel review, Article 1904(2) actually incorporates directly into the Treaty itself the local antidumping and countervailing duty statutes and does so without any substantive amendment of those statutes. The term "statute]" is defined in Annex 1911 as, in the case of Mexico, "the relevant provisions of the *Foreign Trade Act Implementing Article 131 of the Constitution of the United Mexican States* (Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior), as amended, and any successor statutes". See D.O., January 13, 1986. The cited statute, to be referred to herein as the "Old Mexican Trade Law," has been superseded by the new *Foreign Trade Law* (Ley de Comercio Exterior). See D.O., July 27, 1993, as amended, D.O., December 22, 1993. Nevertheless, in the instant case, Transitory Provision Fourth of the new Foreign Trade Law provides that the former law remains applicable ("The administrative proceedings referred to in this Law that are pending at the time this Law enters into force shall be governed by the terms of the *Foreign Trade Act Implementing Article 131 of the Constitution of the United Mexican States*").

^{53/} General Agreement on Tariffs and Trade ("GATT"), opened for signature, Oct. 30, 1947, 55-61 U.N.T.S. 104, T.I.A.S. No. 1700, IV Basic Instruments and Selected Documents ("B.I.S.D.") 1, 4 Bevens 639, as amended T.I.A.S. No. 1890. Mexico became a signatory to the GATT on August 24, 1986. See Poder Ejecutivo, Secretaría de Relaciones Exteriores, D.O., Oct. 29, 1986 (publishing decree pursuant to which Mexican Senate ratified Mexico's Protocol of Accession to GATT). As a result of the Uruguay Round negotiations, the GATT is being superseded by the World Trade Organization ("WTO"). The WTO came into force on January 1, 1995 for each of Mexico, Canada and the United States but it has been agreed that for a period of one year GATT 1947 and the WTO (including GATT 1994) shall co-exist, principally to provide time to settle outstanding GATT disputes. Similarly, the Tokyo Round Antidumping and Subsidies Codes are to co-exist with their new Uruguay Round counterparts for a period of one year. By its terms, the Uruguay Round Antidumping Code will supersede the Tokyo Round Antidumping Code only with respect to "investigations" and reviews of existing measures" initiated

Code,^{54/} is, of course, a fundamentally important part of Mexican antidumping law and its potential "omission" as a source of antidumping law would be a serious distortion of the law as it actually exists in Mexico.

The Panel notes that under the official Spanish language version of NAFTA Article 1904(2),^{55/} this does not appear to pose a significant issue. In that version, "leyes" is referred to as a source of antidumping law in Mexico, and the term "leyes" is well-known pursuant to the Constitution^{56/} to include treaties to which Mexico is a party. However, under the official English language version of Article 1904(2), which utilizes the words "relevant statutes," the omission of a reference to treaties may be of some moment.^{57/} Nevertheless, the Panel concludes that there is ample support that these treaty documents are an important source of Mexican antidumping law for purposes of Chapter 19 generally and Article 1904(2) specifically and that it is appropriate in this context to rely upon the Spanish language version of Article 1904(2). Therefore, the Panel has

after the WTO has come into effect. See Para. 18.3.

^{54/} Agreement on Implementation of Article VI of the GATT ("GATT 1979 Antidumping Code"), 31 U.S.T. 4919, T.I.A.S. No. 9650, 1160 U.N.T.S. 204, 26 B.I.S.D. 171-88 (1980); *reprinted in* 18 I.L.M. 621 (1979) (entered into force January 1, 1980). Mexico became a signatory to the GATT 1979 Antidumping Code on April 12, 1979, but it did not come into force in Mexico until 1988. See Decreto de promulgación del Acuerdo relativo a la Aplicación del Artículo VI del Acuerdo General sobre Aranceles Aduaneros y Comercio, D.O., Apr. 21, 1988 (publishing Mexican Senate ratification and text of GATT 1979 Antidumping Code); see also Decreto por el que se aprueba el Acuerdo relativo a la Aplicación del Artículo VI del Acuerdo General sobre Aranceles Aduaneros y Comercio, D.O., Dec. 4, 1987 (ratifying GATT 1979 Antidumping Code).

^{55/} The second sentence of the official Spanish language version of NAFTA Article 1904(2) reads: "Para este efecto, las disposiciones jurídicas en materia de cuotas antidumping y compensatorias consisten en leyes, antecedentes legislativos, reglamentos, práctica administrativa y precedentes judiciales pertinentes, en la medida en que un tribunal de la Parte importadora podría basarse en tales documentos para revisar una resolución definitiva de la autoridad investigadora competente." (Emphasis added.)

^{56/} See Article 133 of the Constitution.

^{57/} This discrepancy in language may be explained by the fact that in Canada and the United States the word "statute" would be a normal and appropriate use. In addition, in these two countries treaties almost never have direct application (*i.e.*, they are not self-executing). Instead, they enjoy their validity through enabling legislation (*i.e.*, a specific statute implementing the international obligations represented by the treaty). In this context, the English language version of Article 1904(2) would present no concern or difficulty. As shown above, however, in Mexico these treaty obligations are often of direct effect, not imposed through statutory enabling legislation.

considered them in depth for purposes of this review.^{58/}

The Panel also notes the similar technical failure of Article 1904(2) to make reference to constitutional sources as a potential source of antidumping law.^{59/} Again, however, to the extent that the Mexican Constitution has provisions which, expressly or by judicial interpretation, impact the scope or meaning of an antidumping statute, or which impact the scope or meaning of the defined standard of review, this Panel regards itself as compelled to take those constitutional provisions into account. No party in this review has argued to the contrary. Moreover, the Panel notes that the definition of "domestic law" contained in NAFTA Article 1911,^{60/} for purposes of Article 1905(1) ("Safeguarding the Panel Review System"),^{61/} would impose on an Article 1905 committee the duty to consider and apply the Mexican Constitution along with statutes, regulations and judicial decisions in this safeguard context.

In summary, therefore, the Panel interprets its obligations under Article 1904(2) of the NAFTA in the Mexican context as requiring it to examine (i) the Mexican Constitution; (ii) treaty law;^{62/} (iii) statutes; (iv) legislative history, (v) regulations, (vi) administrative practice, and (vii) judicial precedents, all to the extent that the Fiscal Tribunal would have relied on such sources. Of course, not all of these sources of law are of equivalent rank. Under Article 133 of the Mexican Constitution, the Constitution itself prevails over all other law, and constitutionally-mandated laws

^{58/} The Panel notes that the parties to this proceeding have themselves relied extensively on this treaty language.

^{59/} Regrettably, this technical failure is not "cured" by an examination of the Spanish language text of the NAFTA.

^{60/} Article 1911 defines "domestic law" as follows: "domestic law for purposes of Article 1905(1) means a Party's constitution, statutes, regulations and judicial decisions to the extent they are relevant to the antidumping and countervailing duty laws." (Emphasis added.)

^{61/} Not included in the CFTA, the NAFTA's safeguard mechanism is designed to protect panel rulings and the panel process whenever a Party's law impedes the effective functioning of the binational panel review process.

^{62/} The Panel also notes that it would be appropriate to include the NAFTA itself as a source of antidumping law if the NAFTA included *substantive* provisions related to that law. As noted earlier, however, while the NAFTA has implemented important *procedural* changes in the antidumping arena, it has not made substantive changes in the antidumping law of any of the three NAFTA Parties. As will be noted later, the Panel also is of the view that the NAFTA did not intend to make any substantive changes in the Mexican standard of review.

and international treaties prevail over ordinary federal or state laws , including regulations.^{63/} It is a principle of federal law to consider the latter in time to prevail in the event of inconsistency.^{64/}

It was noted in the discussion of Article 1904(2) above that the Panel should rely on the stipulated sources of law "to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority." In order to accomplish this, the Panel thus considers it necessary to follow the legal methodologies employed by local courts (*i.e.*, the Fiscal Tribunal) in applying these various sources of antidumping law. While binational panels are intended to "replace" judicial review of agency determinations, they are not intended to apply a different substantive law than would be applied by the local court, nor are they intended to apply a different standard of review than would be applied by the local court.

Indeed, there has been broad recognition of the fact that binational panels are not to develop a separate jurisprudence in antidumping cases from the jurisprudence developed by local tribunals for such cases.^{65/} The very essence of the Chapter 19 process is one of ensuring that the procedural

^{63/} Under Article 133 of the Constitution, the Constitution prevails over all other laws. On a second level are the laws of Congress which emanate from, or are mandated by, the Constitution and international treaties. Examples of these would be the *Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en materia de comercio exterior* and *NAFTA*. This body of laws, comprise the Supreme Law of the Union. On a third level are ordinary federal laws, which do not develop specific articles of the Constitution; and on a fourth level, federal regulations and all state laws and regulations. See page 32 of *Estudios Constitucionales* by Jorge Carpizo, Instituto de Investigaciones Jurídicas, UNAM, 1980.

^{64/} See the following decision: LEYES, REFORMAS O DEROGACION DE LAS. "... Pero tratándose de dos leyes federales, una disposición de la posterior puede derogar a la anterior.... Puede ser tácita, como cuando lo dispuesto en el precepto nuevo sea incompatible con lo dispuesto en el precepto anterior, aunque se trate de distintos cuerpos de leyes, y aunque en la ley nueva no se hable expresamente de derogación alguna." Instancia: Tribunales Colegiados de Circuito. Fuente: Semanario Judicial de la Federación. Epoca 7a, Volumen 32. Página 59. See also Article 9 of the Código Civil.

^{65/} This conclusion, of course, flows from the language of the Treaty itself. Articles 1901 and 1902 make it clear that each country *retains* its existing domestic antidumping law without change, but is free to amend that law. Under Article 1903, a procedure is established whereby any such amendment can be challenged for its consistency with the Treaty. Various statements made by the U.S. Congress also make this point indisputably clear. In the Statement of Administrative Action to the North American Free Trade Agreement Implementation Act, *reprinted* in H. Doc. 103-159, Vol. 1, 103d Cong., 1st Sess. at 195, for example, Congress made the following statement:

"There are several advantages to having judges and former judges serve as panelists. For example, the participation of panelists with judicial experience would help to ensure that, in accordance with the

improvements adopted in Chapter 19 by the NAFTA Parties for the review of antidumping duty cases will be faithfully implemented, but not to make substantive changes in the local antidumping law. The three governments have reserved that option for themselves.^{66/} In short, it is a fundamental obligation of binational panels to attempt to construe local antidumping law as a local court would construe it, and to construe the applicable standard of review as a local court would construe it.

With the foregoing in mind, the Panel now turns to an examination of the cited standard of review in Mexico, Article 238 of the Federal Fiscal Code.

B. The Statutory Language

1. Article 238

Official Spanish language and unofficial English language versions^{67/} of Article 238 of the Federal Fiscal Code are set out below:

| Artículo 238 Código Fiscal de la Federación | Article 238 Federal Fiscal Code |
|---|--|
| Art. 238. —Se declarará que una resolución administrativa es ilegal cuando se demuestre alguna de las siguientes causales: | Art. 238 —An administrative determination shall be declared illegal when any one of the following grounds is established: |

requirement of Article 1904, panels review determinations of the administering authorities precisely as would a court of the importing country by applying exclusively that country's AD and CVD law and its standard of review. In addition, the involvement of judges in the process would diminish the possibility that panels and courts will develop distinct bodies of U.S. law." (Emphases added).

^{66/} Article 1902.

^{67/} This English language translation of Article 238 of the Federal Fiscal Code was prepared by the Panel itself as an attempt to express in English the legal concepts involved somewhat more clearly than the more literal translations provided the Panel by the parties in their briefs. The Panel appreciates the difficulty of preparing a translation of this provision into English which is effective as well as precise, and in any event has used such translation only as a tool. It has been guided in its analysis ultimately only by the Spanish language original. All other English language translations of original Spanish language text appearing in this Opinion should also be considered to be informal and unofficial.

I. Incompetencia del funcionario que la haya dictado u ordenado o tramitado el procedimiento del que deriva dicha resolución.

II. Omisión de los requisitos formales exigidos por las leyes, que afecte las defensas del particular y trascienda al sentido de la resolución impugnada, inclusive la ausencia de fundamentación o motivación, en su caso.

III. Vicios del 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 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.

I. Lack of jurisdiction or authority of the agency or official issuing the challenged determination or ordering, initiating or carrying out the proceeding in which the challenged determination was issued.

II. An omission of formal legal requirements by the agency or official issuing the challenged determination which affects the person's right of proper defense as well as the scope or meaning {outcome} of the challenged determination, or a failure of the agency or official to provide a reasoned determination based upon the record.

III. A violation or defect of procedure by the agency or official issuing the challenged determination, which affects the person's right of proper defense as well as the scope or meaning {outcome} of the challenged determination.

IV. If the facts which underlie the challenged determination do not exist, are different from the facts cited by the agency, or were considered by the agency in an erroneous way; if the challenged determination was issued by the agency in violation of the applicable laws or rules; or if the correct laws or rules were not applied by the agency.

V. Whenever a discretionary determination by an agency falls outside the lawful scope of that discretion.

2. Related Provisions

Before reviewing the specific clauses of Article 238 of the Federal Fiscal Code, the Panel notes that this provision does not exist in isolation from other provisions of that Code that also bear upon its operation. Indeed, these related statutory provisions—Articles 237 and 239 of the Federal Fiscal Code—have become a source of dispute and controversy in this review. Official Spanish language and unofficial English language versions of these two articles also appear below.

Artículo 237

Article 237

Código Fiscal de la Federación

Art. 237.—Las sentencias del Tribunal Fiscal se fundarán en derecho y examinarán a todos y cada uno de los puntos controvertidos del acto impugnado, teniendo la facultad de invocar hechos notorios.

Quando se hagan valer diversos conceptos de nulidad por omisión de formalidades o violaciones de procedimiento, la sentencia o resolución de la Sala deberá examinar y resolver cada uno, aún cuando considere fundado alguno de ellos. En el caso de que la sentencia declare la nulidad de una resolución por la omisión de los requisitos formales exigidos por las leyes, o por vicios del procedimiento, la misma deberá señalar en qué forma afectaron las defensas del particular y trascendieron al sentido de la resolución.

Las Salas podrán corregir los errores que adviertan en la cita de los preceptos que se consideren violados y examinar en su conjunto los agravios y causales de ilegalidad, así como los demás razonamientos de las partes, a fin de resolver la cuestión efectivamente planteada, pero sin cambiar los hechos expuestos en la demanda y en la contestación.

No se podrán anular o modificar los actos de las autoridades administrativas no impugnados de manera expresa en la demanda.

Artículo 239 Código Fiscal de la Federación

Art. 239.—La sentencia definitiva podrá:

I. Reconocer la validez de la resolución impugnada.

Federal Fiscal Code

Art. 237.—The judgments or orders of the Fiscal Tribunal shall be based on law and shall examine and discuss each and every one of the points challenged in the determination under review. The Fiscal Tribunal shall be able to take well-known facts into account.

When different arguments or grounds for the nullification of the determination under review are made, based on the omission of legal formalities or procedural defects, the opinion or judgment of the Chamber [of the Fiscal Tribunal] shall discuss and resolve each one, even when it considers one of those arguments or grounds to be well-founded. When the opinion or judgment declares the nullity of an administrative determination on the basis of the omission of legal formalities or for procedural defects, it shall indicate in what way the defenses of the party are affected by the omissions or defects and how these affect the scope or meaning {outcome} of the administrative determination.

The Chambers may correct errors in the legal principles alleged by the complainant to have been violated and may examine the applicable legal principles together with the questions of damages and caution, as well as the other arguments of the parties, in order to effectively resolve the questions raised, but without altering the facts set out in the complaint and answer.

The Chambers may not annul or modify acts of the administrative authorities that have not been expressly contested in the complaint.

Article 239 Federal Fiscal Code

Art. 239.— The final judgment may:

I. Recognize the validity of the challenged determination.

II. Declarar la nulidad de la resolución impugnada.

III. Declarar la nulidad de la resolución impugnada para determinar efectos, debiendo precisar con claridad la forma y términos en que la autoridad debe cumplirla, salvo que se trate de facultades discrecionales.

Si la sentencia obliga a la autoridad a realizar un determinado acto, o iniciar un procedimiento, deberá cumplirse en un plazo de cuatro meses aun cuando haya transcurrido el plazo que señala el artículo 67 de este Código.

En caso de que se interponga recurso, se suspenderá el efecto de la sentencia hasta que se dicte la resolución que ponga fin a la controversia.

El Tribunal Fiscal de la Federación declarará la nulidad para el efecto de que se emita nueva resolución cuando se esté en alguno de los supuestos previstos en las fracciones II y III, y en su caso, V del artículo 238 de este Código.

II. Declare the challenged determination a nullity.

III. Declare the purposes of the challenged determination a nullity, specifying with clarity the form and terms the agency must comply with, except where the agency has been granted discretionary powers.

If the opinion or judgment obligates the agency to carry out a given act, or to initiate an administrative proceeding, it must be complied with in a term of four months, even when the time indicated in Article 67 of this [Federal Fiscal] Code may have elapsed.

If an appeal is filed, the effect of the judgment shall be suspended until an order is issued which puts an end to the controversy.

The Fiscal Tribunal shall declare a nullity for purposes of a new administrative determination when the provisions of paragraphs II, III, and V of Article 238 of this [Federal Fiscal] Code are applicable.

3. Arguments by the Investigating Authority and the Complainants

The Investigating Authority, in its briefs and at oral hearing, has presented two fundamental arguments that must be addressed initially by the Panel. The first argument is that Annex 1911, by making explicit reference only to Article 238 of the Federal Fiscal Code, intended thereby to exclude any possible application of its related provisions, Articles 237 and 239.^{68/}

The second argument of the Investigating Authority is that, unlike the Fiscal Tribunal which may rely directly upon the language of Article 239, the Panel is possessed of only limited remedial

^{68/} See pages 22-23 of SECOFI's March 3, 1995 Case Brief (Volume 9, S.P.R. 198) and pages 70-71 of the transcript of the hearing held on May 3-4, 1995 (Volume 17, S.P.R. 461).

authority,^{69/} citing for this purpose NAFTA Article 1904(8): "The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision." The Investigating Authority's main concern is the language of Article 239 which allows a reviewing court to declare, in certain situations, an agency determination "a total nullity." The Investigating Authority believes that binational panels have no such authority.

For their part, the Complainants argue that while the Panel may not directly "nullify" a determination by the Investigating Authority, the Panel possesses ample powers to issue an order to the Investigating Authority requiring it to terminate the proceeding,^{70/} the functional equivalent of nullification.

4. Determination of the Panel

As set out in detail below, the Panel has carefully considered these arguments and has determined that:

- The Mexican standard of review is Article 238 of the Federal Fiscal Code, which article must, however, be read in conjunction with Articles 237 and 239 of the Federal Fiscal Code to the maximum extent consistent with the nature of the binational panel review process;
- The Panel has authority under the NAFTA and under relevant Mexican laws to instruct the Investigating Authority to modify a final determination previously made by it in a manner which effectively terminates the proceeding.

^{69/} See pages 71-73 and 77-78 of the hearing transcript (Volume 17, S.P.R. 461).

^{70/} See pages 11-12 of the hearing transcript (Volume 17, S.P.R. 461).

a. Proper Application of the Mexican Standard of Review

With regard to SECOFI's first argument, the essential question for the Panel to consider is whether the NAFTA Parties intended, by the language of Annex 1911, to not only point broadly to the applicable standards of review but, at least in the case of Mexico, to at the same time delimit or alter that standard of review. Stated another way, the question for the Panel is: whether Annex 1911 should be read as merely saying that binational panels should consider and be bound by the Mexican standard of review, as usually and normally applied by the Fiscal Tribunal; or whether Annex 1911 should be read to say that binational panels must apply a more limited standard of review, one which expressly or effectively ignores the relevant language of Articles 237 and 239, despite the fact that the Fiscal Tribunal can and must apply Articles 237 and 239 along with Article 238.

For several reasons, this Panel determines that there was and is no demonstrated intent on the part of the NAFTA Parties to exclude consideration of Articles 237 and 239 when they drafted Annex 1911. The appropriate rule, therefore, is to apply Article 238, but to include Articles 237 and 239 to the maximum extent allowable by the nature of the binational panel review process.

i. Need for Uniform Standard of Review

In support of the above determination, the Panel first notes the basic policy consideration, expressed on numerous occasions by one or more NAFTA governments, that binational panels ought not to create a separate antidumping jurisprudence^{71/} from that created by the local courts.^{72/} Obviously, however, a separate jurisprudence would inevitably be created if binational panels were compelled to apply one form of the local standard of review while the local courts, in the exact same factual situation, would apply another form of that standard of review. Such a construction is plainly inconsistent with the underlying purpose and spirit of the NAFTA binational review process.

^{71/} This term is used in its English sense of a separate body of law and is not intended to reflect the Mexican legal concept of "*jurisprudencia*."

^{72/} See n. 65 *supra*.

Therefore, the Panel believes that its broad obligation under the Treaty is to apply the same standard of review as would the local court, not a different one—just as it is required to examine the same body of substantive antidumping law, not a different one.

ii. Binational Panel Determinations Must Take Into Account Constitutional Guarantees

Second, the Panel notes that the Fiscal Tribunal has the authority under Articles 238(1) and 239 to declare an agency determination to be a “nullity” in situations where fundamental principles are at stake, particularly when basic constitutional provisions, incorporated through Article 238, are deemed to have been violated. In these situations, binational panels need to have a similarly effective remedy for such violations. If Article 1904(8) were read to limit the ability of the binational panel in this regard, a panel might find itself in the unacceptable position, once having determined that fundamental constitutional provisions had been violated by the Investigating Authority, that it had no effective remedy for such violation.

iii. Treaty Interpretation by the NAFTA Parties

Third, in addition to these basic policy considerations, the Panel has considered whether Canadian or U.S. panels have addressed this general issue in the past, for the same argument could be made in the context of Canadian and U.S. Chapter 19 cases as well. As to the question of whether Annex 1911 operates to delimit or narrow the normal standard of review when it references a particular statute, the Canadian experience is particularly enlightening and supports the Panel’s interpretation. It further illustrates that the NAFTA negotiators of Article 1911 were, or should have been, aware of the following Canadian experience.

Article 1911 of the CFTA and Annex 1911 of the NAFTA once again point to a single statute as “representing” the applicable standard of review for binational panels to follow. Under the CFTA,

that statute was specified as section 28(1) of the Canadian Federal Court Act,^{73/} and under the NAFTA, that statute is specified as subsection 18.1(4) of the Federal Court Act.^{74/} The latter statute is the successor to the former.

Despite the fact that Article 1911 pointed to a single provision of the Federal Court Act as representing the applicable standard of review, Canadian panels which have considered the issue have noted that a separate statute must also be taken into account in determining the applicable standard of review. This statute was section 76(1) of the Special Import Measures Act ("SIMA"),^{75/} which required the reviewing court or binational panel to apply a more deferential standard of review than would otherwise be the case.^{76/}

^{73/} See Article 1911 of the CFTA. The Federal Court Act was found at R.S.C. 1985, c. F-7 and read as follows:

Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, on the ground that the board, commission or tribunal:

- (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
- (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

^{74/} See Annex 1911 of the NAFTA.

^{75/} R.S.C. 1985, c. S-15.

^{76/} SIMA provided that, subject to certain exceptions, "every order or finding of the Tribunal under this Act is final and conclusive." In Canadian law, this statute is to be interpreted as a "privative clause." See National Corn Growers Association v. Canadian Import Tribunal, [1990] 2 S.C.R. 1324 at 1370 (per Gonthier J.). See also Certain Dumped Integral Horsepower Induction Motors, One Horsepower (1HP) to Two Hundred Horsepower (200HP) Inclusive, With Exceptions Originating In Or Exported From the United States of America (hereinafter "Induction Motors"), CDA-9-1904-01, at 16, 4 TCT 7065 at 7072 (September 11, 1991) ("This Panel's jurisdiction is further circumscribed by virtue of section 76(1) of SIMA."). Accord An Inquiry Made By The Canadian International Trade Tribunal Pursuant To Section 42 Of The Special Imports Measures Act Respecting Machines Tufted Carpeting Originating In Or Exported From The United States Of America, CDA-92-1904-02, at 7 (April 7, 1993) ("In Canada, it is the standard of review found in s. 28(1) of the Federal Court Act, as limited by the so-called privative clause in s. 76(1) of SIMA...") and Certain Flat Hot-Rolled Carbon Steel Sheet Products Originating In Or Exported From The United States, CDA-93-1904-07, at 13 (May 18, 1994) ("As a privative

In Canada, therefore, despite the fact that Article 1911 of the CFTA pointed only to the pertinent clause in the Federal Court Act as being descriptive of the standard of review to be applied by panels, every Canadian panel that considered the matter concluded that the reference to the Federal Court Act alone was insufficient. The Federal Court Act provision had to be read together with the well-accepted interpretation of SIMA, despite the fact that the CFTA negotiators failed to make express reference to the latter provision when drafting Article 1911. Such reaching beyond the specific language of Article 1911 in the Canadian context appears to have been accepted by all parties, it was never challenged before an Extraordinary Challenge Committee nor, to the knowledge of the Panel, in any other CFTA or NAFTA context.

While the foregoing perhaps cannot be taken as definitive for any present purpose, it nevertheless represents a strong contextual showing that the CFTA/NAFTA negotiators, when formulating the language of Article 1911 of the CFTA and Annex 1911 of the NAFTA, were not engaged in a process of attempting to narrow, delimit, or otherwise the scope of the relevant standards of review. Rather, the approach seems to have been that the CFTA/NAFTA negotiators were simply pointing broadly to the applicable local standard of review, as it is usually and normally applied in the relevant jurisdiction.^{77/} Therefore, the Panel concludes that when the NAFTA negotiators referred solely to Article 238 of the Federal Fiscal Code, they understood that reference to include other relevant provisions, in particular, Articles 237 and 239 of the Federal Fiscal Code.

clause, SIMA section 76(1) affects the standard of review applicable to the decisions of the Tribunal."). See Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate, Heat-Treated Or Not, Originating In Or Exported From the U.S.A., CDA-93-1904-06 (December 20, 1994) at 14. The existence of a "privative clause" may have a significant outcome on the decision. As stated in the foregoing case, at 17, "[C]hanging the standard of review ... affects the substantive rights of [the] parties." SIMA was amended by the North American Free Trade Agreement Implementation Act, S.C. 1994, c.44, effective January 1, 1994, which repealed the privative clause in SIMA section 76(1) with respect to agency determinations involving the United States and Mexico. Id.

^{77/} This also appears to be true with respect to the United States. The standard of review cited by Annex 1911 for the United States is section 516A(b)(1)(B) of the Tariff Act of 1930. However, it is uniformly accepted that this narrow statutory language may not be understood or applied without the rich body of Supreme Court and other decisions which interpret this language in a fashion that is hardly self-evident from the language itself. See, for example, Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

iv. Article 238 Cannot Be Uniformly Applied Without Also Applying Article 239

Finally, and most importantly, the Panel considers itself compelled to include Articles 237 and 239 within the standard of review required by the Treaty for the simple reason that a failure to do so would lead to a serious distortion of the standard of review as actually practiced by the Fiscal Tribunal. As will be noted below, a bare reading of Article 238, which sets out five different categories of “illegality,” would suggest that all five categories should be treated identically in terms of the remedy to be imposed by the Fiscal Tribunal. The final paragraph of Article 239, however, as well as applicable case law, requires that Article 238(1) and (4) be treated by the court differently from Article 238(2), (3) and (5). In the former case, the entire agency proceeding must be declared a “nullity” *ab initio*, while in the latter case, it is only the individual agency action that is at peril; once remanded for correction, the original proceeding may continue. Therefore, the Mexican standard of review simply cannot be applied accurately and in conformity with the Fiscal Tribunal’s well-established practices and principles unless Article 238 is interpreted in conjunction with its related articles, most particularly Article 239.

b. Authority to Issue Orders that Provide Instructions to the Investigating Authority

The second argument made by SECOFI is that Article 1904(8) of the Treaty effectively limits the remedial authority of binational panels. SECOFI in effect suggests that while the Fiscal Tribunal demonstrably has authority to order the “nullification” of an agency proceeding,^{78/} a binational panel, considering identical facts, may not do so. The end result of identical cases brought before the Fiscal Tribunal and before a Chapter 19 panel would therefore, on this reasoning, be very different. The Panel believes that such a result was not intended by the NAFTA Parties.

^{78/} See Article 95 of the new Foreign Trade Law, discussed in n. 49 *supra*, which states that decisions of the investigating authority can be opposed before the Fiscal Tribunal, asking for the nullification of said decision.

i. Treaty Interpretation by the NAFTA Parties

The Panel has found it useful, once again, to consider the Canadian experience in the context of the remedies available to binational panels, particularly in situations of serious agency defaults, such as a violation of the constitution or other fundamental principles. In Canada, a few panels have considered whether the agency "failed to observe a principle of natural justice or otherwise acted beyond... its jurisdiction", which is the first test set forth in the Federal Court Act under the former Canadian standard of review.^{79/}

Although no panel has found cause to rule affirmatively when reviewing under this standard, the language used in considering the issue is revealing. In Induction Motors, the panel stated: "A breach of natural justice, however slight, which is found to affect the essential fairness of the hearing under review, will render a decision invalid."^{80/} Similarly, in Certain Beer From The United States^{81/}, the panel stated: "If an administrative decision contains an error where the administrative body incorrectly determined the scope of its jurisdiction or authority, then the decision may be overturned." Later the panel said: "If the proceedings violate the fairness standard of the principles of natural justice, the administrative body may lose jurisdiction."^{82/}

^{79/} A challenge on the ground of "natural justice" is akin to a constitutional challenge on the ground of incompetence.

^{80/} Induction Motors, at 25. (See n.76 *supra*). The panel relied on significant prior judicial authority in reaching this conclusion, citing Supermarchés Jean Labrecque Inc. v. Flamand, [1987] 2 S.C.R. 219 (L'Heureux-Dube, J.) ("A departure from this rule of natural justice has been held to constitute want or excess of jurisdiction", at 236) ("...the absence of any real and present prejudice ... can in no way remedy such an infringement", at 238) and Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643 (LeDain, J.), at 661:

I find it necessary to affirm that the denial of a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing Court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

^{81/} The full title is Certain Beer Originating In Or Exported From The United States Of America By G. Heileman Brewing Company, Inc., Pabst Company, And The Stroh Brewery Company For Use Or Consumption In The Province of British Columbia, CDA-91-1904-01 (August 6, 1992), at 11.

^{82/} Id., at p. 12.

In Certain Flat Hot-Rolled Carbon Steel Sheet Products Originating In Or Exported From the United States (Injury),^{83/} the panel stated: "There is a consensus among the participants, and the Panel agrees, that the standard of review for questions of jurisdiction, including issues of natural justice, is 'correctness. The Tribunal must be right. It is not entitled to deference when it addresses a question of jurisdiction. If the Tribunal were wrong, the Panel would remand with instructions to correct the finding."

Finally, in Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate, Heat-Treated Or Not, Originating In Or Exported From The U.S.A., CDA-93-1904-06 (December 20, 1994), the panel, considering a challenge to Chapter 19 roster members from acting as counsel before the agency, stated:

If the participation of Roster Members in the Tribunal's investigation contravenes principles of natural justice, then the determination arising from that investigation is a nullity. The natural justice issue is inextricably interwoven with the Tribunal's final decision. The Panel has jurisdiction to review the Tribunal's final, "definitive" decision. We therefore have jurisdiction to review the natural justice elements of that decision.

Panel Opinion, at 24. (Emphasis added)

These opinions make it clear that Canadian binational panels do not regard their remedial authority as specially limited by Article 1904(8) or otherwise. In a case where "natural justice" has been denied by the agency, these decisions suggest strongly that a Canadian panel would have no hesitancy in regarding the proceeding below as "a nullity," causing it to render an opinion fully appropriate to the nature of that finding.

In the United States, although binational panels rarely, if ever, have addressed fundamental constitutional or jurisdictional questions raised by agency action, there once again has been little hesitancy about crafting orders which effectively overturn the determinations of the agency. In

^{83/} CDA-93-1904-07 (May 18, 1994), at 8.

Certain Softwood Lumber Products From Canada,^{84/} this was done explicitly when the binational panel ordered the local investigating authority to make certain determinations that were specifically designed to bring the case to an end. No doubt, other binational panels in the United States have done effectively the same thing, albeit without so direct a purpose.

ii. Panel Authority to Issue Appropriate Orders

SECOFI makes much of the fact that Article 1904(8) allows binational panels to uphold or to remand the investigating authority, but not to reverse it. In the Panel's view, this is not a substantive limitation, but merely a recognition that it is the agency itself, and not the panel, that must issue the final order terminating a case. Panels have no authority to issue an order *in the name of* the Investigating Authority; panels have authority only to issue an order *to* the Investigating Authority. Therefore, although this Panel does not claim the capacity to directly "nullify" an agency determination, it does have the ability under Articles 238(1) and 239, read in conjunction with NAFTA Article 1904(8) and other authority, to remand to the Investigating Authority with directions that effectively terminate a proceeding. It is then the legitimate expectation of the Panel that the Investigating Authority will comply with that order.^{85/}

The Panel now turns to a more detailed examination of the Mexican standard of review with focus, first, on the constitutional underpinnings of that standard.

^{84/} USA-92-1904-01, December 17, 1993.

^{85/} Under Article 1904(8), the agency must issue an order or otherwise act in a manner which is "not inconsistent with the panel's decision."

C. Constitutional Foundations of the Mexican Standard of Review

It is a core principle of the Mexican juridical system that state organs and administrative authorities may do only that which they have been expressly authorized by law to do.^{86/} Sourced in the Constitution itself, this principle structures the basic relationship between public power and the Mexican people.

Because of the importance pertaining to this case, Articles 14 and 16 of the Constitution will be analyzed.

Article 14(2) of the Constitution establishes a basic guarantee, a "guarantee of legal security" (*garantía de audiencia*) against acts of deprivation (*privación*):

Artículo 14(2).—Nadie podrá ser privado de la vida, de la libertad or de sus propiedades, posesiones o derechos, sino mediante juicio seguido ante los tribunales previamente establecidos, en el que se cumplan las formalidades esenciales del procedimiento y conforme a las leyes expedidas con anterioridad al hecho.

Article 14(2).—No person shall be deprived of life, liberty, property, possessions, or rights without a trial before a previously established court in which the essential formalities of procedure are observed in accordance with laws in effect at the time of the act.

By its terms, Article 14(2) establishes that any deprivation of right must be done through the means of a previously established tribunal, acting in a trial or proceeding which observes all essential legal formalities and in conformity with the then applicable laws. It is said that, in particular, four specific rights are covered by Article 14(2):

- no sanction or other deprivation of right may be imposed upon a person except by means of trial or other judicial proceeding;

^{86/} In contrast, the individual may do whatever he is not prohibited by the law from doing.

- such trial or proceeding must be held before a previously established court or tribunal;
- such trial or proceeding must observe all relevant procedural formalities; and
- the decision of the court or tribunal must be based upon the laws that were in existence at the time.^{87/}

The principle of legality flows most directly from Article 16, which provides the Mexican people with what is known as a "guarantee of legality" (*garantía de legalidad*), which has not been adopted in any other country in such a liberal fashion as in Mexico^{88/}. According to Article 16(1), this guarantee protects individuals against acts of the governmental authority which are not justified or based in a relevant legal provision:

Artículo 16(1).—Nadie puede ser molestado en su persona, familia, domicilio, papeles o posesiones, sino en virtud de mandamiento escrito de la autoridad competente, que funde y motive la causa legal del procedimiento...

Article 16(1).—No person shall be disturbed in his person, family, domicile, documents or possessions, except by virtue of a written order issued by a competent authority stating the legal grounds and justification for the action taken...

The constitutional implications of an agency acting outside the scope of legal authority is illustrated in the following Thesis^{89/}:

Las autoridades administrativas no tienen más facultades que las que expresamente les conceden las leyes, y cuando dictan alguna determinación que no está debidamente fundada

y motivada en alguna ley, debe estimarse que es violatoria de las garantías consignadas en el artículo 16 constitucional.

^{87/} Los Derechos del Pueblo Mexicano. Antecedentes, Origen y Evolución del Articulado Constitucional, Vol. III. Art. 14-3.

^{88/} BURGOA, Ignacio, Las Garantías Individuales Ed. Porrúa, 1979.

^{89/} Quinta Epoca: Tomo XXIX, Pág. 669. Olivares Amado. In Mexican law, a *Tesis (thesis)* is a case precedent that may have persuasive value but is not itself, or has not yet become, a *Jurisprudencia* (jurisprudence). When five *Tesis* in a row adopt the identical holding (without intervening contrary authority), the five cases become a *Jurisprudencia*, which is treated as a binding legal precedent.

Administrative Authorities have no more powers than those expressly conferred by law, and when they render any determination which is not properly grounded and motivated in a law, it must be considered to be in violation of the constitutional guarantee set in Article 16 of the Constitution.

Article 16 of the Constitution also distinguishes among specific rights:

- a state organ that originates an act or procedure which can be interpreted as a nuisance or disturbance (*molestia*) must be properly established in law;
- the act or procedure which is interpreted as "*molestia*" must, in terms of its scope and meaning, itself conform to and fall within a legal norm;
- the act of "*molestia*" must be derived from and set out in a written order; and
- the written order which is the basis of the act of "*molestia*" must set out the legal grounds upon which the order is based and the justifications for issuing it.^{90/}

The guarantees of legality and legal security established by Articles 14 and 16 of the Constitution are of fundamental importance in Mexican law.^{91/} Pursuant to Article 1 of the Constitution, these guarantees protect all persons and individuals in Mexico, including the Complainants. For panel purposes, these guarantees impact both the interpretation to be given to the standard of review and

^{90/} J. Jesus OROZCO HENRIQUEZ. *The Principio de Legalidad* in Mexican Legal Dictionary. Porrúa. 1985 p. 2537.

^{91/} To distinguish between Articles 14 and 16, it may be said that Article 14 establishes the constitutional requirements that sanctions and other ultimate acts of deprivation must satisfy, while Article 16 establishes the various characteristics, conditions and requirements that acts of public authorities must follow from a procedural standpoint up to the point of imposition of such sanctions or acts of deprivation.

to the substance and procedures of any Mexican antidumping proceeding. The enforcement of these guarantees is regarded as a primary function of judicial review by Mexican courts and, therefore, is a primary function of this Panel as well.

The Supreme Court has frequently been in a position to apply these principles, ruling on numerous occasions that administrative authorities may only carry out those functions and perform those acts which the law allows them expressly to do.^{92/} To state the matter more fully, in order for the actions of Mexican authorities to be legal, the agency issuing or carrying out a function, or performing an act, must be "competent" to do so. In order for an agency to be competent, two fundamental requirements must be met: (i) the existence of the acting entity or unit must be formally established in a legal provision; and (ii) that entity or unit must only act in accordance with the express authority granted it by Mexican law.

1. Authority of an Administrative Entity to Act Must be Expressly Attributed by Law

The first requirement establishes that in order for an administrative entity or unit to legally exist, its creation and operation must be expressly established in a body of laws.^{93/} Actions that are

^{92/} Government officials may only do what the law permits them to do. (*Las autoridades sólo pueden hacer lo que la ley les permite*). See Quinta Época:

Tomo XII, Pág. 928. Cía. De Luz y Fuerza de Puebla, S.A.

Tomo XIII, Pág. 44. Velasco W. María Félix.

Tomo XIII, Pág. 514. Caraveo Guadalupe.

Tomo XIV, Pág. 555. Parra Lorenzo y Coag.

Tomo XV, Pág. 249. Cárdenas Francisco V.

See also Tesis (AUTORIDADES ADMINISTRATIVAS.-Los actos de las autoridades administrativas, que no estén autorizados por ley alguna, importan una violación de garantías), Quinta Época: Tomo XXIII, p. 97. Indart Tiburcio, and Tesis (AUTORIDADES ADMINISTRATIVAS, FACULTADES DE LAS. Las autoridades administrativas no tienen más facultades que las que expresamente les conceden las leyes, y cuando dictan alguna determinación que no está debidamente fundada y motivada en alguna ley, debe estimarse que es violatoria de las garantías consignadas en el artículo 16 constitucional), Quinta Época: Tomo XXIX, p. 669. Olivares Amado.

^{93/} See José OVALLE FAVELA, Los Derechos del Pueblo Mexicano, México a través de sus Constituciones, Chamber of Deputies of the Honorable Congress of the Union. Committee of Editorial Affairs - Grupo Editorial, Miguel Angel Porrúa, 4th ed., Mexico, 1994, at 163-171; and Efrain POLO BERNAL, Summary of Constitutional Guarantees, Editorial Porrúa, S.A. de C.V., Mexico, 1993, at 162-173. The internal operation and organizational

carried out by administrative organs or units that have not been formally created or established in legal bodies of laws will not be recognized as being valid. Therefore, if an action of an official is either ordered or carried out by an entity that does not have its existence recognized by law, that action is unlawful under the Constitution, due to incompetence.

This rule is also accepted and consistently applied by the Fiscal Tribunal, as illustrated by the following recent case. This decision, rendered in March, 1995, involved a case brought by a claimant who alleged that the *Director de Responsabilidades y Sanciones de la Contraloría General del Departamento del Distrito Federal* ("Director") had imposed an administrative sanction against him, suspending his employment for a period of 15 days.^{94/} On review by the Fiscal Tribunal, the claimant asserted that the Director lacked competence to issue the challenged resolution, arguing that only his administrative superior, the *Secretario General de Protección y Vialidad del Departamento del Distrito Federal*, had competence to do so.

Against argument by counsel for the Director that his competence was derived from delegated authority which had previously been published in the D.O., the Fiscal Tribunal held that the Director was incompetent to impose the sanction and that the resolution should be declared a nullity under Article 238(1) of the Federal Fiscal Code.

In reaching this conclusion, the Fiscal Tribunal analyzed the internal regulations of the subject agency, which failed to provide for the office in question. Moreover, it was clear to the Fiscal Tribunal that the proper office to issue such a sanction was the *Contralor General del Departamento del Distrito Federal*. The Fiscal Tribunal also rejected the argument that the Director's authority had been delegated to him by virtue of the publication in the D.O. of the previous *Acuerdo Delegatorio de Facultades*, issued by the chief of the *Departamento del Distrito Federal*, since that official lacked

structure of governmental entities and units may be freely established by the units and entities themselves, without endangering the guarantee of legality. Nevertheless, if those entities and units issue or carry out actions which affect individuals, then it is a necessary requirement that the competent officials have their legal existence acknowledged and have their express authority indicated in a legal body of laws.

^{94/} Juicio: 14323/94. Luis Morales Merlos. March 17, 1995. Unanimous.

competence to create new administrative units, although he could delegate particular authority to administrative units that had previously been established by law.

In its opinion, the Fiscal Tribunal expressly relied on a previous "jurisprudencia," supporting its right to declare the challenged resolution a "nullity":

"... consequently, the acts and resolutions issued by the cited administrative unit will be a nullity because they were issued by an authority which was legally nonexistent."^{95/}

2. Administrative Entity May Only Act Within Scope of Attribution

As noted above, the second requirement of Mexican law is that "authorities may only do what the law expressly allows them to do."^{96/} Under the Constitution, officials do not have more authority than what is expressly attributed to them by law and the "actions of administrative authorities which are not authorized by any law, are a violation of [the legal] guarantees."^{97/} Expressed another way, administrative authorities must be expressly authorized and public officials may only issue or carry out acts against the interest of individuals when there is a body of law which expressly authorizes them to do so. If a Mexican official orders or carries out an action which affects the interests and rights of individuals, but has not been expressly and individually^{98/} authorized to do so, this action is therefore unlawful due to incompetence. The guarantee stated in Article 16 of the Constitution puts

^{95/} Tesis de Jurisprudencia, La Revista del Tribunal Fiscal de la Federación, 3a., Epoca, Año II, No. 13, enero de 1989, p. 48 (DIRECCION DE RESPONSABILIDADES Y SANCIONES DE LA CONTRALORIA GENERAL DEL DEPARTAMENTO DEL DISTRITO FEDERAL, CARECE DE EXISTENCIA LEGAL).

^{96/} See the Thesis "ADMINISTRATIVE AUTHORITIES," in No. 68 of the Appendix to the Weekly Legal Journal of the Federation, 1917-1985, eighth part at 114.

^{97/} Id.

^{98/} The granting of authorizations to officials must be done individually and personally for each one of them. Therefore, in Mexico it is unacceptable from the constitutional point of view for the authority conferred on one official to be understood to be automatically attributed to another official, unless a body of law grants authorization to the other authorities as well. The authorization of Mexican officials is not inferred or assumed, but rather it must be expressly and individually conferred by a body of laws.

limits in what government officials can do.

These constitutional principles are of considerable importance to the Panel because the Complainants have directed several constitutional challenges to the Final Determination and to the procedures followed by the Investigating Authority leading up to that determination. Moreover, they are of importance because the applicable standard of review, as expressed in Article 238 and related provisions of the Federal Fiscal Code, is clearly structured and based, in substantial part, on the legal guarantees established by Articles 14 and 16 of the Constitution.

D. "Logical Order" Rule; Declaration of "Nullity"

Before turning to a detailed review of the specific grounds of illegality set out in Article 238, the Panel will note the "jurisprudencia" of the Fiscal Tribunal to the effect that each of these grounds must be studied in a "logical order." That is to say, the Fiscal Tribunal uniformly follows the rule and practice of applying each paragraph of Article 238 in a consecutive or hierarchical order. It examines whether any ground of illegality exists under Article 238(1) and will examine a ground under Article 238(2) only if it is satisfied that a ground under Article 238(1) has not been established, etc. The following "jurisprudencia" illustrates this rule:^{99/}

SENTENCIAS FISCALES. ORDEN LÓGICO EN EL ESTUDIO DE LAS CAUSALES DE ANULACIÓN. El artículo 238 del Código Fiscal de la Federación enumera las causales de anulación de una resolución fiscal o de un procedimiento administrativo, dentro de un orden lógico, en tanto que el estudio de la

TAX JUDGMENTS. LOGICAL ORDER IN THE STUDY OF CAUSES OF ANNULMENT. Article 238 of the Fiscal Code of the Federation enumerates the causes for annulment of a tax judgment or administrative proceeding in a logical order, so that the analysis of a previously-listed cause excludes

^{99/} Segundo Tribunal Colegiado en materia administrativa del primer circuito. See also:

Amparo directo 842/88.- Ómnibus de México S.A. de C.V.- 21 de junio de 1988.- Unanimidad de votos. - Ponente: Ma Antonieta Azuela de Ramírez.- Secretario: Francisco de Jesús Arreola Chávez.

Amparo directo 1362/88 .- Ómnibus de México S.A: de C.V.- 18 de octubre de 1988.- Unanimidad de votos.- Ponente: Ma Antonieta Azuela de Ramirez.- Secretario: Marcos García José.

Amparo directo 12/93.- Operaciones Técnicas, S.A. de C.V.- 17 de febrero de 1993.- Unanimidad de votos.- Ponente : Guillermo I. Ortiz Mayagoitia.- Secretaria: Angelina Hernández Hernández.

Amparo directo 792/93.- Termoformas, S.A: de C.V. - 15 de abril de 1993.- Unanimidad de votos. Ponente; Carlos Amado Yáñez.- Secretario: Miguel Ángel Cruz Hernández.

causal anterior excluye el análisis de las siguientes para decretar, cuando sea procedente, la nulidad del acto o del procedimiento administrativo impugnado, por lo que las Salas Fiscales, antes de resolver que los proveídos combatidos carecen de las formalidades que legalmente deben revestir, analizarán la causal relativa a la competencia de la autoridad emisora ya que dicha cuestión es de análisis preferente, y en caso de que dicha causal resulte ineficaz para declarar la nulidad de la proveídos, entonces deberán proceder en el orden indicado por el referido precepto legal, al estudio de las restantes causas de anulación que se aduzcan para resolver en la forma que legalmente procede.

the analysis of the following causes [as a source] for decreeing the nullity of a challenged act or administrative proceeding when a declaration of nullity is appropriate. Therefore, before deciding that the challenged decisions lack the legally-required formalities, that Tax Chambers must analyze the cost [of annulment] concerning the jurisdiction of the emitting authority since that question is of preferential analysis, and in the event that said cost is insufficient to support the nullification of the decisions, then the court may proceed in the order indicated. In the cited legal precedent to the study of the remaining causes of annulment that are to result them in the legally appropriate manner.

In its review of the specific challenges to the Final Determination made by the Complainants, the Majority intends to follow the Fiscal Tribunal's "logical order" rule.

In addition, as will be noted below in connection with the discussion of Article 239, the Fiscal Tribunal will declare a case of illegality falling under Article 238(1) and (4) as a "nullity," requiring that the determination in question be quashed and the entire proceeding be terminated by the administrative agency. However, with respect to cases falling under Article 238(2), (3) and (5), the Fiscal Tribunal will ordinarily declare the determination in question illegal only for the purposes and reasons identified and will remand the determination to the agency for correction of the errors found. In the latter case, the determination is not quashed nor is the proceeding itself terminated; following correction of the errors, it would normally continue on the basis set out in the agency's remand determination.

E. Article 238(1)

I. Incompetencia del funcionario que la haya dictado u ordenado o tramitado el procedimiento del que deriva dicha resolución.

Article 238(1) pertains to the issue of incompetence or lack of jurisdiction. Pursuant to the constitutional provisions that form the basis of Article 238(1) and to the express language of Article 239, a finding of incompetence requires the reviewing court to declare the administrative resolution in question a "nullity." The court must order that the resolution be quashed and the proceeding terminated, without consideration of any challenges to the substance or merits of the resolution.

Under Mexican law, incompetence, as contemplated by Article 238(1), may involve either (i) incompetence of the agency or official who issued or ordered the resolution in question; or (ii) incompetence of the agency or official which carried out the proceeding in which the resolution was issued. Competence—or incompetence—will normally be shown through an examination of the internal regulations of the agency in question, since these regulations have as their *raison d'être* the creation of subordinate administrative units and the specific functions which are to be attributed to those units.^{100/} The publication in the applicable official gazette (*i.e.*, the D.O.) of the language creating or establishing the agency in question and its attributes is central to any analysis of competence.^{101/}

Issues of competence, and the scope of Article 238(1), are also said to be involved in the following situations:^{102/}

^{100/} Emilio MARGÁIN M., *El Recurso Administrativo en Mexico*, 2nd Ed., Editorial Porrúa, S.A., 1992 ("MARGÁIN"), at 122-23. (See the case cited in n.94 *supra* and accompanying text for an illustration of the Fiscal Tribunal examining the relevant internal regulations.)

^{101/} Revisión No. 1639/82 visible en la Revista del Tribunal Fiscal de la Federación de mayo de 1983, p. 821 (involving purported delegation of authority by head of administrative agency, which delegation was not published in the D.O.).

^{102/} For a general description of these situations, as well as supporting authority. See MARGÁIN, at 121 *et seq.*

- An exercise of authority by a superior agency or official with respect to functions that legally pertain to an inferior agency or official, or an exercise of authority by inferior agencies or officials with respect to functions that legally pertain to their superiors;
- An exercise of authority concerning functional areas over which the agency or official has not been granted competence, as when such agency or official exercises functions that have been granted to another agency with which it has no hierarchical ties;
- An exercise of authority over a geographical area, as when an agency or official exercises authority outside the geographical area legally assigned to it; and
- An exercise of authority in terms of time, as when decisions are taken by officials who no longer have authority to issue acts.

It is important to emphasize that incompetence or lack of jurisdiction is an issue of constitutional dimension and directly invokes the constitutional legal guarantees discussed above. For an act of an administrative agency or official to be constitutional, it is an essential requirement that such agency or official be vested with competent jurisdiction and authority. The Supreme Court has observed that this issue invokes the basic concept of public order and requires that allegations of this nature be examined exhaustively by a reviewing court.^{103/} The "jurisprudencia" of the Fiscal Tribunal, an example of which is quoted below, accords with this view:^{104/}

^{103/} **Amparo Directo 226/89**, visible en el Informe presentado a la Suprema Corte por su Presidente al terminar el año de 1989, Tercera Parte, Tribunales Colegiados de Circuito, Volumen II, p. 822.

^{104/} Gaceta S.J.F. No. 77. Pleno, mayo 1994, p.12. See also Sala Superior del TFF en sesión del 11 de mayo de 1990. Firman, el Magistrado Armando Días Olivares, Presidente del Tribunal Fiscal de la Federación y la Lic. María Jesús Herrera Martínez, Secretaria General de Acuerdos, que da fe.

COMPETENCIA. SU FUNDAMENTACIÓN ES REQUISITO ESENCIAL DEL ACTO DE AUTORIDAD.- Haciendo una interpretación armónica de las garantías individuales de legalidad y seguridad jurídica que consagran los artículos 14 y 16 constitucionales, se advierte que los actos de molestia y privación deben, entre otros requisitos, ser emitidos por autoridad competente y cumplir las formalidades esenciales que les den eficacia jurídica, lo que significa que todo acto de autoridad necesariamente debe emitirse por quien para ello esté facultado expresándose, como parte de las formalidades esenciales, el carácter con que se suscribe y el dispositivo, acuerdo o decreto que otorgue tal legitimación. De lo contrario, se dejaría al afectado en estado de indefensión, ya que al no conocer el apoyo que faculta a la autoridad para emitir el acto, ni el carácter con que lo emita, es evidente que no se le otorga la oportunidad de examinar si su actuación se encuentra o no dentro del ámbito competencial respectivo, y es conforme o no a la Constitución o a la ley; para que, en su caso, esté en aptitud de alegar, además de la ilegalidad del acto, la del apoyo en que se funde la autoridad para emitirlo, pues bien puede acontecer que su actuación no se adecue exactamente a la norma, acuerdo o decreto que invoque, o que éstos se hallen en contradicción con la ley fundamental o la secundaria.

JURISDICTION. PROVIDING A BASIS FOR IS AN ESSENTIAL REQUIREMENT FOR AN ACT OF AN AUTHORITY. Making the harmonious interpretation of the individual guaranties of legallity and juridical security that are stablished in Articles 14 and 16 of the Constitution. It follows that legal acts which affect an individual or deprived him of a right [actos de molestia y privación] must, among other requirements, be issued by a competent authority and comply with the essential formalities that give legal efficacy to the acts, which means that every act of authority must be issued by the person who is authorize to perform the act expressing, as part of the essential formalities, the capacity in which the person issuing the act of authority is acting and the disposition, order or decree that grants such authority. If this is not done, it would leave the affected party without a defense, since without knowing the source of the authority's power to issue the act, nor the capacity in which the act is issued, it is evident that the affected party will not have opportunity to evaluate whether or not the authority's actions are included within the ambit of his respective competence, or whether or not the actions are in conformance with the Constitution or the law, so that, if relevant, he should be able to allege, besides the illegality of the act, the illegality of the support upon which the authority bases its authority to issue the act, since it may happen that the authority's actions do not conform exactly to the norm, order or decree that he invokes, or that these are in conflict with the Constitution or laws.

The Panel notes that the Investigating Authority made very much the same point in its Reply
Brief:

The issuance of any act of "molestia" must be carried out by public officials competent to exercise those functions. In order for public officials to be competent in this

regard, it is necessary that the administrative unit to which he has been assigned to have been formally established in law and that the public official act within the sphere of the attributes and functions which have been expressly conferred.

Reply Brief, at page 30.

This means that a public official may only carry out those functions and activities that he has been expressly authorized by law to do.^{105/}

Finally, in Mexican law the fact that a person has voluntarily submitted to an incompetent act does not vitiate the defect.^{106/} One may not consent to a constitutional violation.

F. Article 238(2)

II. Omisión de los requisitos formales exigidos por las leyes, que afecte las defensas del particular y trascienda al sentido de la resolución impugnada, inclusive la ausencia de fundamentación o motivación, en su caso.

Although Article 238(2) could also involve constitutional concerns, pursuant to Article 239, the Fiscal Tribunal will normally not consider a violation of Article 238(2) as necessitating a declaration that the resolution in question is a "nullity." Instead, the court will remand the resolution back to the agency for correction of the errors found. This permits the proceeding itself to continue. According to the "logical order" rule, the Fiscal Tribunal would analyze Article 238(2) only if competence of the Authority is established and Article 238 (1) is not actualized.

Article 238(2) is directed toward noncompliance with formalities and may involve an omission of formalities required by law in connection with the resolution itself or an omission of formalities required by law in connection with the proceeding out of which the resolution is issued. By its

^{105/} This applies to federal officials. In the case of state officials, their authority must be published in the local official journals.

^{106/} **Amparo Directo No. 612/88**, visible en el Informe rendido a la Suprema Corte por su Presidente, al terminar el año de 1988, Tercera Parte, Tribunales Colegiados de Circuito, p. 95. (Citado por Margáin M. Op. Cit. p. 129).

express terms, Article 238(2) is applicable when:

- the law establishes certain specific requirements or formalities which are not followed by the act or proceeding in question;
- this failure has affected a person's right of proper defense; and
- this failure has also affected the scope or meaning {the outcome} of the resolution;
- alternatively, the administrative act has failed to recite the legal basis on which it was taken and the justifications for taking it.

The first element refers to formal requirements of law which are not observed by, or in connection with, the challenged resolution. "Jurisprudencia" of the Supreme Court holds that the omission or noncompliance with such formalities is sufficient cause for finding the challenged resolution or procedure to be illegal.^{107/}

In both fiscal and administrative (including antidumping) contexts, an omission or noncompliance with formality may occur in connection with "domiciliary" visits and "verification" visits. The legal guarantees established by Articles 14 and 16 of the Constitution will apply to each category of visit, however, on an equal basis. The Supreme Court and Fiscal Tribunal "jurisprudencia" make no distinction between the two types of visits, nor do most commentators. Based on these authorities, an order for a domiciliary or verification visit must be:

^{107/} Sexta Época, Tercera Parte:
Vol. XXXIII, p. 34, A.R. 2125/59 Antonio Garcia Michel. 5 votos
Vol. LV, p. 54. A.R. 5752/61 Antonio Pérez Martín. Unanimidad de 40 votos
Vol. LV, p. 54. R.F. 47-61 Eulalio Salazar Cruz. Unanimidad de 4 votos
Vol. LXXIV, p. 55. R.F. 210/63. Samuel Nieto Enciso. 5 votos
Vol. CXXX, p. 80. R.F. 415/61. Hoteles Nacionales, S.A. 5 votos

The above "jurisprudencia" relates to former Article 202(b), predecessor to current Article 238(2).

- contained in a written order;
- be issued by a competent authority;
- recite the name of the person who will be the subject of the visit and the place to be inspected;
- recite the purpose of the visit; and
- satisfy all other requirements of the law.

In its Reply Brief, the Investigating Authority takes the position that verification visits in antidumping proceedings are distinct from domiciliary visits of a tax character.^{108/} Nevertheless, it does not appear that this position has been accepted by the Supreme Court or by the Fiscal Tribunal in any case; nor does it appear to be consistent with existing Mexican "jurisprudencia" or the requirements of numerous federal laws which establish requirements for verification visits.^{109/} Even more importantly, the position appears to be inconsistent with the language of the Constitution itself. The courts have noted that the second paragraph of Article 16 of the Constitution utilizes the plural, not singular ("*sujetándose en estos casos a las leyes respectivas y a las formalidades prescritas para los cateos*") and thus it appears to comprehend both domiciliary visits and visits for all other

^{108/} Volume 9, S.P.R. 198, p. 56.

^{109/} Cf., for example, Art. 16, 63 y 64 de la *Ley Federal de Procedimiento Administrativo* publicada en el D.O. el 4 de agosto de 1994 y que entró en vigor el 1o de junio de 1995; Art. 41 y siguientes de la *Ley Federal de Turismo* (D.O. 31 XII de 1992 entró en vigor el 31 de Y de 1993) y el Art. 13 fracción V del *Reglamento a la Ley Federal de Turismo*; Art. 182 y 183 del *Reglamento de la Ley de Aguas Nacionales*; Art. 85 de la *Ley de Comercio Exterior* publicada en D.O. el 27 de julio de 1993 y que entró en vigor el 28 de julio de 1993 así como el Art. 146 y 173 del *Reglamento de la Ley de Comercio Exterior* publicado en el D.O. el 30 de diciembre de 1993 y entró en vigor el 31 de diciembre de 1993; Art. 98 de la *Ley Federal de Protección al Consumidor*. Art. 71 y 92 de la *Ley Federal sobre Metrología y Normalización*. (D.O. 1o de julio de 1992 y entró en vigor el 16 de julio de 1992); Art. 126 y 127 del *Reglamento de la Ley de Puertos*.

purposes.^{110/}

It is appropriate to note, however, that Article 238(2) will not be satisfied merely because there is an omission or noncompliance with a formal requirement of the law. This provision was amended in January, 1986 to require that such omission or noncompliance also “must affect the defense of the person and the scope or meaning (outcome) of the resolution”. Article 238(2), therefore, is intended to address more than mere mistakes of formality or otherwise; it is intended to address issues of consequence. What is a matter of consequence will be decided by the Fiscal Tribunal (or binational panel) on a case-by-case basis.

Article 238(2) also applies in a situation where the agency has failed to cite the legal bases for the resolution or the motivations or justifications for making it. The following "jurisprudencia" of the Administrative Chamber of the Supreme Court notes specifically:^{111/}

FUNDAMENTACION Y MOTIVACION, GARANTIA DE. Para que la autoridad cumpla la garantía de legalidad, que establece el Artículo 16 de la Constitución Federal, en cuanto a la suficiente fundamentación y motivación de sus determinaciones, en ellas debe citarse el precepto legal que le sirva de apoyo y expresar los razonamientos que la llevaron a la conclusión de que el asunto completo de que se trata, que las origina, encuadra en los presupuestos de la norma que invoca.

FOUNDATION AND BASIS, GUARANTEE OF. In accordance with Article 16 of the Constitution, every act of a government authority must have an adequate and sufficient foundation and basis. With regard to the former, the legal precepts applicable to the case must be expressed with precision and, with regard to the latter, the reasons or causes, as well as any special circumstances that have been taken into account by the agency, must be stated with precision. It is also necessary that there be an adequate relationship between the motivations for the action and the applicable legal norms.

^{110/} Séptima Época, Tercera Parte.
Vols. 193-198, R.F. 37/84. Regalos Encanto, S.A. Unanimidad de 4 votos.
Vols. 193-198, R.F. 76/84. Juan Ley Zazueta. Unanimidad de 4 votos.
Vols. 193-198, R.F. 65/83. Leopoldo González Orejas. Unanimidad de 4 votos.
Vols. 193-198, R.F. 29/84. Pedro Espina Cruz. 5 votos.
Vols. 193-198, R.F. 18/84 Jorge Matuk Rady. Unanimidad de 4 votos.

^{111/} Informe de la Suprema Corte de Justicia de la Nación, Segunda Parte, 1978, p. 7.

G. Article 238(3)

III. Vicios del procedimiento que afecten las defensas del particular y trasciendan al sentido de la resolución impugnada.

Under Article 238(3), the Fiscal Tribunal will once again not declare the resolution to be a "nullity," requiring the proceeding to be terminated. The court will, instead, simply remand the resolution back to the agency for the correction of errors and the continuation of the proceeding.

In contrast to Article 238(2), which involves the omission of formal legal requirements, Article 238(3) is directed toward procedural errors. In particular, the court must find that:

- There exist some defects in the procedures followed by the agency or official;
- These defects have affected the scope or meaning {outcome} of the proceeding.^{112/}

As is the case with respect to Article 238(2), this provision will not be applicable if the claimant in a trial before the Fiscal Tribunal proves only the procedural defect, without demonstrating how that defect has affected his right of proper defense and how the final resolution of the administrative agency would have differed had the defect not occurred.

H. Articles 238(4)

IV. Si los hechos que la motivaron no se realizaron, fueron distintos o se apreciaron en forma equivocada, o bien se dictó en contravención de las disposiciones aplicadas o dejó de aplicar las debidas.

Article 238(4) of the Mexican standard of review is the first provision to address the merits

^{112/} See **Juicio No. 722/86**.- Sentencia de 10 de diciembre de 1987, por unanimidad de votos. - Magistrado Instructor Raúl Lerma Jasso.- Secretario: Lic. Alfredo Ortega Mora. ("Conforme al artículo 238, fracción III, del Código Fiscal de la Federación, es insuficiente para declarar la nulidad de una resolución administrativa la existencia de un vicio en el procedimiento del cual haya derivado, cuando tal vicio no afectó las defensas del particular y no trascendió al sentido de la resolución..."). See also Revisión No. 1326/81.- Resuelta en sesión de 2 de mayo de 1984, por unanimidad de 8 votos.- Magistrado Ponente: Francisco Xavier Cárdenas Durán.- Secretaria: Lic. Rosa Ma. Corripio Moreno. (VIOLACIONES DE PROCEDIMIENTO.- SI NO AFECTAN EL RESULTADO DEL FALLO NO SON RECURRIBLES EN RECURSO DE REVISIÓN).

of the proceeding, since it relates to the legal and factual grounds upon which the agency or official bases its determination. According to Article 239 of the Federal Fiscal Code, if the Fiscal Tribunal finds that the condition set in this Article is being materialized, generally it will declare the mere nullity of the resolution.

The basic thrust of Article 238(4) is to determine if the law applied by the agency supports its determination. There are three general forms of defect of which the court will be concerned: (i) the resolution was based on inadequate facts; (ii) the applicable law was violated; or (iii) the applicable law was not applied.

Parsing the language of the statute itself, it can be seen that Article 238(4) covers the following situations:

- The facts which support the challenged determination do not exist;
- The facts which are alleged by the agency to support the challenged determination are not the actual facts;
- The facts cited by the agency in support of the challenged determination were wrongfully considered by the agency;
- The challenged determination was issued by the agency in violation of the applicable laws and rules; and
- The agency applied the incorrect laws or rules.

The Supreme Court has considered the impact of Article 238(4), requiring that a violation be declared a "nullity," in the following "jurisprudencia":

ORDEN DE AUDITORIA. LA SENTENCIA FISCAL QUE DECLARA SU NULIDAD DEBE SER LISA Y LLANA Y NO PARA EFECTOS.- El procedimiento de auditoria encuentra su origen en la orden de visita que tenga por objeto verificar el cumplimiento de las obligaciones fiscales, se inicia con la notificación de dicha orden y culmina con la decisión de la auditoría fiscal en la que se determinan las consecuencias legales de los hechos u omisiones que se advirtieron en la auditoría. Por tanto, si la nulidad de la resolución fiscal impugnada se suscitó a consecuencia de que la orden de auditoria que la antecedió contiene vicios, por haberse dictado en contravención de las disposiciones aplicadas o por haberse dejado de aplicar las debidas, tal nulidad debe ser lisa y llana, en términos del artículo 238, fracción IV, del Código Fiscal de la Federación, ya que al ser nula la orden de visita es nulo todo el procedimiento de fiscalización desde su origen y, en estas circunstancias, válidamente puede decirse que la autoridad fiscal no ha iniciado sus facultades de comprobación, pues éstas se inician con el primer acto que se notifique al contribuyente a fin de comprobar si ha cumplido con las disposiciones fiscales, como lo señala el artículo 42 del citado cuerpo legal. Luego, la ilegalidad en la orden de auditoría impide que la nulidad se declare para efectos, como si se tratara de vicios en el procedimiento de fiscalización, puesto que tal decisión sólo puede justificarse ante un procedimiento que jurídicamente se inició, pero no respecto de aquel que no llegó a instaurarse por haber estado viciado desde su origen.

AUDIT ORDER. THE TAX JUDGMENTS THAT NULLIFIES THE SAME MUST BE COMPLETE AND NOT ONLY FOR EFFECTS.- An audit proceeding is based on an inspection order that is designed to verify whether or not tax obligations have been fulfilled. The proceeding begins with a notification of said order and culminates with decision resulting from the tax audit in which the legal consequences of the acts or omissions uncovered in the course of the audit are determined. Consequently, if the nullity of the challenged tax judgment is a consequence of defects in the audit order, in that the audit order was issue in violation of the applicable disposition or for not having applied the applicable disposition, such nullity must be complete within the terms of Article 238, Section IV of the Federal Fiscal Code, since if the audit order is null the entire audit proceeding is null from its origin and in this circumstances, it may be said that the tax authority has not begun to employ its inspection powers, since this begin with a first notice to the tax payer given for the purpose of verifying if he has comply with the tax loss, as is indicated in Article 42 of the Federal Fiscal Code. Therefore, nullity based on an invalid audit order may not be declared solely for its effects, as may occure when dealing with defects in the tax proceeding, since such a decision (declaring something invalid only for its effects) can only be justified with respect to a proceeding which has legally commenced, but not with respect with a proceeding which has not been inaugurated for having been effective from his origin.

I. Article 238(5)

V. Cuando la resolución administrativa dictada en ejercicio de facultades discrecionales no corresponda a los fines para los cuales la ley confiera dichas facultades.

The discretionary powers of an authority in México are understood to be the “power of free appraisal that the law recognizes to the administrative authorities over the content of their acts or actions. This liberty, authorized by law, can be of higher or lower rank and it becomes visible when the authority has a choice between two decisions.”^{113/}

There are obviously many circumstances in which the law confers discretionary powers on an administrative agency.^{114/} The possibility arises, however, that a discretionary determination made by such an agency does not correspond to the purposes for which such discretion was granted.

The doctrinal precedent in Mexico for this situation is termed "deviation of power," in other contexts "deviation of procedure." These are said to occur when a discretionary action is carried out by an administrative agency which is at variance with the purposes for which the law granted such discretion. In the following opinion, the Supreme Court stated:^{115/}

^{113/} NAVA NEGRETE, Alfonso. *Diccionario Jurídico Mexicano*. 1ª edición. México, 1983. Edición Instituto de Investigaciones Jurídicas, UNAM. Tomo IV.

^{114/} The Supreme Court has drawn a distinction between discretionary powers and regulated or directed powers. *See* FACULTADES REGLADAS Y FACULTADES DISCRECIONALES. SU DISTINCIÓN. Revisión No1 363/80. Resuelta en sesión de 20 de mayo de 1982, por mayoría de 6 votos, 1 más con los resolutivos y 1 en contra.

^{115/} **Amparo directo 297/86**, visible en el Informe presentado a SCJN al terminar el año de 1986, Tercera Parte, Tribunales Colegiados, p. 102 (citado por *Margáin M.: Op Cit. p. 151*).

DESVÍO DE PODER Y OTRAS CAUSAS DE ANULACIÓN DE LOS ACTOS DISCRECIONALES DE LA ADMINISTRACIÓN. APLICACIÓN DE LA FRACCIÓN V DEL ARTÍCULO 238 DEL CÓDIGO FISCAL DE LA FEDERACIÓN VIGENTE. Los actos en cuya formación gocen de discrecionalidad las autoridades administrativas, no escapan del control que ejercen los tribunales del país: éstos, entre ellos el Tribunal Fiscal de la Federación pueden invalidarlos por razones de ilegalidad, por razones de inconstitucionalidad o por una causal de anulación que les es aplicable, específicamente conocida como desvío de poder. Se anulará por razones de ilegalidad, cuando en la emisión del acto no se haya observado el procedimiento previsto en la ley, los supuestos y requisitos establecidos en la misma, o no se cumpla con todos sus efectos de validez, como podría ser la competencia o la forma. Será declarado inconstitucional cuando la autoridad haya violado las garantías consagradas por la Constitución en favor de todos los gobernados, como la fundamentación, la motivación y la audiencia entre otras. Igual sucederá cuando se contravenga alguno de los principios generales del derecho, porque la decisión de la autoridad aparezca ilógica, irracional o arbitraria, o bien que contraríe el principio de igualdad ante la ley. Por último, en esta categoría de actos, opera una causal específica de anulación denominada desvío de poder, regulada concretamente por la fracción V del artículo 238 del Código Fiscal de la Federación, que se produce cuando a pesar de la apariencia de la legalidad del acto se descubre que el agente

review, such as by the Federal Fiscal Tribunal which may invalidate such actions for reasons of illegality, for reasons of unconstitutionality, or for reasons arising out of the principle of deviation of power. Actions may be annulled for reasons of illegality if such actions do not observe the procedures established by law or the requirements of such laws, or they do not comply with the necessary elements of validity such as competence jurisdiction and form. Actions must be declared unconstitutional when the administrative agency has violated the legal guarantees, established by the constitution, such as a legal basis, purpose, and proper hearing among others. The same will happen when any of the legal general principles is violated, because the authority's decision appears to be illogical, or unreasonable, arbitrary or in opposition to the principle of equality before the law. Finally, in this category of acts, a specific nullity causal, set

de la Administración emplea un medio no autorizado por la ley para la consecuencia de un fin ilícito (desvío en el medio), o utiliza el medio establecido por la norma para el logro de un fin distinto perseguido por ella (desvío en el fin), en cuyos casos estará viciado de ilegitimidad del acto.

DEVIATION OF POWER AND OTHER CAUSES OF ANNULLMENT OF THE ADMINISTRATIVE AGENCY'S DISCRETIONARY ACTS. APPLICABILITY OF SECTION V OF ARTICLE 238 OF THE CURRENT FEDERAL FISCAL CODE. Actions for which administrative agencies enjoy discretionary authority do not escape judicial

out in Article 238 Section 5 of the Federal Fiscal Code, denominated deviation of power operates. It is produced when notwithstanding with the appearance of legality of the act, it's discovered that the Administration's official uses unauthorized means for the fulfilment of a legal purpose (deviation in the means) or uses the established way, set out in the law for the fulfilment of a different purpose than the one pursued by the law. (deviation in the purpose) In said cases the act would be illegal

Situations covered by Article 238(5) have often arisen in situations where a violation of law occurs but the potential fine is not fixed precisely in amount, permitting the administrative agency to determine the specific amount of the fine. Even though the imposition of a fine is clearly appropriate, Article 238(5) would permit the Fiscal Tribunal to rule that the administrative agency imposed a fine that was excessive in amount.^{116/} Other examples of situations covered by this provision would be where the administrative agency has imposed dissimilar fines in similar cases, or where it has imposed the same fine against parties who, on the other hand, were wealthy and, on the other hand, were poor.

J. Articles 237 and 239

Article 237 of the Federal Fiscal Code requires that decisions and orders of the Fiscal Tribunal be based upon law and examine each and every one of the issues raised by the complainants when there is an omission of the formal legal requirements or infringement of the procedural norms. In doing so, the Fiscal Tribunal is entitled to take well-known facts into account.

^{116/} As an example, it would likely be considered a "deviation of power" if an administrative agency imposed a maximum fine on a Mexican taxpayer who has never before violated the tax laws and did so in this instance only by mistake.

The "jurisprudencia" of the Fiscal Tribunal supports the above in that a "principle of congruency" (*principio de congruencia*) has been adopted by the court, the effect of which is to say that the Fiscal Tribunal will analyze and resolve only the issues raised by the parties, and not issues that have been left unaddressed by the parties.^{117/} The court is strictly limited to a study and review of the controverted points. According with Sections II and III of the CFF, when the nullity concept related to the omission of formal requirements or violation of the procedure, the Fiscal Tribunal should study and resolve each one of the arguments, still in the case that one of them is well-grounded.

The language of Article 237, as practiced by the Fiscal Tribunal, appears quite consistent with the rules otherwise applicable to binational panel review. NAFTA Article 1904 also requires binational panels to base their decisions upon law, the administrative record and Rule 7 of the Rules of Procedure for Article 1904 Binational Panel Reviews ("Panel Rules") limits panel review to the allegations of error of fact or law set out in the complaints and to the procedural and substantive defenses raised in the panel review. Insofar as reliance upon "well-known facts" is concerned, binational panels also frequently rely extensively on facts which are of public record, such as decisions of courts, prior panels, etc.

For its part, Article 239 allows the Fiscal Tribunal to uphold a challenged determination; declare it a "nullity" for all purposes; or declare it illegal for certain purposes, allowing the determination to be remanded for correction of the errors found. The Fiscal Tribunal will declare a challenged determination a "nullity" for all purposes in the case of Article 238(1), pertaining to incompetence, and in the case of Article 238(4), pertaining to a violation of substantive law. In the

^{117/} **Revisión No. 109/88** Resuelta en sesión de 12 de junio de 1990.- Mayoría de 7 votos y 1 en contra.- Magistrado Ponente: Gilberto García Camberos.- Secretario: Lic. José Raymundo Rentería Hernández. (SENTENCIAS DICTADAS POR LAS SALAS DE ESTE ÓRGANO COLEGIADO.- DEBEN RESPETAR EL PRINCIPIO DE CONGRUENCIA PROCESAL PREVISTO EN EL ARTÍCULO 237 DEL CÓDIGO FISCAL DE LA FEDERACIÓN). See also *José BECERRA BAUTISTA, El Proceso Civil en México*, Cuarta edición. Ed. Porrúa México 1974. p. 171.

case of Article 238(2), (3) and (5), the Fiscal Tribunal will remand the determination to the agency, allowing the errors to be corrected and the proceeding otherwise to continue.

IV. CHALLENGES TO THE FINAL DETERMINATION

The challenges to the Final Determination made by the Complainants^{118/} are indicated below. Due to the fact that the Majority has concluded that there were jurisdictional errors (errors of competence), which effectively have made the additional errors unnecessary to address, the Majority does not specifically address in this Opinion those errors contained below in headings B-E.

A. Alleged Jurisdictional Errors

Complainants allege that the Final Determination is illegal under Article 16 of the Constitution and should be declared a nullity under Article 238(1) of the Federal Fiscal Code due to the lack of jurisdiction or competence of the agencies and officials of those agencies who participated in the underlying investigation. Complainants specifically allege:

1. The two administrative units which conducted the investigations and carried out various actions, the *Dirección General de Prácticas Comerciales Internacionales* (DGPCI) and the *Dirección de Cuotas Compensatorias* (DCC), did not legally exist from the date of initiation of the investigation on December 24, 1992 until April 1, 1993 when the internal regulations of SECOFI

^{118/} Panelist José Othón Ramírez wants to establish that some of the Complainant's Briefs were written in poor Spanish.

("SECOFI Internal Regulations") were revised to, among other things, create these units.^{119/}

2. The visitation orders ("Visitation Order") of July 13 and 14, 1993^{120/} signed by *Mr. Gustavo Uruchurtu*, Director of the *Dirección de Procedimientos y Proyectos* (DPP), was issued by an official without competent jurisdiction and authority since the administrative unit that he directed was not legally established or empowered by the then applicable SECOFI Internal Regulations or otherwise.

3. The verification visits of July 23-31, 1993 were conducted in part by two officials, *Mr. Alberto Lerín Mestas*, *Director de Investigación de Dumping y Subvenciones* and *Ms. Erika Guzmán Soulé*, *Subdirector de Investigación de Dumping y Subvenciones* who lacked competent jurisdiction and authority, since these offices or administrative units were not legally established or empowered by the then applicable SECOFI Internal Regulations or otherwise.

4. All SECOFI officials participating in the verification visits of July 23-31, 1993 lacked competent jurisdiction and authority because those officials were designated in orders (*i.e.*, the Visitation Orders) issued by *Mr. Gustavo Uruchurtu*, Director of the DPP, a subunit of the DGATJ, who lacked competent jurisdiction and authority to appoint individual verifiers.

5. One individual, *Mr. Alberto Lerín Mestas*, lacked competent jurisdiction and authority to participate in the verification visits made to USX because the Visitation Orders did not

^{119/} See SECOFI Internal Regulations (*Reglamento Interior de la Secretaría de Comercio y Fomento Industrial*), D.O., April 1, 1993, abrogating the SECOFI Internal Regulations published in the D.O. of March 16, 1989. *Dr. Alvaro Baillet* served as General Director of the DGPCI and *Mr. Miguel Angel Velázquez Elizarrarás* served as the Director of the DCC.

^{120/} Volume 13, C.R. UPCI.211.93.2344.

authorize him to participate in those visits.

6. Two individuals, *Mr. Jorge Santibáñez* and *Mr. Francisco Velázquez*, in their capacity as external consultants, lacked competent authority to participate directly and actively in the verification visits because they were not SECOFI officials.

B. Alleged Technical Errors

Complainants allege that the Final Determination is illegal under Article 16 of the Constitution and should be declared a nullity under Article 238(1) of the Federal Fiscal Code due to certain "technical errors" committed by SECOFI during the investigation. Complainants specifically allege:

1. The failure of the Visitation Orders to specify the place or places in which the verifications were to be conducted, as required by Article 16 of the Constitution.

2. The failure of the Visitation Orders to specify the period of the investigation, as required by Article 16 of the Constitution.

3. SECOFI's failure to notify the Government of the United States and failure to obtain the authorization of the Government of the United States before conducting the verifications, as required by Article 6.5 of the GATT 1979 Antidumping Code and Article 21 of the Old Foreign Trade Regulations.

C. Bethlehem's Alleged Errors Concerning the Dumping Calculation

Complainant alleges that the Final Determination is illegal due to several errors in the way that SECOFI calculated the final dumping margin. Complainant specifically alleges:

1. SECOFI's incorrect utilization of cost data for which the source is unknown in conducting the sales below cost test, in lieu of other cost data supplied by the Complainant which was received and verified by SECOFI.

2. SECOFI's commission of numerous ministerial errors in the dumping margin analysis and calculation, including: (i) the use in some instances of incorrect domestic prices [which instances are identified by Complainants according to product codes]; and (ii) the use of reconstructed values in some instances where correct application of SECOFI's sales-below-cost test would require the use of domestic prices [also identified by product codes].

3. SECOFI's erroneous calculation of the adjustment for freight on *export* sales by deducting both the actual freight adjustment reported for each specific sale and an allocated "freight equalization" amount per ton on all sales in calculating the export price.

4. SECOFI's erroneous calculation of the adjustment for freight on *domestic* sales by deducting both a product-specific or sale-specific freight adjustment for which the source is unknown and an allocated "freight equalization" amount per ton on all sales in calculating home market price.

5. SECOFI's method of calculating the profit on domestic sales for use in computing reconstructed value, did not utilize a "reasonable margin of profit" as required by Article 2 (II) (b) of the old Mexican Trade Regulations.

D. Alleged Errors Concerning the Findings of Injury, Threat of Injury, and Causation

Complainants further allege that the Final Determination is illegal due to certain errors in the determinations of injury, threat of injury, and causation. Complainants specifically allege:

1. SECOFI's failure to disclose the identity of an independent consultant retained by it as well as the contents of the technical report prepared by the consultant violates the transparency requirements set forth in Article 6.7 of the GATT 1979 Antidumping Code and the due process requirements set forth in Articles 14 and 16 of the Constitution.

2. SECOFI's failure to disclose the identity of the independent consultant also raises the appearance of a conflict of interest in violation of due process requirements set forth in Article 6.7 of the GATT 1979 Antidumping Code and Articles 14 and 16 of the Mexican Constitution.

3. With respect to causation, Complainants specifically allege:

a. SECOFI erred in failing to discuss the significant anticompetitive agreements entered into by AHMSA or to demonstrate how AHMSA could be injured, within the

meaning of the old Foreign Trade Law, in light of such agreements.

b. SECOFI erred in determining that AHMSA possessed excess production capacity of the subject merchandise was unsupported by positive evidence on the administrative record in violation of the requirements of Article 3.1 of the GATT 1979 Antidumping Code.

c. SECOFI's inclusion of data on products which were not subject to the investigation in its analysis of the financial condition of the Mexican industry was unsupported by positive evidence on the administrative record in violation of the requirements of Article 3.1 of the GATT 1979 Antidumping Code.

d. SECOFI's methodologies for determining underselling and price suppression and depression were fundamentally defective in that they failed to compare like products.

4. With respect to threat of material injury, Complainants specifically allege:

a. SECOFI erred in failing to disclose the identity of its technical consultant and in failing to make available a public version of the consultant's technical report.

b. SECOFI erred in failing to address the argument that the anticompetitive agreements entered into by the petitioner removed any possibility of injury to the domestic industry.

c. SECOFI erred in finding that the U.S. producers possessed excess production capacity of the subject merchandise was unsupported by positive evidence on the administrative record in violation of the requirements of Article 3.1 of the GATT 1979 Antidumping Code.

d. SECOFI erred in determining that the U.S. producers possessed significant inventories of the subject merchandise was unsupported by positive evidence on the administrative record in violation of the requirements of Article 3.1 of the GATT 1979 Antidumping Code.

E. Other Alleged Errors of Fact or Law

Complainants allege that the Final Determination is illegal due to certain other errors of fact or law made by SECOFI in the investigation. Complainants specifically allege:

1. SECOFI's failure to provide Complainant with access to the complete public record in the underlying investigation violates the transparency and due process requirements set forth in Article 6.7 of the GATT Antidumping Code and Articles 14 and 16 of the Mexican Constitution.

2. SECOFI's incorrect definition of the scope of the Final Determination (*i.e.*, including products which cannot be produced in Mexico).

3. SECOFI's findings of injury, threat of injury and dumping were based on an

unrepresentative sample of imports of cut-to-length plate originating in the United States.

V. COMPETENCE OF THE DGPCI AND THE DCC

The Majority of this Panel^{121/} has concluded that the administrative subunits of SECOFI that carried out this antidumping investigation and proceeding in its early months, particularly the DGPCI and the DCC, were incompetent to do so. These entities were not duly created and established in the manner clearly required by Mexican law and therefore their actions in this matter must, under the applicable standard of review, be “nullified.”^{122/} In the following portions of this opinion, the Majority sets out its reasons for drawing this conclusion.

A. Transitional Period in Mexican Law

This case arose during a transitional period in Mexican law, a period which has seen numerous fundamental changes in Mexico’s treaty obligations, the specifics of Mexican antidumping law, and the organization of SECOFI as the “competent investigating authority.” In an attachment to this opinion, the Majority provides a chronology of these important changes.(Annex I)

The outcome of this case, from the point of view of this competence issue, has been significantly impacted by the changes that were made during this transitional period and, the Majority speculates, by one or more changes that were not made.^{123/}

^{121/} Panelists Ramírez, Lutz and Endsley join together as the Majority in this portion of the opinion.

^{122/} The Majority agrees with Complainants that Article 238(1) is applicable to these competence issues. Applying Article 238(1), the Majority remands this proceeding back to the Investigating Authority for a finding of zero dumping margins with respect to the Complainants and termination of this proceeding. See the Panel’s final order *infra*.

^{123/} See discussion at *infra*.

The question whether particular administrative subunits of SECOFI were competent or incompetent to act in this antidumping proceeding presents an essentially administrative law question, a question to be examined within the context of both the technical aspects of Mexican administrative law and the important constitutional imperatives flowing out of Articles 14 and 16 of the Constitution.^{124/} In Mexico, as will be discussed more fully below, the organization and activities of SECOFI are prescribed and governed by several different legal norms. These include:

- the Constitution;

- the Organic Law of Federal Public Administration (*Ley Orgánica de la Administración Pública Federal*) (“LOAPF”);

- the SECOFI internal regulations (*Reglamento Interior de La Secretaría de Comercio y Fomento Industrial*) (“Internal Regulations”); and

- the SECOFI Organization Manual (*Manual General de Organización de la Secretaría de Comercio y Fomento Industrial*) (“Organization Manual”).

In addition, various delegations of authority within SECOFI are set out in Delegation Agreements (*Acuerdos Delegatorio*).

During this transitional period, the LOAPF, regulations, manuals and agreements have gone

^{124/} See discussion of the Mexican standard of review *supra*.

through a number of changes, as illustrated in part by the following table^{125/}:

| <u>Document</u> | <u>New Version or Amendment To Old Version</u> |
|-----------------------------|--|
| LOAPF | December 29, 1976 December 28, 1994 |
| SECOFI Internal Regulations | August 20, 1985 March 16, 1989 April 1, 1993 September 14, 1994 |
| SECOFI Organization Manual | October 20, 1986 September 19, 1988 June 5, 1989 July 28, 1994 |

^{125/} Date of publication in D.O.

B. The Administrative Structure of SECOFI for Antidumping Cases

1. Constitution

At the constitutional level, the power to determine the administrative structure of the Executive branch of government resides primarily in the President of the Republic. Article 89(I) states that:

Artículo 89.—Las facultades y obligaciones del Presidente son las siguientes:

I. Promulgar y ejecutar las leyes que expida el Congreso de la Unión, proveyendo en las esfera administrativa a su exacta observancia; ...

Article 89.—The powers and duties of the President are as follows:

I. To promulgate and execute the laws enacted by the Congress of the Union providing for their exact observance in the administrative sphere; ...

The President exercises this power, however, within the context of Article 90 of the Constitution, which provides that “Federal Public Administration shall be centralized and run by the state 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 and Administrative Departments....” Thus, in enacting the LOAPF, it is the Mexican Congress that initially sets the overall framework for administrative activity in Mexico, a framework which is to be set out in greater detail by the President acting under his own constitutional authority.

The Supreme Court has confirmed these principles by noting that the power to legally create or establish administrative units of government falls within the President’s “regulatory power”

(*facultad reglamentaria*). For example, in the following case, the Supreme Court held:^{126/}

FACULTAD REGLAMENTARIA. INCLUYE LA CREACION DE AUTORIDADES Y LA DETERMINACION DE LAS QUE ESPECIFICAMENTE EJERCITARAN LAS FACULTADES CONCEDIDAS. Está dentro de la facultad reglamentaria otorgada 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, pues ello significa proveer a la exacta observancia de la ley reglamentada. Además, al tratarse de un organismo que forma parte de la administración pública, aun cuando sea un organismo descentralizado, es precisamente el Presidente de la República, titular de esa administración, 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.

REGULATORY POWER. INCLUDES THE CREATION OF AUTHORITIES AND THE DETERMINATION OF WHO SHALL EXERCISE THE POWERS GRANTED. The creation of authorities to exercise the powers assigned by the relevant law to a determined organ of the public administration is within the regulatory powers granted to the President of the Republic by Article 89, section I of the Constitution. Equally, the choice of the dependencies or specialized internal organs through which the powers granted by the law to a public organ shall be exercised is also within said power [granted to the President], since this involves decreeing the exact observance of the law under which the regulations are created. Furthermore, with respect to an organ which forms part of the public administration, including decentralized organs, it is the President of the Republic, the head of that administration, who possesses the constitutional power to choose the internal organs which shall exercise the powers granted by the law, in order to make possible the fulfillment of the law.

Central to any analysis of competence and jurisdiction, therefore, is the issue whether a law enacted by Congress has granted competence to a particular administrative unit to take actions that affect or impact the public,^{127/} or whether the President has exercised his “regulatory power” in some manner to grant such competence.

^{126/} Court: Second Chamber. Source: *Semanario Judicial de la Federación*. Term: 8A. Book: III First Part. Thesis: Page 277.

PRECEDENTS: **Amparo 6458/85.** Francisco Javier Vázquez Balderas. February 1, 1989. 5 Votes. Magistrate: Manuel Gutiérrez, de Velasco. Secretary: Rosalba Becerril Velázquez.

Amparo 1129/88. Compañía Mexicana de Ingeniería, S.A. June 8, 1988. Unanimous Vote. Magistrate: Atanasio González Martínez. Secretary: Alicia Rodríguez Cruz de Blanco. (8th Term, Book I First Part, Page 223).

Amparo 480/84. Compañía Minera Río Colorado, S.A., August 23, 1984. Unanimous 4 votes. Absent: Santiago Rodríguez Roldán. Magistrate: Carlos del Río Rodríguez. Secretary: Diana Bernal Ladrón Guevara (7th Term, Volumes 187-192, Third Part, Page 65).

^{127/} See Articles 14 and 16 of the Constitution.

2. LOAPF

Pursuant to the cited constitutional provisions, the LOAPF was initially adopted on December 29, 1976 to create and establish the various Secretaries of State, among them the Secretary of Commerce and Industrial Development (SECOFI), granting each of these Secretaries precisely specified attributes and powers. The LOAPF also granted exclusively to the President the power to issue internal regulations for each such Secretary, the purpose of which is to set out the organic structure and powers of that Secretary, including its various administrative units and subunits.

The foregoing can be seen from following provisions of the Organic Law that were in force during this proceeding, which state:

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 o mesa, y por los demás funcionarios que establezca el reglamento interior respectivo y otras disposiciones legales.

Artículo 16.—Corresponde originalmente a los titulares de las Secretarías de Estado y 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 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....

Article 14.—At the head of each Secretary there shall be a Secretary of State who shall be assisted in matters under his jurisdiction by undersecretaries, a chief of staff, directors, deputy directors, and by managers and assistant managers of Departments, Offices, Sections and Subsections, and all other officials mentioned in the appropriate internal regulation and other legal provisions.

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 functionaries 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....

Los propios titulares de las Secretarías de Estado y Departamentos también podrán adscribir orgánicamente las unidades administrativas establecidas en el reglamento interior respectivo, 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 delegan facultades o se adscriban unidades administrativas se publicarán en el “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.

Artículo 19.—El titular de cada Secretaría de Estado y Departamento Administrativo expedirá los manuales de organización, de procedimiento y de servicios al público necesarios para su funcionamiento, los que deberán contener información sobre la estructura orgánica de la dependencia y las funciones de sus unidades administrativas, así como sobre los sistemas de comunicación y coordinación y los principales procedimientos administrativos que se establezcan. Los manuales y demás instrumentos de apoyo administrativo interno, deberán mantenerse permanentemente actualizados. Los manuales de organización general deberán publicarse en el “Diario Oficial” de la Federación.

The Secretaries of State and the heads of the Administrative Departments may ascribe organically the administrative units established in their respective internal regulations to the Undersecretaries, Chief of Staff, and other administrative units at an administrative level equivalent to those set out in such internal regulations.

The decrees through which the powers are either delegated or granted to administrative units shall be published in the “Diario Oficial de la Federación.”

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 administrative unit, which will be issued by the President of the Republic.

Article 19.—The Secretary of State and the head of each Administrative Department shall issue organization manuals and of proceedings and public services necessary for it to function; these shall contain information about the organic structure of the department and the functions of its administrative units, as well as the systems of communication and coordination and the principal administrative proceedings to be established. The manuals and other internal administrative tools shall be updated permanently. The organization manuals shall be published in the “Dario oficial de la Federación.”

The plain meaning of the above provisions is the following:

- Each Secretary of State shall be assisted by the officials and administrative units set out in *Article 14* itself, in the internal regulations or other bodies of law of that Secretary.

- Each Secretary of State may appoint and organize the various officials and administrative units established by the internal regulations of that Secretary. In addition, each Secretary of State may, unless expressly non-delegable, delegate one or more of his powers to such officials and administrative units (*Article 16*).

- The internal regulations for each Secretary of State, issued by the President of the Republic, specify the powers and attributes to be held by each such official and administrative unit (*Article 18*).

- Each Secretary of State must publish in the D.O. and keep current an organizational manual, setting out for the public information regarding the organic structure of the Secretary and other matters (*Article 19*).

Once again, central to these provisions and to Mexican law generally is the principle that only the President of the Republic, the head of the Executive branch, has the authority to issue internal regulations of a Secretary creating or establishing, and thereby giving competence to, an administrative unit.^{128/} The following Thesis confirms this point: ^{129/}

^{128/} The Majority could not find some other decree or order issued by the President of the Republic applicable for this case, which would also be of equal dignity to an internal regulation.

^{129/} Court: Second Chamber. Source: *Semanario Judicial de la Federación*. Term: 7A. Volume: 163-168. Part: Third. Page: 77.

FACULTAD REGLAMENTARIA. SUS LIMITES. Es criterio unánime, tanto de la doctrina como de la jurisprudencia, que la facultad reglamentaria, conferida en nuestro sistema constitucional únicamente al Presidente de la República y a los gobernadores de los estados, en sus respectivos ámbitos competenciales, consiste, exclusivamente, dado el principio de la división de poderes que impera en nuestro país, en la expedición de disposiciones generales abstractas e impersonales que tienen como objeto la ejecución de la ley, desarrollando y completando en detalle sus normas, pero sin que, a título de su ejercicio, pueda excederse al alcance de sus mandatos o contrariar o alterar sus disposiciones, por ser precisamente la ley su medida y justificación.

REGULATORY POWER. ITS LIMITS. Both our jurisprudence and case law are unanimous in holding that the regulatory power conferred in our constitutional system only on the President of the Republic and on the state governors, in their respective areas of competence, consists, exclusively, under the principle of the division of powers that applies in our country, to the issuance of general, abstract and impersonal dispositions that have as their object the execution of the law, developing and completing its norms in detail, but that the regulations may not exceed the scope of the law's commands or contradict or alter its dispositions, given that the law defines the scope [of a permissible regulation] and provides the regulations's justification.

3. Internal Regulations and Organization Manuals

Insofar as the President's "regulatory power" is concerned, Mexican law makes a clear distinction between internal regulations and organization manuals. Internal regulations are issued by the President pursuant to the express authority granted him by the Constitution and the LOAPF. Their most basic purpose is to legally create and establish the various administrative units and subunits that are to be integrated within the Secretariat involved. Therefore, such internal regulations impart juridical competence to the designated administrative units and subunits, making their existence and competence legally and administratively unimpeachable. It is through this mechanism that the guarantee of legal security afforded the Mexican people by Article 16 of the Constitution is protected.

PRECEDENTS: Fiscal appeal 59/81. Playa Sol Vallarta, S.A., October 4, 1982. 5 votes. Magistrate: Carlos del Río Rodríguez.

NOTE: This Thesis also appears in: Appendix, Index 1917-1985, Third Part, Second Chamber, fourth Thesis related with the jurisprudence 402, page 705.

In contrast, organization manuals are not issued by the President, but by the Secretary himself. Organization manuals, therefore, are not an expression of the “regulatory power” granted by the Constitution to the President. As stated in Article 19 of the LOAPF, they are merely informational in character and, however accurately they may describe the internal workings of the Secretariat in question, they do not, and cannot, give existence and legal competence to the administrative units and subunits mentioned therein. These must depend, for their legal competence, upon a law or the internal regulations for that Secretariat (or other regulations or decree of the President issued pursuant to his “regulatory power”), identifying and granting them specific attributes and powers.

Mexican case law clearly confirms these principles.^{130/}

REGLAMENTO INTERIOR DE LA SECRETARIA DE COMERCIO Y FOMENTO INDUSTRIAL, NO PREVE CON CARACTER DE AUTORIDAD AL DIRECTOR DE PRODUCTOS MANUFACTURADOS E INDUSTRIA BASICA. El Reglamento Interior de la Secretaría de Comercio y Fomento Industrial no prevé la existencia legal del Director de Productos Manufacturados e Industria Básica, y no puede considerarse que el manual general de organización a que alude el artículo 8 del reglamento citado, publicado en el Diario Oficial de la Federación el 20 de octubre de 1986, reformado por otro publicado en el mismo diario de 19 de septiembre de 1988, donde se menciona una dependencia de nombre similar a la que nos ocupa, le da vida jurídica ya que sólo tiene funciones de orientación para las dependencias en el indicadas y al público en general, de lo cual se advierte que no puede

THE INTERNAL REGULATION OF THE MINISTRY OF COMMERCE AND INDUSTRIAL DEVELOPMENT DOES NOT PROVIDE THAT THE DIRECTOR OF MANUFACTURED PRODUCTS AND BASIC INDUSTRY IS A [LEGAL] AUTHORITY. The internal regulation of the Ministry of Commerce and Industrial Development does not provide for the legal existence of the Director of Manufactured Products and Basic Industry, and we cannot consider that the general organizational manual referred to in Article 8 of the aforementioned regulation, published in the Diario Oficial de la Federación on October 20, 1986, reformed by another [manual] published in the same publication on September 19, 1988, where a dependency of a similar name is mentioned, gives legal existence [to the Director of Manufactured Products and Basic Industry] since [the manual] only has the purpose of

^{130/} Court: Tribunales Colegiados de Circuito. Source: Semanario Judicial de la Federación. Term: 8A. Book: III, Second Part. Page 654. CUARTO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO.

PRECEDENT: Amparo 474/89. Ciba Geigy Mexicana, S.A. de C.V., March 16, 1989. Unanimous Votes. Magistrate: Hilario Barcenás Chávez. Secretary: Emiliano Hernández Salazar.

tener carácter legislativo. En consecuencia, se debe concluir que el director en comento no existe con el carácter de autoridad por lo que, con fundamento en lo dispuesto por el artículo 27, fracción VI, del Reglamento Interior de la Secretaría de Comercio y Fomento Industrial es al Director General de Precios a quien le corresponde el tramitar y dictaminar las solicitudes para fijar or modificar precios y tarifas.

serving as a guide for the dependencies mentioned in it and for the general public, from which it is clear that it cannot have a legislative character. Consequently, it must be concluded that the director in question does not possess the attributes of an authority and that, on the basis of what is provided for by Article 27, section VI of the interior regulation of the Ministry of Commerce and Industrial Development, the General Director of Prices has the responsibility for processing and deciding applications to fix or modify prices and fares.

Accord:131/

MANUAL GENERAL DE ORGANIZACION DE LA SECRETARIA DEL TRABAJO Y PREVISION SOCIAL. NO PUEDE EQUIPARARSE A UN REGLAMENTO O LEY INAPLICABILIDAD DEL. El Subdirector “B” de Sanciones de la Dirección General de Asuntos Jurídicos de la Secretaría del Trabajo y Previsión Social no es competente para emitir actos de molestia en ausencia de los Directores General de Asuntos Jurídicos y de Sanciones de la citada dependencia, ya que en el Manual General de Organización de la Secretaría del Trabajo y Previsión Social que invoca para apoyar y justificar su competencia, este instrumento carece de toda fuerza legal pues dichos manuales de organización a que se refiere el artículo 19 de la Ley Orgánica de la Administración Pública Federal, no tienen naturaleza normativa, sino su papel simplemente es de ser una fuente de información actualizada de la organización y atribuciones de la estructura interna de cada secretaría de Estado, pero sin que dicha información que sumariamente se publica en el Diario Oficial de la Federación pueda

GENERAL ORGANIZATION MANUAL OF THE MINISTRY OF LABOR AND SOCIAL WELFARE. CANNOT BE COMPARED WITH A REGULATION OR LAW. INAPPLICABILITY OF. Sub-Director “B” of Sanctions of the General Department of Legal Affairs of the Ministry of Labor and Social Welfare is incompetent to issue acts which affect legal rights in the absence of the General Directors of Legal Affairs and of Sanctions of the aforementioned Ministry, since the General Organizational Manual of the Ministry of Labor and Social Welfare cited [by Sub-director “B” of Sanctions] to support his competence lacks all legal force since said organizational manuals referred to in Article 19 of the Organic Law for the Federal Public Administration (Ley Orgánica de la Administración Pública Federal) cannot create legal norms; rather their role is simply to be an up-to-date information source regarding the organization and internal structure of each Ministry. This information which is summarily published in the Diario Oficial de la Federación cannot be compared as to its legal force with that possessed by the internal

131/ Court: Tribunales Colegiados de Circuito. Source: Semanario Judicial de la Federación. Term: 8A. Book: X-October. Page 373. CUARTO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO.

PRECEDENTS: Amparo 654/92. Ganaderos y Productores de Leche Pura, S.A. de C.V., June 4, 1992. Unanimous Votes. Magistrate: José Méndez Calderón. Secretary: Silvia Martínez Saavedra.

equipararse al carácter normativo que tienen los reglamentos interiores de las secretarías, que se prevén en el artículo 18 de la Ley Orgánica de la Administración Pública Federal; pero tampoco tienen un valor regulador jurídico ya que el papel de los manuales es sólo contar con información actualizada de tipo meramente administrativo, pues ni la pluricitada Ley Orgánica de la Administración Pública Federal, que prevé su existencia, ni ninguna otra ley o dispositivo reglamentario le dan carácter normativo alguno. En consecuencia, el manual de organización que se cita no puede ser fuente de competencia de ninguna autoridad. Además, de acuerdo con el sistema legal vigente, los órganos administrativos y sus atribuciones deben recogerse en principio en los reglamentos interiores de las secretarías de Estado, y siendo en la especie que dicha Subdirección “B” de sanciones no se encuentra prevista en el artículo 3 del Reglamento Interior de la Secretaría del Trabajo y Previsión Social, el órgano en cuestión is inexistente.

regulations of the ministries provided by Article 18 of the Ley Orgánica de la Administración Pública Federal. [The organizational manuals] also do not create a regulatory power since the role of the manuals is only to contain up-to-date information of a merely administrative nature, in that neither the aforementioned Ley Orgánica de la Administración Pública Federal, that provides for their existence, nor any other law of regulation gives [the manuals] any sort of normative character. Consequently, the cited organizational manual cannot be a source of authority for any legal body. Furthermore, in accordance with our operative legal system, the administrative organs and their powers should be set out in the internal regulations of the ministries, and since said Sub-Department “B” of Sanctions is not provided for by Article 3 of the Internal Regulations of the Ministry of Labor and Social Welfare, the organ in question is null and void.

C. Study of DGPCI’s and DCC’s competence

Based on the foregoing, the Majority therefore analyzes whether by virtue of a law, the SECOFI Internal Regulations, or otherwise, the DGPCI and the DCC were competent to act during the period from December 4, 1992 until April 1, 1993.

1. The SECOFI Internal Regulations

a. The 1985 Regulations

The SECOFI Internal Regulations of August 20, 1985 (“the 1985 Regulations”),^{132/} in Article 2, state as follows:

Artículo 2.—Para el estudio, planeación y despacho de los asuntos que le competen, la Secretaría de Comercio y Fomento Industrial contará con los siguientes servidores públicos, áreas y unidades administrativas:

Secretario
Subsecretaría de Comercio Exterior

Direcciones Generales de:

[list omitted]

Unidades de:

[list omitted]

Article 2.—For the study, planning and handling of issues within its competence, the Secretary of Commerce and Industrial Development shall have the following public servants, areas and administrative units:

Secretary
Undersecretary of Foreign Commerce

General Directorates:

[list omitted]

Units:

[list omitted]

^{132/} The 1985 Regulations abrogated and superseded the previous internal regulations published in the D.O. on December 12, 1983. See Article Second, Transitory Provisions.

Delegaciones Federales:

[text omitted]

Federal Delegations:

[text omitted]

A plain reading of Article 2 suggests that its essential purpose is to list all those *Subsecretarías, Direcciones Generales, Unidades, and Delegaciones Federales* making up SECOFI's organizational structure and, by so listing them, to legally create, establish and give competence to each listed administrative unit and subunit.

Although the 1985 Regulations do make reference to an administrative unit which appears to have some authority concerning unfair trade practices,^{133/} it is manifest that these regulations make no reference whatever either to the DGPCI or the DCC, in Article 2 or elsewhere. Therefore, it may be concluded that the 1985 Regulations did not legally create or establish these two administrative subunits.

b. The 1989 Regulations

The 1985 Regulations were abrogated^{134/} by new internal regulations published in the D.O. on March 16, 1989 ("the 1989 Regulations"). Article 2 of the 1989 Regulations follows exactly the

^{133/} Article 2 makes reference to the *Dirección General de Negociaciones Económicas y Asuntos Internacionales* to which Article 18(III) attributes some competence in the area of "unfair practices" (*prácticas desleales de carácter comercial*).

^{134/} See Article Second, Transitory Provisions. The Majority takes the term "abrogate" (*abrogar*) in its normal and plain meaning, as to "annul" or "repeal" the prior act. Clearly, the term is intended to refer to an annulment or repeal of the prior act as a whole, and not merely to a derogation in part from specific terms of that prior act. In the latter case, it is Mexican practice to utilize the verb "to derogate" (*derogar*). See Diccionario Jurídico Mexicano, Instituto de Investigaciones Jurídicas, U.N.A.M., Ed. Porrúa, 1992. Vol. I (A to C), "ABROGACIÓN, I. (Del latín *abrogatio*, del verbo *abrogar, anular*). Es la supresión total de la vigencia y, por lo tanto, de la obligatoriedad de una ley.... IV. En el lenguaje técnico-jurídico se sigue haciendo la distinción entre derogación y abrogación; refiriéndonos en el primer caso a la privación parcial de efectos de la ley y en el segundo a la privación total de efectos de ésta."

same format as its predecessor, listing both the Secretary and Undersecretary of Foreign Commerce. Under the *Direcciones Generales*, however, Article 2 also lists for the first time the *Dirección General de Servicios al Comercio Exterior* (DGSCE). The attributes of the DGSCE are set out in Article 16(XII), as follows:^{135/}

XII. Estudiar y proponer con la participación de las Direcciones Generales de Política de Comercio Exterior y de Negociaciones Comerciales Internacionales, la aplicación y monto de las cuotas compensatorias y cuotas antidumping, a mercancías que se importen en condiciones de prácticas desleales de comercio internacional, así como las salvaguardias cuando procedan en los términos establecidos por la Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior.

XII. To study and propose with the participation of the Direcciones Generales de Política de Comercio Exterior and Negociaciones Comerciales Internacionales the application and amount of countervailing duties [*cuotas compensatorias*] and antidumping duties [*cuotas antidumping*], to merchandise which is imported under conditions of unfair practices, as well as the remedies which are to be imposed pursuant to the Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior.

Once again, the 1989 Regulations make no reference to either the DGPCI or the DCC; only the DGSCE is set out as the appropriate entity to “study and propose” with two other general directions, with respect to antidumping and countervailing duty matters. Therefore, it can be concluded that while the 1989 Regulations did create the DGSCE, they did not legally create or establish either the DGPCI or the DCC. The Majority notes that it was the 1989 Regulations that were in existence during the period December 4, 1992 through April 1, 1993.

^{135/} As a matter of terminology, the Majority notes that this clause makes a clear distinction between countervailing duties [*cuotas compensatorias*] and antidumping duties [*cuotas antidumping*]. With this exception, however, and with the further exception of NAFTA Article 1904(2) which refers to “*cuotas antidumping y compensatorias*,” the Majority has found no other provision in Mexican law which makes this terminological distinction. All other references the Panel has found appear to use the term “*cuotas compensatorias*” as referring generically to **both** countervailing duties and antidumping duties. *See*, for example, Article 33(XII) and 33(XXIII) of the 1993 Regulations. If such generic use is intended to eliminate the distinction, it is not clear to the Majority what term will be used to describe solely countervailing duties. This terminological confusion is not to be desired.

c. The 1993 Regulations

The SECOFI internal regulations were not re-issued again until April 1, 1993 (“the 1993 Regulations”).^{136/} The 1993 Regulations expressly abrogated the prior 1989 Regulations.^{137/}

Article 2, following the exact same format as both prior internal regulations, created the Secretary, a re-named Undersecretary of Foreign Commerce and Investment (*Subsecretaría de Comercio Exterior e Inversión Extranjera*), the DGSCE and, for the first time, a new administrative subunit entitled the *Unidad de Prácticas Comerciales Internacionales* (UPCI). The attributes of the DGSCE were set out in Article 13, while those of the UPCI were set out in Article 33. Once again, no reference was made to the DGPCI or the DCC.

Thus, it may be concluded that while the 1993 Regulations re-established the DGSCE and established once again the UPCI, they did not legally create or establish either the DGPCI or the DCC.

2. The SECOFI Organization Manuals

As noted above, the SECOFI Organization Manuals do not, in the Majority’s view, legally

^{136/} The 1993 Regulations came into force on April 2, 1993, the day following publication in the D.O. See Article First, Transitory Provisions.

^{137/} Article Second, Transitory Provisions. While the 1989 Regulations were abrogated in total, this transitory provision also indicated, however, that the 1993 Regulations were to prevail over another legal provisions which may be found to be contrary (“*Se abroga el Reglamento Interior [del] 16 de marzo de 1989 y se derogan todas aquellas disposiciones que se opongan al presente Reglamento*”).

establish or create administrative units and subunits, at least insofar as they affect or impact the public.^{138/} The SECOFI Organizational Manuals are internal documents which, by their own terms, are intended merely to provide detailed information concerning SECOFI's antecedents, its applicable juridical and administrative provisions, its attributes and objectives. The Organizational Manuals do not confer such attributes, however; these are conferred by means of the LOAPF, the SECOFI Internal Regulations, or perhaps some other law, regulation or Presidential decree.

As was stated identically in the Introductions to the 1986 and 1988 Organization Manuals, it is their purpose, in part:^{139/}

—Precisar las funciones encomendadas a las diferentes unidades administrativas que la integran, basadas en las atribuciones conferidas por el artículo 34 de la Ley Orgánica de la Administración Pública Federal y el Reglamento Interior de la Secretaría, así como establecer las relaciones que deben existir entre las mismas.

—To specify the functions entrusted to its various administrative units, based on the attributions conferred by Article 34 of the Organic Law of Federal Public Administration and the Internal Regulations of the Secretary, as well as to establish the relationships that should exist between them.

a. The 1986 SECOFI Organization Manual

The 1986 SECOFI Organization Manual was published in the D.O. on October 20 of that same year, and conforms to the 1985 Regulations in that it makes reference in the list of administrative subunits on page 30 and to the organigram on page 31 to both the *Subsecretaría de*

^{138/} See Articles 14 and 16 of the Constitution. The Majority appreciates that SECOFI may establish or create administrative units and subunits, establishing budgets therefore and otherwise, without constitutional implication, provided that such units and subunits are limited to internal functions only and do not directly affect or impact the rights and interests of individuals.

^{139/} See, for example, Introduction, 1988 Organization Manual. While the more recent SECOFI Organization Manuals, for example, the 1989 Organizational Manual, do not continue this language, it is merely a recapitulation of Mexican administrative law and it must be presumed that its omission in the recent manuals does not occasion a change in substance or point of view on the part of SECOFI.

Comercio Exterior and to the *Dirección General de Servicios al Comercio Exterior* (DGSCE). The functions of the DGSCE are set out on page 50, and the organigram of the DGSCE on page 51 shows that the DGSCE at this time was organized internally into four *Direcciones*, including the *Dirección de Cuotas Compensatorias y Sector Público* (“DCC y SP”). Other than what may be surmised by virtue of its own title, and the title of its various administrative subunits, no description is given in the 1986 Organization Manual of the specific functions and attributes of the DCC y SP.^{140/} The 1986 Organization Manual makes no reference whatever to the DGPCI.

b. The 1988 SECOFI Organizational Manual

The SECOFI Organization Manual was re-issued and published on September 19, 1988 with, for present purposes, no change in substance.^{141/} The functions of the DGSCE are set out on page 51 and the organigram on the following page makes reference to the *Dirección de Cuotas Compensatorias* (DCC) as one of the three *Direcciones* operating directly under the DGSCE. Once again, the 1988 Organization Manual contains no specific discussion of the attributes or functions of the DCC, other than what may be discerned from its title and that of its own administrative subunits. The 1988 Organization Manual makes no reference whatever to the DGPCI.

^{140/} The 1986 Organizational Manual merely describes where the DCC can be found in the organizational structure of SECOFI.

^{141/} The 1988 Organizational Manual does not contain express Transitory Provisions which would indicate as a formal matter that this manual “abrogated” the 1986 Organizational Manual. Nevertheless, based on Article 19 of the LOAPF, which requires SECOFI to maintain and publish currently accurate organizational manuals, the Majority believes that the legal impact and effect of the 1988 re-issuance was to “abrogate” the 1986 Organizational Manual.

c. The 1989 SECOFI Organization Manual

The SECOFI Organization Manual was re-issued and published in the D.O. on June 5, 1989.^{142/} The organic structure of SECOFI is set out on pages 20 and 21, making reference once again to the *Subsecretaría de Comercio Exterior* and to the DGSCCE. An organigram of SECOFI, showing the relationship between these two entities is contained on page 40. However, only the functions of the DGSCCE are set out on pages 25 and 26, with no organigram of the DGSCCE itself. Thus, the 1989 SECOFI Organization Manual makes no reference whatever to the DCC nor, of course, to the DGPCI.

d. The 1994 SECOFI Organization Manual

The SECOFI Organization Manual was not re-issued and published again until July 28, 1994.^{143/} In this version of the manual, the pertinent undersecretary position is renamed the *Subsecretaría de Comercio Exterior e Inversión Extranjera* and under it are named two pertinent subunits, the *Unidad de Prácticas Comerciales Internacionales* (UPCI) and the DGSCCE.^{144/} The organigram of SECOFI on page 44 refers to both the UPCI and the DGSCCE, but does not refer to any possible subunits of those entities. The 1994 Organization Manual makes no reference whatever to the DGPCI or the DCC.

^{142/} The 1989 Organizational Manual contains transitory provisions. Article Second of these Transitory Provisions indicates that the 1988 SECOFI Organizational Manual is "abrogated." *See* n.132 *supra*.

^{143/} The 1994 Organizational Manual abrogates the 1989 Organizational Manual. *See* Article Second, Transitory Provisions.

^{144/} *See* pages 25, 28-30.

3. Other Laws, Regulations, or Presidential Decrees

The Majority has not discovered, nor has it been cited by the Investigating Authority to, any other laws, regulations, or Presidential decrees which make mention of the DGPCI or the DCC.

4. Conclusion

Based upon the foregoing, the Majority concludes that neither the DGPCI nor the DCC, which carried out essentially the entirety of this antidumping proceeding between December 4, 1992 and April 1, 1993, were ever legally established or in existence. Their existence was never established in any of the SECOFI Internal Regulations, most particularly the 1989 Regulations, nor were they established in any other law, regulation, or Presidential decree.

The minimal references to the DCC in the 1988 SECOFI Organization Manual cannot, in law or in fact, be considered to have legally established or created the DCC. Properly interpreted, the Majority finds that the SECOFI Organization Manuals themselves do not even purport to create or give legal competence to administrative units and subunits. By their own terms, consistent with Article 19 of the LOAPF, these manuals clearly recognize their limited informational and educational role, and that they rely for grants of competence upon Article 34 of the LOAPF and the SECOFI Internal Regulations. Sound constitutional principles, based on the legal guarantees established by Articles 14 and 16 of the Constitution, would prevent, in any event, a contrary interpretation.

The Majority also notes that the 1989 SECOFI Organization Manual expressly “abrogated” the 1988 SECOFI Organization Manual which, at that time, was the only legal document even

mentioning the DCC.

Between December 4, 1992 and April 1, 1993, therefore, it may be said that no law, regulation, manual, or Presidential decree in effect in Mexico even mentioned the DCC or the DGPCI. Therefore, in the Majority's judgment, the DCC and the DGPCI were nonexistent in law and, constitutionally speaking, completely incapable of acting against the rights and interests of individuals in this antidumping proceeding.

The Majority recognizes that, internally, SECOFI had apparently organized itself during this time frame to include the entities DGPCI and the DCC. SECOFI, however, failed to arrange for the enactment of a suitable Internal Regulation that would validate this structure, giving these entities legal competence under the accepted constitutional and administrative principles. Had SECOFI undertaken this effort, most of the Complainants' constitutional challenges with respect to the actions of the DGPCI and the DCC would be rejected by this Panel, and the Panel would be free to review the important substantive antidumping law issues raised. However, SECOFI did not undertake this effort, therefore it must be considered under NAFTA and Mexican law to have commensurate legal significance: the failure to enact a suitable Internal Regulation means that the DGPCI and the DCC were never legally competent to act and that their actions in this case must, under the applicable standard of review, now be "nullified."^{145/}

^{145/} See prior discussion of the Panel's authority to issue an order to the Investigating Authority to terminate a proceeding.

5. SECOFI's Arguments

SECOFI argues to the Panel that the DGPCI only issued two internal documents of minor consequence in this matter,^{146/} and continues that all other documents were issued by the head of the DCC, whose existence was established in the 1988 Organizational Manual as a subunit of the DGSCE. SECOFI additionally notes that Article 32 of the 1989 Regulations states that “the Directors General may be substituted in their absence by their respective area directors...” Thus, SECOFI believes that the DCC could act as substitute for the DGSCE in carrying out the latter’s assigned area of competence, which includes unfair foreign commercial practices.

As stated above, the Majority cannot accept SECOFI’s reasoning. Mexican law does not permit an organization manual to legally create or establish administrative units with competence to affect the legal sphere of the individuals; that is the function of the Internal Regulations (or some other law, regulation, or Presidential decree). Even if the contrary were true, the 1988 Organization Manual was abrogated in its entirety by the 1989 Organization Manual, which makes no mention of the DCC or the DGPCI. In addition, while the cited Article 32 might allow a legally constituted DCC to substitute on a temporary basis for the DGSCE,^{147/} it manifestly does not allow a non-legally constituted DCC to substitute for a non-legally constituted DGPCI. Moreover, in Mexican law, some delegation of authority must exist (*acuerdo delegatorio*) to permit an administrative subunit to substitute on a temporary basis for its parent unit.^{148/} No such delegation exists in this case, either with respect to a delegation by DGSCE to DCC or DGPCI to DCC. Even if a Delegatory Agreement existed, the administrative units that would have received delegatory powers must have quoted in their official letters the forementioned agreement that grants them their powers. However, in this case

^{146/} Citing DGPCI.113.92.202 and DGPCI.92.200 (sic).

^{147/} The Majority accepts that the DGSCE was validly created and established by the 1989 Regulations, with competence in the antidumping field.

^{148/} See discussion of delegation of powers *infra*.

it was not done either.

As a factual matter, the Majority also does not accept that only two unimportant internal communications were made by the DGPCI during the period in question. Almost all of the scores of letters to domestic companies, letters to the foreign steel producers (including the Complainants), and internal memoranda were under the name of the DGPCI and were designated as being DGPCI documents, although issued in fact by the head of its purported administrative subunit, the DCC. By these documents, the DCC was thus informing the outside world that it was entitled to issue letters and documents on behalf of the DGPCI^{149/} which, as has been noted, never came into existence.^{150/}

Moreover, the Majority cannot escape the fact that DGPCI and DCC were representing the Investigating Authority over a nearly four-month period. This was a critical period in which: the petition was received from AHMSA; its acceptance was acknowledged to AHMSA; the scope of the information and documentation to be requested from domestic and foreign interests was considered and determined; the questionnaires themselves were issued; the answers to the questionnaires were received; the scope of any deficiencies was considered; etc. It is difficult to imagine a more important period in the life of any antidumping investigation, a period whose actions and results will dramatically impact not just the Preliminary Determination, but the Final Determination as well. The

^{149/} It must be noted, however, that none of the documents issued by the DGPCI but subscribed by DCC recited any agreement (*acuerdo delegatorio*) or other authority by the DGPCI to the DCC to do so. As noted previously, these documents were subscribed by *Mr. Miguel Angel Velázquez Elizarrarás* as DCC's director. However, the Panel also notes that throughout this period of time and as early as December, 1992, *Mr. Velázquez* also signed substantively equivalent documents under the name of the *Unidad de Prácticas Comerciales Internacionales* (UPCI), despite the fact that the UPCI did not come into existence until April, 1993.

^{150/} The Majority does not speculate about the outcome of this case had SECOFI carried out this antidumping proceeding through the auspices of the DGSCE, which under law was legally constituted with competence to act. It is likely, however, that there would have been little contention as to its authority to do so. In this instance, SECOFI chose to act through the DGPCI and DCC which, as noted, were never legally constituted and thus were wholly without competence to act.

Majority cannot accept SECOFI's implication that all of this activity, covering such a substantial period of time, was somehow inconsequential.^{151/}

Accordingly, on the basis of the applicable standard of review, which the Majority finds to be Article 238(1) of the Federal Fiscal Code, the Majority determines that the DGPCI and the DCC were incompetent to act during the initial stages of this antidumping proceeding and that the Final Determination is remanded to the Investigating Authority to issue an order terminating the proceeding as against Complainants.

VI. VERIFICATION VISITS

Complainants have raised numerous challenges to the Visitation Orders and to the verification visits issued and carried out by the Investigating Authority, also on competence grounds, as is derived from the conclusions drawn by the Majority in Section V of the document. Specifically, Complainants allege that:

- The Visitation Orders of July 13 and 14, 1993, signed by *Gustavo Uruchurtu*, Director of the *Dirección de Procedimientos y Proyectos* (DPP), were issued by an official without competence to do so since his administrative unit was not legally established in any body of law.

^{151/} The minority of this Panel appear to argue that no significant actions were ever taken against the Complainants during this period and that, in constitutional terms, there was no act of *molestia*. Under the facts, the majority regards this conclusion as absurd.

- The verification visits were carried out in part by two officials, *Alberto Lerín Mestas*, Director of Investigation of Dumping and Subsidies (*Dirección de Investigación de Dumping y Subvenciones*), and *Erika Guzmán Soulé*, Assistant Director of Investigation of Dumping and Subsidies (*Subdirección de Investigación de Dumping y Subvenciones*), who lacked competence since their administrative units were similarly not legally established.

- All SECOFI officials participating in the verification visits lacked competence to do so since they were designated in Visitation Orders issued by *Gustavo Uruchurtu*, Director of DPP, who lacked competence to appoint individual verifiers.

- The “external advisors,” *Messrs. Jorge Santibáñez Fajardo* and *Francisco Velázquez*, which participated in the verification visits to USX on July 23,24 and 26-27, 1993 and to Bethlehem on July 28-31, 1993, lacked competence to do so because they were not SECOFI officials;

- In the case of the USX verification visit, *Mr. Lerín*, although participating actively and directly in the visit, was not designated as a visitor in the applicable Visitation Order.

- The Visitation Orders for both Complainants failed to specify the place or places in which the visit would be carried out and failed, as well, to specify the period subject to investigation;

- The consent of the Government of the United States to the verification visit, required by Article 6.5 of the 1979 Antidumping Code, was not obtained.

A. Issuance of the Visitation Orders of July 13 and 14, 1993

As noted above, the Visitation Orders of July 13 and 14, 1993^{152/} were signed by *Gustavo Uruchurtu*, Director of the DPP, which within SECOFI was an administrative subunit of the *Dirección General Adjunta Técnica Jurídica* (DGATJ), which in turn was an administrative subunit of the UPCI. Although the UPCI was duly created by the 1993 Regulations, those regulations make no mention of either the DGATJ or the DPP. In the case brief of the Investigating Authority, the Panel was advised that *Mr. Uruchurtu* had become Director of the DPP as of January 16, 1993 and that *Mr. Velázquez* became Assistant General Director of the DGATJ on March 1, 1993.^{153/}

The Investigating Authority has argued that in the temporary absence of the UPCI, the DGATJ may issue orders or carry out verification visits pursuant to the provision in the 1993 Regulations which allow the area director to substitute for its parent unit. Similarly, the Investigating Authority argues that in the temporary absence of the DGATJ, the DPP may substitute for the DGATJ to carry out those actions.^{154/} The referenced provision, Article 39 of the 1993 Regulations, states as follows:

Artículo 39.—Los Directores Generales serán suplidos en sus ausencias temporales por el director de área respectivo. Las ausencias temporales de los directores serán suplidas por el subdirector al cual corresponda el asunto, salvo que sea único en la dirección o unidad respectiva, caso en el cual será suplido por el servidor público de jerarquía inmediata inferior que designe el Director General....

Article 39.- Directors General shall be replaced during their temporary absences by their respective area director. The directors shall be replaced during their temporary absences by the sub-director to whom the matter relates. In the event that there is no relevant sub-director, the director shall be replaced during their temporary absence by the public servant, immediately following in the hierarchy

^{152/} Volume 13, C.R. UPCI.211.93.2289 and Volume 13 C.R. UPCI.211.93.2344

^{153/} See pages 45-46 (Volume 9, S.P.R. 198)

^{154/} See pages 45-46 (Volume 9, S.P.R. 198)

designated by the director general...

This provision refers to the concept of substitution of General Directors and of their subordinates within the structure of SECOFI.

Under Mexican administrative law principles, a delegation of powers is itself a juridical act by means of which an administrative organ transmits a portion of its powers or faculties to another administrative organ with whom it has a hierarchical relationship.^{155/} In order for such a delegation of powers to be lawful, it must satisfy several conditions:

- it must be expressly permitted by the law;

- the entity which delegates a portion of its powers must be legally authorized to delegate them;

- the entity which receives the delegation of power must be legally authorized to receive them; and

^{155/} Miguel ACOSTA ROMERO, "Teoría General del Derecho Administrativo" (1991), p. 117.

- the powers which are delegated must be of a nature permitting such delegation.^{156/}

Importantly, the failure of any of the foregoing conditions to be met will nullify the delegation as a matter of law since it is a question of public order falling under constitutional guarantees.^{157/}

The commentator Alfonso NAVA NEGRETE has emphasized the necessity of specific delegations of power being expressly made and published in the D.O.:^{158/}

Por su objeto, la delegación administrativa debe estar autorizada por la ley or por un ordenamiento de carácter general. No será suficiente encontrar razones justificadas de eficiente y eficaz administración, para apoyar su delegación de facultades, si ésta no se prevé en ley.

An administrative delegation must be authorized by law or by an ordinance of a general character. I shall no be sufficient to base [the delegation] on reasons of efficient and effective administration, if these are not provided for by law.

Salvo lo que prevenga esa ley, la delegación de competencia puede llevarse a cabo por medio de un decreto o acuerdo general administrativo o de un acto administrativo concreto. En el primer caso, será indispensable la publicación en el Diario Oficial del decreto o acuerdo; en el segundo, se requerirá que cada vez que se ejercite la competencia delegada se invoque el acuerdo de delegación (número y fecha del documento en que consta).

Except for what is provided for in this law, a delegation of powers may be made by means of a decree or general administrative resolution (acuerdo) or a concrete administrative act. In the first case, the decree or resolution must be published in the Diario Oficial; in the second, each time that the delegated power is exercised the resolution in which the delegation was made must be cited (number and date of the document)

^{156/} Alfonso NAVA NEGRETE, “Delegación de Facultades” en el Diccionario Jurídico Mexicano (1987), Book II, p. 862.

^{157/} Id.

^{158/} Id.

The jurisprudencia of the *Tribunales Colegiados* is in full agreement with the above statements:^{159/}

DELEGACIÓN DE FACULTADES, ES SUFICIENTE PARA LA LEGALIDAD DEL ACTO DE MOLESTIA MENCIONAR EL ACUERDO DELEGATORIO.—Cuando un funcionario jerárquicamente inferior, actúa por delegación de facultades, esto es, por omisión, autorización o encargo del funcionario superior, es suficiente para la legalidad del acto de molestia que se mencione el acuerdo en el que se confirieron dichas facultades que se están utilizando y su fecha de publicación en el Diario Oficial de la Federación.

DELEGATION OF POWERS. IT IS SUFFICIENT FOR THE LEGALITY OF THE GOVERNMENTAL NUISANCE ACTS TO MENTION THE DELEGATION AGREEMENT.- When a hierarchially inferior public servant, acts on a delegation of powers, that is, by omission, authorization or assignment of a hierarchially superior public servant, it is sufficient for the legality of the governmental nuisance acts to mention the delegation agreement in which the said and used powers were conferred and the date of publication in the Diario Oficial de la Federación.

It is thus clear that a delegation of power may only be lawfully exercised if that delegation is permitted by a published legal text, such as the Internal Regulations of the Secretariat concerned. It must follow, of course, that a delegation of powers will no longer be of legal effect if the law or regulations establishing or approving the delegation is abrogated. Finally, the Fiscal Tribunal and the other federal courts have made it clear that a delegation of powers must be established by law or

^{159/} Cuarto Tribunal Colegiado en Materia Administrativa del Primer Circuito. Term: 8A. Book I. Thesis 39. Page 233.

regulation, and not by an organization manual.^{160/}

Thus, while it may be correct to note that Article 4 and 39 of the 1993 Regulations, as well as Article 16 of the LOAPF, anticipate the possibility that administrative units and subunits of SECOFI may delegate powers to their hierarchical inferiors, it is the view of the Majority that all specific delegations of power must meet the conditions of such delegations and be published in the D.O. In the present case, however, it is clear that SECOFI never published such a delegation agreement (*acuerdo delegatorio*) in the D.O. in favor of either the DGATJ or the DPP.

In the opinion of the Majority, therefore, the argument made by the Investigating Authority lacks foundation. The entities (the DGATJ and the DPP) which attempted to exercise the powers of the UPCI lacked competence to do so because of the lack of such a published delegation agreement (*acuerdo delegatorio*) by SECOFI. In addition, these same entities lacked competence because the 1993 Regulations did not grant the power to the DGATJ or the DPP to actually receive such a delegation of power.^{161/}

In addition to the failure of the UPCI, the DGATJ and the DPP to comply with the principles of law concerning delegation of powers, as discussed above, an even more basic defect also appears.

^{160/} See Informe 1989. SCJN. Second part, Volume 1, Page 34.

Jurisprudencia del TCC. Delegation of powers (Gaceta. N. 45. September, 1991, Page 47).

Thesis TCC. Autoridades administrativas, competencia de la. Puede establecerse también en un Acuerdo Delegatorio de Facultades (Semanao. January-June 1988. Second Part. 1 Page 144).

Jurisprudencia 224 TFF. El Acuerdo Delegatorio de Facultades deja de tener vigencia si se deroga la ley que le dio origen (RTFF. July 1985. Page 11).

Criterio SS. Competencia delegada. El acuerdo respectivo deja de tener vigencia al abrogarse el reglamento en que se funda (RTFF. January 1988. Page 22).

^{161/} As a factual matter, this is actually consistent with the fact that in none of the documents signed by the DGATJ or the DPP did these entities state that they were authorized to carry out these actions on behalf of, and to act in substitute for, their administrative superior.

As discussed at length above in the case of the DGPCI and the DCC, in order for an administrative entity to be competent to act against the interests of a person, the authority of that agency must be expressly conferred by law. In this case, however, although the UPCI was, from April 2, 1993, established by law to handle antidumping proceedings, the 1993 Regulations did not establish or create, or give legal competence to, either the DGATJ or the DPP. Accordingly, these entities were incompetent to carry out acts which affected the rights and interests of individuals.

The Majority notes, consistent with its conclusion here, that in several recent *amparo* decisions, on substantively identical facts, the Fourth District Administrative Court^{162/} has upheld the challenge by the foreign steel producers (including USX and Bethlehem) that the visitation order in question was issued by an incompetent authority (the DCC and the DGPCI), since the latter entities existence had never been recognized in a legal ordinance. In addition, the Court upheld the challenges that the verification visits were initiated and concluded by entities lacking in competence, because their powers were never established in a legal ordinance. Examining Article 2 of the applicable SECOFI Internal Regulations, the Court concluded that neither the DGPCI nor the DCC were mentioned and, therefore, their actions, when taken against individuals or persons, were in violation of the constitutional guarantees.

Thus, the Majority agrees with Complainants' challenge that the Visitation Orders were illegal because they were issued by the administrative unit which was incompetent to act.

^{162/} **Sentencia** dictada por el Juez Cuarto de Distrito en Materia Administrativa en el Distrito Federal el 25 de octubre de 1994, al resolver el juicio de **amparo 193/93**.

Sentencia dictada por el Juez Cuarto de Distrito en Materia Administrativa en el Distrito Federal el 17 de octubre de 1994, al resolver el juicio de **amparo 194/93**.

Sentencia dictada por el Juez Cuarto de Distrito en Materia Administrativa en el Distrito Federal el 6 de septiembre de 1994, al resolver el juicio de **amparo 195/93**.

These cases are currently on appeal. This Majority cites them only as an example of the manner in which competence of the authorities is analyzed by the courts.

B. Participation by Mr. Lerín and Ms. Guzmán

On the basis of the foregoing authorities, and without further detailed discussion, the Majority finds that the direct and active participation by *Mr. Lerín*, as director of *Investigación de Dumping y Subvenciones* and *Ms. Guzmán* as subdirector of *Investigación de Dumping y Subvenciones* in the verification visits was in violation of the law since their administrative units had not been legally established, and thus it must be concluded that they lack competence.

C. Appointment of Verifiers

On a similar basis, the Majority finds that *Mr. Uruchurtu*, as Director of the DPP, lacked competence to appoint individual verifiers.

As already mentioned, the Complainants establish that none of the verifiers that participated in the visits to the foreign industries were competent, by virtue that the Visitation Orders in which they were named, were issued and signed by an incompetent authority.

The Majority expresses that the DPP was not constituted by a legal regulation, that granted the DPP the condition of competent authority. Because of this, the verifier's appointment that was made to attend the verification visits to the foreign industries, must be considered illegal, since it was issued by an inexistent administrative authority and therefore incompetent.

D. Participation by the “External Advisors”

With respect to the issue of the competence of *Messrs. Jorge Santibáñez Fajardo* and *Francisco Velázquez*, external advisors to SECOFI, to participate actively and directly in the verification visits, the Majority notes initially that the Visitation Orders issued by the DPP a subunit of the DGATJ, which is part of the UPCI designated several persons, among them two external advisors in matters of accounting, in said order.^{163/} Part V of the Visitation Orders is quoted in pertinent part as follows:

V. *Personnel Matters.*

71. In order to carry out the present visitation order, there has been designated the following persons:

....

- iv) *Jorge Santibáñez Fajardo*
- v) *Francisco Velázquez*

Nothing in this Part V, or elsewhere in the Visitation Orders, alerted their recipients to the fact that *Messrs. Santibáñez* and *Velázquez* were not public servants or employees of the Investigating Authority. The plain reading of this provision would, however, lead the reader to conclude that in fact these individuals were employees or public servants of the Investigating Authority.

The Majority recognizes that in the Verification Reports the Investigating Authority specifically recognized that these individuals had functioned as “external advisors.”^{164/} However, this does not derogate from the fact that the Visitation Orders failed to specify that *Messrs.*

^{163/} See UPCI.211.93.2289 and UPCI.211.93.2344 of July 13 and 14, 1993, respectively.

^{164/} See Volume 13 C.R. s/n of July 23 for USX and July 28 for Bethlehem.

Santibáñez and *Velázquez* were not employees of the Investigating Authority or otherwise public servants. The Majority, therefore, finds the challenge of incompetence to their actions to be well-founded.

In Mexico, compliance with the obligations established by Article 16 of the Constitution require that only officials with competent jurisdiction may issue and carry out actions which affect the rights and interest of individuals or persons. Thus, Visitation Orders must be issued by officials with competent jurisdiction, and verification visits must be conducted by officials with competent jurisdiction.

It is not an obstacle to the adoption of this position that Article 21 of the Old Foreign Trade Regulations, which were in effect during the period in question, granted authority to the Investigating Authority to:

“contract for the services of specialized external advisors to assist in the investigation and proof of the data and elements which are required to support a resolution.”

The sense of this provision, in the judgment of the Majority, is nothing more than that the Investigating Authority may utilize the services of external advisors, in technical or scientific matters, to assist its work and deliberations. This provision may not, however, be employed to substitute external advisors for internal employees and permit the external advisors to, in effect, carry out the work of such internal employees.

To comply with Article 16 of the Constitution, and the correct sense of Article 21 of the Old Foreign Trade Regulations, such external advisors may function in an advisory capacity only and may not participate directly and actively in the verification visit.

Because the Investigating Authority failed to follow the above procedure in the present case, the Majority upholds the subject challenge to the verification visits.

E. Participation by Mr. Alberto Lerín Mestas in the USX Verification Visit

USX also challenges the verification visit carried out at its premises due to the participation in the visit by *Mr. Alberto Lerín Mestas*, who was not designated at all in the Visitation Order. Although he was named in the final Verification Report as having participated in the verification visit,^{165/} he was not named in the initial Visitation Order as one of the participating verifiers. A review of the final Verification Report establishes that *Mr. Lerín's* participation was clearly more than insubstantial.^{166/}

In the judgment of the Majority, it is a legal prerequisite in Mexico that each member of the verification team must be properly named in the Visitation Order, since it is only in this manner that the party being verified can understand that the visitor is an official or employee of the Investigating Authority and is not an outsider who has no authority to carry out the act of verification. In the present case, it is clear that *Mr. Lerín* was not designated as a visitor in the Visitation Order.^{167/} Since this is true, he could not demonstrate to the party being investigated that he was acting on behalf of the Investigating Authority with both responsibility and competence to carry out the visit.

Therefore, the Majority upholds this particular challenge to the verification visits.

^{165/} Id.

^{166/} Mr. Lerín's signature appears on pages 1 and 2 of the USX Verification Report.

^{167/} See UPCI.211.93.2289 of July 13, 1993.

The Majority finds no merit in the Investigating Authority's argument that it was because of exigent circumstances that two designated visitors could not ultimately attend the verification visit and that *Mr. Lerín* attended in their absence. It is accepted law that verification visits can only be carried out by means of a written Visitation Order issued by the competent authority in which the individuals charged with carrying out the visit, and only those individuals, may intervene in such an act of *molestia*.^{168/} Thus, the Majority finds that the intervention of Mr. Lerín in this particular verification visit to be illegal.

The following Thesis^{169/} supports the foregoing position:

VISITAS DOMICILIARIAS. NO LAS PUEDEN DESAHOJAR FUNCIONARIOS DIVERSOS DE LOS VISITADORES AUTORIZADOS, AUN CUANDO TENGAN FACULTADES MAS AMPLIAS QUE ESTOS. La fracción I, inciso b) del artículo 84 del Código Fiscal de la Federación, vigente hasta el 31 de diciembre de 1982 establecía: “Art. 84. En las visitas domiciliarias se observará lo siguiente: 1. Sólo se practicarán por mandamiento escrito de autoridad fiscal competente que expresará; b) el nombre de las personas que deban desahogar la diligencia, las cuales podrán ser sustituidas, aumentadas or reducidas en su número por la autoridad que expidió las orden. En estos casos se comunicará por escrito al visitado estas circunstancias, pero la visita podrá ser válidamente practicada por cualquiera de los visitadores.” De lo antes transcrito se desprende que sólo las personas designadas en

INSPECTIONS OF DOMICILES. CANNOT BE MADE BY FUNCTIONARIES OTHER THAN THE AUTHORIZED INSPECTORS, EVEN WHEN THEY HAVE BROADER POWERS THAN THE AUTHORIZED INSPECTORS. Section I, sub-section b) of Article 84 of the Tax Code of the Federation, in force until December 31, 1982, established: “Art. 84. In inspections of domiciles the following shall be observed: 1. They shall only be undertaken pursuant to written order of the competent tax authority that shall state; b) the names of the persons who shall perform the inspection, who may be substituted, added to or reduced in number by the authority which issued the order. In these circumstances, the change(s) shall be communicated to the inspected party writing, but the inspection may be validly undertaken by any of these inspectors.” From the above it is evident that only the persons designated in the written order

^{168/} Article 16 of the Constitution

^{169/} Court: Tribunales Colegiados de Circuito. Source: Semanario Judicial de la Federación. Term: 8A. Book VI. Part: Second. Page: 695. CUARTO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO.

PRECEDENTS: **Amparo directo 84/90**. Super Tienda El Emporio Mercantil, S.A., June 7, 1990. Unanimous votes. Magistrate: Hilario Bárcenas Chávez. Secretary: Emiliano Hernández Salazar.

el mandamiento escrito podrán desahogar diligencias relativas a la visita y el hecho de que otras autoridades fiscales tengan facultades aún más amplias que las de los visitadores designados, no implica que puedan desahogar esas actuaciones legalmente, pues al señalarse en la orden de visita el o los nombres de los visitadores, en cumplimiento de la garantía de seguridad jurídica, son la autoridad competente para practicar las actuaciones relacionadas con dicha visita, pues de interpretar en sentido contrario el precepto citado bastaría con señalar en la orden que la visita podría ser realizada por quien tuviera facultades legales para ello, sin precisar nombres, lo cual alteraría el texto legal.

may perform the legal proceedings related to the inspection and it does not follow from the fact that other tax authorities may have broader powers than those of the designated inspectors that the other authorities may legally perform these acts, since in keeping with the right to juridical security, the person or persons named in the inspection order are the competent authority to undertake the acts related to said inspection. If the cited precept were interpreted in a different manner, it would be enough to state in the order that the inspection may be realized by whomever has the legal powers to do so, without specifying names, which would alter the legal text.

Accord:^{170/}

VISITAS DE AUDITORIA. EN ELLAS DEBE ACTUAR SOLO EL PERSONAL EXPRESAMENTE DESIGNADO EN LA ORDEN DE VISITA. A efecto de resguardar la garantía de seguridad jurídica que en favor de los gobernados se encuentra establecida en el artículo 16 constitucional, en las visitas domiciliarias que se efectúen en el domicilio de los contribuyentes, sólo pueden apersonarse los visitadores que se encuentren expresamente designados en la orden de visita. Cuando alguno de ellos actúe sin estar comisionado por la autoridad, su gestión resultará violatoria de los artículos 43 fracción II y 45 del Código Fiscal de la Federación, sin que pueda considerarse como un error mecanográfico, el hecho de que por alguno de ellos, se hubiera asentado incorrectamente su nombre en la orden relativa, pues la violación en que se incurre lesiona la esfera jurídica del particular, en tanto que de la actuación ilegal de un visitador, puede originarse una liquidación, la cual lleva implícita una transgresión a las normas que rigen el procedimiento, trascendiendo hasta la resolución que se

FIELD AUDITS. ONLY EXPRESLEY DESIGNATED PERSONNEL IN THE VISITATION ORDERS MUST ACT. With the purpose of securing the guarantee of legal security that in favor of the people is established in Article 16 of the Constitution, in the domiciliary inspections that take place in the domicile of the taxpayer, only inspectors expressly designated in the visitation order can appear. When any of them act without being commissioned by authority, its action will result in the violation of Articles 43, Clause II and 45 of the Federal Fiscal Code, without the possibility to considerate as a typing error, as a fact that because of one of the latter, an incorrect name has been placed in the related order, since the incurred violation injures the field of action of the private individual, as long as from the illegal performance of a visitor, a liquidation can originate, act which carries, in an implied manner, a transgression to the norms that rule the procedure, transcending all the way to the resolution that will be challenged for annulment.

^{170/} Juicio Atrayente No. 416-92-439. Solved in session of October 18, 1994, by a majority of 5 votes, 2 with the resolute points and 2 partially against. Magistrate: Ma. Guadalupe Aguirre Soria. Secretary: Lic. Ma. Eugenia Rodríguez Pavón.

impugne en el juicio de nulidad.

In conformity with the above, the majority concludes that there was a violation in this case of the legal provisions applicable to a verification visit, specifically the principles established by Article 16 of the Constitution.

1. Opportunity to Challenge the Verification Orders

The Investigating Authority points out that the Complainants had the opportunity of challenging the contents of the Verification Order since they were granted a period of 7 business days to present any clarification thereto. Nevertheless, it is the view of the Majority that the period granted by the Investigating Authority was and is not established in any law, but was granted by the Investigating Authority of its own volition to permit the Complainant to challenge at that time the facts asserted in the Verification Order. However, the granting of such a period does not prevent the Complainant from choosing to raise such challenges in an appropriate manner, such as before this Panel, following issuance of the Final Determination.

The foregoing is made clear by the following Thesis:^{171/}

^{171/} Jurisprudencia No. 9. Informe 1978, Third Part, Colegiados, Pag. 70, S.C.J.N. 7th. Term, Primer Circuito, 1er. Tribunal.

PRECEDENTS: **Amparo en Revisión No. 454/72.** El Correo Textil, S.A. y otra, January 8, 1973, unanimous de vote. **Amparo en Revisión No. 27/75.** D'scorpius Palace, S.A., February 26, 1975, unanimous vote. **Amparo Directo No. 141/75.** Tecnoplásticos, S.A., April 29, 1975, unanimous vote. **Amparo en Revisión No. 621/76.** "Ramex Vega", March 15, 1977, unanimous vote. **Amparo Directo No. 787/77.** Felipe García Moreno, November 3, 1977, unanimous vote.

VISITAS DE INSPECCIÓN O AUDITORÍA. OPORTUNIDAD DE SU IMPUGNACIÓN.—Del contenido de la tesis sostenida por este Tribunal con anterioridad, respecto de la oportunidad para impugnar una visita de auditoría, se desprende que el afectado por una orden de visita puede impugnarla desde que tenga conocimiento de ella, si por si sola le depara un perjuicio legal, o puede impugnar la visita al iniciarse, o en cualquier momento de su desarrollo en que estime que se la ha deparado un perjuicio difícilmente reparable, o imposible de reparar, con posterioridad. O bien, sin que se estime consentida necesariamente la visita, y menos aun sus resultados, el afectado puede esperar a que, con base on las actas relativas, se le finque algún crédito o responsabilidad, para impugnar, en ese momento, la orden misma, o el desarrollo de la visita, si así estima que tiene mejor oportunidad de evaluar la lesión a sus derechos y la conveniencia de impugnar esa lesión, pero si el afectado por una orden de visita no impugna en amparo esa orden dentro del término legal, no impugna oportunamente la practica de la visita, mientras se esta efectuando, o al concluir, es claro que, una vez concluida la visita, ya no podrá promover el juicio de amparo contra los actos de que se trata, sino hasta el momento en que alguna resolución, con base en las actas correspondientes, o en los resultados de la visita, la finque (sic) alguna responsabilidad, o el finque algún crédito, momento en el que podrá impugnar tanto esta resolución, como las ordenes de visita y los actos de desarrollo de la visita, excepto aquellos hechos que hubiere confesado expresa, libre y espontáneamente, o aquellas violaciones formales ya consumadas que hubiere expresamente consentido. Pues es así como este Tribunal considera que deben aplicarse, a estos casos, las fracciones XI y XII del artículo 73 de la Ley de Amparo.

GENERAL OR AUDIT INSPECTIONS. OPPORTUNITY TO CHALLENGE SAME.-- It is evident from the prior thesis issued by this Court concerning the opportunity to challenge an audit inspection that the party affected by an inspection order may challenge the order from the time that he becomes aware of the order, if the order in and of itself will prejudice his legal rights, or he may challenge the inspection at the commencement of same, or at whatever moment during the inspection in which he estimates that the inspection has caused him irreparable damage or damage which would be difficult to subsequently repair. The affected party may also wait until payment of an amount of money or some type of responsibility is imposed upon him as a result of the inspection to challenge the inspection order or the conduct of the inspection, if he feels that he would thus have a better opportunity to evaluate the injury to his rights and the advisability of challenging this injury, without the affected party thus being considered to have consented to the inspection or to its outcome. However, if a party affected by an inspection order does not challenge such order by way of amparo during the time period permitted by law to file such challenges, nor challenges timely the conduct of the inspection during the course of the inspection or at its termination, it is clear that, once the inspection is concluded, the affected party may not file an amparo action against the acts under consideration until the time in which he is charged some amount of money or some type of responsibility is imposed upon him as a result of the inspection. At that time, the affected party may challenge the orders issued as a result of the inspection, as well as the inspection order and the conduct of the inspection, except for those facts which he has expressly confessed in a free and spontaneous manner, or those formal violations to which he has expressly consented. This is how this court considers that sections XI and XII of Article 73 of the Amparo Law (Ley de Amparo) should be applied to these cases.

2. Formal Requirements of Domiciliary Visits

SECOFI has argued that the requirements of Article 6(5) of the 1979 Antidumping Code ought to prevail over the requirements of the Federal Fiscal Code or the old Foreign Trade Law. Article 23 of the latter gives to SECOFI the power to effect domiciliary visits according to the formalities of the *Ley sobre Atribuciones del Ejecutivo Federal en Materia Económica*.

The Majority believes SECOFI's argument to be unfounded, since Article 16 of the Constitution requires that Verification Orders:

- a. Be contained in a written order;

- b. Be issued by a competent authority;

- c. Express the name(s) of the persons being visited;

- d. Set out the purposes of the visit; and

- e. Fulfill other requirements of applicable law.

As stated in the following decision:172/

VISITAS. REQUISITOS DE LAS. Por mucho que en la Ley sobre Atribuciones del Ejecutivo Federal en Materia Económica, no se mencionen o precisen ningunos requisitos que deben llenar los inspectores, relativos a las visitas de inspección que practiquen, ello es completamente irrelevante, ante la circunstancia de que dicha ley, en sus disposiciones debe estar supeditada en todo a lo que establezca la Constitución General de la República, en los términos de su Artículo 133.

INSPECTIONS. REQUIREMENTS FOR. No matter how much the Law of the Federal Executive's Powers in Economic Affairs, does not mention or precise any requirement that inspectors must fulfill, in relation to the verification visits practiced by them, it is completely irrelevant, before the circumstance that the forementioned law, in its provisions must be subdued in all respects to what is established in the General Constitution of the Republic, in terms of its Article 133.

172/ Sexta Epoca, Tercera Parte: Vol. LII, Pág. 174. A.R. 2655-61. Venancio López Fernández. 5 votos.

The Majority believes that in Mexico, to issue such a Visitation Order in a fiscal matter or in a matter of foreign commerce, these fundamental requirements must always be observed, and that Article 6(5) of the 1979 Antidumping Code does not supersede them. This is because the Constitution prevales over international treaties according to its Article 133.

F. Decision of the Panel with respect to other issues.

With respect to the rest of the arguments presented by the Complainants, the Majority, expressly declines to reach a decision on those issues, by virtue that competence issues are of a preferential analysis and that these were founded properly.

VII. ORDER OF THE PANEL

Pursuant to Article 1904(8) of the NAFTA, the Panel remands the Final Determination to SECOFI, for actions not inconsistent with this Memorandum, Opinion and Order. In particular SECOFI shall issue a new determination within 21 business days from the date of this order that terminates the proceeding on cut-to-length plate imports, initiated against the Complainants, specifically USX and Bethlehem. Such determination shall require that:

- 1.- The exports of USX and Bethlehem of the goods subject of the proceeding enter Mexican territory with zero antidumping duties applied to them upon their importation.
- 2.- Any cash deposits or customs bonds relative to antidumping duties made or posted by the importers, to the competent authorities, in order to import the said goods manufactured by USX and Bethlehem be refunded or canceled as appropriate.

SIGNED IN THE ORIGINAL BY:

José Othón Ramírez Gutiérrez

José Othón Ramírez Gutiérrez

Robert E. Lutz

Robert E. Lutz

Harry B. Endsley

Harry B. Endsley

Issued on Mexico City, this 30th. day of August, 1995.

CHRONOLOGY OF MEXICAN TRADE LAW

| Date | Action |
|------------------------------|--|
| <i>February 5, 1917</i> | Mexican Constitution first enacted; numerous amendments followed |
| <i>December 29, 1976</i> | Publication in Diario Oficial (D.O.) of Federal Public Administration Law (establishing SECOFI) |
| <i>August 20, 1985 *</i> | Publication in D.O. of Internal Regulations of SECOFI (abrogating December 12, 1983 version) |
| <i>January 13, 1986</i> | Publication in D.O. of old Foreign Trade Law |
| <i>August 24, 1986</i> | Mexico becomes signatory to the GATT |
| <i>October 20, 1986 **</i> | Publication in D.O. of original Organizational Manual of SECOFI (based on original Internal Regulations of SECOFI) |
| <i>November 25, 1986</i> | Publication in D.O. of old Foreign Trade Regulations |
| <i>April 21, 1988</i> | Publication in D.O. of GATT Antidumping Code |
| <i>May 10, 1988</i> | Entry into force of GATT Antidumping Code |
| <i>May 19, 1988</i> | Publication in D.O. of amendments to old Foreign Trade Regulations |
| <i>September 19, 1988 **</i> | Publication in D.O. of revision #1 of Organizational Manual of SECOFI |
| <i>March 16, 1989 *</i> | Publication in D.O. of revision #1 of Internal Regulations of SECOFI (abrogating August 20, 1985 version) |
| <i>June 5, 1989 **</i> | Publication in D.O. of revision #2 of Organizational Manual of SECOFI |
| <i>December 17, 1992</i> | Signature by the President of Mexico of the NAFTA |
| <i>December 24, 1992</i> | Publication in D.O. of Initiation of Investigation of Cut-to-Length Steel Products |
| <i>April 1, 1993 *</i> | Publication in D.O. of revision #2 of Internal Regulations of SECOFI (abrogating March 16, 1989 version) |
| <i>July 27, 1993</i> | Publication in D.O. of new Foreign Trade Law |
| <i>November 22, 1993</i> | Ratification by the Mexican Senate of the NAFTA |
| <i>December 22, 1993</i> | Publication in D.O. of amendments to new Foreign Trade Law |
| <i>December 30, 1993</i> | Publication in D.O. of new Foreign Trade Regulations |
| <i>January 1, 1994</i> | Entry into force of the NAFTA |
| <i>July 28, 1994 **</i> | Publication in D.O. of revision #3 of Organizational Manual of SECOFI |
| <i>August 2, 1994</i> | Publication in D.O. of Definitive Resolution |
| <i>September 15, 1994 *</i> | Publication in D.O. of revision #3 of Internal Regulations of SECOFI (amending part April 1, 1993 version) |

**SEPARATE DECISION OF PANELISTS JOHN BARTON AND
GUSTAVO VEGA CÁNOVAS**

Panelists John H. Barton and Gustavo Vega Canovas agree with the majority of the Panel that the final determination under review in this case should be remanded to the Secretariat of Commerce and Industrial Development (SECOFI) in accordance with Article 1904, section eight of the North American Free Trade Agreement (NAFTA). However, our remand is based on a different rationale. We consider the basis for our remand to be sections III and IV, and not section I of article 238 of the Federal Fiscal Code,¹ the governing standard of review according to Annex 1911 of NAFTA. Even though we do not agree in principle that SECOFI's resolution should be nullified *ab initio*, on grounds of lack of the investigating authorities competence, we do consider that this same authority engaged in other errors that are subject to review.²

The principal difference between this dissent and the majority of the Panel is that we consider that the authority which acted between December 24, 1992 and April 1, 1993, this being the Directorate of Compensatory Duties (DCC), had legal existence that was established

¹In Article 238 of the Federal Fiscal Code it is established that an administrative resolution is illegal when it has one of the following defects:

I. The official who dictated or ordered or carried out a procedure that led to the resolution was legally incompetent.

II. There were omissions of formal requirements established by law, that affect the defenses of the individual and affect the meaning of the challenged resolution, including a lack of sound or legal motivation in the particular case.

III. There were errors in the proceedings that affected the defenses of the individual and affected the meaning of the challenged resolution.

IV. If the facts which motivated the resolution were different or were incorrectly interpreted or if the resolution was contrary to the legal provisions applied or that should have been applied.

V. When the administrative resolution was issued in exercise of an agencies' discretion and did not correspond to the reasons for which the law granted said discretion.

²Because of this we do not decide here whether or not the panel has the authority under article 239 of the Federal Fiscal Code to declare null a resolution released by SECOFI. We further do not decide other points related to this issue, such as the majorities' contention that Article 238 can only be uniformly applied in conjunction with Article 239 of the Fiscal Code or whether Article 238 must be applied in a certain logical order, and much less what is the correct interpretation of Section I of Article 238. In consequence, whatever affirmations that the majority make with respect to these points are not supported by this dissent.

in SECOFI's September 19, 1988 General Organizational Manual and also had express authority to conduct the investigation realized during the period in question, in virtue of the existence of a delegation agreement that was issued by the Secretariat of Commerce on September 12, 1985, which expressly allowed the area Directorates to take the actions that the Directorate in question carried out during the aforementioned period. Furthermore, in our opinion, the authority that emitted the verification orders had the legal competence to issue such orders in virtue of having been delegated authority from the Unit of International Trade Practices (UPCI), authority that was established under SECOFI's new interior regulation of April, 1993 and through which it was given all the authority needed to investigate, prosecute, and conclude antidumping investigations. Therefore, we would not have declared the final resolution in this case illegal and null *ab initio*, but we would have reviewed it using section II of Article 238 of the Fiscal Code in relation to the allegations of incompetence and under sections III, IV and V of the same Article in relation to the allegations made against SECOFI with respect to the determination made by SECOFI on dumping and injury.

In this separate opinion we present our position on the various points discussed by the parties, detailing the reasons that brought us to dissent with the majority of the panel and setting forth the specific aspects of the resolution that the authority would have had to correct, if the resolution had not been declared void. Finally, our analysis is presented with the intention of being useful, both for SECOFI as well as for litigating attorneys, in future decisions subject to panel review within the jurisdiction of NAFTA.

I. THE LEGAL COMPETENCE OF THE ADMINISTRATIVE AUTHORITIES BETWEEN DECEMBER 24, 1992 AND APRIL 1, 1993

1. The Respondents alleged in their briefs that the heads of the administrative agencies that prosecuted the antidumping investigation during its initial period, December 24, 1992 through April 1, 1993, specifically, the Directorate of International Trade Practices (DGPCI) and the Directorate of Compensatory Duties (DCC), did not have legal existence and, consequently, the competence to prosecute the investigation. In their brief and in the public hearing, the Secretariat of Commerce and Industrial Development did not deny the nonexistence of DGPCI, but argued that such nonexistence was irrelevant in virtue of the fact that the Director of the DCC was the person that carried out the actions during the investigation during the period in question.

2. The central question that the panel must consider, then, consists of determining the legal status of the DCC. For the Respondents, the DCC, as well as the DGPCI, did not have any recognizable legal existence in any legal provision during the time period in question, including the Law Implementing Article 131 of the Constitution, the Regulation against Unfair Trade Practices, and the Internal Regulation of SECOFI of March 15, 1989 and, therefore, was legally incapacitated to conduct an investigation.

SECOFI denied that the DCC was not legally recognized and did not have legal capacity, arguing that the legal existence of the DCC was found in that fact that it was appropriately created as a Directorate of an area dependent on the General Directorate of Services to International Trade (DGSCE), and, in accordance with the Internal Regulation of 1989, had the legal capacity to "propose the application and amount of compensatory tariffs and antidumping tariffs", while the competence of the DCC³ derived from Art. 32 of the Internal Regulation of SECOFI of 1989, which permits the general directors to be replaced in their temporary absence by the director of the respective area.

3. We are in agreement with the majority of the panel that in order to find the legal status of the DCC it is important to analyze the legal requirements in force during the time of the investigation which are necessary under the Mexican Judicial System in order for an authority to have legal capacity, primarily, the Organic Law of Federal Public Administration (LOAPF). LOAPF was the legal system under which the diverse Secretaries of State were created and it distributed and limited authority and other specific attributes among the different administrative entities which comprise them. However, we are not in agreement that an analysis of this law implies the conclusion that for an administrative authority to legally exist and validly act it must be so stated in the Internal Regulation of the Secretariat of State in question, according to Article 18 of that law, and that an organizational manual is not legally sufficient to give legal life to a subordinate authority, such as an area directorate.

In fact, in LOAPF several legal methods are established under which the President of the Republic and the Secretaries of State can establish legal competence for authorities that carry out public administration. The first formula--and without a doubt the most important--is the one established by Article 18 of the LOAPF, that is, through the Internal Regulation of each Secretariat of State and the several Administrative Departments, which determines, "the attributes of their administrative entities, as well as, the methods through which their heads can be replaced during temporary absences".

However, the LOAPF also includes in Article 14, the following:

At the head of each Secretariat there will be a Secretary of State, who, in the course of matters under his jurisdiction, will be aided by subsecretaries, major officials, directors, subdirectors, chiefs, department subchiefs, office and table subchiefs and other functionaries that are established in the internal regulation **and**

³SECOFI bases the existence of the DCC on the fact that it was established in its General Organizational Manual of 1988, which expressly states that it is part of the DGSCE.

other legal dispositions.

In other words, the law itself establishes that in addition to the Internal Regulation there can exist other legal provisions creating authorities which a Secretary of State can use to grant competence. It is clear that these and other legal methods are not the Law Regulating Article 131 of the Constitution or its respective Regulation, because these laws do not make reference to specific administrative entities that can act in the particular processes of an antidumping investigation.

In our opinion, it was the LOAPF itself that established other legal methods for establishing authorities and assignment of legal capacity among these entities.⁴ One especially important method is found in Article 16 of the LOAPF, that establishes the following:

It corresponds originally to the heads of the Secretaries of State and Administrative Departments to prosecute and resolve matters under their competence, but for better organization of work they may delegate to their functionaries that are referred to in Articles 14 and 15 any of their powers, except those that by legal provision or internal regulation are to be exercised only by those heads[...] The same heads of the Secretaries of State and Departments may also organically ascribe to the administrative units established in the respective internal

⁴For example, decrees dictated by the President of the Republic constitute a general method through which the President implements the authority given to him through Article 89 of the constitution. Likewise, the Internal Regulation is promulgated through a Presidential decree, but equally, according to the courts, through a decree the President may: "...develop and detail the general principles contained in the Law of the Secretaries and Departments of State and in the Federal Fiscal Code [in which these proceedings lie....] for which reason the judiciary has granted the decree the character of a law from a formal point of view [that] does not require the intervention of Congress to create secondary organs of the executive branch." See, COMISION DE ADMINISTRACION FISCAL REGIONAL, DERECCION DE ADMINISTRACION FISCAL REGIONAL Y ADMINISTRACIONES FISCALES REGIONALES. CONSTITUCIONALIDAD DEL DECRETO PRESIDENCIAL QUE LAS ESTABLECE. Instancia: Tribunales Colegiados de Circuito. Source: Judicial Weekly of the Federation. Series: 7A. Volume; 103-108. Page: 58. Precedents: Direct Amparo 416/77, Socorro Avila Hernandez. August 2, 1977. Majority of Votes. Majority: Jesus Ortega Calderon, Dissent: Guillermo Guzman Orozco.

regulation, to the Subsecretariats, Major Officials, and other administrative entities of equivalent administrative level that are specified in the internal regulation. [...] The agreements by which authority is delegated or by which authority is allocated to administrative entities will be published in the Official Gazette⁵

This article clearly establishes the authority of a Secretary of State to establish authorities and delegate powers to subordinate authorities in the Secretariat.

Another method of special interest for our purposes is established in Article 19 of the LOAPF, that makes references to the general organizational manuals of the Secretariats and states the following:

The Head of each Secretariat of State and Administrative Departments will prepare the manuals of organization, of procedure, and of services to the public needed for proper functioning; these should contain information about the organizational structure of the entity and the functions of its administrative agencies, as well as its communication systems and coordination procedures and the principal administrative procedures that are established. The manuals and other instruments used for internal administrative guidance should always be kept current. The general manuals of organization should be published in the Official Gazette.

For the majority of the panel this legal structure is not an instrument that can be used to establish authorities and serves only as a source of information as to how the Secretariat is organized and the functions of its units, and cannot be considered as a legal obligatory

⁵It is important to mention that, as in the case of a presidential decree, the *acuerdos de adscripción orgánica de autoridad y de delegación de facultades* (delegation agreements for the ascription of authorities and of delegation of powers), issued by a Secretariat of State has been recognized by courts as an act that is legislative in character and, therefore, like a decree or an interior regulation, can serve as a way for the Secretariat of State to create entities of lower rank within the Secretariats and to delegate powers to these entities. See, **AUTORIDADES ADMINISTRATIVAS. COMPETANCIA DE LAS. PUEDE ESTABLECERSE TAMBIEN EN UN ACUERDO DELEGORIO DE FACULTADES.** Instance: Tribunales Colegiados de Circuito. Source: Federal Judicial Weekly. Series: 7A. Vol.: 103-108. Page 58. Precedents: Direct Amparo 417/77. Socorro Avila Hernandez. August 2, 1977. Majority of Votes. Majority: Jesus Ortega Calderon. Dissent: Guillermo Guzman Orozco.

instrument for individuals. In our opinion, it is not possible to regard the organizational manual as a simple instrument to inform as to how a secretariat is organized, because the manual's essential function is to develop and complement the organizational structure of a Secretariat in ways not normally spelled out in the internal regulations of the Secretaries of State. To be more specific, the manual is an adequate instrument to establish the legal existence of authorities with less rank than those established by the Internal Regulation.

In fact, from reading the internal regulations of the Secretaries of State, one can deduce that they normally inform individuals of the structure of a Secretariat at the highest levels, that is, the administrative entities that are directly dependent on the Secretariat, the corresponding Subsecretaries, the Office of the Major Official, and finally, the general Directorates. In other words, the interior regulation is a general instrument that establishes the minimum structure of a Secretariat and almost never descends to levels lower in the structural hierarchy.⁶ The organizational manual, however, is seen as a document that serves to develop and inform with respect to the organizational composition of the Secretariat, even at the lowest levels, such as the area directorates.

The description of a Secretariat that an organizational manual must include is not a mere copy of the respective interior regulation. Rather its level of detail is much greater, and, because of the need to inform individuals of the structure of the Secretaries of State, Article 19 imposes the requirement that the manuals of organization must be always current and must be published in the Official Gazette.

Furthermore, the manuals do not attribute to the area directorates legal competencies that are their own; The area directorates exercise the authority held by the general directorate that they belong to, in conformity with the division of labor stated in the interior regulation of the Secretariat or in any other legal provision that can have legal effect on third parties.⁷ The area

⁶This can be proven by reading the interior regulations of the Secretaries of State. For example, the interior regulations of the Secretaries of Social Development of June 4, 1992; of Communications and Transportation, of March 19, 1994; of Public Education, of March 26, 1994. In these the structure that appears are at the level of the Subsecretaries, Office of the Major Official, Coordinating Units, and General Directorates, and in some cases decentralized organs, but never area Directorates. The only exception that was found is in the current regulation of the Treasury Department, where the area Directorates are described for a good number of general directorates. See, Interior Regulation of The Secretariat of the Treasury, DOF Monday February 24, 1992, pp. 3-5.

⁷Another possible legal provision would be an *acuerdo de adscripción orgánica de autoridad y de delegación de facultades* (delegation agreement for the ascription of authorities and of delegation of powers), issued by a Secretariat of State, as in the present case, and to which we will refer to later.

directorate can exercise such functions as long as the general directorate to which it belongs exists and it is not necessary for it to appear in all organizational manuals.

To conclude, the organizational manual informs the citizen of:

The existence of the area directorates, that are almost never mentioned in the internal regulation;

Their organizational membership in a certain general directorate;

The functions that they perform and their subsidiary exercise of authority stem from the general directorate that they are in;

When all the information just described becomes public by being placed in the Official Gazette, it is done with the purpose of alerting individuals of the current administrative provisions, with the consequent effect of making binding upon individuals all the provisions contained in the organizational manual that are consistent with the provisions of higher legal instruments.⁸

A decision of the Circuit Courts that, in our judgment, corroborates our interpretation of the legal significance of the organizational manuals is the following:

⁸This is clearly recognized in the following decision: "Precepts that contain abstract dispositions and are of general observance. To be obligatory they must be published in the corresponding official organ. Instance: Second Section, Source: Appendix 1985, Parte III Administrative Section, Thesis 394, Page 679. In the same source, it is also established that in order for dispositions of general observance...to be obligatory, they must meet two requirements: One, they have to be published in the *Diario Oficial* (Official Gazette), and, two, they have to allow the passing of the time period required by law".

ADMINISTRATIVE AUTHORITY, COMPETENCE. WHENEVER THERE ARE DIRECTORATES OF AREA OR OFFICIALS BELOW IN THE HIERARCHY THE NORMS THAT GRANT AUTHORITY TO THEIR SUPERIORS ARE NOT APPLICABLE. According to articles 14 to 19 of the Ley Organica de la Administracion Publica Federal, the conduct of activities of each Secretariat of State is assigned to the head of such Secretariat, who may use administrative units established in an Internal Regulation issued by the Executive of the Union, or as the case may be, in a Manual General de Organization published in the Diario Oficial de la Federacion. In this sense, in order to satisfy the competence requirement for a Directorate of Area, it is not enough that the Internal Regulation provides for the authority of the General Direccion on which the Directorate of Area depends. This is because competence established in the that manner cannot be interpreted as being so extensive as to authorize the performance of any officer depending on the former [entity]. In this respect, it is important to point out that an administrative unit presupposes the existence of an [official] organ, that is to say, the combining of a physical person (holder) and a bundle of attributions (competence), in order to satisfy the guarantee of legality established in Article 16 of the Constitution; each one of such administrative units when performing [acts of authority] keeps its own individuality which it does not share with the others.

Instancia: Tribunales Colegiados de Circuito. Source: Semanario Judicial de la Federacion. Epoch 8A. Tomo: III Segunda Parte-2. Page: 654.

CUARTO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO. TERCER TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO. PRECEDENTS: Amparo en revision 673/85. Porfirio Mayorquin Ibarra. January 12, 1988. Unanimous vote. Drafter: Gerardo David Gongora Pimentel. Secretary: Adriana Leticia Campuzano Gallegos.

This decision clearly stipulates that even though an area directorate to satisfy the competency requirement must rely on its own authority and not just on that of the General Directorate of which it forms a part, it can obtain its own legal existence by being included in either an internal regulation or in a general organizational manual published in the Official Gazette. From this thesis it becomes evident that the internal regulation is not the only instrument that can give existence to lesser authorities and that the general organizational manual serves a similar function and, therefore, is not limited to informational purposes as suggested by the majority of the panel. But what about the second requirement for legal

competence, that is the specific powers that the DCC had to enjoy in order for it to legally act on his own? As we will see later on, this group of attributes were expressly granted by SECOFI in an Agreement of Delegation of Authority issued by the Secretary of Commerce.

4. In virtue of the aforementioned, we can conclude that an additional form of establishing authorities contemplated by Article 14 of the LOAPF is the organizational manual and that, given that the organizational manuals of 1986 and 1988 mentioned the DCC, this entity was in legal existence. Nevertheless, it is important to note that the Respondents and the majority of the panel presented another argument on which to deny the legal existence of the DCC, that is, that even if one concedes that the aforementioned manual gave legal existence to the DCC, the new SECOFI organizational manual of June 5, 1989 expressly revoked the 1988 manual, the new manual made no reference to the DCC, and therefore, the DCC had no legal existence.⁹

The question that must be asked in this respect is if the revocation of the General Manual of SECOFI of 1988 effectively should be considered as the disappearance of the DCC. In our opinion, this conclusion is unacceptable because the DCC did not have any independent legal existence but rather it formed part of the General Directorate of Services for Foreign Trade (DGSCE) whose existence originated before the issuance of SECOFI's new internal regulation and derived also from the new 1989 manual, and by being included in the new arrangement retained its existence and retained competence to prosecute dumping investigations. The DCC, as an integral part of the DGSCE since 1986, can not then be interpreted as disappearing by the revoking of the 1988 manual. There follows a summary of the facts and legal rationale that support our conclusion.

A) Because of the publication of the Law Implementing Constitutional Article 131 and the Regulations against Unfair International Trade Practices, the President of the Republic issued a decree on February 12, 1986 in which he modified the Internal Regulation of SECOFI of August 20, 1985, and created the General Directorate of Services to Foreign Trade (DGSCE) giving it the authority in Art. 17, Section XIV, to:

Study and propose, with the participation of the General Directorates of Customs and of Economic Negotiations and International Matters, the application and amount of compensatory duties on merchandise that is imported under conditions of unfair international trade when they

⁹In fact, transitory Article 2 states that: "The General Organizational Manual of the Secretariat of Commerce and Industrial Development, published in the Official Gazette on September 19, 1989, is revoked by this present manual." See, "Manual General de Organizacion de la SECOFI", published in the Official Gazette in June 5, 1989, p. 41.

are applicable under the terms of the Law Implementing Article 131 of the Political Constitution of the United States of Mexico in the area of Trade.¹⁰

B) On October 20, 1986, SECOFI published a new organizational manual, in which there was a reorganization of the Secretariat with the purposes of updating its functions in accordance with the changes in development strategy that had first been implemented the year before. In particular, after the instructions released by the Executive branch on July 22, 1985 that attempted to reduce the structures of Public Administration. SECOFI's organization and structure were analyzed and its organic structure was made considerably more simple; the Subsecretaries of Industrial Planning and Regulation and Warehousing were eliminated, as were nine general Directorates, and those organs that coordinated them.¹¹

One of the most important characteristics of this organizational manual is that it presented detailed specifications of all the functions of all the administrative entities that were included in the Secretariat after the streamlining process. Furthermore, the manual also included a clear picture of the different area directorates, subdirectorates and other departments included in these entities. One of the Directorates that remained after the streamlining was the General Directorate of Services for Foreign Trade (DGSCE), whose function is described in section XIV of Article 17 of the above mentioned decree.¹² Likewise, this manual includes a diagram where the DGSCE is expressly divided into four area Directorates, one of which is the Directorate of Compensatory Duties and the Public Sector, that is itself divided into three subdirectorates and eight departments.¹³

C) September 19, 1988, SECOFI produced a new Organizational Manual in which the

¹⁰See, "Decreto por el que se modifica el Reglamento Interior de la Secretaria de Comercio y Fomento Industrial", published in the Official Gazette, Wednesday February 12, 1986, pp. 111-113. It is important to mention here that the majority, as an example, when checking the existence of the DGSCE found it in the Internal Regulation of 1989 leading it to deduce that this entity might well have existed but not necessary the DCC. However, the origins of the DGSCE really comes from this decree and the DCC from the organizational manual of SECOFI of 1986 and, by recognizing the aforementioned, they would have to accept that the DGSCE and the DCC already existed before 1989 and that all the 1989 manual did was to ratify their existence.

¹¹See, "Manual General de Organizacion de la SECOFI", published in the Official Gazette of Monday October 20, 1986, p.7.

¹²See *Ibid.* 50 et seq.

¹³The three area Directorates of GDSFT are the Technical Directorate, The Directorate of Services for Export, and the Directorate of Analysis and Decrees. These are in turn divided into six subdirectorates and 23 departments *Ibid.*, p. 51.

restructuring of the public sector was deepened. With the signing of the Solidarity Pact by the Federal Government several compromises were established to reduce inflation in the country and to re-establish economic growth. Many of the Federal Government's obligations were aimed at reducing public expenditure, which implied a further intensification of the actions that were adopted to control the growth of the public sector. To implement its obligations the Federal Government issued the Austerity Agreement for all the dependencies and entities of public administration which resulted in the elimination of 56 organs located within SECOFI that represented 5.09% of the organic basic and non-basic structure of the dependency.¹⁴

The 1988 manual, as the 1986 manual, detailed the specific functions of all the administrative entities that remained after the drastic reduction procedures, included a clear diagram, and detailed all the area Directorates, and other departments that made up the entity.¹⁵ The DGSCCE was included in this new manual, having its number of Directorates reduced from four to three. One of these was the Directorate of Compensatory Duties which was divided into three subdirectorates and nine departments.¹⁶

D) When the administration of 1988-1994 began, SECOFI decided to publish still another manual. One of the fundamental reasons for this was to redefine the objective of the entity in an effort to "strengthen its role as a promoter of internal and external commerce and to eliminate those factors that impede its progress."¹⁷ In a desire to reach this goal, through the manual, a organic and functional restructuring of the Secretariat took place through which the Subsecretariats of Industrial Development and of Regulation of Foreign Investment and Technology Transfer were unified giving rise to the Subsecretariat of Industry and Foreign Investment. The General Directorates of Sectoral Statistics and Information and Economic Analysis were also merged and attached to the Secretariat leaving in its place the General Directorate of Planning and Information, and other general Directorates were also attached to the Office of the Major Official.

However, even with the restructuring, the DGSCCE remained with the Subsecretary of Foreign Trade, along with three other general Directorates that formed part of the same entity. These were the General Directorate of Border Issues, the General Directorate of International

¹⁴See Official Gazette 4-I-88 where the Austerity Agreement is published. Also, the "General Organizational Manual of SECOFI", published in the Official Gazette on Monday September 19, 1988 p. 6-7.

¹⁵The manual was so detailed and its descriptions of the administrative functions of the administrative entities was so complete that it reached a length of 97 pages.

¹⁶The three subdirectorates of the new DCC were the Systems Subdirectorate, The Technical Directorate of Countervailing Duties, and the Subdirectorate of Countervailing Duties.

¹⁷See General Organizational Manual of SECOFI published in the Official Gazette, June 5, 1989, p.8

Trade Matters, and the General Directorate of Foreign Trade Policy. One of the most notable characteristics of this manual is that it no longer included a diagram of each of the general Directorates, rather, it only contained a description of the Secretariat at three different levels: The Secretary level, the Subsecretary level, and the General Directorates. In other words, contrary to normal practice, the 1989 manual held to the same level of generality as the Internal Regulation of SECOFI of the same year. Was then the manual a simple redundancy? What was the purpose of producing a new manual that did not describe the entire structure of SECOFI?

In our opinion, the most pertinent and logical supposition is that the 1989 Organizational Manual was published to indicate which subsecretariats had been eliminated, which had been created and which had been fused and what entities had been attached to the Secretary, and finally, to corroborate the permanence of other subsecretaries and their respective general directorates, as in the case of the Subsecretary of Foreign Trade and the four general directorates that made up that entity, including the DGSCE. However, as stated, the manual did not mention the three area directorates that were dependent on the original general directorates.¹⁸ In short, if one of the basic objectives of the restructuring was to strengthen SECOFI's role as a promoter of domestic and foreign trade, it makes no sense to suppose that the 1989 manual implied a legal disappearance of all the area directorates of the Secretariat and the nine departments that integrated the DGSCE, whose main purpose is to support its functions. It is a universally accepted legal principle that the accessory follows the fate of the principal. It is impossible to suppose that 1989 Organization Manual affirmed the DGSCE and its functions and at the same time eliminated the directorates that are vital to its functioning.

Because of these considerations we can conclude that the DGSCE had a continuous existence from the moment it was created by presidential decree in 1986 until it was eliminated by the new 1993 Internal Regulation and Manual. The DCC, as a part of the whole, also had existence for budgetary purposes, as well as in its actions, as was seen by the appointment of Mr. Velázquez Elizarrarás as its director on January 10, 1990, which is presented in an annex to the briefs of the Investigating Authority.

This interpretation of the effects of the revocation of the 1988 Manual, in our opinion, is consistent with the principles and general rules expressly recognized by Mexican courts, the most important of which is that when two contradictory interpretations of law exist courts should pick the one that creates that the least judicial uncertainty. Accepting that the publication of the 1989 Manual resulted in the legal disappearance of the DCC is the same as accepting that this Manual eliminated all area directorates located within SECOFI, and that none had the legal capacity to act for the purposes that they were created.¹⁹

¹⁸And it is precisely because the Manual did not go down to this level of detail and only consisted of 41 pages as opposed to 1988 when it doubled this size.

¹⁹See the decision, "Seguro Social. Notificaciones en el recurso de inconformidad ante el." Instance: Second Section. Source: Weekly Judicial Reports of the Federation. Series 6A.

This principle of interpretation can be tied to another very important one that establishes that a court when interpreting the law must assume that all the legal provisions make up a single judicial system and all must therefore have effect. This means that one should not assume that there are sterile orders or norms, but that all the norms of the system fulfill a function and on top of this they are in harmony with the rest of the system, in such a way that the interpretation must try to place the norm logically within the rest of the system.²⁰

To conclude that the new manual destroyed part of SECOFI's structure would be similar to concluding that all the provisions (including those of the higher hierarchy) that referred to the area Directorates and department heads were left with no effect, and that the delegation agreements, the ascription agreements, and even the LOAPF, would be inapplicable for SECOFI. All the provisions referred to these entities would have had no effect and would have regulated entities that did not exist.

The alternate criteria that we propose does not have these effects, rather it permits us to suppose that the new manual made several changes expressly and it did so in relation to what was in the previous manual. This criteria offers several advantages: (I) the principle of harmony of the judicial system is not affected; (ii) it permits us to find that there are no contradictions in the judicial system, and entities that are subject to other regulations that assumed their existence are not eliminated; (iii) it conforms to the rule that the accessory follows the fate of the principal and that interpretations that do not conform with reality should be avoided.

In conclusion, it is possible validly to conclude that during the time that the challenged acts occurred, between December 24, 1992 and April 1, 1993 the DCC existed as a Directorate integrated to the DGSCE.

Volume XIV-Page: 74.

²⁰See the thesis "Twenty days per year. Indemnification payments by concept. Interpretation of articles 48, 49, 50, 51 and 52 and the new federal employment law.", which states that: "It is a principle of harmonious jurisprudence that the interpretation of two or more legal precepts that relate to the same system must be harmonious, realizing that an individual interpretation can lead to different conclusions than those the legislator intended." Instance: Tribunales Colegidos de Circuito. Source, Appendix 1975. Parte: VI. Thesis 154. Page: 213. Precedents: Seventh Series, Sixth Part: Volume 48, Pag 55. Direct Amparo 1408/72. Gloria Cabrera Bearra. February 21, 1972. Unanimous. Majority Armando Moldonado Cisneros. Volume 46, Page 86 Direct Amparo 708/72. Maria Luisa Ramirez Apresa. October 20, 1972. Unanimous. Majority Enrique Arizpe Narro. Volume 46, pag 86. Direct Amparo 727/72. Francisco Escalante Boo. October 20, 1972. Unanimous. No majority writer named, Volume 56, Page 62. Direct Amparo 534/73. Ernestina Sosa Beltran. August 9, 1973. Unanimous. Majority: Ignacio M. Cal and Mayor. Volume 56, pag. 62. Direct Amparo 630/73. Ricardo Perez Peralta. August 22, 1973. Unanimous. Majority Armando Maldonado Cisneros.

5. However, there is a second question that must be analyzed in relation to the first allegation by the Respondents. That is, whether Mr. Velázquez Elizarrarás in his capacity as head of the DCC had the legal power to order the administrative acts he ordered during the proceedings. We mentioned before that, even though an Organizational Manual is an adequate instrument to establish the legal existence of area directorates, there are precedents that say that it is not enough for the general directorate to have established authority, and that the area directorates must also have express authority to carry out specific actions.

The Investigative Authority argues in its brief that Mr. Velázquez E. could act in place of the General Director of the DGSCE. In our opinion, if it is true that under Article 32 of SECOFI's Interior Regulation, the Director of the DCC could take the place of the Director of the DGSCE in the lineal hierarchy, it can not be ignored that the orders, notifications and documents produced by Lic. Miguel Angel Velázquez Elizarrarás were never initialed "P.A.", which, in accordance with the above article, should appear when a official acts in the absence of a superior, furthermore, it is not credible that the Director General of DGSCE was absent for a period of over four months. Because of this, it is not possible to accept the argument of the Investigating Authority that the official was acting in place of a superior.

Does this mean that the above mentioned official was incompetent to engage in the acts referred to by Respondents?

In our opinion, it is not possible to accept the authorities' argument, but it is important to note that during this period the DCC had the benefit of a delegation agreement issued by the Secretary of Commerce and Industrial Development, which gave the entity the authority to pursue the acts undertaken during the challenged period.²¹

In fact, an *Acuerdo Delegatorio* of SECOFI, published in the Official Gazette on September 12, 1985 contains an Article 6 that states:

In order to facilitate matters pertaining to the competent administrative units, powers are

²¹The majority of the panel, when discussing the possible competence of the DCC to undertake the challenged acts, considered the argument presented by the investigating authority as meaning that it had acted in the absence of a superior in the hierarchy, rejecting this on the basis that to act validly, the DCC needed an express delegation of power by the DGSCE, which would necessarily have had to be published in the Official Gazette. However, the majority of the panel did not consider that this delegation could come from a much broader agreement dictated by the Secretariat himself, such as the present delegation agreement. In our opinion, it is not possible to understand why the majority did not consider the agreement of 1985 in his analysis of this question.

bestowed upon Area Directors and Deputy Directors, Departmental Chiefs and Subchiefs, Office Chiefs, Delegates, Subdelegates . . . in order for them to sign the forms that establish any fees to be charged, orders regarding inspections and domiciliary visits, requests for information, data and documents, and in general to issue official administrative documents related to the activities that are under their responsibility.²²

This *Acuerdo* was preserved by another *Acuerdo Delegatorio* of SECOFI, published in the Official Gazette on April 3, 1989,²³ whose second transitory article established the following:

The Agreements published in the Diario Oficial de la Federacion in September 12, 1985 and April 5, 1988, which respectively delegate authority to the Subsecretaries, Major Officials, General Directors and others from the Secretaria de Comercio y Fomento Industrial and determine the organization of the federal 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.

Furthermore, in virtue of the fact that there is nothing in the Internal Regulation of SECOFI of March 15, 1989 and the Agreement of Allocation of Administrative Powers of April 3, 1989 that conflicts with any of the provisions of the Delegation of Powers Agreement of September 12, 1985, and given the fact that said Agreement was valid until March of 1994,²⁴ it follows that

²²See "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 Official Gazette, Thursday September 12, 1985, p. 19.

²³See "Acuerdo por el que se adscriben orgánicamente las unidades administrativas de la Secretaría de Comercio y Fomento Industrial," published in the Official Gazette, Monday April 3, 1989, p. 22.

²⁴On March 24, 1994 the Secretariat of Commerce and Industrial Development issued its "Acuerdo que Adscribe Orgánicamente Unidades Administrativas y Delega Facultades en los Subsecretarios, Oficial Mayor, Jefes de Unidad, Directores Generales y otros Subalternos de la Secretaría de Comercio y Fomento Industrial," which included Article 2 that states, "The 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

the DCC, in its role as a Directorate dependent on the competent administrative entity, the DGSCE, had the authority to issue "orders for inspection and verification home visits; orders requiring for reports, data, documents, and in general, execute procedures related to the activities under their authority," during the period that the challenged acts took place, between December 24, 1992 and April 1, 1993. And when one reviews the actions of the DCC during this period it is possible to answer that these were done within the scope of the aforementioned agreement.

At the same time, it must also be noted that in none of its actions did the DCC ever mention the delegation agreement that gave it the competence to carry out these actions legally:

DELEGATION OF AUTHORITY. IT IS ENOUGH FOR AN ACT OF MOLESTIA TO BE LEGAL THAT THE AUTHORITY CITES DE DELEGATION OF AUTHORITY AGREEMENT ON THE BASIS OF WHICH IT ACTED. When an official that is junior in hierarchy acts through a delegation of authority, that is, by commission, authorization or delegation of the superior official, it is sufficient for the action legality of the act of molestia that an official cites the agreement of delegation of authority on the basis of which he took the actions of authority and its date of publication in the Official Gazette.

CUARTO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO
PRECEDENT: Direct Amparo 1674/86. Rafael Gonzalez Ordaz. June 2, 1988. Unanimous.

Industrial, published in the Official Gazette of the Federation on September 12, 1985, and its amendments are hereby abrogated." See, DO, March 29, 1994 p.12. Some courts have held that the validity of an delegation agreement is derived from the Internal Regulation. However, even if we suppose that the delegation agreement received its validity from SECOFI's 1989 Internal Regulation, it is important to note that in the new regulation of 1993 there exists a third transitional article that states: "all dispositions in conflict are revoked". Likewise, an analysis of the said Regulation of 1993 reveals that there exists no contrary provision to those contained in the delegation agreement of 1989 and, therefore, this stayed in force until it was revoked in March of 1994.

Majority: David Delgadillo Guerrero. Secretary:
Silvia Gutierrez Toro.

In other words, as established in this opinion, a simple cite to the delegation agreement and its date of publication would have been enough to give plain legality to the acts. Now, does the fact that the DCC did not cite the Delegation Agreement take away the authority and leave the panel no choice but to declare the resolution illegal under Section I of Article 238 of the Federal Fiscal Code? In our opinion, this omission does not leave the DCC without legal competence but rather left its authority without foundation; because of this the acts that the DCC undertook during December 24, 1992 and April 1, 1993 should have been analyzed under Section II of Article 238 of the Federal Fiscal Code. On this point, there is the following decision dictated by the circuit courts:

SENTENCES OF THE FEDERAL FISCAL TRIBUNAL, FULL OR PARTIAL NULLITY OR FOR EFFECTS OF COMPETENCY. When in a proceeding for nullification, there are arguments that tend to show that the authority issuing the challenged act did not have the legal competence to do so, it is obligatory for the fiscal Court to deal with this issue, according to Article 237 of the Federal Fiscal Code, even if this subject has not been brought up in front of the authority, and, if such arguments are well founded, the resolution issued by the Court will have to declare the act completely null, because it is under section I of Article 238 of the Federal Fiscal Code and, on the other hand, when it is argued that the authority did not properly justified its competence, the nullification determined by the Court will be by applying Section II of Article 238 and the last paragraph of 239 of the Federal Fiscal Code of the Federation, because in this case, the basis for the annulment is a lack of foundation of competence of the authority, not an analysis of whether the authority was competent to carry out such actions.

SEXTO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVE DEL PRIMER CIRCUITO.

Instance: Tribunales Colegiados de Circuito.
Source: Judicial Weekly of the Federation. Series
8A, Volume XI May. Thesis: 1.6o.A.182 A.
Page: 405. Code: TC16182 ADM.
PRECEDENTS: Direct Amparo 156/93.
Termoformas, S.A. de C.V. February 10, 1993.
Unanimous. Majority: Mario Perez de Leon
Espinoza. Secretary: Yolanda Ruiz Paredes.

6. We must still determine the way in which section II of Article 238 should have been applied with respect to the first allegation of the Respondents. In conformity with section II of Article 238 of the Federal Fiscal Code, it is declared that an administrative decision is illegal when there exists, "an omission of the formal requirements established by law, that affect the defenses of the individual and affect the meaning of the challenged resolution, including the lack of foundation or legal motivation in the particular case".

In other words the panel would have had to examine if in the period between December 24, 1992 and April 1, 1993 the actions of the authority during the investigation omitted some formal requirement demanded by the legislation that would have affected the individual defenses of Respondents or would have affected the meaning of the final resolution, including a lack of foundation or legal motivation. In order to carry out this review we would have had to determine: (I) what types of act did the investigating authority carry out between December 24, 1992 and April 1, 1993; (ii) what were the formal requirements that the agency had to comply with and what were the legitimate interests of Respondents during the period in question; and (iii) whether any of the acts of the authority during this phase of the investigation infringed on the legitimate interests of Respondents to such an level that it would have left them deprived of defenses and affected the meaning of the resolution.

7. In the following section we will analyze the actions of the DCC during the challenged period under Section II of Article 238 of the Federal Fiscal Code.

A) Types of Acts Realized by the Investigating Authority During the Period of December 24, 1992 and April 1, 1993

After an exhaustive review of the actions of the investigating authority during the period of December 24, 1992 through April 1, 1993 we have found that the authority engaged in three types of actions:

a) Resolutions accepting pleadings and questionnaire responses from AHMSA and other interested persons, that is documents in the record labeled, 1, 3, 5, 9, 19, 27, 30, 31, 34, 35, 44, 46, 47, 52, 58, 65, 109, 110, 115, 117, 122 and 126.

b) Notifications of February 3 and 8 of the initiation of the antidumping proceeding and specifying the questionnaires responses. These notifications were given in two parts: a simple notification of the provisional resolution and a requirement to present information based on a questionnaire on a certain date (March 8, 1993) indicating that such information would not be considered for purposes of the revision to the provisional resolution if it was not presented by that date. The notification also stated that if the responses were not presented in the course of the investigation, the final resolution would be based on the best information available.

c) Resolutions of March 3, 1993 denying extension of time on the basis that the time period had expired for making such a request. The agreement also indicated that documents presented before the end of the investigation would be considered for purposes of the final resolution. These actions are found in the administrative record as numbers 68, 69, 88 and 105.

To what extent are the mentioned actions in conformity with the legal requirements that the authority must comply with in an antidumping investigation? We turn to this question in the following section.

B) Formal Requirements that the Investigating Authority Should Comply With in an Ongoing Investigation

The procedure for an antidumping investigation in Mexico consists of four stages: A) from the presentation of a complaint until its acceptance;²⁵ B) from the acceptance of the complaint until the provisional resolution, C) the review of the provisional determination; and D) the final resolution, published in the Official Gazette.

The acts that are challenged here occurred during the third phase of the investigation, that is beginning at the time the authority published the provisional determination, which initiated the dumping investigation proper, in terms of article 238 of the Federal Fiscal Code.

In conformity with the legal provisions in force at that time, in this part of the investigation SECOFI should have, under Article 12 of the Law Regulating Article 131 of the Constitution and Articles 15 and 20 of the Regulation against Unfair Trade Practices, received legal

²⁵In this stage and in the second, the complaint is presented to SECOFI and is analyzed to see if it is legally sound; if it is found adequate, SECOFI officially accepts the complaint, analyzes it, solicits and receives information, determines the existence of dumping and, if there is enough information to determine injury, issues a provisional determination resolution, initiating the investigation. See, Eduardo Andere, "The Antidumping regimes of Mexico and the United States. Considerations for negotiation of the Free Trade Agreement" in Eduardo Andere and Georgina Kessel, *Mexico and the Trilateral Treaty of Free Trade, Sectoral Impacts*, Mexico, ITAM-McGraw-Hill 1992, pp. 315-383.

arguments from all persons that could have had a legal interest in the results of the investigation and received information on their behalf by those parties with legal interest.²⁶ With this information, SECOFI is to evaluate the elements that served as a base for the provisional resolution in order to confirm, modify, or revoke the resolution.

In conclusion, one of the principle obligations of SECOFI in this phase of the antidumping investigation is to admit legal arguments from all parties with legal interest in the antidumping investigation and, once such interest is found, give them the opportunity to participate by presenting information that could be useful to the authority when reviewing the provisional determination. In order to determine if any of the acts of the administrative authority during this phase of the investigation affected the legal interests of the Respondents to such a degree that they were deprived of a defense or affected the meaning of the resolution, it is important to determine with clarity what were the legitimate interests of the Respondents in this antidumping investigation.

C) *Legitimate Interests of the Respondents recognized by the legislation in force during the investigation*

This question is very relevant because, as is demonstrated by the following thesis of the Circuit Court not every individual, per se, has a legal interest in a dumping investigation:

PODER JUDICIAL DE LA FEDERACION
3er. CD-ROM JUNIO DE 1993
Instancia: Tribunales Colegiados de Circuito
Fuente: Semanario Judicial de la Federacion
Epoca: 8A
Toma: X-DICIEMBRE
Tesis: I. 4o. A. 501 A
Pagina: 363
Clave: TC14501 ADM

It is contrary to law to resort to a juicio de amparo to challenge final resolutions in matters of dumping issued by the Secretary of Commerce and Industrial Development, as well as violations during an administrative proceeding, because the legal interests of the citizen are not affected. . . . Article 27 provides that during the period of investigation the interested parties are allowed to offer any kind of evidence, with the exception of witnesses or evidence not permitted because of public order, public morals or good custom. In this proceeding, SECOFI, ex-officio or through a complaint, is exclusively in charge of investigating and determining the existence or non-

²⁶See the Official Gazette of January 1, 1986 and November 25, 1986.

existence of dumping, which is the practice of introducing goods in the market below their normal value. The law's original intention is not to favor the particular interests of any moral or physical person, but to regulate and to promote foreign commerce, the national economy and to achieve any other similar goal or benefits for the country as provided in Article 131 of the Constitution. . . . Therefore, just because Articles 13 of the Law and 27 of the Regulations provide that domestic producers or complainants may submit any kind of evidence with the exceptions mentioned above, this only means that they only assist the investigating authority to determine whether dumping has or has not occurred. The role of the complainant is restricted to bringing facts before the authority which he believes are related to dumping. Another element which confirms that final resolutions in anti-dumping proceedings do not affect the legal interests of the complainant, involves the nature of the tariffs which initially the authority assesses on persons who introduce goods unfairly (Article 35, Section I, point c of the Customs Act); and the tariffs have as an objective repressing, discouraging or retarding such importing practices, and furthermore they exist independently of other charges, and become a regulating and restricting measure on the importation of products. . . . The amendment, repeal or confirmation of these levies is an act that affects only the state, or to a certain extent only those who actually unfairly import goods because these charges are levied upon them, but domestic producers are not affected for these stated reasons.

CUARTO TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO

PRECEDENTES: Amparo en Revision 334/92, Sinteticas S.A de C.V., 14 de Mayo 1992, unanimidad de votos

As this thesis tells us, there are two types of legitimate interests that exporters possess in an antidumping investigation, according to the Constitution and applicable legislation, that is, one to "offer all types of evidence" ...in an antidumping investigation and, second to obtain, "the information facilitated to the Secretariat by whatever affected party".²⁷

The Antidumping Code of GATT also contains similar dispositions. Article 6, paragraph

²⁷See Articles 23 and 27 of the Regulation against Unfair Trade Practices, in the book entitled *The Mexican System of Defense against Unfair International Trade Practices*, Mexico, D.F. SECOFI series Foreign Trade, 1990.

1 of that Code requires that "foreign suppliers... shall be given ample opportunity to present in writing all evidence that they consider useful in respect of the anti-dumping investigation". Article 6 paragraph 2 requires that the authorities "provide opportunities for... the exporters... to see all the information that is relevant to the presentation of their cases" and paragraph 7 of the same article requires that "all parties shall have a full opportunity for the defense of their interests".²⁸

It is also important to point out that these legitimate interests of foreign exporters are conditioned on several factors. For example, one requirement that foreign suppliers must comply with for their information and evidence to be considered by the authority is that they present their information or evidence through questionnaires. Article 21 of the Regulation against Unfair International Trade Practices establishes that: "The Secretariat will verify the information entered upon questionnaires"²⁹ Also, the same article gives SECOFI the authority to "authorize domiciliary visits in the headquarters of the complainants or the importers of the goods subject to investigation" and to "verify information and evidence produced in relation to the cost of production in the country of origin".³⁰

Finally, article 6 paragraph 8 of the Antidumping Code establishes that "in cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final findings, whether affirmative or negative... may be made on the basis of the facts available".³¹ Likewise, Article 6 paragraph 5 grants the authority the ability to "verify the information provided".³²

In short, an act of authority affects legal interests of a foreign supplier and eliminates the possibilities of defense in an antidumping investigation only if it limits the rights to present information and evidence and if this evidence is not taken into consideration in the final determination. Equally, in order for a foreign exporter to ensure its interests of presenting information and proof of its costs and prices and to ensure that such information and costs are considered in the final resolution, such exporter should respond to the questionnaire and allow a verification visit.

Based on the information discussed above, we can now answer the question of whether the acts of the investigating authority during this time period interfered with the legitimate interests

²⁸See Agreement pertaining to the application of Article VI of GATT published in *ibid.*, pp. 97-116

²⁹See Regulation in *ibid* pp. 71-93

³⁰*Ibid.*

³¹See Antidumping Code Op. Cit p 106.

³²*Ibid* p. 105.

of the Respondents to such an extent as to deprive them of a defense or to affect the meaning of the resolution, and our answer is that there is no evidence that the Respondents were denied the right to present evidence or to state what was legally important or that there were errors in the proceedings that affected the sense of the resolution according to the standard established by section II of article 238 of the Federal Fiscal Code. One must recognize that on March 3, the authority denied the Respondents an extension of time to present information. However, this denial was clearly legal under the provisions of the Regulation against Unfair Trade and the Antidumping Code that impose on parties a reasonable time frame for presenting evidence. Furthermore, this denial did not affect the ability of the Respondents, in the end, to present the information within the time frame granted by the authority, but furthermore, they would have been allowed to present the information after that period through the end of the proceeding.

We now turn to the following issue for analysis by the panel, which is Respondent's argument with respect to violations committed by the authority during the verification visits.

II. COMPETENCE OF OFFICIALS INVOLVED IN THE VERIFICATION PHASE

The Respondents argued that the authorities that prosecuted the antidumping investigation were not legally authorized to carry out the investigation during July, 1993. These arguments will be analyzed below.

1. Competence of the Officials who Issued the Verification Orders

a) Bethlehem and USX alleged that the verification orders of which they were notified were invalid because they were signed by an official that represented an administrative entity that was not legally established or authorized to issue such orders. In other words, according to the Respondents in virtue of the fact that these orders were issued by an official without competence, the panel should declare that the final resolution is illegal and without effect, as is laid out in section I of Article 238 of the Fiscal Code.

These orders were issued in the following order. The first verification order, dated July 13, 1993 was directed to USX.³³ This order shows the signature of Mr. Gustavo Uruchurtu, who is identified as the "Director of Projects and Proceedings" and was jointly issued by the UPCI and the Directorate of Projects and Procedure (DPP).

The second verification order, dated July 14, 1993 was sent to Bethlehem.³⁴ It was also signed by Mr. Uruchurtu, who is identified as the Director and was also issued by the UPCI and the DPP.

³³See the document identified as number 255 in the administrative record.

³⁴See the document marked 256 in the administrative record.

- b) The Respondents in their briefs and in the hearing accepted that the UPCI was legally existent as recognized by the SECOFI's Interior Regulation published in the Official Gazette on April 1, 1993, but they affirmed that this was not the case for the DPP and therefore it did not have the competence to issue a verification order in its name. The investigating authority, argued that it was the UPCI that prosecuted the investigation and that the director of the DPP, in his role as a official of the UPCI had delegated authority that belonged to the UPCI.
- c) The majority of the panel recognized that when the verification orders were executed, the Directorate that issued the verification order was not legally recognized in the Internal Regulation of April 1, 1993 or in any other legal provision and, because of this, did not have legal competence to order the verification visits, finding another reason to nullify the definitive resolution based on section I Article 238 of the Fiscal Code.
- d) In our opinion, however, it is possible to demonstrate that the verification orders were effectively issued by the UPCI and that the official that issued them was delegated the authority by the UPCI and, therefore, these orders were legal.

In fact, these verification orders clearly appear as UPCI documents. This is the first administrative entity that is mentioned in each of these documents. Immediately after the date in each document there is a code number that identifies the document as belonging to the UPCI. For example, the verification order of July 8, 1993 sent to USX is identified as document No. UPCI.211.93.2289. Likewise, as is discussed below, the only officials that were mentioned in the verification orders were described as UPCI employees.

Similarly, the person who signed the verification orders was formally named as a official of the UPCI, as can be seen from the assignment "evidence of personnel transfer," January 16, 1993, which formally gave Gustavo Uruchurtu the duties of UPCI Director. This document points out that the UPCI is the responsible entity where the official was physically based.

Furthermore, Article 33, Section I of the Internal Regulation of SECOFI of April 1, 1993 gives to the UPCI the authority to "investigate, carry out and resolve the administrative proceedings that refer to unfair practices in international trade". Similarly, Section III of this article gives it the authority to "order and execute verification visits".

Likewise, we should remember the existence of the *Acuerdo Delegatorio* of 1985, ratified by the 1989 *Acuerdo Delegatorio*, that delegated authority to the area directors and other subordinate officials of the administrative entity to sign verification orders, making it possible to assume that Mr. Uruchurtu had the authority to sign these orders based on this agreement.

This interpretation is corroborated by examining the *Acuerdo de Ascripción Orgánica y de Delegación de Autoridades*, issued by the Secretary of SECOFI, on March 29, 1994, whose Article 2 abrogates the *Acuerdo Delegatorio* of 1985, establishes in its Article 5, Section VIII

that all the authority that had been given to the head of the Unit of International Trade Practices in the earlier *Acuerdo* was delegated to the General Adjunct Technical Legal Director and, in his absence, in the Director of Projects and Proceedings. Within this grant of authority was found the power to "issue notifications and verification orders, inspections and recognition of matters within its jurisdiction".

In our opinion, it is through this last *Acuerdo* of 1994 that the Area Directorate of Projects and Procedure, as well as the General Technical Legal Adjunct Directorate, were originally ascribed to the UPCI, that is, they appeared under its authority. Likewise, it is through this *Acuerdo* that was granted most of the powers that belong to the UPCI.

To conclude, we believe that the UPCI validly delegated its authority to issue verification orders to the director of an administrative entity (DPP), that, at the time they were issued had not been created as a separate entity within the UPCI, and that its legal independent existence took place subsequently in the *Acuerdo de Ascripción Orgánica* issued by the Secretary of Commerce in March of 1994. Such a delegation of authority to informal entities that subsequently become independent units has been expressly recognized by the tribunales colegiados and has not been found to violate the right to legal security as long as there is no change in the entity that possessed the authority during the investigations, as was in the present case. The following precedent is clear in this point:³⁵

PODER JUDICIAL DE LA FEDERACION
3er. CD-ROM JUNE 1993

Instancia (Level): Tribunales Colegiados de Circuito
Fuente (Source): Legal Weekly of the Federation
Epoca (Era): 7A
Tomo (Volume): 97-102
Pagina (Page): 177

RUBRO (Issue): PROFIT SHARING, UNDER-DIRECTORATE. IT IS
RETROACTIVE WITH REGARD TO ITS ACTS.

Even though the representatives of the dissenting Union expressed their objections in June 1973 and the authority that resolved the issue, the Sub-dirección de Participación de Utilidades, was only established by the *Acuerdo* issued on February

³⁵This thesis clearly recognizes that subordinate authorities can be created by an *acuerdo de ascripción orgánica y de delegación de facultades*, issued by a Secretariat of State. We believe that this opinion sustains our opinion that the Agreement of Abscription and Delegation of 1994 should be considered as one giving legal formal existence to the General Technical Legal Adjunct Directorate as well as the Directorship of Projects and Procedure, as independent entities within the UPCI.

14, 1975, by the head of the Secretaría de Hacienda y Crédito Público, it does not imply that the mentioned Sub-dirección is only authorized to process and resolve complaints made after it was established. In fact, the Secretaría de Hacienda is the body which according to the Constitution has the competence to resolve worker's complaints regarding a company's income tax declaration. So, to this end, the head of the Secretariat, to better discharge its duties pursuant to Article 26 of the Secretariats and State Departments Act, partially delegated his powers among his subordinates, that is, among different Direcciones which were then assisted by other departments. Though by means of the powers distribution it was the Departamento de Participación de Utilidades the entity which initially carried out and resolved the workers' complaints, with the establishment of the Sub-dirección de Participación de Utilidades, dependent of the Dirección General del Impuesto sobre la Renta, under Article 3/II of the Acuerdo that established it, the Departamento de Participación de Utilidades was granted the power to process out and review the complaints, and to modify as befitting the liable income. Therefore, even though the Departamento de Participación de Utilidades was initially in charge of processing the complaint of the union, and in doing so, had communicated the complaint to the company, even though it was the Sub-dirección de Participación de Utilidades which resolved the union's complaint, the acts of the latter are legal, because its powers derive from the Secretaria of Hacienda and Credito Publico. **It is false that the Departamento de Participación de Utilidades did not have the power to resolve the complaints that were presented before it had been lawfully established. At the moment when the Sub-dirección de Participación de Utilidades was established no change or modification was made concerning the entity that had the power to resolve the complaints. The Secretary just delegated part of its competence to its subordinates. It is clear that the authority that processed the complaints and the authority that resolved them are under the said Secretary and, therefore, the responsible authority did not violate the principle of judicial security. The establishment of the Sub-dirección de Participación de Utilidades was due to the fact that the body in which the power on this matter lies decided the necessity to create such entity, to be specially in charge of processing the complaints, with no harm to its own powers and with the aim of facilitating the course of the complaints.**³⁶

PRIMER TRIBUNAL COLEGIADO EN MATERIAL ADMINISTRATIVO DEL
PRIMER CIRCUITO.

e) It is true, that the verification orders did not recite the legal foundation for the delegation of authority based on Article 6 of the 1985 Acuerdo. Here, again, this was a problem of lack

³⁶As can be seen from this opinion, the Tribunal Colegiado does not consider the principle of legal security violated, because during the investigation there was no change of the entity that had the competence, that is, the Secretariat of the Treasury. Likewise, here, at no time did SECOFI lose its competence, or stop conducting the investigation.

of fundamentation of authority under Article 238/II of the Fiscal Code of the Federation. However, if we had analyzed the visitation orders under this fraction, we would have reached the conclusion that the verification orders were not acts that affected the legitimate interests of USX or Bethlehem and would not have left them without a defense or affected the meaning of the resolution.

2. Competence of the Officials Who Participated in the Verification Visits

In each of the verification orders the following five persons were named as those that participated in the verification visits.

Jorge Miranda Meave
Jose Simon Somohano
Erika Guzman Soule
Jorge Santibanez Fajardo
Francisco Velazquez

In addition, in the reports of the verification visits of USX and Bethlehem the same five people appear as participants in the verification visits, except for Jose Simon Somohano who did not participate in any of the verifications.³⁷ Likewise, in these reports of the verification of USX there appears the name of Alberto Lerin Mestas.

Respondents raise four issues relating to the competence of those persons who carried out the verification visits. For each of these issues, Respondents claim that any lack of competence caused the entire Final Resolution to be illegal under Article 238/I of the Federal Fiscal Code. We consider these four issues in order.

a) First, Respondents claim that two of the persons who participated in the visits held positions in entities that had not been legally established and, for this reason, they were not competent to participate in the verification procedure.

The report of USX's verification visit identifies Alberto Lerin Mestas as the head of the Directorate of Investigation of Dumping and Subsidies, and in the reports of both visits Erika Guzman Soule is also mentioned as subdirector of Investigation of Dumping and Subsidies. Neither of these entities was legally established as a separate administrative entity. However, Secofi claims that these individuals were a part of UPCI which was lawfully created. The verification reports also identify these persons only as officials of UPCI ("funcionarios de la Unidad de Practicas Comerciales Internacionales").

In other words, whatever their titles, these two individuals appear to have been acting as

³⁷See numbers 255, 256 of the administrative record.

officials of UPCI which was lawfully established. Furthermore, it is important to note that at that time, the Law Regulating Article 131 of the Constitution, in Article 23 established the following:

The inspection, oversight and imposition of sanctions pursuant to this law are within the jurisdiction of the Secretary of Commerce and Industrial Development and will be carried out in accordance to the formalities and in conformity with the procedures established in the Law Granting Powers to the Executive Branch on Economic Matters.³⁸

Likewise, Article 19 of the Law Granting Powers to the Executive Branch on Economic Matters in force at that time stipulated the following:

The Secretariat of Commerce will establish inspection and oversight services. To assure that the dispositions of this law and those derived from this law are met, the Secretariat of Commerce will have the authority to solicit the exhibition of books, papers and data, as well as to execute inspections.

Physical as well as moral persons will have the obligation to produce the books, papers, reports and data that the Secretariat of Commerce asks for in writing, related to the present law and those derived from this law. **Inspections will be conducted only by personnel authorized by the Secretary of Commerce, with prior identification and exhibition of their authorizing document, and during days and working hours; but they may also be effectuated during non-working days and non-working hours, when it is necessary, with express authority.**

Of every inspection a report will be prepared,

³⁸See Official Gazette January 13, 1986.

identifying the person with whom the inspection was conducted. This should be done in the presence of two witnesses appointed by that person or, if he refuses, by the official carrying out the visit. A copy of the report will be left with the person that participated in the visit.

In other words, according to the Law Regulating Article 131, the formalities that had to be followed for inspection visits were those established in the Law Granting Powers to the Executive Branch on Economic Matters and this, in turn, did not establish as a requirement that the visitors be necessarily competent officials of SECOFI, rather they only had to be **authorized personnel** by SECOFI, which in the present case happened and, therefore, the Respondents' argument that the visits necessarily had to be carried out by legally competent officials was not valid. (That relating to Mr. Lerin is analyzed under point c.)

b) Second, Respondents claim that none of the individuals who participated in the verification visits were competent because the verification orders which identified these individuals were not issued by competent officials. However, as stated before, this argument cannot be considered, since the verification orders were issued by competent officials.

c) Third, USX argues that Mr. Alberto Lerin Mestas was legally incompetent to participate in the verification visits, because his name did not appear on the order.

It is true that Mr. Lerin's name does not appear on the order, and that he participated in the visit. Secofi argues that because of *force majeure* Alberto Lerin Mestas was forced to participate in the verification.

Weighing the above facts, we do not believe that the participation of Mr. Lerin Mestas can cause the total illegality of the Final Resolution, according to Article 238 section I. The report on the verification was not signed by Mr. Mestas, but rather by Erika Guzman Soule and by Jorge Miranda Meave, who are expressly named in the verification order.³⁹ From these facts it can be concluded that Mr. Lerin was not the official who carried out this part of the antidumping process, in conformity with Article 238 section I of the Fiscal Code. In such a case, his participation in the verification is an error in the proceeding, which would have to be examined under section III of Article 238 of the Fiscal Code, which then leads to the recognition that the verification visits did not infringe any of the legitimate rights of Respondents. In effect, there is no evidence that the verification visits, or the participation of Mr. Mestas in the case of USX affected the legitimate interests of Respondents to present evidence in the antidumping proceeding. On the contrary, under the law, the verification visits allowed SECOFI to consider the evidence and information presented by Respondents.

³⁹See number 260 of the administrative record.

d) Fourth, Respondents claim that two external consultants which participated in the verifications did not have legal competence to do so, given that they were external consultants.

However, Article 21 of the Regulation against International Unfair Trade Practices establishes that the investigating authority "may hire the services of expert consultants as a aid to the investigation and the verification of data" which constitutes sufficient authority for SECOFI to contract consultants to **assist** in the job of verifying data. Here, the key words are "assist" and "aid." The verification visits were realized by "officials" of the UPCI and the apparent function of the consultants expressly mentioned in the orders was to assist these officials. In our opinion, there is no norm within the Mexican legal system that can stop SECOFI from hiring external consultants in this fashion, to assist and aid in the functions of the UPCI during the verification visits. In addition, as we mentioned before, according to the Law Granting Powers to the Executive Branch in Economic Matter, all that is required is for the visitors to be personally authorized by SECOFI. Lastly, there exists no evidence that participation of the consultants affected the legal interests of the Respondents on any manner.

Because of all the reasons mentioned above, in our opinion the allegations of Respondents on these points should have been denied.

III. FORMALITY AND TECHNICAL ISSUES

Respondents raised three issues of a technical nature regarding the verification visits. First, they claim that the visits took place at addresses that were different than those on the orders. Second, they claim that the verification orders failed to specify the period covered by the investigation. Third, Respondents claim that Secofi failed to notify and to obtain an authorization from the US government before the verification visits. With respect to these arguments, the Respondents asked the panel to review these issues under sections II and III of Article 238 of the Federal Fiscal Code.

In our opinion, the panel should also have denied these allegations in virtue of the following considerations.

1. The Visits Occurred at Different Locations than those Stated on the Orders

The visits were executed in three days, in the case of Bethlehem. During the second day

the Bethlehem's employees explained that some information was in another factory⁴⁰ and during the third day they went to that factory to verify this particular point: cost of production.

In the case of USX, apparently the entire visit was carried out at one address that was different from that established by the verification order and the investigating authority admits this fact.

However, the omission of these formalities and the other procedural errors should be analyzed under sections II and III of Article 238, and the law clearly states that the errors must negatively affect the defenses of the individual and the meaning of the final resolution. There is no evidence that, in this case, the omissions and errors committed affected any of the defenses available to the Respondents or the final resolution, therefore, the panel should have denied these allegations.

2. Failure to Specify the Period Covered by the Verification

The verification order failed to specify the period that was to be verified during the verification visits. The Respondents claim that this failure violates the legal protections granted by Article 16 of the Constitution.

In fiscal visits, the purpose of establishing the time period which is going to be verified is crucial, since usually the taxpayer does not know beforehand which is the time frame during which the Treasury believes there may be an infringement of fiscal laws. Thus, if the time period is not explicitly mentioned in the verification order, the taxpayer may be left without the opportunity to present an adequate defense, since he would not know the purpose of the visit. However, the case here is very different, because the companies that were visited already knew what the period of the investigation was, because this data is an essential element of the whole investigation; from the resolution declaring the initiation of the investigation, it was announced and known by the Respondents. In effect, in the resolution initiating the investigation, published in the Official Gazette on December 24, 1992, this information was mentioned and the notifications of said resolution make explicit that the reports, actions and evidence refer to the period between January and June of 1992. In our opinion it is adequate to consider these visits as "actions" and thus that Respondents had been advised of the time period.

In this case, again, the omission of formalities stated in the law and the procedural errors should be analyzed in the light of how they affect Respondent's defenses and affect the meaning of the final resolution. Because there exists no evidence that the Respondents were affected in any way, or that the final resolution was affected by the errors in this period, the panel should have denied these allegations. In addition, the authority did make known the time period by including it in the initial notification.

⁴⁰See page 5 of the visit report.

3. Failure to Notify the US Government

Article 6, paragraph 5 of the 1979 GATT Anti-dumping Code requires that an investigating authority should "notify the representatives of the government of the respective country" in which a verification visit will take place. Article 21 of the Regulation Against Unfair International Trade Practices provides for a verification in the country of origin "if the respective government authorities accept the execution of the same..." In this case, there was no notification to the US Government or an acceptance of the verification visits by the US Government. Respondents claim that this procedural error should be reviewed under Article 238/III.

In our opinion, Respondents did not have standing to complain about this procedural error because standing lies only with the United States government. Besides, it was not necessary for the panel to entertain such an argument, given that, here also, there is no evidence that this omission affected any defense of the Respondents or affected the final resolution, as is established in Art. 238 section III, and therefore, the panel should have denied here too these complaints.

IV. CONTROVERSIES WITH RESPECT TO THE DUMPING DETERMINATION BY SECOFI

With respect to imports from the United States, the relevant Mexican law provides for the imposition of antidumping duties when there is both:

“Importation of merchandise at a price less than that applicable to identical or similar goods destined for consumption in the country of origin. . .” (Foreign Trade Act Implementing Article 131 of the Constitution of the United Mexican States, D.O., January 13, 1986, hereinafter the “1986 Law”, Art. 7), and

The “importation of the merchandise causes or threatens to cause harm or prejudice to national production or creates an obstacle to the establishment of industry. (Arts. 14 and 15).

In our dissenting opinion, following international practice, we refer to issues under the first provision just quoted as “dumping” issues and those under the second provision as “injury” issues. Article 7 goes on to define a number of other ways in which the price comparison is to be made, as well as further aspects of the comparison. In particular, under certain circumstances, the price in the country of origin is to be calculated as the sum of “the cost of production in the country of origin, and a reasonable margin for profit and the costs of transportation and sale.” (Art 7(I)(b) of the Law Implementing Article 131 of the Constitution.

Bethlehem raises two groups of issues with respect to SECOFI’s determination of

dumping.⁴¹ It argues (1) that SECOFI made erroneous freight adjustments, both in calculating the price of domestic (U.S.) sales and in calculating the Mexican sales price, and (2) that SECOFI erroneously ignored losses on sales below cost in calculating profit.

1. Domestic and Export Freight Calculations.

Under SECOFI's approach to the price comparison that it had to make to determine dumping, it was necessary to compare Bethlehem's ex factory price for domestic sales to U.S. customers with Bethlehem's ex factory price for products exported to Mexico. If the domestic price was higher than the export price, the difference would be the margin of dumping.

However, excluding freight costs to obtain an ex factory price proved to be difficult because in quoting prices to customers in both the United States and Mexico, Bethlehem used a freight cost that was usually different from the actual amount the company paid to the carrier of the steel. It estimated a freight cost on the invoice and charged the customer for the quoted price and the estimated freight cost. Although it noted that amount as the freight expense for accounting purposes, it paid the carrier the real freight cost, and made internal accounting adjustments to reconcile the difference between the invoice freight charge and the actual freight expense.

Sometimes the invoice freight cost was lower than the actual cost and sometimes it was higher. If the estimated freight cost was lower than the actual cost, the price of the steel was lower than the price represented on the invoice because the customer paid less than was necessary for freight and Bethlehem absorbed a portion of the freight cost. The opposite was true if the customer paid more for freight than the actual amount payable.

Bethlehem claims that it reported United States prices to SECOFI net of the estimated transportation costs included in the sales invoice. Bethlehem then proceeded to calculate an average adjustment figure to account for the difference between the estimated cost already subtracted from the invoice price and the actual freight cost paid to the carrier.⁴² Bethlehem provided an average adjustment because it would have been unduly burdensome to calculate

⁴¹ In addition, Bethlehem had argued that SECOFI did not use the data that it had supplied with respect to its production costs. SECOFI responded that the difference derived, in fact, from the adjustments that it had to make to convert from short tons (used in the United States) to metric tons (used in Mexico). In light of the arithmetic and logical plausibility of this explanation and of the fact that Bethlehem did not respond to this argument in its reply brief, we accept SECOFI's explanation. (Bethlehem Antidumping Brief at 4-10; Investigating Authority Brief at 70-73)

⁴² Bethlehem Confidential Antidumping Brief at 11-12 -- the data quoted here and in other parts of this section are not confidential; Bethlehem Antidumping Reply Brief at 1.

the adjustment figures on a transaction by transaction basis due to the volume of domestic transactions. Bethlehem contends that the average adjustment provided is the only adjustment that needs to be made and that it represents the average difference between the estimated costs found on the invoice and the actual amount paid to the carrier.⁴³

SECOFI disagrees with this position. It claims that two adjustments are needed in order for the price to be net of actual transportation cost because, according to SECOFI's description, Bethlehem used three different freight numbers when calculating freight expense and not two. The first number is the amount that Bethlehem charges to the client. SECOFI refers to this value as the "estimated" freight. This price is negotiated between Bethlehem and their clients and does not represent an estimate of freight charges for accounting purposes. The second number is an estimated freight charge SECOFI designates as the "provisional" freight. This number is a guess by Bethlehem's accountants as to what freight will realistically cost and is different from the "estimated" cost included in the sales invoice. The third number is the actual amount Bethlehem pays the carrier. SECOFI claims that the average adjustment value given by Bethlehem accounted for the difference between the provisional freight cost and the actual freight cost, but did not account for any discrepancy between the amount of freight charged to the client and the provisional freight noted on Bethlehem's accounting records. Therefore, Bethlehem's freight adjustment was only partial and a second adjustment between the "estimated" freight cost and the "provisional" freight cost had to be made in order to find the actual cost of freight.⁴⁴

Bethlehem was harmed by the double adjustment because many of the secondary adjustments made by SECOFI were negative. This means that they effectively increased the U.S. price because a *negative* adjustment was *subtracted* from the unit price and thus expanded the margin of dumping. This dispute is factual and centers around whether the "estimated" or invoice price and the provisional price are in fact the same value. Bethlehem claims that the invoice freight costs are entered into its accounting records as the provisional freight costs and no other provisional value is ever used. SECOFI maintains, as noted above, that the invoice price it designated as the "estimated" freight is independent of the "provisional" freight that Bethlehem records as a realistic guess of freight expense. If only two freight values were, in fact, used, Bethlehem's argument is correct and if there were three different freight values, SECOFI's methodology is correct.

Bethlehem also argues that the freight adjustment was incorrectly made with respect to the Mexican price calculation. Again, there were differences between quoted and actual freight. However, there were considerably fewer steel sales to Mexico than domestically, and Bethlehem made the freight adjustment on a transaction-by-transaction basis and gave SECOFI a

⁴³Bethlehem Antidumping Brief at 11-17

⁴⁴Investigating Authority Brief at 69-83.

comprehensive adjustment figure for each separate sales transaction which accounted for the difference between the invoice freight cost and the actual out-of-pocket freight cost. Under this argument, any further freight adjustments made by SECOFI were erroneous because the individual adjustment information provided by Bethlehem already reflected the appropriate alterations for each separate and specific transaction.⁴⁵

In calculating the Mexican price, SECOFI made this adjustment and then made a further adjustment based on the confidential adjustment figure Bethlehem had provided for its domestic transactions. Bethlehem argues that this is double counting and also inappropriate because the second average adjustment figure was intended only for domestic sales and was used because the total volume of transactions did not allow for transaction-by-transaction adjustments as were made in the case of exports to Mexico. SECOFI responds that the extra adjustment was still necessary to reach actual freight because Bethlehem did not differentiate transportation costs by market. Therefore, the same freight adjustments should be made to both domestic and export prices.⁴⁶

In reviewing SECOFI's actions here, we believe that we should apply either clause III or clause IV of Article 238, and that the outcome is the same either way. Under clause III, we are to remand if there is a procedural error that affects the defenses of the individual and the outcome, and the erroneous conduct of a calculation is certainly an error in procedure. In fact, in its Final Determination, SECOFI stated that:

. . . the description contained in this resolution regarding the methodology and the source data employed is sufficiently explicit to allow every exporter to reproduce the Department's calculations based on its own confidential information.⁴⁷

This clearly indicates that SECOFI has committed a procedural error if its analysis is insufficiently explicit as well as if an error is obvious on the face of its analysis. Alternatively, under clause IV, we are to remand if the facts which underlie the challenged determination did not exist or were considered by the agency in an erroneous way. In this particular case, this points to essentially the same standard.

With respect to the U.S. price, the freight adjustment issue is a factual question of how many numbers Bethlehem used in its billing? If there was really a quoted freight, a provisional freight, and a real freight, as described by SECOFI, then both adjustments were appropriate in calculating the domestic price. If, however, the confidential number was actually an average of all the differences between quoted and real freight, there is no need for an extra adjustment.

⁴⁵Bethlehem Antidumping Brief at 18-19; Bethlehem Antidumping Reply Brief at 6-11.

⁴⁶Investigating Authority Brief at 74-79.

⁴⁷Final Determination, published in the D.O.F., August 2, 1994, paragraph 21.

SECOFI has presented no clear and understandable evidence, either in its brief or at oral argument, that Bethlehem Steel used three different freight values. Furthermore, SECOFI has not clearly established how it determined the adjustment between the invoice freight cost and the estimated freight cost. In fact, Bethlehem claims that deducing such a number from the information given was mathematically impossible. Without concrete and understandable evidence showing that Bethlehem Steel used three different freight values, we are unable -- on the basis of the information before us -- to avoid a conclusion that there was procedural error or that the facts did not exist or that they were considered in an erroneous way.

Moreover, we do not understand the way the domestic adjustment figure provided by Bethlehem was used as an adjustment factor in the context of sales to the Mexican market. Although not absolutely clear from either the oral argument or the briefs, it appears that the freight adjustment values reported for exports sales were calculated on a transaction-by-transaction basis and represent the actual freight adjustment figure for each transaction in question. If this is the case, it follows that no other adjustment can be made without double counting the freight adjustment. Furthermore, any double counting may artificially increase the margin of dumping by depressing the price of exports to the Mexican market. Here again, SECOFI has failed to provide an adequate and understandable explanation as to why it was appropriate to use the domestic adjustment factor when calculating the export price of the goods in question. It has also failed to adequately explain why Bethlehem's transaction-by-transaction adjustment did not adequately account for any discrepancy between the invoice cost and the actual out-of-pocket freight expense at issue. We thus again find it impossible to avoid a conclusion that the facts were considered in an erroneous way that requires us to remand under clauses III or IV of Article 238.

We would therefore remand both issues for SECOFI. It is possible that SECOFI could resolve this issue through a clearer explanation of its actual correction including a clear accounting of not only the procedure used for determining the actual transportation costs, but also of the calculation of all the relevant numbers and of the specific sources from which they were drawn. And it is also possible that the calculation should be fundamentally revised.

2. Profit Margin

Under certain circumstances, instead of using a domestic (U.S.) price to compare with the export (Mexican) price of an investigated product, SECOFI is to construct the value of the good in order to determine if dumping took place. This calculated or constructed value, as described above, includes three different components: the good's cost of production, transportation costs and general sales costs, and a reasonable profit margin. This portion of the dispute revolves around the last component. Bethlehem claims that SECOFI calculated a profit margin that was unreasonably high, unduly raising the U.S. value of the product and increasing the margin of dumping. The relevant Mexican regulation requires that:

As a general rule, as long as there is normally a profit on sales of products of the same general category in the internal market of the country of origin, the amount to be included for such a purpose shall not be greater than this amount. In other cases, the profit shall be based on reasonable criteria using available information.⁴⁸

SECOFI calculated the profit margin by looking at Bethlehem Steel's profit margins earned on individual transactions in the five years prior to the period of investigation. However, SECOFI excluded all transactions that resulted in losses and only relied on transactions that posted gains for Bethlehem Steel.⁴⁹

Bethlehem argues that transactions undertaken at a loss should have been included in the profit margin calculation. This exclusion of sales at a loss, it argues, elevates the calculated profit margin beyond reasonable levels. Bethlehem adds the argument that this violates the International Antidumping Code's legal requirement that profit margins included in constructed value calculations be reasonable.⁵⁰

As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.⁵¹

SECOFI's position is that it excluded sales that resulted in losses in order to reach a profit margin that was generated by normal commercial transactions. It reads Mexican law's requirement that the profit margin represent normal commercial operations to mean that the profit must be calculated only from normal commercial transactions. SECOFI further explains that these normal transactions can not occur at a loss because no firm could function for an extended period of time engaging in sales below cost and, therefore, these transactions are not normal. SECOFI claims that this approach is mandated under the law because if transactions at a loss are included in the profit margin calculations, the constructed value could be lower than actual sales prices. This would plainly go against Mexican law which states that the cost of production in its entirety must make up one of the factors of the reconstructed value.⁵²

⁴⁸Article 2 (II)(B), of the Regulation against Unfair Practices in International Trade, D.O., November 25, 1986.

⁴⁹Final Determination, published in the D.O.F., August 2, 1994, Paragraph 44

⁵⁰Bethlehem's brief on Dumping Issues, Pages 20-24; Bethlehem's reply brief on dumping issues, pag. 11.

⁵¹International Antidumping Code, Article 2(4).

⁵²Article 7(I)(b) of the Law Implementing Article 131 of the Constitution. Investigating Authority Brief at 87-104

The pattern of antidumping law in a number of nations, including the United States, is to use a constructed value estimate of the source nation price precisely in those cases in which actual sales are, in some sense, taking place at a loss. This pattern must be considered in interpreting the International Antidumping Code. It would undercut the purpose of the constructed value concept to require that negative profits be taken into account.

Under clause V of Article 238, we must ask whether SECOFI's exercise of its administrative discretion corresponds to the purposes for which the law confers such powers. The statute and the international convention require only that the methodology and the profit margin generated be reasonable. From this perspective, our conclusion would be that it was an appropriate exercise of discretionary powers for SECOFI to determine that sales below cost are not in the course of normal commercial transactions and should be excluded from the calculation of the profit margin.

IV. CONTROVERSIES WITH RESPECT TO SECOFI'S DETERMINATION OF INJURY

Bethlehem also raises objections to SECOFI's finding that the Mexican steel industry was harmed. One objection is that SECOFI relied upon an external consultant's report and that neither the report nor the name of the consultant was made available to it. Others are issues of substantive anti-dumping law. These include (1) an argument that the Mexican complainant in this case, Altos Hornos de Mexico S.A. de C.V. (AHMSA), has a monopoly position due to a number of anti-competitive arrangements and that it was error to view as injury the lowering by imports of a non-competitive price (to competitive levels), (2) an argument that AHMSA was not shown not to be working at capacity and was thus not harmed, and (3) an argument that SECOFI erred in finding harm to AHMSA by relying on evidence about the steel industry as a whole rather than on evidence that separated the effects of imports of those products found to be dumped.

1. The External Consultant's Report

As part of its determination of whether there was injury, SECOFI commissioned an expert consultant's report, and referenced it in the Final Determination.⁵³ Neither the consultant's report nor the identity of the consultant were made available to Respondents.⁵⁴

The exact extent to which SECOFI relied upon the report in preparing its Final Determination is a matter of dispute. Respondents claim that SECOFI relied heavily on the

⁵³Final Determination, Paragraphs 123, 127, 154, and 155

⁵⁴In addition to their regular briefs, the parties filed supplementary briefs on this issue after the oral argument.

report in defining what products are similar to those imported and in its findings that the industry had excess capacity.⁵⁵ SECOFI counters in its brief that the excerpts quoted by Respondents are isolated excerpts of the Final Determination and that it did not base its decision mainly on the Consultant's Report. SECOFI states that it determined the methodology to be followed in light of the applicable legislation, that its decision was based on the evidence contained in the administrative record submitted by the parties as well as on evidence obtained directly by SECOFI, and that the Consultant's Report was taken into account for highly specialized technical aspects, such as physical and chemical properties and specifications of the

⁵⁵In its brief, Bethlehem indicated that during the prosecution of the investigation, it had proposed the exclusion of certain products because the domestic industry did not make them or they were of low quality. (Bethlehem Injury Brief at 14). It also indicated that AHMSA opposed the exclusion and that SECOFI rejected requests to determine whether the industry produced such products or even those that could fulfill the same functions, relying on the Consultant's Report for this determination. (See Final Determination published August 2, 1994 in the D.O.F. at paragraphs 28 and 31.) In support of this argument, Bethlehem cites the following sections of the Final Resolution to indicate the importance given by SECOFI to the technical Report:

Paragraph 123 “. . . the Secretariat takes into account all the facts submitted by the interested parties . . . described under points 120 to 121, and the result of a technical study by a special consultant.”

Paragraph 127, part c) “Beginning with the technical report, the arguments and evidence from the interested parties . . .” and in part d) “Once these factors [arguments, evidence, and technical report] are evaluated . . . it can be concluded that . . .”

In the Bethlehem brief it is also argued that although there was unequivocal proof in the administrative record that AHMSA operated at full capacity, SECOFI contended that AHMSA was operating at full practical capacity and that it asked an unidentified consultant to evaluate the arguments of AHMSA. In support, Bethlehem cites the following paragraphs of the Final Determination. (Bethlehem Injury Brief , pages 18-19):

Paragraph 154, “The Secretariat sought the opinion of an external consultant to evaluate the real capacity of the complaining enterprise during the period under investigation. From the technical opinion, it can be concluded that the actual capacity as presented to the Secretariat is correct, even though this enterprise has a larger nominal capacity.”

Paragraph “On the basis of the arguments and evidence submitted by the involved parties and the external technical opinion, the Secretariat concludes that the level of utilization of the installed capacity of the complainant decreased in the terms described in Paragraph 150. See Bethlehem Brief on Injury, pages 13-18; Bethlehem Reply Brief on Injury, pages 4-21.

products subject to the investigation.⁵⁶

Respondents question SECOFI's refusal to disclose the contents of the report and to disclose the identity of the technical consultant and they argue that by not making available a public version of the consultant's report the Authority violated transparency requirements of Mexican law and the GATT.⁵⁷ They claim that SECOFI's repeated denials of their requests for disclosure of such information deprived them of an opportunity to refute misstatements, correct errors, mount a proper defense, and challenge the qualifications and potential bias of the consultant. In other words, they argue that the Authority violated clause III of Article 238 of the Fiscal Code and that this panel should strike down this section of the Determination, with the effect that the Authority would issue a new determination in which their defenses and arguments are taken into account.

SECOFI responds that its refusal to provide the name of the consultant and the consultant's technical report does not violate any requirements of Mexican law or the GATT. It argues that it was authorized by law to obtain the consultant's services, and that the consultant's technical opinion was only one element upon which it relied in determining similar product and excess capacity, and that such determinations were also based on the evidence in the record and evaluated in accordance with a methodology developed by SECOFI. It further argues that the technical consultant's report was not submitted by a party to the investigation, and that the report is an internal document which was prepared for internal use and, as an internal document, was appropriately designated as confidential. SECOFI states that it did in fact make public versions of the document available to the Respondents, and that confidential versions were made available to those with access to such confidential information. Finally, it argues that its non-disclosure of the name of the technical consultant does not raise the appearance of a conflict of interest.⁵⁸

In discussing this issue in its brief, SECOFI did not take a position as to which clause of Article 238 should apply. In its oral argument at the hearing however, it asserted that clause IV provides the applicable standard of review, thereby more narrowly framing the issue. By referencing Section IV, the Investigating Authority asks the Panel to consider only whether SECOFI properly applied the law before it, i.e. whether it was justified in treating the technical consultant's report as a privileged internal document and the consultant's identity as confidential within the terms of Article 23 of the 1986 Regulations Against Unfair Practices in International Trade:

The claimants, the importers, and exporters of

⁵⁶Investigating Authority Brief at 106 on similar product issue and 111 on excess capacity issue

⁵⁷Bethlehem Injury Brief at 10.

⁵⁸Investigating Authority Brief at 105-131

merchandise involved in the investigation, as well as involved representatives of the governments of exporting countries, can obtain the information given to the Secretariat by any of the affected parties, with the exception of the internal documents prepared by the Secretariat and those considered confidential.

At the hearing, Panelists inquired whether the Report was in the record and accessible to them for their review. The Investigating Authority replied that it was.⁵⁹ However, when Panelists attempted to review it, they found it was not available in complete form in the record and requested on May 11, 1995 that SECOFI provide it to the Panel. On May 16, 1995, the document, in its confidential form, was submitted to the Panel and, apparently for the first time, annexed to the confidential record of the case.⁶⁰ During this same period, on May 17, 1995 in response to Panel Orders of April 28, 1995 and May 12, 1995), SECOFI issued an order authorizing Respondent's attorney to have access to confidential information.

We must deal here, however, with the way the issue was presented at the time of the Final Determination. It is important to take into account two aspects of this question.

The first is that the issue presented to us here is a transitional issue that we do not expect to see arise in the same way under Mexican law in the future. Article 23 of the 1986 Regulations, just quoted, which applies in this case that provided that SECOFI could develop and use confidential information, and envisioned information would be available to it alone. In contrast, Mexico's new law provides a mechanism (comparable to that of both Canada and the United States) under which at least a portion of the confidential information is shared among attorneys of all parties:

The Secretaría will provide interested parties timely access to examine all the information which is held in the administrative record for the presentation of their arguments. Confidential information will be available only to the accredited legal representatives of the parties interested in the administrative investigation, with the exception of reserved commercial information whose divulging could cause substantial and irreversible harm to the holder of such

⁵⁹See Transcript of the Public Hearing (Spanish version), page 286, line 27.

⁶⁰See Official Record, Volume 16, Document No. 422.

information and of government confidential information.⁶¹

Thus, although there is still a limited category of information that is not shared, the new law provides a mechanism under which information such as that at issue in the consultant's report can be made available to opposing attorneys. Such a mechanism was not available under the older law under which the current proceeding is conducted.

Second, we do not doubt SECOFI's legal ability to create categories of confidential information, and we think it is very likely that the consultant's report involved in this case could be considered an "internal document," and thus subject to confidentiality under the old trade regulations. Neither the Respondents nor SECOFI, either in their briefs or in their oral arguments at the hearing, cited any law interpreting the definition of "internal documents." SECOFI argued that the Report should be considered an internal document because the consultant "acted as an assistant helping the Investigating Authority in the investigation..." and because the Report "was part of the deliberation process of the authority...."⁶²

Respondents are in disagreement with respect to the treatment of the Report as an internal document, and their argument is that it was not prepared by officials of the Investigating Authority but by an "outside consultant," who was employed by SECOFI for the express purpose of preparing the Report. Respondents emphasize the express language of Article 23: "internal documents prepared by the Ministry"⁶³ and argue that the Report was not in the strict sense an "internal document" because it was prepared by persons outside the Ministry.

We believe that it would be inappropriate not to allow SECOFI to work through consultants and, at least under the old law, to create "internal documents." The consultant was employed by the Investigating Authority and the work product of such a contractual relationship would normally be considered the property of the agency which contracted for the report. Thus, we do not believe that we should reject SECOFI's creation and use of confidential information under clause IV of Article 238 as a violation of the applicable rules.

However, this leaves us with the much more difficult and broader question whether SECOFI's refusal to disclose the Consultant's Report and to reveal the identity of the consultant violate the standards of Articles 14 of the Mexican Constitution and the obligations prescribed in the GATT Antidumping Code then in force and accepted by Mexico. If SECOFI failed to meet these standards, its action violates clause II of Article 238, which directs remand in case of procedural defects that affect the defenses of the individual and affect the meaning of the

⁶¹Law of Foreign Commerce, Art. 80, D.O., July 27, 1993.

⁶²Investigating Authority Brief at 115

⁶³Bethlehem Reply Injury Brief at 11

challenged determination.

Article 14 of the Mexican Constitution guarantees "legal security" and "legality."⁶⁴ It specifically states:

No one shall be deprived of life, of liberty, or of his/her properties, possessions, or rights, except by means of a judgment pursued before a previously established tribunal, in which there is compliance with essential procedural formalities, and in conformity with laws issued before the event.

It is clear that the standard includes a right to be heard and particularly the right to have access to information that is necessary to mount a viable defense. There must be, for example, "the possibility of contradiction between the demonstrative elements held by the authority and those presented by the individual."⁶⁵

The GATT Antidumping Code also includes transparency requirements. The Preamble to Article VI states that it is "desirable to provide for equitable and open procedures as the basis for a full examination of dumping cases." Article 6.7 provides that "[Throughout the antidumping investigation all parties shall have a full opportunity for the defense of their interests." And, quite explicitly, Article 6.2 provides that:

⁶⁴ Polo Bernal, Efrain, Breviario De Garantías Constitucionales, Editorial Porrúa, S.A. (Mexico 1993) at 121. Moreover, according to interpretations by Mexican courts and scholars, Article 14 includes the requirements set forth in Clause III of Article 238. See generally Burgoa Orihuela, Ignacio, Las Garantías Individuales, Editorial Porrúa, S.A., 24th ed. (Mexico 1992) at 505-573; Castro, Jeventino V., Garantías y Amparo, Editorial Porrúa, S.A., 7th ed. (Mexico 1991) at 229-249; Polo Bernal, Efrain, *supra*, at 116-155.

⁶⁵ With respect to the verification powers of authorities to determine compliance on the part of taxpayers, there is compliance with the constitutional guarantee of a hearing, through permitting intervention by the individual during the total official administrative proceeding. Or through permitting the opportunity to offer any type of information and probatory evidence which may be presented to the authority to show compliance with his obligations, and this opportunity to intervene, whether consisting of a simple request for information or a formal hearing, requires that in any of them, there be the possibility to contradict the evidence held by the authorities by means of declarations, response, or affidavits on the facts which relate to the relevant action, as well as to make comments on irregularities and omissions with respect to verifications. Polo Bernal at 142.

The authorities concerned shall provide opportunities . . . to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 3 . . . and that is used by the authorities in an antidumping investigation, and to prepare presentations on the basis of this information.

Paragraph 3 goes on to define confidential information in terms of the commercial implications of the information and of the way in which it was provided. It permits non-disclosure of the data, while noting in footnote that some parties permit disclosure subject to a narrowly-drawn protective order.

The GATT Antidumping Code is directly applicable in Mexico under Article 133 of the Mexican Constitution.⁶⁶ It does allow confidential information to be held from the parties under certain circumstances, but the objective and spirit of the Agreement are clearly to have open and fair procedures.⁶⁷ We believe that if this objective and spirit are used as a perspective in interpreting Article 14 of the Mexican Constitution, every scope must be given to that Article's requirement that the parties in this case have access to information necessary to mount a viable defense.

Because the scope of the investigation (similar product) and the assessment of capacity may have been based in significant part on the work of an unidentified consultant whose work and whose potential for conflict could not be challenged, we believe that failure to disclose the document (under a protective order) or to disclose the name of the consultant violates Article 14. The only accountability of the consultant is to the agency which itself is building its case against the Respondent, and under the procedures of this case, there is no way for the parties to evaluate the consultant's report or possible interests in the case. Failure to disclose the identity of the technical consultant also raises the appearance of a conflict of interest. Respondents allege that the consultant never visited AHMSA's plant (he/she was so familiar with the industry that a visit was unnecessary); moreover, SECOFI assured Respondents that the consultant was the most prominent steel expert in Mexico and that the consulting company "did a lot of business with the steel industry in Mexico," all of which would clearly pose a

⁶⁶ Article 133: This Constitution, the laws of the Congress of the Union that emanate from it and all the treaties which are in accord with the same, celebrated and which are celebrated by the President of the Republic, with the approval of the Senate, will be the supreme law of all the Union.

⁶⁷ Under the new Antidumping Code (from the Uruguay Round), which is not applicable here, the provisions for transparency are much more explicit and encourage an open and fair procedure.

possible conflict of interest. For all these reasons, we conclude that the Determination should be remanded to the Investigating Authority under clause III of Article 238.

2. Injury in a non-competitive context

Bethlehem makes a very interesting and economically significant argument with respect to dumping law's injury evaluation in the context of a monopolistic industry. It notes that AHMSA is the only Mexican producer of carbon steel plate, that the firm's opportunity to charge a monopoly price has not been limited by the Mexican government, and that the firm has a number of restrictive agreements with producers in other nations. In such a situation, imports are the only way to give the Mexican consumer the benefit of a competitive price. SECOFI should, it argues, have considered this point, and its failure to do so is a violation of Articles 20 and 28 of its regulations⁶⁸, which require that it "review the elements that serve as a basis for issuing its provisional resolution"⁶⁹ and that its resolution must consider "the modalities with respect to . . . a reasoned analysis".⁷⁰

SECOFI's response is that it does not have jurisdiction to make such a competition law analysis, and that the implications of any monopoly position that AHMSA may hold are solely for the Federal Competition Commission. It follows, for SECOFI, that it would be inappropriate for it to make the analysis suggested by Bethlehem, and that such an analysis would violate Articles 20 and 28.⁷¹

Bethlehem responds that the regulation's definition of "injury" requires that the profits lost by the affected industry be "legal" and "normal,"⁷²

There are reasonable economic arguments that the term "legal and normal" should be read to mean "competitively determined." Under the standard of review applicable to these proceedings, it is clear, however, that SECOFI has the authority to decide not to import such a competition-based restriction. The relevant section is clause V of Article 238, which directs that a decision be overturned when discretionary powers are exercised in a way that does not correspond to the objectives of the law. Whether or not Bethlehem is right as a matter of economics, it is impossible to say that SECOFI's decision is not directed to achieving the objectives of the law.

⁶⁸Bethlehem's brief over Injury Issues, pp. 42-47

⁶⁹Article 20, Regulation against International Unfair Trade Practices

⁷⁰Article 28, *ibid.*

⁷¹Investigating Authority Brief at 132-138

⁷²Regulations Against Unfair Practices in International Trade, Article 1(VIII) as amended. Bethlehem Reply Injury Brief at 28-30

3. AHMSA's capacity and operating level

Bethlehem's concerns with SECOFI's analysis of AHMSA's operations and capacity reflect, in part, Bethlehem's inability to review the consultant's report discussed elsewhere. These concerns can, however, be supported by clearly discernable facts. In July 1992, AHMSA declared to the U.S. International Trade Commission that it was operating "at full capacity, taking into account the limitations imposed by its limited supply of raw steel." Bethlehem suggests that the limitations derived from AHMSA's decision to close its oldest raw steel furnaces, as a result of which AHMSA was forced to allocate raw steel among various products, and the production of steel plate did not use all the specific installed capacity available, although the overall system was operating at "full practical capacity." Bethlehem then argues that AHMSA's declaration of operation at full capacity necessarily applies to **all** products.⁷³

SECOFI responds that its Final Determination recognized the conflicts between AHMSA's statements to the Mexican and U.S. authorities and that it therefore conducted a separate investigation of AHMSA's capacity.⁷⁴ This investigation, of course, relied upon the consultant's report discussed above.⁷⁵

In its response brief, Bethlehem continues to argue that AHMSA's statement to the U.S. authorities implies that AHMSA was operating at full capacity, and also suggests that SECOFI should have analyzed the difference between "practical capacity" and "installed capacity" as a way of resolving the possible contradictions in AHMSA's statements.⁷⁶

When faced with a contradiction, such as is alleged here, between a firm's statements to it and to foreign authorities, SECOFI must clearly conduct an investigation to determine which statements are accurate. That it did so in this case is not contested by Bethlehem. In fact, SECOFI did consider the difference between practical capacity and installed capacity, and also analyzed the possibility that there could be injury in a situation such as this in which a specific production line is used at less than installed capacity as the result of an allocation decision. SECOFI admitted that installed capacity for sheet steel was not being completely utilized and concluded that this was the result of a shortage of steel inputs that was being used to fabricate other products, in virtue of the price effects of the dumped imports on the products subject to the investigation. In sum, whether we look to sections III, IV, or V of Article 238, we conclude that SECOFI has committed no error in the analysis that there is damage within the terms of the relevant Mexican legislation on antidumping. Therefore, we conclude that there is no reason for remanding this issue to SECOFI.

⁷³Bethlehem Injury Brief at pp. 43-56

⁷⁴Definitive Resolution, paragraphs 152-54

⁷⁵Investigating Authority Brief at 139-158

⁷⁶Bethlehem Reply Injury Brief at 21-28

4. Reliance on global rather than specific steel data

Finally, Bethlehem argues that SECOFI did not adequately focus its analysis of the Mexican steel market and of AHMSA's financial position, i.e. that it considered effects on the steel industry generally rather than on those specific forms of steel that actually competed with the products found to be sold at dumping prices. In other words, in reviewing AHMSA's financial position, Bethlehem argues that SECOFI made no effort to separate the effects of AHMSA's steel plate operations from its other steel operations. And, it argues that, in looking at price effects, SECOFI compared the average prices of the imported products under investigation with the average prices of all Mexican steel products. This, under its analysis, violates GATT, because of GATT's requirement that the comparisons be made with like products. The GATT Antidumping Code requires that the injury decision:

. . . shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.⁷⁷

By using words such as "like products" and "such products," Bethlehem argues, GATT requires a degree of specificity not followed by SECOFI in making the comparisons with national products.⁷⁸

SECOFI responds, with respect to its analysis of AHMSA's financial position, that Mexican law requires it to look at a number of factors in evaluating damages and, in particular, to consider the effect on enterprises. Article 15 of the 1986 Law requires it to consider the volume of imports, the effect on prices, and the effect on national producers. This effect on producers is detailed in Article 15.3:

The effect caused or which may be caused on

⁷⁷ In addition, Article 3.5 states:

The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realizations, profits. When the domestic production of the like product has no separate identity in these terms the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

⁷⁸ Bethlehem Injury Brief at pp. 69-82

national producers of merchandise identical to or similar to that imported, considering all the factors and pertinent economic indices which relate to production and sales, such as their appreciable or potential decline, participation in the market, return on investment, utilization of installed capacity, factors which affect internal prices, appreciable and potential negative effects on employment, salaries, growth, investment, and other facts that may appear appropriate.

In light of such a broad directive, SECOFI is, it argues, free to look at overall profit. Similarly, under GATT and Mexican law both, it is entitled to look at price impacts on “similar products.” Thus, it argues, it has complied with the law.⁷⁹

Bethlehem responds, with respect to the impacts on the Mexican producer, that steel plate represents only 18 % of AHMSA’s operations, so that it is inappropriate to use the overall numbers. And with respect to overall prices, Bethlehem argues, SECOFI should not be using average prices at all, but should be using a sample of price comparisons on specific products.⁸⁰

In general, it is better to make a judgment about the impact of imports on enterprises using data of the type suggested by Bethlehem; similarly, it is better to make a judgment about the impact on prices using price trends for the specific products being imported. At the same time, SECOFI’s use of a different approach is not necessarily a procedural error or an erroneous analysis of the facts, as would be required for remand under Clauses III or IV or Article 238.

Three factors lead us to this position. First, to the extent that SECOFI analyzed broader data rather than specific data, the breadth actually dilutes the effect of any dumped imports. Thus, if all other factors are equal, a price decline with respect to 18 % of a firm’s products will decrease the firm’s profit by just 18 % of a price decline among all products. Assuming there were no other effects that produced an impact on other products that would be misattributed to imports, SECOFI’s approach actually makes it harder to find damage and, therefore, did not affect Bethlehem’s legal interests.

Second, we recognize that SECOFI may not have available to it all the specific data it might like. To the extent to which it had more precise data, this should, of course, be used, and with respect to AHMSA’s price of steel plate, SECOFI in fact used specific data.⁸¹ However,

⁷⁹Investigating Authority Brief at 159-185

⁸⁰Bethlehem Injury Reply Brief at 30-39

⁸¹To the extent that more precise data are available, they should, of course be used -- and, at least with respect to AHMSA’s price for plate, SECOFI did use specific data, Final

article 3.5 of the Anti-dumping code establishes that the character of an injury determination depends on the availability of information:

The effects of the dumped goods will be evaluated in relation to the national production of like products data allows for its separate identification, with the application of criteria such as: the process of production, the results for sales to producers, and those benefits. When national production of the similar product does not have a separate identity in relation to these factors, the effect of the imports subject to the dumping investigation will be evaluated subject to the production of the most restricted group of products that includes the similar product and that has reliable data.

Thirdly, we believe that this part of the analysis, in which SECOFI must weigh and evaluate the available information to make a difficult decision, is precisely the type of situation in which SECOFI's expertise and capability must be respected. Certain parts of this analysis require SECOFI to apply discretion, which we must accept in accordance with clause V of Article 238, particularly when, as in this case, the applicable legislation permits the analysis of a broad range of data. In virtue of the foregoing, we do not believe that there is any reason to remand the determination to SECOFI on this issue.

VI. Order of the panel

For all the reasons stated above we would therefore remand with instructions:

- (1) To recalculate or to clarify the calculations of freight adjustments with respect to both the U.S. and Mexican price determinations, and
- (2) To determine injury without use of the expert consultant's report on injury, unless opposing counsel has the opportunity to comment on the report as well as on the possible bias of the consultant.

Determination at Paragraph 139.

Signed in the original by:

Date

Gustavo Vega Cánovas
Chair

John H. Barton
Panelist