

52

BINATIONAL PANEL REVIEW
Pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:

FINAL DETERMINATION OF THE
ADMINISTRATIVE AND SUNSET
REVIEW OF THE ANTIDUMPING
DUTY ON THE IMPORTS OF CERTAIN
TYPE OF STEARIC ACID FROM THE
UNITED STATES OF AMERICA,
IRRESPECTIVE OF THE COUNTRY
OF SHIPMENT. THIS MERCHANDISE
IS CLASSIFIED IN THE TARIFF
SCHEDULES OF THE GENERAL
IMPORT AND EXPORT TAX LAW AS
3823.11.01 AND 3823.19.99.

SECRETARIAT FILE NO:

MEX-USA-2011-1904-01

PANELISTS:

Marguerite Trossevin

Lynn Kamarck

Velta A. Melnbrencis

Mariano Gomezperalta Casali

Eunice Herrera-Cuadra. Chair.

SECCIÓN MEXICANA DEL
SECRETARIADO DE LOS
TRATADOS COMERCIALES

10 OCT. 2013
10:00 am
RECIBIDO

PARTICIPANTS

A. Claimant

Quimic, S.A. de C.V. (hereafter "Quimic" or the "Claimant"), represented by Eduardo David Garcia and Juan Carlos Partida Poblador.

B. Investigating Authority

Unidad de Prácticas Comerciales Internacionales of the Mexican Ministry of Economy (hereafter "UPCI" or the "Investigating Authority") represented by Victor M. Aguilar Pérez, Adriana Díaz Ortiz and Rodrigo Orozco Gálvez.

C. In support of the Investigating Authority

Vantage Oleochemicals, Inc. (hereafter "Vantage"), appearing *ad cautelum*, represented by Adrian Vazquez Benitez and Horacio Armando Lopes Portillo Jaso.

INTRODUCTION

This Binational Panel has been established pursuant to Article 1904.2 of the North American Free Trade Agreement (hereafter "NAFTA") and is charged with the power to review the Final Determination of the administrative review of the antidumping duties on the imports of certain type of stearic acid from the United States, irrespective of the country of shipment, issued by the UPCI on September 29, 2011 and published in the *Diario Oficial de la Federación de los Estados Unidos Mexicanos* (Official Gazette of the Federation, hereafter "DOF") on October 7, 2011 (hereafter the "Determination"). This Determination modified the final antidumping duties derived from the final decision of April 8, 2005 to an antidumping duty of 17.38% and revoked the "all others" antidumping duty applicable to the merchandise exported by Vantage.

The Panel issues this Decision and Order pursuant to Article 1904.8 of NAFTA and Part VII of NAFTA Article 1904 Rules of Procedure regarding the Binational Panel Reviews (hereafter "Rules of Procedure").

I. PROCEDURAL BACKGROUND

A. Administrative Proceedings

On April 8, 2005 the Investigating Authority published in the DOF the final decision that imposed antidumping duties on the import of certain types of stearic acid.

On November 11, 2009 the Investigating Authority published in the DOF the Notice of Sunset Review of the applicable antidumping duties of certain types of stearic acid. In response to this notice, Quimic requested that the Investigating Authority initiate a sunset review.

On April 7, 2010 the Investigating Authority published in the DOF a notice initiating both a sunset review and an administrative review of the antidumping duties, establishing January 1 to December 31, 2009 as the period of the investigation and review.

On February 14, 2011 the preliminary decision, to continue with the proceedings and to maintain the existing antidumping duties, was published.

On October 7, 2011 the final determination was published, which concluded that there was sufficient evidence to determine that the revocation of the antidumping duty would allow the continuation of the unfair trade practice, and, therefore, it modified the antidumping duty imposed in the Final Decision of 2005, extending it for another 5 years. It also revoked the "all others" antidumping duty applicable to Vantage, subject to further review for three years, in accordance with Article 105 of the *Reglamento de la Ley de Comercio Exterior* (Regulation of the Foreign Trade Law, hereafter RLCE).

B. Proceedings before the Panel

On November 4, 2011 Quimic requested a Binational Panel review of the Final Determination published in the DOF on October 7, 2011.

On December 5, 2011 Quimic filed its Complaint in conformity with Rule 39 of the NAFTA Article 1904 Rules of Procedure.

On December 15, 2011 Vantage filed its notice of appearance *ad cautelum* in conformity with Rule 40(1) (a) (b) and (d) (ii) of the Rules of Procedure.

On December 16, 2011, the Investigating Authority expressed its interest in participating in the review by filing a notice of appearance pursuant to Rule 40(1)(b) and (1) (a) (b) and (d)(ii) of the Rules of Procedure.

On March 5, 2012, Quimic filed its brief in conformity with Rule 57(1) of the Rules of Procedure.

On May 4, 2012, Vantage filed an *ad cautelam* brief in opposition to the Complainant's brief in conformity with Rule 57(2) of Rules of Procedure. On the same date the Investigating Authority filed its Reply brief in opposition to the Complainant's brief in conformity with Rule 57(2) of Rules of Procedure.

On May 21, 2012, Complainant filed a Reply brief in conformity with Rule 57(3) of Rules of Procedure in opposition to the arguments raised by the Investigating Authority and Vantage in their respective briefs.

On January 18, 2013, based upon Rule 61 of the Rules of Procedure, Vantage filed an incidental motion offering what it considered supervening evidence.

On January 28, 2013, the Investigating Authority responded to the incidental petition filed by Vantage. On the same day, Quimic responded in opposition to the petition.

In conformity with Rules 65 and 67 of NAFTA Rules of Procedure, the public hearing was held in Mexico City on April 11, 2013. At this hearing, the parties had full opportunity to present the arguments raised in their briefs.

On April 15, 2013, pursuant to the Panel's request, the Investigating Authority filed authorities cited during the public hearing.

On April 23, 2013, in conformity with Rule 61 of NAFTA Rules of Procedure, Quimic filed a motion requesting that the Panel reject the authorities presented by the Investigating Authority.

On May 3, 2013, the Investigating Authority responded to the motion filed by Quimic, mentioned in the above paragraph.

II. DETERMINATION UNDER REVIEW

As described in Section I.A, the Investigating Authority initiated a sunset review and an administrative review jointly. The Complaint only refers to the administrative review. Therefore, the Panel has limited its analysis and decision to this administrative review, which is within the Panel's competence pursuant to the NAFTA Rules.¹

III. STANDARD OF REVIEW

Pursuant to Article 1904.2 of NAFTA, the legal provisions that the Panel must apply as its standard of review are the relevant statutes, legislative history, regulations, administrative practice and the relevant judicial precedents to the extent that a court of the importing Party party would rely on such materials to review the final determination at issue. The Panel should also apply the general legal principles that the court of the importing country otherwise would apply to review the final determination. That is to say, the Panel should base its review on the law, administrative practice, and judicial precedents of the country that issued the final determination that will be reviewed.

Article 1904.3 of NAFTA states that the Panel should apply the standard of review set forth in Annex 1911 of NAFTA, which defines the applicable standard of review for the final determinations. Section c) establishes that the standard of review applicable for review of the final determinations issued by the Mexican authority is set forth in Article 238 of the *Código Fiscal de la Federación* (Federal Fiscal Code, hereafter CFF) or any successor statute based solely on the administrative record. This provision was subsequently replaced by Article 51 of the *Ley Federal del Procedimiento Contencioso Administrativo* (Federal Law of Administrative Litigation Procedure, LFPCA), and was published in the DOF on December 1, 2005, which states:

¹ Complainant's Brief, Public version pp. 4, 24, and 25. Investigating Authority's Response Brief, Public version pp. 42-44. Transcript of Public Hearing, April 11, 2013, pp. 6, 7, 43, and 44.

ARTICLE 51. An administrative decision shall be declared illegal in the following cases:

I. Incompetence of the official that made the decision or order or conducted the proceeding, which gave rise to the decision.

II. Omission of the formal requirements required by the laws that affect the defenses of the private party and have an effect on the impact of the challenged resolution, including the absence of a basis or rationale as the case may be.

III. Errors in the proceeding that affect the defenses of the private party and have an effect on the meaning of the challenged resolution.

IV. If the facts that gave rise to the cause of action did not occur, were different or were evaluated wrongly, or if an order was made in violation of the applicable rules or there was a failure to apply the rules that should have been applied.

[...]

Arbitral bodies or other bodies arising from alternative dispute settlement mechanisms, particularly from the area of unfair international trade practices, and contained in international treaties and conventions to which Mexico is a party, may not revise the grounds listed in this article without a previous complaint from an interested party.

Therefore, this Panel may only declare that the Determination subject to review is illegal based on the grounds listed in Article 51 and according to the issue(s) set forth in the Complaint.

IV. ARGUMENTS OF THE PARTIES

A. COMPLAINANT

According to the arguments in the complaint, Quimic argues that there are two different review procedures: a procedure for change in circumstance pursuant to Articles 99 and 100 of the RLCE; and, the review procedure established in Article 101 of the RLCE. Quimic argues that the procedure established in Articles 68 of the LCE, 99 and 100 of the RLCE is not the "ideal" procedure to modify the dumping margins. Additionally, Quimic states that the Investigating Authority could review the dumping margins in conformity with Article 101 of the RLCE but it did not do so.

Quimic argues that the Final Determination is illegal because, in its view, the Investigating Authority may not modify margins of dumping in a review under Article 11.2 of the World Trade Organization ("WTO") Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade ("ADA") of 1994, known as the Antidumping Agreement (hereafter "ADA"), Article 68 of the *Ley de Comercio Exterior* (hereafter "LCE"), nor in accordance with Articles 99 and 100 of the RLCE.²

Quimic also argues that, even if the Investigating Authority may modify dumping margins under the changed circumstance procedure, it was illegal to do so in this case because, according to Quimic, Vantage was a "new shipper".³

Quimic argues that Vantage was not an interested party in the administrative review conducted under Articles 68 of the LCE and Articles 99 and 100 of the RLCE, and, therefore, the Investigating Authority could only calculate a dumping margin for Vantage through a new shipper investigation, pursuant to Article 9.5 of the ADA and Articles 89-D of the LCE and 101 of the RLCE.

Furthermore, the Complainant claims that even if the Panel decides that the procedure established in Articles 11.2 of the ADA and Articles 99 and 100 of the RLCE allow the Investigating Authority to modify the antidumping duties applicable to Vantage, the determination subject to review is illegal because the Investigating Authority incorrectly and improperly determined a specific margin of price discrimination for Vantage in the antidumping duty review procedure, where Vantage is a recently created company that did not export during the original period of investigation. The Complainant considers that the above is contrary to Articles 9.5 of the ADA and 89-D of the LCE, which contain express provisions for a specific and ideal procedure for the determination of antidumping duties for companies that did not ship the investigated merchandise during such period.⁴

According to Quimic, Vantage is a new shipper for all purposes related to the application of the antidumping duty, and as such, it should not have been

² Complainant's Brief. Public version pp. 30-34.

³ Complainant's Brief. Public version pp. 34-36.

⁴ Complainant's Brief. Public version pp. 34-36.

considered as an interested party in the antidumping review procedure, nor should a specific margin of price discrimination be calculated for Vantage in such procedure.

Quimic argues that if Vantage's intentions were to have a specific margin of price discrimination calculated, it could have initiated, at any moment, a new shipper procedure. Quimic suggests that by Vantage not doing so *motu proprio*, the Investigating Authority should have directed Vantage to use such procedure.⁵

Additionally, the Complainant contends that the definition of interested party relevant for the review at issue is the definition established in Article 89-D of the LCE and not Article 51 of the LCE because the latter contains a general definition that, according to Quimic, does not apply for special procedures. It is worth noting that both the Complainant and the Investigating Authority confirmed during the hearing that the new shipper procedure can only be initiated at a party's request. The Investigating Authority does not have the authority to initiate the procedure *ex officio*.⁶

Finally, during the hearing the Complainant argued, in support of its allegations, that Article 68 of the LCE only allows the confirmation, modification, or revocation of the antidumping duties but does not allow the determination of antidumping duties. The Complainant appears to argue that in determining an antidumping duty of 0% for Vantage in the Resolution, without a prior specific antidumping duty for such company, the Investigating Authority acted in an illegal manner and violated the terms expressed in Article 68.

B. Investigating Authority

The Investigating Authority argues to the contrary that, consistent with Article 11.2 of the ADA, it is authorized by law to review antidumping duties and to modify them or eliminate them in accordance with the results of such investigation.

The Investigating Authority also asserts that, under Mexican law, there is one administrative review process, which is established in Article 68 of the LCE and

⁵ Complainant's Brief. Public version p. 39, second paragraph. Public Hearing Transcript p. 9.

⁶ Public Hearing Transcript, pp. 12-18.

Articles 99 and 100 of the RLCE and that it properly acted in conformity with those provisions when it conducted an *ex officio* review of Vantage.

In regards to the Complainant's claim that the Investigating Authority could only establish a specific antidumping duty for Vantage in accordance with the new shippers procedure, the Investigating Authority stated that it gave notice, during the review, to all the interested parties, pursuant to Articles 6.11 of the ADA, 51 of the LCE, and 100 of the RLCE. And, pursuant to Article 51 of the LCE, exporters, importers, and national producers are considered interested parties. The Investigating Authority considers that Vantage is an interested party, regardless of whether it is or is not of recent creation, or whether it exported or not during the original period of investigation, because if a company exported the merchandise during the review period the Investigating Authority must consider it as an interested party. If it does not do so, it would be acting contrary to law.⁷

In regards to the argument presented by the Complainant during the hearing in regards to Article 68 of the LCE only allowing the confirmation, modification, or revocation of the antidumping duties, but, not their establishment, the Investigating Authority argued that there was no creation of an antidumping duty based on the administrative procedure at hand, but a "modification" of the "all others" antidumping duty and that is in conformity with Article 68 of the LCE.

C. *Ad cautelum* participation

Before addressing the arguments presented by the parties in dispute in the Briefs and in the oral argument during the public hearing, the Panel highlights that, even though the Panel decided to read and hear Vantage, whose appearance was *ad cautelum*, this part of the decision will only refer to the arguments presented by the parties in dispute, the Complainant company, Quimic, and the respondent, the Investigating Authority.

It is relevant to note that in accordance with Article 97 of the LCE, and as established in Article 1904 of the NAFTA, Vantage opted to seek the review mechanisms in the national courts as established in the law, and, therefore, that is

⁷ Investigating Authority's Response Brief, Public Version pp. 59-61.

the forum in which it must resolve its claims. Notwithstanding, due to the fact that the issues presented for review in this case are centered on the treatment given by the authority to this company, its *ad cautelum* participation has been accepted, with the legal limitations that such legal appearance implies.⁸

V. ANALYSIS OF THE PANEL

A. Standard of Review stated by the Complainant

In the present case, the Complaint is based on a violation under Article 51 generally. The Investigating Authority and Vantage argued that the Complaint did not comply with the requirements of Article 51 in linking the grounds found in the Article with each one of the Complainant's claims and injuries.⁹ In the Complainant's Reply Brief, the Complainant set forth additional elements in regards to the grounds in Article 51.¹⁰

In regard to the lack of clarity in the standard of review set forth by the Complainant, the Panel considers that, in this particular case, the Investigating Authority was able to determine each one of the claims stated by the Complainant in the Complaint and was able to respond to each one of them and defend its interests in an adequate manner. The Panel therefore determines that the complaint was not fatally deficient and the review on the merits was legally appropriate. It is important to note, however, that this decision is based solely on the particular facts and circumstances of this case, which made it possible for the Investigating Authority and Vantage to understand and answer each one of the claims set forth by the Complainant in its brief. This decision should not be seen as a derogation of the complainant's responsibility to set forth its claims under Article 51 of the LFPCA with specificity.

The Panel also considered relevant the following decision of the court:

⁸ Vantage Oleochemicals opted to challenge the determination reviewed by this Binational Panel in the *Tribunal Federal de Justicia Federal y Administrativa* (Federal Tax and Administrative Justice Court). On October 27, 2011 Vantage presented the Notice of Intent to initiate judicial review. Vantage Brief. Public version, May 4, 2012, p. 11. Public Hearing Transcript, April 11, 2013, p. 78.

⁹ Investigating Authority's Response Brief, Public Version, pp. 40-41, paragraph 67. Public Hearing Transcript, April 11, 2013, pp. 26, 27, 28, and 81.

¹⁰ Complainant's Reply Brief, Public Version, pp. 15, 16, and 17.

JUDGMENTS FROM THE FEDERAL TAX AND ADMINISTRATIVE JUSTICE COURT. THEIR CONTENT AND OBJECTIVE IN RELATION TO THE CLAIM.

From the context of Articles 237 and 238 of the Federal Tax Code it can be derived that the Chambers of the Federal Tax and Administrative Justice Court when issuing their decision, will decide based on "the claim of the complainant that is inferred from the complaint in relation to a challenged decision," which determines the content and the objective of the judgments and implies considering: a) the request in relation to the legally protected right; and b) the reason for the claim or title which is the cause for the claim. Thus, the trier of fact, in a non-formalistic manner of a factual basis, should evaluate if the essence and relevance of what is presented is in accordance with the ordinance, all of the above which in a reasonable, integral, and non-rigorous manner, without separating them from the effects or consequences of the essence of the claim, giving preference to a response based on the factual and real truth and beyond the procedural. That would imply a complete and wide statement of the proposed issue and addressing the merit of the case, the legal problems, and of the controversy, as mandated by Article 17 of the Constitution...¹¹ [Emphasis added].

On the other hand, the Complainant stated in its Reply Brief that this Panel should apply the grounds stated in Article 51 of the LFPCA, in light of Article 50 of the same law. Given this affirmation, it is worth noting that, as mentioned by the representative of the Investigating Authority during the public hearing, "Article 50 of the LFPCA is not a part of the standard of review established in NAFTA, therefore, the Panel is prohibited from taking it into account."¹² This Panel considers that the standard of review of Article 51 of the LFPCA is the standard referred to in Annex 1911 of NAFTA. This Panel cannot extend the standard of review to include Article 50 because there is no express provision for such purposes in Annex 1911 of NAFTA. The contrary conclusion would lead this Panel to exceed the

¹¹ *Tribunal Federal de Justicia Fiscal y Administrativa*. Jurisprudencia. I, 4th. A. J/20/2003. *Semanario Judicial de la Federación y su Gaceta, Novena época*, February 2003, p. 944.

¹² Transcript of Public Hearing, April 11, 2013 pp. 25, 26, and 29.

limits of its authority that have been established in Articles 1904.3, 1904.8, and in Annex 1911 of NAFTA.

Several Panels have discussed this issue and, even though their decisions and opinions are not binding on this arbitral tribunal, it is worth taking into account their reasoning.¹³ In regards to the affirmations made regarding the application of Article 50 of the LFPCA, this Panel decides that the standard of review is solely the one established in Article 51 of such law.

The claims made by the parties in this case can be reduced to two main issues:

First, the authority of the Investigating Authority to determine a specific antidumping duty *ex officio* based on the mechanism established in Articles 11.2 of the ADA, 68 of the LCE, and 99 and 100 of the RLCE; and

Second, the obligation of the Investigating Authority to determine a specific antidumping duty for Vantage only in conformity with the provisions of Article 9.5 of the ADA and 89-D of the LCE.

B. Authority of the Investigating Authority to modify the antidumping duties based on the mechanisms established in Articles 11 of the ADA, 68 of the LCE, 99 and 100 of the RLCE.

The Panel examined, based on the administrative record and on the applicable Mexican legislation, whether the Investigating Authority acted pursuant to law when it modified the antidumping duties applicable to Vantage in conformity with Articles 11 of ADA, 68 of the LCE, 99 and 100 of the RLCE.

Article 11.1 of the ADA states that “an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.” (Emphasis added). As explained by the panel in *EC-Anti-dumping Duties*

¹³ Other Binational Panel Decisions that address this issue specifically are: MEX-USA-94-1904-01 (Flat Steel), pp. 21-22; MEX-USA-94-1904-03 (Polystyrene), p. 13; MEX-CAN-96-1904-02 (Rolled steel plate), pp. 30-31; MEX-USA-96-1904-03 (Hot rolled steel sheet), p. 14; MEX-USA-98-1904-01 (Fructose), pp. 36-37; MEX-USA-00-1904-01 (Urea), p. 15; MEX-USA-00-1904-02 (Bovine), p. 11; MEX-USA-05-1904-01 (Pipes), pp. 11-20, to mention a few.

on Malleable Cast Iron Tube or Pipe Fittings from Brazil,¹⁴ Article 11.1 establishes a general, overarching principle, the modalities of which are set forth in paragraphs 2 and 3 of Article 11.

From the text of Article 11.2 of the ADA, when analyzing whether to maintain the duty, the Authority has the authority to remove or modify it:

The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, *upon request* by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately. [Emphasis added].

Thus, Article 11.2 establishes a review process that (1) the investigating authority may initiate upon request *or* on its own initiative, and (2) enables the investigating authority to consider removing *or* varying the anti-dumping duty to ensure that, consistent with Article 11.1, the duty is maintained only "to the extent necessary" to counteract injurious dumping.

On the other handConsistent with, Article 11.2, Article 68 of the LCE specifically establishes:

Final antidumping duties may be reviewed annually at the request of an interested party or officially by the Authority at any time. . . . Those determinations that confirm, modify, or revoke countervailing duties shall be considered final... [Emphasis added].

The Panel finds that Article 68 of the LCE explicitly grants the Investigating Authority broad powers to conduct *ex officio* reviews of antidumping duties that confirm, modify, or revoke antidumping duties. There is no limitation on such authority that applies to the case before us. To the contrary, Article 68 explicitly

¹⁴ EC-Anti-dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/R, 7 March 2003, para. 7.113.

contemplates modification or revocation of antidumping duties based on the results of a review, in congruence with the general framework established in the ADA. Additionally, the provisions in Articles 99 and 100 of the RLCE contain the procedures that should be followed in the Investigating Authority's review and expressly refer to *ex officio* reviews. The Panel reiterates that the limitations that the Complainant asserts do not exist either in the provisions of the ADA or in the specific rules contained in the LCE or RLCE. On the contrary, such provisions expressly authorize the Investigating Authority to carry out *ex officio* reviews of the antidumping duties at issue.

Regarding the Complainant's extemporaneous argument that Article 68 of the LCE only refers to the confirmation, modification, or revocation of the antidumping duties, but not the determination of a duty, the Panel considers that the claim by the Complainant does not have any merit. Vantage was subject to the payment of the "all others" antidumping duty of 36.51% before the administrative review (duty that was established in accordance with the provisions of Article 68 of the LCE), which was revoked pursuant to Article 68 of the LCE.

In analyzing the application of Article 68, this Panel finds that this article explicitly confers on all "interested parties" the right to participate in the review. The definition of interested party is found in Article 51 of the LCE which states:

Interested party means the producers who have submitted requests, importers and exporters of the product under investigation, as well as any foreign legal persons having a direct interest in the investigation in question and those who are so defined in international trade agreements and treaties.

Nothing in the language of Article 51 limits the definition of "interested party" as referred to in Article 68 to foreign producers and exporters that exported the subject merchandise during the period of the original investigation. Therefore, even assuming *arguendo* that Vantage was a new shipper, the Panel disagrees with Quimic's argument that the Investigating Authority could not treat Vantage as an interested party in an administrative review under Article 68 of the LCE and Articles 99 and 100 of the RLCE.

This Panel concludes that the Complainant's claim cannot be sustained because of Mexico's obligation, in Article 11 of the ADA, to maintain the antidumping duty only during the time necessary to counteract the dumping, and to provide a review procedure that can be at a party's request or *ex officio*.

Therefore, this Panel concludes that Article 68 of the LCE explicitly allowed the Investigating Authority to modify or revoke the antidumping duties in conformity with the administrative procedure that it performed and confirms the Determination in regard to this point.

C. The obligation of the Investigating Authority to determine an antidumping duty specific to Vantage only in accordance with the provisions of Article 9.5 of the ADA and 89-D of the LCE.

Regardless of the Investigating Authority's ability to conduct reviews under Article 68, Quimic argues that Vantage was a "new shipper" and therefore the Investigating Authority could only modify Vantage's antidumping duty under the new shipper provisions of Article 9.5 of the ADA and Article 89-D of the LCE.

Under the ADA, "authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer of the product under investigation."¹⁵

Article 9.5 of the ADA obligates Members to provide new shippers the opportunity to obtain a company-specific duty rate on an accelerated basis

Article 9.5 of the ADA states the following:

If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement

¹⁵ ADA Article 6.10.

and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

While Article 9.5 creates an obligation to provide an accelerated review process for new shippers, it does not establish specific procedural requirements other than an accelerated timetable and a prohibition on levying duties while the review is pending. Therefore, it is within the discretion of individual WTO Members to establish their own procedures for new shipper reviews.

Article 89-D of the LCE, defines what entities qualify as new shippers and gives them the right to request a special review. Article 89-D states:

The producers whose goods are subject to a final countervailing duty order and have not exported any of these goods during the period of time under investigation that gave rise to the proceeding that consequently imposed the appropriate countervailing duties, can request an effective examination proceeding for new shippers in order to determine their individual margins of dumping, if:

I. They have carried out exporting transactions concerning the merchandise subject to countervailing duties after the investigated period of time that gave rise to the proceeding that imposed the referred countervailing duty, and

II. Demonstrate that they do not have any link with the producers or exporters of the exporting country that have been given the specific countervailing duty rate.

Having examined the language of ADA and the LCE Article, the Panel disagrees with Quimic's argument that those provisions establish the exclusive mechanism for reviewing new shippers. ADA Article 9.5 creates an obligation to provide accelerated reviews for new shippers, and LCE Article 89-D gives new shippers the right to request such expedited review. Neither article obligates new shippers to avail themselves of that special right rather than the normal review procedures, nor do they obligate the Investigating Authority to initiate such a review *ex officio* if one is not requested. The Panel does not find any basis in ADA Article 9.5 or LCE Article 89-D to limit the Investigating Authority's ability to review a new shipper

under the normal procedures, if the new shipper elects not to request an expedited review. The Panel therefore disagrees with Quimic's suggestion that the Investigating Authority was required to direct Vantage to request a new shipper review if Vantage wanted its own company-specific margin calculation.

It is clear that the law does not compel the Investigating Authority to initiate *ex officio* a new shipper procedure because it is mandatory that the interested company request it. As can be verified in the administrative record of the investigation and as confirmed by the parties in this review, Vantage did not request the initiation of a special new shipper procedure.

In addition, the Panel considered that, under Quimic's interpretation of the law, if a new shipper elected not to request a special "new shipper" review, the Investigating Authority's hands would be tied, even if the facts suggested that the new shipper's rate was significantly different than the "all others" rate. However, as discussed above, Article 11.1 of the ADA establishes an obligation to maintain anti-dumping duties only "to the extent necessary" to offset injurious dumping. Article 9.5 does not alter the overarching obligation or limit use of the modalities in ADA Article 11.1. Therefore, the Panel concludes that when the Investigating Authority considers that the facts warrant a review of a new shipper, it may conduct such a review *ex officio* pursuant to its authority under Article 68 of the LCE and the RLCE, unless the qualifying new shipper requests a special review under Article 89-D.

Therefore, for the reasons stated above, and because the Panel considers that the Investigating Authority acted in conformity with the applicable law in considering Vantage as an interested party, according to Article 51 of the LCE, this Panel confirms the Determination subject to review on this point.

VI. INCIDENTAL MOTIONS

During this proceeding, the parties submitted two incidental motions to the Panel. The first motion, presented by Vantage, requested the Panel consider judicial precedent as evidence that Vantage is a successor in interest to a company called Uniquema, which received an antidumping duty rate in the original investigation.

As explained above, it is irrelevant to the Panel's decision in this case whether Vantage is a "new shipper" or not. Therefore, in accordance with the principle of judicial economy, the Panel has not addressed the merits of that motion.

The second motion, submitted by Quimic, was a challenge to the Investigating Authority's submission, pursuant to a request from the Panel during the hearing, of a WTO case the Investigating Authority cited during the hearing. The Panel has not relied on that case in rendering its decision. Therefore, in accordance with the principle of judicial economy we have not addressed the merits of that motion.

VI. DECISION AND ORDER OF THE PANEL

Pursuant to the review procedure established in Article 1904 of NAFTA Chapter XIX and for all the reasons stated above, this Panel finds that the alleged violations claimed by the Complainant before this Binational Panel are without legal merit and affirms the Final Determination.

Issued on October 10, 2013

Signed in original by:

Marguerite Trossevin

Lynn Kamarck

Velta A. Melnbrencis

Mariano Gomezperalta Casali

Eunice Herrera-Cuadra

Chair

Issued on October 10, 2013

Signed in original by:

Marguerite Trossevin

Lynn Kamarck

Velta A. Melnbrencis

Velta A. Melnbrencis

Mariano Gomezperalta Casali

Eunice Herrera-Cuadra

Chair

SECCIÓN MEXICANA DEL
SECRETARIADO DE LOS
TRATADOS COMERCIALES



10 OCT. 2013



RECIBIDO