

DECISION OF THE BINATIONAL PANEL IN ACCORDANCE WITH ARTICLE
1904 OF THE NORTH AMERICAN FREE TRADE AGREEMENT.

RECORD
MEX-USA 00-1904-02.

INDEX

I.- In General

1.- Introduction.....	4
2.- Panel Members	4
3.- Participants	4
4.- Previous Panel Orders	5
5.- Competence	7
6.- Background	8
7.- Review Criteria	9

II.-Issues Before the Panel

8.- Lack of authority of the Deputy Director of Legal Affairs of the Secretariat of Commerce and Industrial Development.	10
8.6.- Analysis	12
8.62.- Conclusion	21
9.- Illegal receipt of the official questionnaires, evidence, and arguments presented outside of the time limits.	21
10.- Determination of a relevant market, as well as the establishment of the certification requirement of classification and shelf-life.	21
10.1.- Analysis	22
10.87.- Conclusion	39
11.- Application of an antidumping duty greater than the margin of dumping calculated for each of the products subject to investigation.	39
11.4.- Analysis	40
11.55.- Conclusion	51
12.- Application of a final antidumping duty based on a sample.	52

12.4.- Analysis	52
12.5.- Conclusion	53
13.- Incorrect application of the methodology used to calculate the margin of dumping to determine the antidumping duties for broker companies.	54
13.4.- Analysis	54
13.13.- Conclusion	56
14.- Extension of the deadline for the preliminary antidumping duties.	56
14.4.- Analysis and Conclusion	57
15.- Determination of threat of injury to the national production of fresh, chilled, and frozen beef in carcass.	57
15.4.- Analysis	58
15.47.- Conclusion	68
16.- Determination of injury to the national production of fresh, chilled, and frozen boneless beef and beef with bone cuts.	69
16.4.- Analysis	69
16.26.- Conclusion	74
17.- Determination that the national production of tongue, liver, and other eatable offal does not supply the same markets as the imported products.	74
18.- Violation of Article 6.8 and Annex II of the ADA because the information provided by PM Beef Holdings, LLC for the determination of its individual margin of dumping was not considered.	75
18.8- Analysis	76
18.18- Conclusion	78
19.- Complaint for review by de Trosi de Carnes and complaint by Le Viande.....	78
20.- Order of the Panel	78
21.- Term for remand.	80

DECISION OF THE BINATIONAL PANEL IN ACCORDANCE WITH ARTICLE
1904 OF THE NORTH AMERICAN FREE TRADE AGREEMENT.

RECORD
MEX-USA 00-1904-02.

I. IN GENERAL

1. INTRODUCTION

Review before a Binational Panel of the Final Determination of April 27, 2000, published in the Official Gazette of the Federation on April 28, 2000, of the Antidumping Investigation on imports of Bovine Beef and Eatable Offal, goods classified under tariff fractions 0201.10.01, 0202.10.01, 0201.20.99, 0202.20.99, 0201.30.01, 0202.30.01, 0206.21.01, 0206.22.01, and 0206.29.99, of the Tariff of the General Import Tax Law, originating from the United States of America, independent of the country of origin.

2. PANEL MEMBERS.

Lisa B. Koteen
Cynthia Crawford Lichtenstein
Ruperto Patiño Manffer
Jorge Alberto Silva Silva
Eduardo Magallón Gómez

3. PARTICIPANTS.

3.1 Party: The Government of Mexico

3.2 Investigating Authority: Secretariat of Commerce and Industrial Development, now the Secretariat of Economy .¹

3.3 Interested Parties:

3.3.1 IMPORTERS. Mayoreo en Carnes y Embutidos de Importación, S.A. de C.V.; Comercializadora de Carnes de Cd. Juárez, S.A. de C.V.; Rose Comercio Internacional, S.A. de C.V.; Asociación Nacional de Tiendas de Autoservicio y Departamentales, A.C.; Carl's Jr. de Monterrey, S.A. de C.V.; Trosi de Carnes,

¹ The decree which amended, supplemented, and repealed various provisions of the Organic Law of the Federal Public Administration was published in the Official Gazette of the Federation dated November 30, 2000 (evening edition), in which Articles 34 and the fifth interim related to the change of name of the Secretariat of Commerce and Industrial Development to the Secretariat of the Economy. Hereinafter, all mention in this decision of the Secretariat of Commerce and Industrial Development or SECOFI shall now be understood to mean the Secretariat of the Economy. [Sometimes referred to in this document as the Investigating Authority or IA].

S.A. de C.V.; Industrializadora de Comida Rápida, S.A. de C.V.; Le Viande Comercializadora, S.A. de C.V.

- 3.3.2 EXPORTERS. Tyson Fresh Meats, Inc. (formerly IBP, Inc.); Sun Land Beef Company, Inc.; Excel Corporation; National Beef Packing Company, LLC, (formerly Farmland National Beef Packing Company, L.P.); Murco Foods, Inc.; Packerland Packing Company, Inc.; PM Beef Holdings, LLC; CKE Restaurants, Inc.; Northern Beef Industries, Inc.; Sam Kane Beef Processors, Inc.
- 3.3.3 NATIONAL PRODUCTION.² Asociación Mexicana de Engordadores de Ganado Bovino, A.C.; Sukarne Producción, S.A. de C.V., (formerly Ganadería Integral El Centinela, S.A. de C.V.); Ganadería Integral Vizur, S.A. de C.V.; Ganadería Integral SK, S.A. de C.V.; Productores de Carne de Engorda, S.A. de C.V.; Confederación Nacional Ganadera; Empacadora Romar, S.A.

4. PREVIOUS PANEL ORDERS.

- 4.1 The participants in this proceeding presented various written pleadings and motions that the Panel resolved through panel orders. A review of the orders follows:
- 4.2 On February 22, 2002, this Panel decided in favor of the pleading presented by the IA, in compliance with the obligation imposed upon the Panel by Rule 41 (1) (b) and (c) of the Rules of Procedure of the North American Free Trade Agreement (hereinafter NAFTA and Rules of Procedure). At the same time, Excel Corporation's response to the IA's pleading was rejected.
- 4.3 On February 22, 2002, this Panel decided in favor of the pleading presented by Asociación Mexicana de Engordadores de Ganado Bovino, A.C. (hereon referred to as "AMEG") and Ganadería Integral El Centinela, S.A. de C.V. (hereon referred to as "El Centinela"), and ordered Excel to comply with its duty to give proper notification to the parties, in accordance with the Rules of Procedure, of its pleading presented on November 6, 2000. Once the presentation of the pleading was held to have been properly notified to AMEG and El Centinela, these companies were given 10 days to respond, in accordance with Rule 62 of the Rules of Procedure.
- 4.4 On February 22, 2002, the Panel decided against the pleading presented by AMEG and El Centinela, which requested the Panel to reject the pleading presented by Excel to correct the title on the cover of the brief written in response to the briefs of the IA, AMEG, and El Centinela.

² During the proceedings, these participants withdrew from the review. As result, it is unnecessary to study the allegations raised in the claims presented by these participants in compliance with Article 57 of the Rules of Procedure of Article 1904 of the North American Free Trade Agreement ("NAFTA"), hereinafter referred to as the "Rules of Procedure".

- 4.5 On February 22, 2002, the Panel decided against the pleading presented by the National Production, which argued for the discontinuation of the proceedings of the review of the Final Determination by the Panel for those complainants seeking an *amparo review*.
- 4.6 On February 22, 2002, the Panel decided against the pleading presented by the National Production, which argued for the discontinuation of the proceedings of the review of the Final Determination by the Panel.
- 4.7 On February 22, 2002, the Panel decided in favor of the pleading presented by Sukarne, which requested that once the formal requirements for access to confidential information were satisfied on behalf of the pleading party, the IA issue the authorization.
- 4.8 On February 22, 2002, this Panel issued a document ordering the participants in the investigation to comply with the duty to notify the rest of the participants in a proper and timely manner as required by the Rules of Procedure.
- 4.9 On August 13, 2002, this Panel decided against the pleading presented by Excel, which requested that the briefs presented by AMEG and Sukarne be rejected.
- 4.10 On August 19, 2002, this Panel decided in favor of the pleading presented by IBP and Sun Land, and modified the agenda of the public hearing on August 29-30, 2002, to carry out, in camera, the arguments with respect to the calculation of the margins of dumping.
- 4.11 On September 11, 2002, the Panel acknowledged the withdrawal of the pleading referred to in the point above.
- 4.12 On September 11, 2002, the Panel decided against the pleading presented by the National Production, which requested the Panel to postpone the public hearing of August 29-30, 2002.
- 4.13 On September 11, 2002; October 23 and 31, 2002; and January 10, 2003, the Panel issued orders that required Attorney José Othón Ramírez Gutiérrez continue to serve as Legal Counsel for the National Production until the Panel received a notification of change of legal counsel in accordance with paragraph 2 of Rule 21 of the Rules of Procedure.
- 4.14 On October 23, 2002, the Panel issued an order holding: a) that the companies Sukarne, AMEG, Vizur, SK, Confederación, Carne de Engorda y Romar, had failed to comply with Rule 21(2) of the Rules of Procedure, as a result of which José Othón Ramírez Gutiérrez continued to represent those companies before the Panel; and b) that with respect to the two pleadings presented by the

Confederación to withdraw from the review proceedings, those pleadings were treated as not presented for failure to comply with the Rules of Procedure.

- 4.15 On October 31, 2002, the Panel decided in favor of the pleading presented by Excel and rejected the written document presented by the IA on its oral presentation at the public hearing held on August 29-30, 2002.
- 4.16 On February 6, 2003, the Panel issued an order with respect to the pleading presented by Sukarne, Vizur and SK, acknowledging that the Panel had received proper notification of the change of Legal Counsel in favor of Benjamín Sepúlveda Lugo; and on the same day, the Panel acknowledged the withdrawal of these companies from the review proceedings.
- 4.17 On February 14, 2003, the Panel decided against the pleading presented by IBP, Sun Land, Murco, Farmland, and Packerland, asking that the arguments presented by the IA during its oral participation in the continuation of the public hearing on January 9, 2003 be rejected.
- 4.18 On February 14, 2003, the Panel issued an order acknowledging the proper notification of change of Legal Counsel for AMEG in favor of Rosa Anel García Espinosa; and on the same day, the Panel acknowledged the withdrawal of AMEG from the review proceedings.
- 4.19 On February 14, 2003, the Panel issued an order acknowledging the proper notification of change of Legal Counsel for the companies Romar and Carne de Engorda in favor of Enrique López López; and on the same day, the Panel acknowledged the withdrawal of these companies from the review proceedings before this Panel.
- 4.20 On February 17, 2003, the Panel issued an order acknowledging the proper notification of change of Legal Counsel for Confederación Nacional Ganadera in favor of Heriberto Cárdenas Galván; and on the same day, the Panel acknowledged the withdrawal of this company from the review proceedings.

5. COMPETENCE.

- 5.1 This Binational Panel has the authority to review the Final Determination of the Antidumping Investigation on Imports of Beef and Eatable Offal originating from the United States of America, independent of the country of origin, issued by the Secretariat of Commerce and Industrial Development, case number 09-98, assigned to the Office of International Trade Practices (Unidad de Prácticas Comerciales Internacionales), in accordance with Article 1904, Chapter XIX of the North American Free Trade Agreement (from hereon referred to as “NAFTA”).

5.2 In accordance with Article 1904.8 of NAFTA and rule 72 of the Rules of Procedure of Article 904 of NAFTA (hereon referred to as “the Rules of Procedure), this Panel issues its decision in writing.

6. BACKGROUND

- 6.1 On June 30, 1998, Confederación Nacional Ganadera; Asociación Mexicana de Engordadores de Ganado Bovino, A.C.; Unión Ganadera Regional del Norte de Veracruz; Unión Ganadera Regional de Tabasco; Carnes Valmo de Sonora; S.A. de C.V.; Empacadora de Carnes Unidad Ganadera, S.A. de C.V.; Fapsa y Asociados, S.A. de C.V.; Frigorífico y Empacadora de Tabasco, S.A. de C.V.; Frigorífico Rastro del Sureste de Veracruz, S.P.R. de R.L.; Frigorífico del Sureste, S.A. de C.V.; Ganadería Integral El Centinela, S.A. de C.V.; Ganadería Integral SK, S.A. de C.V.; and Ganadería Integral Vizur, S.A. de C.V., requested the initiation of the antidumping investigation and the antidumping duties to be imposed on imports of live cattle, bovine beef and eatable offal, originating from the United States of America, independent of the country of origin.
- 6.2 The petitioners stated that during the period of June to December, 1997, these imports were carried out by means of unfair international trade practices, in the form of dumping.
- 6.3 On October 21, 1998, the determination issued by the Secretariat of Commerce and Industrial Development, declaring the initiation of the antidumping investigation that led the Determination that the Panel is currently reviewing and establishing the period of investigation as being from June to December 1997, was published in the Official Gazette of the Federation (hereinafter DOF).
- 6.4 The Secretariat determined that during the investigated period, the representation of national producers of beef in carcasses was 90.9 percent; cuts of beef with bone – 43.6 percent; boneless cuts of beef – 39.6 percent; and tongues, livers, and other eatable offal – 90.2 percent.
- 6.5 On August 2, 1999, the Preliminary Determination, which concluded the investigation of live cattle without imposing a countervailing duty, was published in the DOF. The Preliminary Determination further ordered that the investigation of the rest of the goods continue, imposing provisional countervailing duties in some cases against companies participating in the investigation, under the terms which appear in the Determination.
- 6.6 The Secretariat concluded that the fact that the products were fresh, chilled, or frozen, did not result in differences in characteristics of the products, as a result of which the Secretariat ruled that fresh, chilled, or frozen products were like products.

- 6.7 The products with which the Secretariat continued the investigation fall within the following tariff fractions:

0201.10.01 Fresh or chilled carcasses or half carcasses
 0202.10.01 Frozen carcasses or half carcasses
 0201.20.99 Fresh or chilled cuts with bone
 0202.20.99 Frozen cuts with bone
 0201.30.01 Fresh or chilled boneless cuts
 0202.30.01 Frozen boneless cuts
 0206.21.01 Frozen tongues
 0206.22.01 Frozen livers
 0206.29.99 Other frozen eatable offal.

- 6.8 In the Final Determination, the administrative proceeding of the investigation was declared concluded for imports of tongues, livers, and other eatable bovine offal originating from the United States of America, independent of the country of origin, without imposing a dumping duty.

- 6.9 Finally, the IA issued the Final Determination of the antidumping investigation on April 27, 2000, published in the DOF the following day. The Final Determination is under review, with regards to carcasses or half carcasses or cuts with bone and boneless cuts, by the Panel in accordance with Article 1904.1 of NAFTA. In reference to the determination on live cattle, tongues, and livers, and other eatable offal, no party challenged those determinations.

7. REVIEW CRITERIA

- 7.1 In accordance with Article 1904 (3) of NAFTA, the Panel is to apply the review criteria indicated in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply in order to review a Determination of the IA. In conformity with the requirement of Article 1904 (2) of NAFTA, the Binational Panel is competent to review, “based on the Administrative Record, a Final Determination on antidumping duties and countervailing duties issued by a competent authority of importing Party to determine whether such determination was in accordance to the legal provisions in antidumping and countervailing duty law of the importing Party.”
- 7.2 Article 1911 of NAFTA defines the term “general legal principles as those that include principles such as the standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies.” In accordance with Article 1904 (3) of the NAFTA, the Panel shall 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 authority.

- 7.3 In Annex 1911 of NAFTA, we find the specific definitions by country, and in regards to the review criteria for Mexico (part c), we find that this is: “the standard set out in Article 238 of the Federal Fiscal Code, or any successor statutes, based solely on the administrative record.”
- 7.4 In regards to the issues raised by the participants as violations of Constitutional Articles 14 and 16, this Panel does not have the IA to determine these issues, as this falls under the exclusive power of the Federal Judicial Power.³ This Panel has replaced the Federal Fiscal and Administrative Justice Court, which controls the legality of the administrative authorities with the causes of illegality contained in Article 238 of the CFF (Federal Fiscal Code). This criteria is supported by the jurisprudence cited in the footnote.⁴ In light of this, the Panel abstains from analyzing the constitutional arguments raised by the petitioners.
- 7.5 This Panel wishes to make it clear that it can consider as a privileged source of inspiration the material set out in international treaties or agreements, and that these may be cited in the same manner in which we cite an author, a book, or legal precedent, which are evidently not obligatory or binding. Likewise, the Panel wishes to specify that the opinion of the Panel should not be understood under any circumstance as implying that the government of Mexico has failed to comply with an international treaty or obligation. The Panel’s interpretation of national laws in light of international agreements, which shall be cited further on, is done with the sole purpose to maintain harmony among such norms, the clear purpose expressed by Mexico by signing on to NAFTA, a purpose which is evidenced by Article 1904.15 and Annex 1904.15 in Mexico’s list, whereby Mexico undertook the obligation to modify its laws and regulations on the subject.

II. ISSUES BEFORE THE PANEL

- 8 ISSUE I. LACK OF AUTHORITY OF THE DEPUTY DIRECTOR OF THE DEPARTMENT OF LEGAL AFFAIRS OF THE SECRETARIAT OF COMMERCE AND INDUSTRIAL DEVELOPMENT. This issue was raised by the participating companies IBP, Inc., Sun Land Beef Company, Inc., Farmland National Beef Packing Company, L.P., Murco Foods, Inc., Packerland Packing Company, Inc., and PM Beef Holdings, LLC. (hereinafter referred to as the “meat companies” or the “complainants”).
- 8.1 The companies argued that the Final Determination is illegal because several of the acts carried out during the course of proceedings were ordered, processed, and

³ Article 1904 (1) of the NAFTA.

⁴ FEDERAL FISCAL AND ADMINISTRATIVE JUSTICE COURT. HAS THE IA TO DECLARE JUDGEMENT ON THE UNCONSTITUTIONALITY OF A PRESIDENTIAL DECREE THAT DELEGATES POWERS TO AN INFERIOR IA, TO GIVE LEGAL IA TO ANOTHER ADMINISTRATIVE IA. Ninth Period. Source: Semanario Judicial de la Federación, Volume: XIV, August 2001. Thesis: 11 to 12A, Page 1445, Registry No. 188,918.

- determined by an authority which lacked the power to do so. The companies argued that the department lacked authority because it did not exist, thus violating Article 16 of the Constitution and resulting in the illegal act established in section I, Article 238 of the Federal Tax Code. The companies also argued that the Deputy Director of the Department of Legal Affairs of the Office of International Trade Practices of SECOFI is an incompetent authority that carried out various “acts of nuisance” that affected the rights of the companies. Furthermore, they argued that an Agreement on Delegation of Powers cannot create and grant competence, as this may only occur by means of a Law or Regulation. Finally, they argued that the General Office of Legal Affairs (hereon DGATJ, refers to the office or the director) signed all the Orders or notices, indicating that this was done under instruction of the Chief of the Office of International Trade Practices (hereon UPCI). However, the Agreements which the DGATJ refers to are not found in the Administrative Record.
- 8.2 The IA argued that at no time during the course of the antidumping investigation, did the complainants raise the alleged lack of authority of the IA before this Panel, nor that of the Deputy Director of the Department of Legal Affairs, who oversaw the administrative procedure of the antidumping investigation on imports of bovine beef. On the contrary, the complainants participated in various stages of the proceedings through the notification of the DGATJ. Contrary to the argument raised by the complainants, the Department of Legal Affairs existed and continues to legally exist, and had and continues to have the IA to issue the acts complained of, in accordance with the Organic Law of the Federal Public Administration (LOAPF) and the Internal Regulation of the Secretariat of Commerce and Industrial Development and the Agreement on Delegation of Powers of the Secretariat.
- 8.3 The IA indicates that the complainants concentrate on 5 documents in their presumption of a lack of authority. If as alleged, the complainants would have suffered some irregularity, including lack of authority or nonexistence of the officer that signed these documents, the complainants should not have participated in the antidumping investigation, or having done so, they should have expressed their position on the matter; that is to say, having failed to do so, the complainants clearly consented to the acts they now allege are illegal.
- 8.4 Furthermore, the IA points out that nowhere in their briefs, do the complainants specify the alleged acts of nuisance or the injuries they incurred. This is supported by the fact that the complainants do not distinguish between setting out the specifics of their complaint and making general statements such as the fact that the DGATJ issued orders initiating the administrative investigation, requirements to present additional information, and verification orders. Instead, the complainants merely point to 5 documents, not all of which were directed towards the parties raising the allegation, in a footnote. Moreover, the complainants do not explain how they were injured by the issuance of the orders or acts indicated.

- 8.5 The IA adds that the Office of International Trade Practices is an administrative agency that relies on legally established duties, structure, and organization, in accordance with Articles 2 and 38 of the Internal Regulations of the Secretariat; that is to say, the UPCI is an administrative organization that provides support to the Secretariat of Commerce and Industrial Development with respect to the commencement, processing, and determination of investigations of unfair practices of international trade, whose duties may be delegated to various officers of the administrative agency, in accordance with Article 38 of the Internal Regulations of the Secretariat of Commerce and Industrial Development and Article 19 of the Agreement on Delegation of Powers of the Secretariat.

ANALYSIS.-

- 8.6 The complainants requested this Binational Panel to declare that "...the Final Determination is illegal because various acts carried out during the course of proceedings, which resolved the Determination being challenged, were ordered, processed, and determined by an authority which lacked the power to do so. The Deputy Director of the Department of Legal Affairs (DGATJ) of the Office of International Trade Practices (UPCI) of the Secretariat of Commerce and Industrial Development, is an authority which lacks the power to carry out various "acts of nuisance" that affected the rights of the Complainant. Such is a violation of Article 16 of the Constitution and one of the causes of illegality established in section I of Article 238 of the Federal Tax Code also arises..."
- 8.7 First of all, looking at the specific terms set out in Annex 1911 of NAFTA one sees that the Parties specified that the COMPETENT INVESTIGATING AUTHORITY means: c) in the case of Mexico, the authority appointed within the Secretariat of Commerce and Industrial Development, or the authority which succeeds it.
- 8.8 According to Annex 1911 of NAFTA, the FINAL DETERMINATION means: c) in the case of Mexico, i) a Final Determination with respect to the investigations of antidumping or countervailing duties ordered by the Secretariat of Commerce and Industrial Development in accordance with Article 13 of the Regulatory Law of the Political Constitution of the United States of Mexico in the Matter of Foreign Trade, as amended.
- 8.9 This Binational Panel is reviewing a Final Determination which is signed by the Secretariat of Commerce and Industrial Development, issued in an investigation of antidumping or countervailing duties in accordance with Article 13 of the Regulatory Law of Article 131 of the Political Constitution of the United States of Mexico in the Matter of Foreign Trade. Thus, the determination under review was issued by the proper authority in Mexico.

- 8.10 Prior to an analysis of the rest of the arguments related to the competence of the IA raised by the participating companies cited at the beginning of this section, this Binational Panel expresses the following:
- 8.11 First, this Binational Panel warns that the proper, competent body that is responsible for processing and determining international trade investigations is the IA, by means of the Office of International Trade Practices (UPCI), which was not challenged by any of the Participants before this Binational Panel. Rather, this was expressly acknowledged by the participating companies that raised the issue of lack of IA.⁵
- 8.12 During the investigation, this Office carried out various acts by means of the Department of Legal Affairs (“DGATJ”) of the Secretariat of Commerce and Industrial Development.
- 8.13 In this review, there were two types of functions: those carried out directly by the Head of the UPCI and those issued by the DGATJ. Only the latter are being challenged by the companies that raised the issue of lack of authority, since those functions carried out by the Head of the UPCI were not challenged by any of the Participants.
- 8.14 The issue to be determined by this Panel is whether the DGATJ, as an internal unit of the UPCI, had the authority to carry out the acts that are challenged by the Complainants. Six Panels of Chapter XIX of NAFTA, Tribunal Fiscal de la Federación (TFF), now the Federal Tribunal of Fiscal and Administrative Justice, in two decisions, and two district judges, to the extent of knowledge of this Panel, have essentially analyzed the same issue in light of Mexican law, although there are differences in terms of regulatory framework, time, and specific forms of delegation.
- 8.15 Five panels, one federal judge and the Supreme Court of Justice (in review of the decision of the District Judge), determined that the DGATJ had the authority to carry out its acts during the corresponding antidumping investigations.⁶ One panel, two resolutions of the TFF, a district judge, and a Collegiate Court (in review of the decision of the District Judge) reached the opposite decision.⁷

⁵ See the Brief by IBP, Inc., pg. 49, point 4, Sun Land, pg. 50, Murco, pg. 50, Farmland, p. 51, Packerland, pg. 51, and PM Beef, pg. 49 in which the company stated: “The Internal Regulation of SECOFI grants such IA only to the IA.” Note footnote of page 39: Internal Regulation Article 38, Section I.

⁶ See the decisions of the panels in cases : MEX-94-1904-01 Flat Coated Steel; MEX-94-1904-03 Polystyrene and Impact Crystal; MEX-96-1904-03 Hot-Rolled Steel; MEX-96-1904-02 Rolled Steel Plate; MEX-USA-98-1904-01 High-Fructose Corn Syrup; and the sentence issued on amparo suit 682/97 by the Sixth District Judge on Administrative Matters of the Federal District, on May, 28, 1998, and was established in the amparo judgment in the review A.R.2067/98, issued by the First Chamber of the Federal Supreme Court on January 2001.

⁷ See the decision of Panel MEX-94-1904-02, Cut-to-Length Plate Products. Likewise see judgments: record 100(20)9/97/2221/96 of the Second Section of the Superior Chamber of the TFF, on February 12, 1998; record 12009/99-11-05-7/514/00-S2-06-01 of the Second Section of the Superior Chamber of the TFF of November 27, 2000; Amparo Suit P-52-96 of the Fourth District Judge on Administrative Matters,

- 8.16 This Panel, after analyzing these decisions,⁸ the law, regulations, other administrative provisions, and relevant precedent, considers that it is not necessary to carry out an in-depth analysis of this issue, as the Panel finds that there is an even more persuasive reason to reject the argument of the complainants. The functions carried out by the Director of the DGATJ during the antidumping investigation subject to review, which were opposed by the complainants, were not acts of nuisance under Article 16 of the Constitution; that is to say, these were not acts that would have affected their legal interests.⁹
- 8.17 This is a central point because the first paragraph of Article 16 of the Constitution only requires that an authority be competent when the act of the authority results in a nuisance; that is to say, when the legal interests of the parties are affected (by deprivation or nuisance). The following jurisprudence thesis exists in this regard: ACTS OF DEPRIVATION AND ACTS OF NUISANCE, ORIGIN AND EFFECTS OF THE DISTINCTION.¹⁰
- 8.18 Article 14 of the Constitution establishes in its second paragraph that no individual shall be deprived of life, liberty, property, rights or possessions without a trial before the previously established courts, in which the necessary formalities of procedure are complied with and carried out in accordance with the laws issued prior to the action. Article 16 of the same Supreme Legislation provides in its first paragraph that no one shall interfere with an individual's person, his family, domicile, papers and possessions without a written mandate by the competent authority that sets out the legal basis and justification for the proceeding.
- 8.19 Consequently, the Federal Constitution distinguishes between acts of deprivation and acts of nuisance and regulates these types of acts in a different manner. The former results in the diminution, damage, and definitive suppression of the rights of the governed. Such acts are only authorized by compliance of the requirements set out in Article 14, that is the existence of a trial before a previously established jury, that complies with the essential formalities of the proceeding and that the laws are applied to the act being tried.

on March 5, 1998; and finally, the record of the Amparo Review R.A. 4841/98 of the First Tribunal Court on Administrative Matters of the First Circuit, on September 19, 2000.

⁸ This Panel is aware that the decisions of the NAFTA Panels are not binding, as this is established by the Treaty itself, and that in Mexico, legal precedent is not obligatory, only the jurisprudence that the competent bodies require, as established in the section "Review Criteria" of this Decision.

⁹ This Panel is aware that the Amparo Suit P-52/96, in the judgment of the Fourth District Judge on Administrative Matters, on March 5, 1998, as well as the Review (R.A.) 4841/98, issued by the First Arbitration Court on Administrative Matters of the First Circuit, on September 19, 2000, the judges considered that the acts of the DGATJ, in this case, constituted acts of nuisance. This Panel respectfully dissents in regards to this interpretation, for the reason that in the opinion of the Panel, the judges failed to carry out an analysis of each of the acts of the DGATJ being challenged, to determined whether these actually constituted acts of nuisance, which is the type of analysis that this Panel carries out.

¹⁰ Ninth Period. Instance: Plenary. Semanario Judicial de la Federación and its Gazette. Volume: IV, July 1996. Thesis: P./J. 40/1996. Page 5.

- 8.20 On the other hand, acts of nuisance, despite affecting the legal rights of the governed, do not have the same effect as acts of deprivation, as acts of nuisance only restrict a right in a provisional or preventive manner with the purpose of protecting the general welfare. Acts of nuisance are authorized according to Article 16, as long as the written mandate is issued by a body with legal authority that provides the basis and justification for the proceeding.
- 8.21 In order to elucidate the constitutionality or unconstitutionality of an act of deprivation by an authority that is challenged, it is necessary to specify whether the act is a nuisance, and whether such act requires compliance with the formalities established by the Article 14, or whether it is an act of nuisance, for which it is sufficient to comply with the requirements established in Article 16.
- 8.22 In order to make this distinction, we should look at the aim of the act, that is, whether the deprivation of a material or immaterial property is the ultimate purpose of the authoritative act, or whether the nature of the act is merely a provisional restriction.
- 8.23 In other words, the issue of competence in Article 16 of the Constitution cannot be applied to all acts of an authority, as the Constitution does distinguish among acts that cause a nuisance.
- 8.24 Thus, it is important to distinguish between acts of an authority that cause a nuisance to an individual, those that benefit an individual, those that are of a procedural nature that do not affect the right of the individual, and internal acts by the government.
- 8.25 Another distinction must be made in regards to the last category: those acts that even though they are internal, affect the legal rights of the individual, producing a nuisance, and those acts that are merely internal and do not transcend the rights of the individual.
- 8.26 Acts of an authority that produce a benefit, acts of a procedural nature, and internal acts of the authority that do not affect upon the rights of the individual are not held subject to the constitutional requirement of “competence,” since these types of acts do not cause a nuisance for the individual.
- 8.27 An act of an authority that causes a nuisance to an individual, including the internal aspect of the act, is held subject to the requirement of “competence” established in Article 16 of the Constitution.
- 8.28 In summary, the requirement of competence is only applicable to acts of nuisance. It is important to determine whether the acts challenged by the Complainants should comply with the requirements established in Article 16 of the Constitution.

- 8.29 It is important to note that the whole of the proceeding may not be considered as the pleaded injury, as done by the complaining companies that presented the issue of the lack of competence. They should have specifically stated the “Legal Allegations,” in accordance with Part IV of Rule 59 of the Rules of Procedure of Chapter XIX of NAFTA.
- 8.30 Thus, in this review the “legal allegations” were expressed as “...numerous acts carried out during the course of proceedings were processed and determined by an incompetent authority.” Such procedural acts should have been specified, since only under these conditions may an analysis determine whether such acts transcend the challenged decision. As such, the injuries that do not satisfy these requirements, as established in Rule 59 of the Rules of Procedure, are inoperative for their insufficiency.
- 8.31 A simple, general statement may not be considered a “legal pleading” under Part IV of Rule 59 of the Rules of Procedure of Chapter XIX of NAFTA, for failure of being carried out as established by this rule, and thus this Panel declares it as inoperative.
- 8.32 The legal pleading should have been related in a concise manner with the procedural acts that are claimed to have been carried out by an incompetent authority. On the contrary, the participating companies that challenged the competence now being determined, abstained from identifying the acts in the Administrative Record, thus failing to satisfy the obligation imposed by Rule 59 of the Rules of Procedure of Chapter XIX of NAFTA. By talking about procedural acts, the Complainants should have established a specific relation with such acts¹¹ omitted in their briefs any reference to evidence in the Administrative Record¹² and abstained from identifying the page and/or pages of specific procedural acts.¹³ Finally, a simple assertion by the participating companies that challenged the authority of the DGATJ is inoperative, in the sense that numerous acts were processed by an authority which is considered incompetent, which implies that various other acts were processed by a competent IA. It is not the duty of this Binational Panel nor does the Panel have authority to compensate for the deficiency of the claim. That is, determining which acts were carried out by an incompetent authority and which were carried out by a competent authority, for which the “legal pleadings” that were presented, and considering the absence of specific indications, this Binational Panel cannot make a general study of the act of complaint under Rule 7, since these specific indications were not presented to the Panel, as required by the Rules of Procedure of Article.

¹¹ Rule 59, Part II: Relation of the Facts. (a)

¹² Such as the procedural acts that are being challenged.

¹³ Rule 59, Part II: Relation of the Facts. (c).

- 8.33 In light of this, the Panel can only consider those injuries or pleadings that would have been presented in the complaints as established by Rule 7 of the Rules of Procedure.
- 8.34 This Binational Panel establishes a fundamental distinction between the functions of an authority that cause a nuisance to the individual and those that do not, whether these are internal acts that do not transcend the legal rights of the individual or acts that rather than creating a nuisance produce a benefit to the individual.
- 8.35 Notifications.-
- 8.36 In regards to the notifications, from the perspective of the act of nuisance regulated by Article 16 of the Constitution, the Judicial Power of the Federation has established the following criteria:
- 8.37 ADMINISTRATIVE NOTIFICATION. THIS IS NOT AN ACT OF NUISANCE UNDER THE TERMS ESTABLISHED IN ARTICLE 16 OF THE CONSTITUTION.¹⁴ The administrative doctrine classifies administrative acts or conditions (which include notifications by fiscal authorities), according to their content in the following categories: 1. Acts that directly expand the rights of individuals. Acts of this nature are those of admission, approval, licenses, permits or authorizations, and concessions and patent privileges. 2. Acts that directly limit the legal rights of individuals, such as orders, expropriations, investigation of tax credits, sanctions, and acts of execution; and 3. Acts that clarify when there is an issue of fact or law. Acts of registration, certification, authentication, notifications, and publications fall under this category. From a constitutional standpoint, acts of nuisance can only be those that fall under the second category; that is, acts that directly limit the rights of individuals, not however, notifications that make acknowledgements to a person or give notice of administrative acts, establishing the point of origin for other acts or resources that can be considered acts of nuisance, as opposed to the simple notification of its existence.
- 8.38 It is clear, therefore, that notifications of initial and preliminary determinations are not acts of nuisance, as such notifications do not affect the legal rights of the complainants. These notifications communicate to the parties the status of things or the law as they are issued or produced by two authorities—the Secretariat of Commerce and Industrial Development and the UPCI.
- 8.39 Grants for extension of deadlines and requirements for additional information.
- 8.40 Likewise, it should be recognized that the grants for extension of deadlines and requirements for additional information also do not result in acts of nuisance, as these involve a benefit for the complainants in giving them the opportunity to present information that is useful for promoting their interests. The extension of

¹⁴ Eighth Period. Semanario Judicial de la Federación. Volume: III. Second Part I, June 1989. pg. 481.

- deadlines to present documentation or to provide information is clearly a benefit. Perhaps less clear, but an even greater benefit, is giving them the opportunity to present information that could be beneficial to promote their interests. While a requirement to provide information subject to legal sanction would be an act of nuisance, a requirement to voluntarily provide information may strengthen their position, such as the requirements in question, and is a beneficial act that is left outside the range of Article 16 of the Constitution.
- 8.41 Notifications of Orders for Verification Visits.
- 8.42 In relation to the proceeding it is essential to distinguish between an order for a verification visit, a notification of the order for a verification visit, and the carrying out of the verification visit.
- 8.43 The order for a verification visit is an internal act that has external effects. By means of such an act, the authority orders another hierarchically subordinated authority to carry out the verification visit. The passive subject of the order is the official that carries out the visit and not the individual. This internal act has consequences on the legal rights of the individuals at the time it is carried out; that is, at the time of the verification visit. The individual is the passive subject of the execution of the verification visit. The verification order issued to the officials that will carry out the visits is the cause, the effect of which is the verification visit. Thus, as order ultimately results in an act of nuisance, which the verification visit is, the requirements of Article 16 of the Constitution must be complied with in terms of the issuing of the order and the carrying out of the verification visit. The validity of the order depends on several requisites: i) that the issuer may emit the order: ii) that the recipient may receive it, and iii) that it is in compliance with the necessary requisites such as the competence of the IA.
- 8.44 The only thing that the notification of the order for a verification visit does is to inform the individual of the order, the act of authority, which orders a subordinate authority to carry out the visit. This notification reproduces the content of the order for a verification visit and informs the individual of the order to the officials responsible for executing the verification visit. The notification is a merely procedural act, not an act of nuisance, as established by the jurisprudence thesis previously mentioned.
- 8.45 ACTS THAT ARE NOT NOTIFIED OR ARE ILLEGALLY NOTIFIED, PROCEDURE TO FOLLOW UNDER ARTICLE 209 OF THE FEDERAL TAX CODE.¹⁵ In regard to the requirements of section 1 of Article 209, when the notification of the act is challenged, if the claiming party has knowledge the claim shall state the date in which the notification was recognized, and in the event that the administrative act is also challenged, the concepts of nullification shall be set out. The Court shall first study the concepts of nullification alleged with respect

¹⁵ Federal Fiscal Court. Third Period. Plenary. October 1993. Thesis III-JSS-A-26. pg. 8.

- to the notification and if it is determined that this is illegal or that the party did not have notification, the consequence will be to consider that the actor had knowledge of the administrative act on the date of its initial brief. Second, the Court shall proceed with a study of the challenge that would have been formulated against the administrative act. The goal is to make an in depth determination of the business, and to avoid the reposition of the administrative proceeding as to the notification.
- 8.46 Independent of the issue of competence being irrelevant as to the notification of the order for the verification visit, even when the illegality in the notification is pleaded, such a circumstance would not have a serious effect on the investigation proceeding carried out by SECOFI.
- 8.47 The complainants do not challenge the verification visits that are carried out. The complainants assume the validity of the appointment of the authorities to issue of the verification orders, as well as the competence of the authority issuing the verification order, the validity of the issuance of the order, and the reception of the order and its execution. As a result, all of the proceedings in regards to the order for the verification visit and the execution of the visit are assumed by the complainants.
- 8.48 The act that the complainants challenge as originating from the incompetent authority is the document that contains the notification of the verification visit. Since the verification is merely procedural, it does not affect the legal rights of the complainants nor is it an act of nuisance. As such, even assuming that the DGATJ did not have authority to issue the notification, such circumstance would be equally irrelevant, since the notification is not an act of nuisance.
- 8.49 Thus the panel concludes that the pleading of the complainants relative to the argument that the DGATJ carried out a series of acts that caused them a nuisance should be rejected.
- 8.50 In addition, this Binational Panel considers that the complainants had every opportunity to present evidence and pleadings and to express what was in their legal interest, and that they did so.
- 8.51 If an individual decides to participate in an antidumping investigation, has legal interest, and the right to present evidence, and that these be considered in the investigation. The following legal provisions support this point of view.
- 8.52 Article 82 of the LCE (*Ley de Comercio Exterior* hereinafter LCE) in operation on the date of the beginning of the administrative investigation, provides that: “Interested parties may offer any type of evidence...”
- 8.53 Article 27 of the Regulation Against Unfair Practices of International Trade grant the interested parties and other interested persons the right to offer “all types of

- evidence” in the antidumping investigation. According to Article 23, persons have the right to obtain “the information made available to the Secretariat by any of the affected parties.”
- 8.54 Article 81 of the Regulation of the LCE (hereinafter RLCE) provides that the IA shall carry out, in its initial determination: I.- A notice to the interested parties and the foreign governments, in order for them to express what is in their best interest.
- 8.55 The first part of the Agreement for the Application of Article VI of the General Agreement on Tariffs and Trade (“Antidumping Code of the GATT 1979”) contains similar provisions. Article 6, paragraph 1 of the Code establishes that “the foreign suppliers and all interested parties in an antidumping investigation shall have ample opportunity to present written pleadings that they consider useful.” Paragraph 2 of the same Article states that the authorities shall provide “... the exporters the opportunity to review all the relevant information for the presentation of their arguments,” while paragraph 7 states that “all parties will have ample opportunity to defend their interests.”
- 8.56 In addition, each interested party has the right to have the evidence they present be taken into consideration by the authority before the Final Determination is issued. This principle has been recognized in the decision of a Mexican court in relation with the antidumping proceeding.
- 8.57 In the same manner, the complainants are correct in adducing that the Determination being challenged violates, in their judgment, the guarantee of a hearing established in Article 14 of the Constitution, which establishes the right of the governed to be heard, prior to the deprivation of their possessions or rights, which involves not only their right to be given an opportunity to defend themselves as to the facts, but also the right that the evidence and pleadings are taken into account prior to the issuing of the act of authority.
- 8.58 It is worth indicating that the legal interest of the complainants in presenting evidence and in having such evidence considered, is subject to limitation. If the IA validly issues a questionnaire, the interested party should respond; in the opposite case, their evidence may be thrown out. Article 6, paragraph 8, of the Antidumping Code, indicates: “In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and Final Determinations, affirmative or negative, may be made on the basis of the facts available.”
- 8.59 These legal provisions indicate that this Panel should analyze whether the IA observed the right of the interested parties that had the right to participate in the investigation. In other words, whether the companies were free to offer their own information and evidence, as well as maintain their right that this be considered, independent of whether this information and evidence was presented in response

- to questionnaires, or whether that evidentiary activity was imposed upon them as an obligation.
- 8.60 It is significant that the Administrative Record does not show that any participating company raised the issue of incompetence before this Binational Panel, or that they objected or were reluctant to offer any evidence or information that they eventually presented. In fact, the Administrative Record indicates that each of the companies voluntarily took part in the antidumping investigation, and presented information in the form of their responses to the questionnaires, that none raised an objection to the material or evidence presented, and moreover, that after submitting the questionnaires, the companies continued to offer major information and evidence to the IA.
- 8.61 The Administrative Record reveals that the interested parties voluntarily exercised their right to present evidence and plead as to what was in their best interest, that they had the knowledge of what IA to submit these to, that they had the knowledge of how to defend themselves and against whom to raise their defense, as all of their motions were presented before the competent authorities (SECOFI, UPCI). As it has been mentioned, the companies had the right to present evidence, and the validity or invalidity of the notifications and questionnaires did not extinguish or limit the right or legal right of these companies to offer evidence in this general investigation and that such evidence be considered.

CONCLUSION.-

- 8.62 The above leads this Binational Panel to conclude that the “Legal Pleadings” with respect to the legal existence and competence of the DGATJ and its Director should be denied, and consequently, is rejected, since it is useless to remand to the IA, which in the end, would once again determine the issue. Furthermore, this would result in another review before this Binational Panel. Thus, under the principles of timely and expedited administration of justice contained in Article 17 of the Constitution, in cases like this, it is suitable to deny the “Legal Pleadings” and determine the issue.
9. **ISSUE II. ILLEGAL RECEIPT OF THE OFFICIAL QUESTIONNAIRE, EVIDENCE, AND ARGUMENTS PRESENTED OUTSIDE OF THE TIME LIMITS, raised by the National Production.**
- 9.1 The Panel does not study this issue raised by the participants that were part of the National Production, which withdrew from this review. (See footnote on page 2).
10. **ISSUE III. DETERMINATION OF A RELEVANT MARKET, AS WELL AS THE ESTABLISHMENT OF THE CERTIFICATION REQUIREMENT OF CLASSIFICATION AND SHELF LIFE.** The companies Sun Land Beef Company, Inc., Murco Foods, Inc., Packerland Packing Company, Inc., Farmland

National Beef Packing Company, L.P., IBP, Inc., CKE Restaurants and Excel Corporation, raised this issue.

ANALYSIS.-

- 10.1 Determination of a relevant market:
- 10.2 The issue this Panel has to resolve is whether SECOFI's Final Determination with respect to relevant market, was rendered in accordance with the applicable law.
- 10.3 The complainants argued that there is no legal provision in the LCE or the RLCE that allows the IA to determine the existence of a relevant market. They also paragraph out that, in the Final Determination, there is not an explanation whatsoever about the facts the IA took into account to render this determination.
- 10.4 Likewise, the complainants argue that the issue of a "relevant market for exporters" was not a subject of controversy during the administrative investigation. The only time the issue, related to the relevant market, was raised was at the Public Hearing during the investigation, in which to a question raised by the authority, some of the exporters answered that the main products they exported (but not the only ones) were precisely, "Select" or "Choice" beef cuts.
- 10.5 Additionally, the complainants state that the only paragraphs of the Final Determination that deal with the possible determination of a relevant market, are paragraphs 431 and 654.
- 10.6 Paragraph 431 refers only to the issue of similar products and that it is not the objective of this paragraph to establish a definition of the relevant market of the investigated products and from the analysis of paragraphs 431 and 654, it is possible to conclude that the IA considers as important the fact that the bovine beef transactions to Mexico are mostly concentrated in products type "Choice" or "Select".
- 10.7 They also paragraph out that the determination of a relevant market, contradicts what is established in paragraphs 488 and 489 of the Final Determination, where the IA expressly dismissed the arguments presented by both exporters and importers, with respect to the segmentation of the bovine products market.
- 10.8 The IA indicates that the legal grounds to determine a relevant market is expressed in paragraph 410 of the Final Determination, in which it is expressed that the IA made an analysis of the different factors of injury provided for in Articles 42 of the LCE and 64 of the RLCE, as well as some of the factors of threat of injury provided for in Articles 42 of the referred statute, 68 of the RLCE, 3.1, 3.2, 3.4, 3.5, 3.7, and 3.8 of the ADA.

- 10.9 According to the analysis of the Panel, since the IA did not use “the relevant market” as an economic concept or factor in its Final Determination, the issue lacks substance and is dismissed.
- 10.10 Requirement to obtain a certificate that confirms the shelf life of the product subject to investigation.
- 10.11 The issue that this Panel should resolve is whether the Final Determination by the IA in that part referring to the requirement to demonstrate before the customs authority, through a certificate issued by the United States Department of Agriculture that the classification of “Select” or “Choice” was complied with and that no more than 30 days have passed since slaughter, according to the plant certificate, was or was not in accordance with legal provisions on antidumping and compensatory duties of the importing Party.
- 10.12 The complainants argue the following:
- 10.13 There is no legal provision in the LCE or in its Regulation that allows the IA to request that it be demonstrated before the customs authority, through a certificate issued by the U.S. Department of Agriculture, that the classification “Select” or “Choice” is complied with and that no more than 30 days have passed since the date of slaughter, according to the respective plant certificate. In the Final Determination there is no explanation of the special circumstances, specific reasons, immediate causes or facts that led the IA to request such a certificate. Therefore Articles 124 and 126 of the LCE are violated which gives rise to the hypothesis established in sections II and IV of Article 238 of the CFF..
- 10.14 The certificate already existed because it is strictly indispensable that the meat that comes from the United States has a certificate issued by the Department of Agriculture of the United States. The problem is that that certificate is now closely related to the application of an antidumping duty and there is no legal basis, in the LCE nor in the ADA, that based on such a certificate, the antidumping duty be applied. Furthermore,, the certificate of origin exists which is a very important matter for the effects of applying antidumping duties and the law does establish it and surely in the certificate that the exporters issue, the origin is established that ultimately is the one that give grounds for imposing an antidumping duty to X product from X country.
- 10.15 Regarding the extension of the time limits to offer evidence, the complainants indicate the following:
- a) That the investigations in the area of unfair trade practices have as a main objective to determine, through an investigation carried out in accordance with the procedure established in the law, the existence of price discrimination, of the injury or threat of injury, and its causal relationship.

b) According to the LCE, price discrimination should be understood to mean the importation of merchandise at a price below its normal value and injury or threat of injury to mean that the imports generate an injury or damage to the national industry. And, causal relationship to mean that the imports with price discrimination are the direct cause of the injury or threat of injury.

c) The procedures in the subject of unfair trade practice do not allow the IA to impose additional restrictions in the area of exports or imports because this would violate Article 131 of the Constitution, the LCE, and its Regulation.

d) Supposing, without conceding, that the IA would have considered that the fact that the imports and exports mentioned in the Public Hearing of January 6, 7, and 8 of the year 2000 were sufficient to determine the requirement for the above-mentioned certificate, it should have proceeded in accordance with Article 171 of the Regulation of the LCE. That is to say, it should have requested the extension of any evidence or evidentiary hearing with the intent that this would lead to the discovery of the truth of the facts that were investigated.

e) Notwithstanding the above, and in addition to the fact that the IA does not have the powers to request such a certificate for the investigated products (paragraph 654 of the Final Determination), there does not exist in the Administrative Record any evidence that demonstrates that products with more than 30 days since slaughter were imported and that those imported products caused injury or threat of injury to the national production.

f) There does not exist one request for information in the Administrative Record in which the IA requested information relating to the age of the meat. That is to say, within the questionnaire that was issued by the Secretariat, it did not request information related to what grade or type of meat, whether it was "Select", "Choice", or "Prime", "No-roll", "Ungraded", or its quality. On the other hand, the complainants consider that the age of the meat is not an essential element for the investigation at hand.

g) On the other hand, supposing, without conceding, that such products were imported, they were presented within the databases of the exporters and importers and were taken into account for the application of the individual antidumping duties of each one of the complainants.

h) As it can be verified in the Administrative Record, the complainants presented in their response to the questionnaire all the sales in their internal market in the U.S., as well as their export sales to Mexico during the investigated period, without importance to the age or grade, because all of the sales included all the prices, by product code, including their adjustments of all the investigated products. Thus, all the sales were reported, including the ones with more or less than 30 days in the domestic market as well as the export market in the United States. The authority had all of the information to calculate an antidumping duty.

Therefore, the IA had all the necessary information to determine one antidumping duty, without importance to the age of the meat products.

i) On the other hand, the IA did not extend the evidentiary period or the requests for evidence, in order to inform itself of other facts and based itself solely and exclusively on that said by the importers and exporters. Consequently, the Final Determination violates Articles 81 of the LCE and Articles 166, 167, 168, and 171 of its Regulation.

- 10.16 The IA states that the legal provisions that allow it to request a certificate to be presented that certifies the quality of the products subject to the investigation, as well as the useful shelf life, are found in Article 41 section IV and Article 42 section VI of the Mexican Foreign Law and Articles 3.4 and 3.7 of the ADA. These allow the IA to use other elements to determine injury and the threat of injury to the national production and it is the function of this IA to determine the necessary means for the adequate application of the antidumping duties.
- 10.17 On the other hand, the IA also states in its Brief that the investigations in the subject of unfair trade practices have as their objective to analyze the existence of price discrimination practices and to determine if they cause or threaten to cause an injury to the national production. That in the case of the antidumping investigations they translate into the imposition of antidumping duties whose goal is to guarantee fair conditions of competition in light of the unfair trade practices and to avoid wherever possible that they negatively impact other productive sectors and on the consumer public.
- 10.18 In the antidumping investigation on bovine meat the IA considers the bovine meat as a product of basic consumption because it has as its objective to feed humans.¹⁶ Due to the above, the mentioned authority considers that the antidumping duties imposed on bovine meat impact the consumer public and so they present public interest considerations.
- 10.19 Thus, in compliance of several provisions of the LCE, amongst them are Articles 5 and 16, the IA reached the decision to apply antidumping duties to the bovine meat through the instruments that permit it to provide fair conditions of competition and to avoid whenever possible a negative impact on other productive sectors and on the consumer public. Therefore, the IA decided to apply the individual definitive antidumping duties resulting from the margins of price discrimination calculated for each one of the exporters for the imports of the meat products “Select” or “Choice” with no more than 30 days since the date of slaughter and the margin of price discrimination of the higher prices per group of products found in the investigation, pursuant to Articles 54 of the LCE, Article 89 of the RLCE, and Article 6.8 of Annex II of the ADA for the rest of the products.

¹⁶ See paragraph 18 of the Final Determination.

- 10.20 The IA states that in the section on Preliminary Considerations of the Final Determination the factors are stated that it used to base its decision to establish a certificate that certifies that no more than 30 days have passed since the date of slaughter of the investigated products and that such determination is based on the analysis carried out by the IA from the information provided by the interested parties that participated in the antidumping investigation.
- 10.21 In this manner the IA observed diverse considerations that reflect the need to implement an alternative mechanism so that the antidumping duties did not cause adverse effects on the consumer public such as:
- a) The lack of differentiation between the national and the imported meat when offered to the consumer public.
- 10.22 “As can be observed in paragraph 489 of the Final Determination, as in the verification visits records¹⁷ carried out by the IA, the importing companies affirm that they acquire national and imported product which they transform and later sell. However, in their sales activities and sale to the consumer public they do not distinguish between the type of meat nor in its origin. Thus, in not having a distinction between the different types of meats that they offer to the consumer public, the consumer lacks the elements that allow it to distinguish between the different types of meat and the age of meat. For these reasons, the IA considered it necessary to implement a measure that would permit a guarantee to the consumer public safety as to the type and age of the meat that enters the Mexican market through the imports.”¹⁸
- b) Affirmations made by the importing and exporting companies regarding the age of the meat they sell.
- 10.23 “The affirmations presented by the parties in relation to the age of the meat that is imported into Mexico are found expressed in the pleadings presented by the exporters and importers companies during the proceedings,¹⁹ as well as in the

¹⁷ See Record of the Verification Visit of Aurrerá, S.A. de C.V. of November 11, 1999, page 6 of record 2042 of the index of the Administrative Record, Volume 93 of the nonconfidential version and pages 9 and 10, Volume 413, confidential version, and Verification Record of Gigante, S.A. de C.V., November 22, 1999, record 2195 of index of the Administrative Record, Volume 96 nonconfidential version and Volume 416, confidential version.

¹⁸ See Brief by the IA, dated November 24, 2000, pages 113 and 114.

¹⁹ See the pleading by Operadora Futurama, S.A. de C.V., record 9904716 of September 28, 1999, pages 1 and 2, registry 1466 of the indices of the Administrative Record, nonconfidential version Volume 71 and confidential version Volume 319 and the pleading by Ayvi, S.A. de C.V., record 9904703 of September 28, 1999 pages 2 and 3, registry 1458 of the index of the Administrative Record nonconfidential version Volume 68 and confidential version Volumes 288-290.

record of the Public Hearing that was held on January 6, 7, 8, of the year 2000,²⁰ contained in the Administrative Record of the antidumping investigation.

- 10.24 In paragraph 165 section B subsection d of the Final Determination, in the record of the public hearing, and in the pleadings presented by the national production in the antidumping investigation, the petitioners argue that in the U.S. market there are commercial practices that are outside of the normal commercial operations such as the auction prices (push lists) and the sale of irregular products such as dark cuts, without classification and waste cattle. It is worth commenting that the practice by the exporters is also followed by the importers as they do not state on their exhibit shelves, nor on their commercial invoices, the type of cut that is sold nor the time that has passed since the date of slaughter, packaging, or cutting, nor the date in which it is was displayed for the consumer public.
- 10.25 Likewise, the national producers affirm that time is a determinant factor in the price of the meat products, because the greater the lapse between sacrifice and the sale of the product the price will be less, as well as the opportunity to sell the product. In reference to the irregular products such as the dark cutter, no roll, and utility, time accentuates the loss of value.
- 10.26 As mentioned in paragraph 165 of section A subsection j of the Final Determination, the importers affirm that the push list or inventory sales, "...cannot on their own be considered unfair trade practices because any merchant offers his inventory with the greatest discount in reference to the age of the product, without that necessarily implying a price discrimination..." The above reveals the existence of the meat product imports with an age of over 30 days, which are offered to the consumer public without distinction to the fresh products, a differentiation almost impossible for the consumer to make."
- 10.27 The commercialization and imports of meat products with a greater age could not necessarily reflect the existence of unfair trade practices. However, based on the above arguments, the imposition of definitive antidumping duties that limit the entrance of such merchandise through the certificates established in paragraph 654 of the Final Determination do guarantee that fair competition conditions are offered and that negative impacts are avoided for other productive sectors and for the consumer public without it violating any legal provision in the subject matter or is there any violation of the rights of the exporters that participated in the investigation, so long as these have imposed upon them a margin of price discrimination calculated individually for each exporter as a result of the antidumping investigation.

²⁰ See pages 37-39, 398, 399, 470-473 of the record for the public hearing of February 11, 2000, registry 2728 of the Administrative Record's index, nonconfidential version Volume 105-106 and confidential version Volumes 431-432.

10.28 From the above it is derived that SECOFI in using the certification or labeling that is required for the products that enter into the country, does so as a means to prove if the meat that enters Mexico has less than 30 days from the date of sacrifice, given the considerations mentioned above and the convenience of imposing a definitive antidumping duty that limits the entrance of the merchandise through the certificates established in paragraph 654 of the Final Determination, to guarantee fair conditions of competition and to avoid negative impacts on other productive sectors and on the consumer public.²¹

c) Determination of the age of the bovine meat with the information provided by the interested parties.

10.29 “As can be observed in paragraphs 189, 190, and 191 of the Final Determination, the IA dismissed, for the effects of calculating the margin of price discrimination, the argument by the national production relating to the sale of the non-preferred products such as dark cutter, no roll, and utility because they are carried out with a loss in the internal market of the United States. It did not provide information that justified excluding the sales carried out at a loss.

10.30 From the information provided by the national production and by the importers and exporters one cannot distinguish which sales correspond to meat products of over 30 days since slaughter. However, SECOFI observed that the effect of the push list on the prices of the sales in the Mexican market are reflected in the margins of price discrimination at the product code level because the level of detail of the codification of the products reported by the exporting companies, does not specify the number of days of inventory.

10.31 The above does not allow an exact determination of the cases in which the products are over 30 days old. In these circumstances the imposition of a general antidumping duty without the application of instruments, such as the above-mentioned certificates, does not guarantee that the imports of meat products that enter into Mexico, and consequently that reach the consumer public, are fresh products that are less than 30 days old.”²²

d) The preference of the consumer public.

10.32 “In the Administrative Record of the investigation there is documentary evidence consisting in market studies presented by Gigante, S.A. de C.V. and by the Coalition of exporters in which the preferences of the consumer publics are contained with regards to the acquisition of bovine meat and the uses and habits of consumption are analyzed.

²¹ Id. at pages 114-117.

²² Id. at pages 117-118.

- 10.33 In the above-mentioned studies it is sustained that the consumer public prefers bovine meat over pork and chicken meat and so bovine meat is consumed in the greatest amount. Additionally, in such studies it is recognized that one section of the public consumption does not buy bovine meat in the self-service stores because it does not know the country of origin or where the meat is from and it does not trust it because the meat is no longer fresh.
- 10.34 Similarly, the results of the market studies refer to comments by the consumer public in regard to the negative attributes of the meat sold in self-service stores which include the lack of uniformity in the size, the freshness of the cuts, and the fact that the meat in the shelves is offered as left over meat, and that in the sales older meat is sold. Likewise, the consumer public stated as negative attributes of the frozen meat (old and stale), the dark color or brown/black color that it has, the lack of juices (blood while raw as well as in the cooking process), hard meat/difficult to cut and eat once it is cooked (stiff), concentrated/strong flavor, and little nutrients.
- 10.35 In paragraph 420 of the Final Determination the personnel of the companies verified by SECOFI stated that the imported merchandise presented a darker color and that they had a shorter shelf life than the national product.
- 10.36 Lastly, the market studies presented by Gigante and the Coalition paragraphed out that the negative characteristics have greater weight than the positive attributes because within such characteristics the one that stood out was the perception by the public of consuming left over meat, lacking freshness because a long time passes between the slaughter and the consumption.
- 10.37 ...from the results stated in the market studies, the IA considered, as a result of the antidumping investigation, that because bovine meat is a basic consumption product it is necessary that the imposition of antidumping duties guarantee a timely defense to the national production and to avoid whenever possible that it impact other productive processes and the consumer public. Consequently, the import of meat products was limited to products properly classified as “Select” or “Choice” and with a period from the date of slaughter of no more than 30 days because as time goes by the price of the meat is reduced.”²³

e) Application of certificates as a result of the administrative practice

- 10.38 “If the LCE establishes that the Secretariat will oversee that the antidumping duties provide fair conditions of competition to the branch of the national production and to avoid where possible that they negatively impact other productive sectors and the consumer public, then, specifically Article 5 section VII and Article 16 section V of the LCE state the powers of the SECOFI to apply the adequate measures to guarantee that the antidumping duties comply with the objective established in the Law.

²³ Id. Pgs 119-121.

- 10.39 In this manner, in terms of the analysis and evaluation of the information the IA had during the investigation, the IA will determine in each case the adequate measure to impose the antidumping duties and to provide fair conditions of competition for the national production.
- 10.40 SECOFI simply imposed definitive antidumping duties that limit the entry of merchandise through certificates established in paragraphs 654 of the Final Determination, which guarantees fair conditions of competition and prevents negative repercussions on other productive sectors and the consumer. Because it was dealing with the competitive product, SECOFI used the certification required of products entering the country as a way to determine whether the beef was less than 30 days old from the date of slaughter. That is to say, SECOFI did not impose a new obligation for importers; rather, SECOFI used a mechanism already in existence to reach its goal.
- 10.41 This is not the first time SECOFI applies this type of mechanism or requirement that permits the adequate application of the antidumping duties. For example, the “certificate of final use” is indicated in paragraph 674 of the Final Determination of the antidumping and antidumping investigation of cold rolled steel sheet, published in the DOF on December 27, 1995 which states:
- 10.42 “Attach to the import declaration, at the time of the customs clearance, a certificate of the end use of the good, signed by the importer under penalty of perjury, stating the characteristics of the imported cold-rolled steel and stating that these characteristics strictly correspond to those described in sections a, b, c, d, and e; the end use of the imported product and the declaration that the imported cold-rolled steel imported with these characteristics cannot be used for different purposes than those indicated.”
- 10.43 In the same manner, the certificates requested in the Final Determination of the antidumping investigation on cut to length plate products, published in the DOF on November 18, 1994; the Final Determination of the antidumping investigation of flat coated steel, published in the DOF on December 29, 1995; the antidumping and antidumping investigations on hot rolled steel sheet, published in the DOF on December 30, 1995; the antidumping and investigations on cold rolled steel sheet, published in the DOF June 7, 1996. All of these entail the application of measures that the IA has established in order to apply adequate compensatory duties, provide fair conditions of competition, and prevent negative repercussions on other productive sectors or the consumer public.
- 10.44 Thus, the IA determined that in order to impose adequate compensatory duties on imports of bovine beef, it was necessary to apply a mechanism that would allow for the identification of type and age of beef. In such manner, SECOFI could apply compensatory duties that counteract practices of unfair international trade and provide fair conditions of competition without having a negative effect on the

- consumer public. Such mechanism consists of the certificates of classification of Select or Choice beef and the age of beef in the sense that the good imported is no more than 30 days old from the date of slaughter. These measures were clearly set out in paragraph 654 of the Final Determination. ...”²⁴
- 10.45 Due to the above, the IA maintained that it has the authority to establish modalities in the of application of compensatory duties. The IA has the power of legal interpretation, in accordance with Article 2 of the LCE and Article 14, paragraph IV of the Mexican Constitution.
- 10.46 In the case of the antidumping investigation on imports of bovine beef, the IA determined that it was necessary to distinguish between imported beef that was older and younger than 30 days, for the application of the definitive antidumping duties, because the price is different for meat with more than 30 days since the date of slaughter of the beef than that meat that has less age.
- 10.47 Similarly, the IA considered that since it became aware of the “push lists” at the Public Hearing of the investigation held on January 6-8, 2000, a difference in price was observed between the products. .
- 10.48 The IA maintained that it did not have knowledge of the “push lists” prior to the Public Hearing indicated above and it did not rely on expert technical evidence in the record that corroborated this, but, what it did find was that that the exporters had ample knowledge of their goods and the transaction of those goods.
- 10.49 The IA considered that it was the duty of each interested party to provide a description of their product, including the types of products traded.
- 10.50 If the complainants wished to distinguish and obtain specific antidumping duties for these products of greater age, they could have provided this information from the beginning. The exporters know the beef market well and they simply cannot argue that they do not know or did not know at the time they completed the questionnaires that the beef is sold at lower prices when its age is more than 30 days since the date of slaughter. It was from them, specifically, that the information was derived that the beef is sold in various classifications, that is, Choice, Select, Prime, No roll, and other qualities more or less than 30 days.
- 10.51 The IA considers that the information was requested in the official questionnaire of the investigation because in the introduction of the questionnaire it is stated that “In addition, the export companies can present information that is not requested which is considered relevant.”
- 10.52 Therefore, the companies had the duty to provide the necessary information so that the IA could make determinations, such as the adjustments indicated in Article 36 of the LCE.

²⁴ Id. Pgs. 137-141.

- 10.53 The IA acted on basis of the information and facts of which it had knowledge. In an antidumping investigation, the parties present information they consider adequate to defend their interests. Failing to do so or presenting information is completely their responsibility. This can result in adverse effects, since the IA can make its determination based on the best available information.
- 10.54 In addition, the petitioners had ample opportunity to present information related to the age of beef when they presented their arguments, even after the Public Hearing of the antidumping investigation. Nevertheless, they failed to do so, perhaps because they believed that this affected their interests or because they did not rely on this information. They now argue that the IA should have requested information from them with respect to the age of beef, and that because the IA failed to do so, this affected their legal interest.
- 10.55 With respect to the extension of time to present evidence, the AI stated during the Public Hearing that the time limits for the investigation did not allow for this.
- 10.56 This Panel considers that the LCE and its Regulation do not expressly establish the possibility that the IA should request a party to demonstrate before the customs authority, through a certificate issued by the United States Department of Agriculture, that the classification of “Select” or “Choice” was complied with and that no more than 30 days have passed since the day of slaughter, according to the plant certificate. As such, the Final Determination being reviewed lacks legal basis with respect to the compensatory and antidumping duties imposed by the importing Party.
- 10.57 The previous is corroborated by this Panel, through a detailed analysis of the Final Determination of the IA with the purpose of determining whether the act had proper legal basis.
- 10.58 This Panel considers that none of the legal grounds invoked in the Final Determination correspond to those invoked by the IA in its Brief and in the Public Hearings held on August 29-30 of 2002, and January 10, 2003; that is to say, the grounds indicated by the IA to request the certificates were Articles 2, in correlation with the fourth paragraph of Article 14 of the Constitution, and Articles 5, 16, and 88 of the LCE. From the previous Articles, the only invoked was Article 5, section VII of the LCE in paragraph 175 of the Final Determination. Section VII of Article 5 of the LCE indicates the authority of the Secretariat to “process and resolve investigations dealing with unfair practices of international trade, as well as determine the antidumping duties that result from such investigations” but does not give authority to request the certificates discussed in paragraph 654 of the Final Determination.
- 10.59 Other Articles invoked by the IA in its Briefs and paragraph 410 of the Final Determination refer to the analysis of the elements of injury in accordance with

- Articles 41 of the LCE and 64 of the RLCE, as well as some of the elements of threat of injury established in Articles 42 of the LCE, 68 of the RLCE, and 3.1, 3.2, 3.4, 3.5, 3.7, and 3.8 of the ADA, which were invoked by the IA as other elements of injury. However, these also do not apply to the certificates covered in paragraph 654 of the Final Determination.
- 10.60 With respect to the provisions invoked by the IA in its brief and in the Public Hearings of August 29-30 of 2002, and January 10, 2003, it should be made clear that this Panel does not consider said Articles applicable for the following reasons:
- 10.61 From the analysis of Articles 2, 5, 16 and 88 of the LCE invoked by the IA to impose the certificate previously mentioned the following can be derived:
- 10.62 Article 5²⁵ of the LCE does not expressly grant authority to the IA to require certifications that confirm that the classification of “Select” or “Choice” is complied with and that no more than 30 days have elapsed since the date of slaughter.
- 10.63 The above is true because in the present case, none of the circumstances anticipated by Article 5 of the LCE are applicable for the certificate requirement.
- 10.64 On the other hand, Article 16²⁶ of the LCE is only applicable to regulatory measures and non-tariff restrictions on importation, circulation, or transit of

²⁵ Article 5. The powers of the Secretariat are:

- I. To study, project, and propose tariff modifications to the Federal Executive;
- II. To process and settle investigations on safeguard measures, as well as to propose measures that will result from such investigations to the Federal Executive;
- III. To study, project, establish, and modify non-tariff regulatory and restrictive measures for exportation, importation, circulation, and transit of goods;
- IV. To establish the rules of origin;
- V. To grant pre-permission and assign import and export quotas;
- VI. To establish the requirements for marking for each country of origin;
- VII. To process and settle investigations of unfair practices of international trade, as well as to determine the antidumping duties that result from said investigations;
- VIII. To advice Mexican exporters involved in foreign investigations on unfair practices of international trade and safeguard measures;
- IX. To coordinate international commercial negotiations with the proper departments;
- X. To expedite administrative provisions in compliance with international trade treaties or agreements of which Mexico is party;
- XI. To establish mechanisms to promote exports; and
- XII. Any other power expressly granted by law or regulation.

²⁶ Article 16.- The non-tariff regulatory and restrictive measures on imports, circulation, or transit of goods, which sections III and IV of Article 4, may be established in the following cases:

- I. When these are temporarily required or to correct imbalance in the balance of payments, in accordance with the international treaties or agreements of which Mexico is party;
- II. To regulate the entry of used products, unwanted objects, or goods that lack a substantial market in the country or origin.
- III. In accordance with the provisions established in the international treaties or agreements of which Mexico is party;

goods, which may only be applied by the Federal Executive, and which refer to circumstances anticipated in sections III and IV of Article 4²⁷ of the LCE, which do not have anything to do with the application of a certificate that confirms that the imported meat is “Select” or “Choice” and that no more than 30 days have passed since the date of slaughter, and which refer to the establishment of: a) measures to regulate or restrict the exportation or importation of foreign goods through agreements issued by the Secretariat or, as the case may be, jointly with the competent authority and published in the DOF, and b) measures to regulate or restrict the circulation or transit of foreign goods in the national territory coming from and going abroad by means of agreements issued by the competent authority and published in the DOF.

10.65 Specifically, in the interpretation of Article 88²⁸ of the LCE, it is evident that for the IA said Article is unclear, since in the Public Hearings of August 29-30 of 2002, and January 10, 2003, the IA contradicted itself with respect to the application and interpretation of this Article.²⁹

10.66 This Panel considers that such confusion is explainable for the following reasons:

a) Under the terms of Article 88, the IA first resolves that there is the existence of price discrimination and then applies an antidumping duty that is applied to imported goods under conditions of dumping.

b) It is also clear from the Administrative Record that the IA considered the database from exporters, importers, and brokers, which included products of different grades or types and age and based on it the IA applied individual antidumping duties for each one of the complainants.

c) Precisely, these individual antidumping duties are the ones that should provide a timely defense to the national production and prevent wherever possible

-
- IV. As a response to restrictions against Mexican exports applied unilaterally by other countries;
 - V. When necessary to prevent competition in the domestic market by goods involving unfair practices of international trade, in accordance with this law, and
 - VI. When situations arise that are not foreseeable by normal Mexican laws with respect to national security, public health, ecological and livestock sanitation, in accordance with legislation in this area.

²⁷ Article 4.- The Federal Executive shall have the following powers:

- ...
 - III. To establish measures to regulate or restrict the exportation or importation of goods through agreements issued by the Secretariat or, as the case may be, jointly with the competent IA and published in the Official Gazette of the Federation;
 - IV. To establish measures to regulate or restrict the circulation or transit of foreign goods in the national territory originating from and set aside for foreign trade, by means of agreements issued by the proper IA and published in the Official Gazette of the Federation; ...

²⁸ Article 88.- By imposing a antidumping duty or by proposing the application of a safeguard measure, the Secretariat shall oversee such measures, in addition to providing a timely defense to the national production, preventing negative repercussions in other productive processes and in the consumer public.

²⁹ See Transcript of Public Hearing of August 30, Spanish version pg. 49 to 58.

negative repercussions in other production processes and consequently in the consumer public.

d) Notwithstanding the above, the IA decides to impose a residual antidumping duty under the terms of paragraph 654 of the Final Determination, if it is not demonstrated before the customs authority, through a certificate issued by the United States Department of Agriculture that the classification of “Select” or “Choice” was complied with and that no more than 30 days have passed since the day of slaughter, according to the plant certificate.

e) The logical problem that arises from this is that notwithstanding that the IA applied an individual antidumping duties for each one of the complainants, the IA also applies the measure that is to say, the certificate, and based on not presenting the certificate, the IA applies the residual antidumping duty on based on the fact that there did not exist any information and that the IA considered should have been provided by the exporters, whether or not the question of the age of beef was included in the official questionnaire of the investigation. Thus, the IA alters the logical order of the Article, for if one does not comply with the certificate then a residual antidumping duty is applied, equivalent to the highest duty, on basis of the best available information under Article 54 of the LCE.

f) The IA argues in its Brief and in the Public Hearings of August 29-30 of 2002, and January 10, 2003, that the justification for the certificate indicated in paragraph 654 of the Final Determination for consumers to be able to differentiate between types of beef being consumed. The quality of food impacts health.³⁰

g) Notwithstanding the above, the IA itself does not know whether in the Mexican market it would be guaranteed, that at least by the price, the meat could be distinguished as fresh meat or as meat older than 30 days. Thus, the certificate measure applied does not serve to protect the consumer public.

10.67 For the reasons stated above, this Panel considers that the certificate, as a measure used to protect the consumer public, supposing without conceding, that the IA has the authority to require such a certificate, is insufficient and inapplicable, and that the antidumping system is not the tool to accomplish such goal. The antidumping duty is the only remedy against price discrimination.

10.68 This Panel considers that the fact that the IA has in the past used the certificate requirement in other antidumping investigations, does not legitimize this practice, nor does it make it legal, on basis of Article 10 of the Federal Civil Code, which establishes custom cannot go against the law, or disuse of the law, or a contrary practice cannot be raised against the observance of the law.

³⁰ See the transcription of the Public Hearing of August 30, Spanish version, pgs. 59 and 60..

- 10.69 Furthermore, the legal grounds and justifications used by the IA in its Brief and in the Public Hearings of August 29-30 of 2002, and January 10, 2003, to request the certificate are not applicable, reason for which the Secretariat based its determination on allegations, conjectures, or remote possibilities.
- 10.70 Likewise, this Panel considers that the fact that the IA invoked its power to interpret the LCE, under Article 2³¹ of the LCE and Article 14³² of the Constitution, confirms that there is no express legal provision on the subject of antidumping and compensatory duties of the importing Party to require the certificate established in paragraph 654 of the Final Determination.
- 10.71 Regarding the quality of meat, this Panel agrees with the IA that the problem of the quality of meat is not a new issue because it was invoked the importers and exporters, and also by the producers during the course of the investigation while the parties made their arguments and offered their evidence as stated in the following paragraphs of the Final Determination:
- 10.72 Arguments and evidence of the participants.
- I. Importers: paragraph 35(C); paragraph 37(D); paragraph 39 (D and E); paragraph 41(A, B, C, and D); paragraph 43(H)(b), (M), (N), and (O); paragraph 45, (A, H, K, L, M); paragraph 49 (B, D, E,); paragraph 55(E); paragraph 57(A); paragraph 59(A, D, E, H, I, K(c)); paragraph 61(K); paragraph 63(C, E); paragraph 65(B, E, F); paragraph 67(A, C); paragraph 69(C); paragraph 71(A); paragraph 75(A); paragraph 77(C); paragraph 79(C, D, H); paragraph 83(C, E, I); paragraph 90(C); paragraph 92(G); paragraph 94(B, E, L, N); paragraph 96(A)(c), (E), (F); paragraph 98(D); paragraph 100(A, M(a));
- II. Exporters: paragraph 111(B)(d), (F); paragraph 121(B, F);
- III. National Production: paragraph 133(D, O); paragraph 165(A)(c, d, e, h, i, and j), (B)(d, e).
- 10.73 From an analysis of the paragraphs mentioned above, this Panel concludes that the arguments presented by the importers and exporters had the purpose to distort that the products imported into the country were similar to those produced in Mexican territory.

³¹ Article 2.- The provisions of this Law are for the purpose of public order and shall apply to the whole of the Republic, without prejudice to international treaties or agreements of which Mexico is party. The application and interpretation of these provisions correspond, for administrative purposes, to the Federal Executive by means of the Secretariat of Commerce and Industrial Development [previously SECOFI, now the Secretariat of Economy].

³² Article 14.- ...

In civil trials, the definitive sentence shall be determined in accordance with the language of the law or the legal interpretation of the law. Should these be found to be lacking, the sentence shall be based on general legal principles.”

- 10.74 With respect to the price list for the “push list”, the IA indicates in paragraph 195 of the Final Determination that the petitioners argued for the existence of the price list for the “push lists”, that according to their statements were evidence that the products that have not been sold within a time period in which they are normally sold in the domestic U.S. market, are sold to Mexico at prices that do not cover the costs of production.
- 10.75 Due to such arguments of the petitioners, in paragraph 196 of the Final Determination, the Secretariat considered that the effect of the “push lists” on sale prices in the Mexican market are reflected in the margins of price discrimination by product code, since the level of detail of the codification of the products reported by the exporters to the Secretariat do not specify the number of days in inventory of the product. Thus, if the practice mentioned exists indicated by the petitioners, the comparison of normal value and export price carried out by the Secretariat reflects the price variation caused by the difference in days between production and the sale of each product in each market.
- 10.76 Analyzing paragraphs 189 -196 of the Final Determination, this Panel considers that the IA should not have considered as valid the argument of the petitioners with respect to the existence of price lists for the “push lists”, since in paragraph 190 [of the Final Determination], the IA itself rejects the argument of the petitioners that non-preferred products such as “dark cutter”, “no roll”, and “utility” are commercialized in the U.S. as well as the Mexican market, at prices that do not allow for profits, since there is no evidence in the Administrative Record to support the argument that domestic sales of non-preferred products in the U.S. market occur at a loss. Moreover, the IA adds that even if the argument of the petitioners had been acceptable, due to the procedural stage of the investigation, the Secretariat would have been unable to require specific information with respect to costs of production from each of the participating export companies. This Panel considers that the IA should have applied the same reasoning to the argument related to the price lists for the “push lists”.
- 10.77 Notwithstanding the above, in regards to the price lists for the “push lists”, without any evidence in the Administrative Record to support the existence of such lists, and due to the inability of the IA to obtain specific information regarding these lists because of the procedural stage of the investigation at the time, the IA considers that the effect of the “push lists” on sale prices in the Mexican market is reflected in the margins of price discrimination at the product code level, since the product codes reported by the export companies to the Secretariat did not specify the number of days in inventory for each product. As such, if the practice indicated by the petitioners existed, then the comparison carried out by the Secretariat between normal value and export price reflected the variation of prices caused by the difference in days elapsed between the production and sale of each product in each market.

- 10.78 Due to the above, this Panel rejects the argument of the IA that the existence of the “push lists” is revealed by the existence of imports of beef products older than 30 days, which are offered to the consumer publics without distinction from fresh products, a differentiation which is almost impossible for a consumer to make.
- 10.79 Specifically, in paragraphs 195 and 196 of the Final Determination, the IA wishes to justify the requirement of a certificate that demonstrates that the imports are “Select” or “Choice” and that no more than 30 days have elapsed since the date of slaughter.
- 10.80 The IA considers that the exporters should have provided such information in the official questionnaires, indicating with specificity the age of the investigated products. Since no such information was found in the Administrative Record, the IA proceeded first, to require the certificate, and second, to apply the best available information pursuant to Articles 6.8 of the ADA and 54 of the LCE.
- 10.81 It should be made clear that this Panel considers that if the IA, prior to the Public Hearing, had knowledge of the existence of problematic issues with respect to the quality of the national and imported products, as indicated in the Final Determination, it could have requested additional information rather than wait for “the export companies to provide information that was not requested but which that they nevertheless considered relevant.”
- 10.82 Likewise, this Panel considers the determination of the IA is not in accordance with the law. It is easy for the IA, that if at almost the end of an antidumping investigation an issue arises according to that stated by the producers, importers, brokers, or exporters, an issue that is considered important at the Public Hearing during the course of the investigation, an issue in which the parties were not given the opportunity to express their arguments or provide supporting evidence then the IA’s determination to use of the best available information is not in accordance with the law. This, under the premise that there is no information documented in the Administrative Record, and that due to the procedural stage of the investigation, the Secretariat is unable to request additional information.
- 10.83 For the IA, the word of the producers, importers, brokers, or exporters was considered true and without further investigation, whether for lack of time, or because the IA does not want to assure itself with the information already in its possession, therefore the IA invokes on one hand, the application of a certificate that demonstrates that the beef is “Select” or “Choice”, and on the other, that no more than 30 days have elapsed since the date of slaughter, which gives rise to the application of Article 54 of the LCE., that is to say, the application of a residual antidumping duty due to the nonexistence of information in the record and base itself on the best information available. If the IA was sure that the age and quality of the meat was a relevant economic factor in the investigation that influenced the branch of production subject to investigation, it should have so established it and as a consequence it should have observed Article 54 of the LCE; that is, it should

have given all the interested parties notice that it needed this information and should have granted ample opportunity to the parties to present in writing the evidence they considered relevant. As it appears in paragraphs 13, 17, 651, 652, and 653 of the Final Determination, the IA determined from the beginning that it did not matter whether the product was fresh, chilled or frozen because they did not have different characteristics from the products and so it considered that fresh, chilled or frozen products were similar products. This was corroborated by the specification of the tariff classifications in which it is clear that at not time did they refer to the age of the meat, standard which was verified in paragraph 489.

10.84 This Panel reiterates that none of the legal grounds invoked in the Final Determination correspond to those invoked by the IA in its Brief and in the Public Hearings held on August 29-30 of 2002, and January 10, 2003. Therefore, on the one hand, this Panel must only and exclusively consider the legal grounds and reasons stated in the Final Determination. The Federal Fiscal Court has so established³³ this and the following jurisprudential precedent:

18.85 “FEDERAL FISCAL COURT. INVARIABILITY OF THE DETERMINATIONS CLAIMED BEFORE IT.- The invariability principle of the determinations claimed before the Federal Fiscal Court is stated in in Article 215 of the Federal Fiscal Code; therefore, to determine the validity or nullity of a determination, such court must attend only and exclusively to the legal grounds and reasons invoked at such determination and to refrain itself of considering the arguments of the authorities, when, by means of such arguments, the authorities try to change or to extend the legal grounds and reasons given at such challenged determination.”³⁴

10.86 Lastly, this Panel also considers that there is no legal provision in the LCE or in its Regulation that allows the IA to request the certificate established at paragraph 654 of the Final Determination.

CONCLUSION.-

10.87. In conclusion, this Panel considers that the act of the IA under discussion was not carried out in accordance to the legal provisions on the subject of antidumping duties of the importing Party.

11. ISSUE IV. APPLICATION OF AN ANTIDUMPING DUTY GREATER THAN THE MARGIN OF PRICE DISCRIMINATION CALCULATED FOR EACH OF THE PRODUCTS SUBJECT TO INVESTIGATION. The

³³ “ADMINISTRATIVE DISPUTE. CANNOT BE IMPROVED IN THE REPLY TO THE CLAIM THE CONTROVERTED DETERMINATION”. Semanario Judicial de la Federación y su Gaceta. Volume IX, March, 1999, Thesis VIII.1st.22nd., page 1415.

³⁴ Ninth Epoch. Second Collegiate Court of Administrative Matters of the First Circuit. Semanario Judicial de la Federación y su Gaceta. Volume II, November, 1995. Thesis: I.2nd A. J/4, page 482.

companies IBP Inc., Sun Land Beef Company, Inc., Farmland National Beef Packing Company, L.P., Murco Foods, Inc., Packerland Packing Company, Inc., CKE Restaurants, Inc., Carl's Jr., de Monterrey, Industrializadora de Comida Rápida, S.A. de C.V., Trosi de Carnes, S.A. de C.V., Le Viande Comercializadora, PM Beef Holdings, LLC., Excel Corporation, Asociación Nacional de Tiendas de Autoservicios y Departamentales (National Associations of Department and Self-Service Stores), Northern Beef Industries, Inc., presented this issue.

- 11.1 These companies argue that the IA applied an antidumping duty greater than the margin of price discrimination calculated for each of the products for the simple reason that different classifications existed and that the IA incorrectly determined two different antidumping duties for each of the products exported during the investigated period, notwithstanding the fact that there is no IA that allows for the determination of different antidumping duties.
- 11.2 The IA stated that the determination of final antidumping duties was a result of compliance with provisions contained in the legislation on the subject, Articles 30 and 31 of the LCE, Articles 38 through 58 of its Regulations, and Article 2 of the ADA, among others. Therefore, at no time during the proceedings were the petitioners left in a state of defenselessness because they had complete and ample opportunity to present the arguments and evidence in the defense of their interests pursuant to Article 6.1 of the ADA. Furthermore, Article 6.9 of the Agreement establishes that the information should be provided to the parties with sufficient time so that they may defend their interests, and the authority kept all the information generated in the record that was available to the parties. The definitive antidumping duties were imposed based on the information provided by the interested parties, as well the information they provided during the public hearing.
- 11.3 That it correctly applied the definitive antidumping duties (paragraph 654 of the Final Determination) because its imposition derived from Article 5 section VII of the LCE, among others, in the sense that it is the responsibility of SECOFI to carry out and determine the investigations in the area of unfair international trade practices, as well as to determine the antidumping duties that are obtained from such investigations. The nature and purpose of the imposition of antidumping duties derive from Article 16 section V of the LCE, because they are considered a non-tariff measure to the imports of merchandise, whose final objective is to prevent the entry into the domestic market of products under conditions of unfair international trade practices.

ANALYSIS.-

- 11.4 The Final Determination issued by the IA on April 29, 2000, imposed antidumping duties upon bovine beef imports from the U.S. falling into certain tariff categories. The duties were calculated individually for seven companies

that participated in the investigation, representing approximately 94% of the imports during the investigation period. A weighted average of the duties individually calculated was imposed on imports from the other participants in the investigation, and imports derived from Con Agra, Inc. were made subject to the residual duty calculated on the basis of the best available information, essentially the highest dumping margin found during the course of the investigation, in paragraph 659 of the Final Determination.³⁵

11.5 Equally, paragraphs 651, 652, and 653 imposed the highest margin of price discrimination on imports of meat originating in the United States of America derived from nonparticipating exporters in the investigation and that had certain tariff classification categories.³⁶ Thus, the highest margin of price discrimination was applied toward certain classifications of meat.

11.6 However, the Final Determination, unlike the Preliminary Determination, in paragraph 654 imposed a new requirement upon the categories of beef in paragraphs 651 and 653 “having to prove undoubtedly before the customs IA, through a certificate issued by the U.S. Department of Agriculture, that the product complies with ‘Select’ or ‘Choice’ classifications, and that no more than 30 days have elapsed since the date of slaughter, in accordance with certification from the plant.”³⁷ If the imports are not accompanied by the certification, the antidumping duty imposed on the imports by paragraph 654 is the residual duty, calculated on the basis of the “best available information,” that is the highest dumping margin found in the course of the investigation and the same antidumping duty that is applied by the Final Determination to the exports of the particular categories of meat covered by participants (such as Con Agra, PM Beef Holdings) who were determined by the IA to have failed to cooperate.³⁸

11.7 The practical result of paragraph 654 is that the companies that participated in the investigation, and for whom either an individual margin of dumping or an average margin of dumping was calculated upon the basis of the information requested by the IA and supplied by the companies now receive their calculated antidumping duty ONLY if the meat they export is “Select” or “Choice” and is less than 30 days from slaughter.

11.8 This is the reason that the companies concerned maintain that they are illegally receiving an antidumping duty greater than the margin of dumping calculated for each of the products subject to the investigation.³⁹ This effect is particularly acute in the case of CKE Restaurants, Inc., who ship only beef purchased from

³⁵ See paragraph 659 of the Final Determination, published April 28, 2000 in the DOF.

³⁶ Id. paragraphs 651-653.

³⁷ Id. paragraph 654.

³⁸ See Article 54 of the LCE, correlated with Article 6.8 of the ADA of 1994.

³⁹ Brief presented by IBP, et al. on December 11, 2000.

suppliers named in the investigation and who received an antidumping duty of .07 U.S. dollars per legal kilogram so long as the beef was produced by any of the companies named in paragraph 653.⁴⁰ Unless CKE Restaurants, Inc., can produce the required certifications (and obviously since their product is frozen hamburger for fast food restaurants they do not keep track of the date of slaughter and have no economic reason to so do), under paragraph 654, the antidumping duty applied will be 0.07 U.S. dollars per legal kilogram, and if not then it will be 0.63 U.S. dollars per legal kilogram.⁴¹

- 11.9 This problem for the participants in the investigation arose because at no time during the investigation did the IA request any information relating to the classification of the meat imported (“Select” or “Choice”) or to the age of the meat. The questionnaires drafted by the IA asked for the appropriate data for a dumping investigation only in terms of tariff category.
- 11.10 Excel’s figures apparently included both classified and unclassified meat without differentiation⁴² between the two categories. CKE Restaurants’ figures made no differentiation because their product does not use Select or Choice and since the meat they export is frozen, time from slaughter is irrelevant.
- 11.11 In its brief (paragraphs 245-321) and extensively at the initial Public Hearing on August 29 and 30, 2002, the IA justified the residual duty imposed on imports of beef originating from seven companies for whom an individual margin of dumping was determined (or an average margin of dumping for the other participants found to have cooperated) unless the imported meat is accompanied by the certificates required by paragraph 654.
- 11.12 The brief contains statements that indicate that the IA believes that Article 88 mandates it to protect the “consumer public” from meat whose quality and/or age since slaughter cannot be identified.⁴³
- 11.13 It must be mentioned that in Paragraph 256 of the IA’s brief, after repeating its determination “to impose the antidumping duties on the bovine meat through instruments that allow fair trade competition conditions to be provided and to avoid wherever possible the negative impacts on other productive processes and the consumer public.” The IA states that it determined the application of the definitive individual dumping duties “...from the margins of price discrimination calculated for each one of the exporters for the imports of meat products Select or Choice with no more than 30 days since slaughter and the higher margin of price discrimination per group of products found in the investigation...”⁴⁴

⁴⁰ See paragraph 653 (E), section b, of the Final Determination.

⁴¹ Id. P. 653 (G).

⁴² Administrative Record: Public Hearing transcript of August 29 and 30, 2002.

⁴³ Article 88 of the LCE.

⁴⁴ See point 256 of the IA’s brief.

- 11.14 The IA maintained in its brief, as well as the Public Hearing of January 9, 2003, that the residual duty of paragraph 654 of the Final Determination was applied to non-certified meat, citing the second paragraph of Article 54⁴⁵ in relation to Article 6.8 of the ADA, because the exporter had not provided the necessary information to calculate the margin of dumping for this type of meat.⁴⁶
- 11.15 However, the brief prepared for the hearings of August 29 and 30, 2000 concentrated on the IA's assertion that Article 88 of the LCE, taking into consideration Article 2 of the LCE, authorizes it to protect the consuming public.
- 11.16 Thus, in point 5B, paragraph 25 of the IA's brief "Considerations that led to the authority's determination"⁴⁷ states, "...the IA [in the course of the investigation] observed several considerations that demonstrated the need to implement a mechanism through which the antidumping duties did not cause adverse effects on the consumer public.
- 11.17 Such considerations are the following: "Lack of a difference between the national and imported beef when offered to the consumer public...statements made by the importing and exporting companies with regards to the age of the meat that they sell." However, "as observed in point 489 of the Final Determination, as well as the records from the verification visits carried out by the IA, the import companies acquire the national and imported product, which are transformed and thereafter commercialized. Nevertheless, in their commercial and sale activities to the consumer public, the type and origin of beef is not distinguished. Thus, by not differentiating between the different types of beef that are offered to the consumer public, such practice does not allow for differentiating between the type and age of beef."
- 11.18 For the above reasons, the IA considered that it was necessary to implement a measure which would guarantee safety to the consumer in regards to the type and age of beef that enters the Mexican market via imports.⁴⁸
- 11.19 Equally, in Paragraph 260, the IA asserts "the petitioners argued that there are practices within the U.S. market that fall outside normal commercial operations, such as push lists, and the sale of irregular products, such as unclassified dark cutter, and waste livestock. This practice of the exporters is also followed by importers, who do not indicate in their inventories nor in their sale receipts, the

⁴⁵ Article 54 of the LCE in correlation with Article 6.8 of the ADA also cited by the IA that states, "In cases where one interested party denies access to the necessary information or does not provide it within a reasonable time, or significantly impedes the investigation, can formulate determinations... on the basis of the information available.

⁴⁶ Article 6.8 of the ADA.

⁴⁷ IA's Brief, paragraph 257, November 24, 2000.

⁴⁸ Id. paragraph 258.

type of beef sold nor the time elapsed between slaughter, packaging or cut, and the date in which the beef is offered for sale to the consumer public.”⁴⁹

- 11.20 Paragraph 261 reiterates the assertions of the national production that age affects the price of beef offered and paragraph 262⁵⁰ uses the argument of the importers that “push lists or the selection of inventories” on their own cannot be considered an unfair trade practice because any merchant offers its inventories with greater discounts in relation to the age of the product without this meaning price discrimination...” as evidence of “...the existence of the imports of meat products with an age greater than 30 days, which are offered to the consumer public without distinction from fresh products, a distinction which is almost impossible for the consumer to make.”
- 11.21 Thus, the IA concludes (in paragraph 263) that “...the imposition of a final antidumping duty that limits the entry of [older beef products] through the certificates established in paragraph 654 of the Final Determination, does guarantee that fair conditions of competition are offered and that negative impacts on other production sectors and the consumer public are avoided.”
- 11.22 The IA continues in paragraph 264 “According to the above, SECOFI can use the certificate or mark that are required of products that enter the country. This is done as a means to verify that the meat that enters Mexico is less than 30 days old since the date of slaughter.” In short, the IA in its brief concedes that the requirements of paragraph 654 of the Final Determination were imposed to prevent meat from entering Mexico that is older than 30 days from slaughter.⁵¹
- 11.23 The question is then whether the IA in an antidumping investigation has the power to impose a residual duty (one that was the highest dumping margin found in the course of the investigation) on products for which no margin of dumping was calculated in order to prevent those products from entering the country as a measure of consumer protection.
- 11.24 The IA contents that it has the IA to so interpret Article 88 of the LCE because of the power of interpretation given to it by Article 2 of the LCE which states, “The provisions of this Law are of public order and of application throughout the entire Republic, without prejudice to the provisions of the international treaties or agreements to which Mexico is a party. The application and interpretation of these provisions correspond, for administrative purposes, to the Federal Executive through the Secretariat of Commerce and Industrial Development.”⁵²

⁴⁹ Id. paragraph 260.

⁵⁰ Id. paragraph 262.

⁵¹ See paragraphs 265-267 of the IA’s brief.

⁵² See Article 2 of the LCE.

- 11.25 The interpretation made by the IA ignores the first sentence of Article 2 “...without prejudice to the provisions of the international treaties or agreements to which Mexico is a party.” This must mean that any interpretation made by the IA, under the second sentence of Article 2, must be guided by the applicable laws and regulation as well as the provisions of Article VI of the ADA, to which Mexico is a party.
- 11.26 This means that the phrase “any adverse effects upon other domestic sectors of production and the consumer public” in Article 88 must be interpreted consonant with and in light of the ADA. What are the “adverse effects” referred to by Article 88? If in order to provide “timely protection to the domestic industry” against products entering the country under conditions of price discrimination, whose definition is found in Article 2.1 of the ADA; i.e. the product is introduced into the importing country’s commerce “at less than its normal value,” meaning that the export price is “less than the comparable price, in normal commercial operations, for a like product when destined for consumption in the exporting country.”⁵³ Given this type of practice, the IA of the importing country imposes an antidumping duty on the product and in this manner the price at which the products are sold in the importing country is increased.
- 11.27 This means that other productive sectors that use the products have increased costs of production or that consumers of the products (as in the case of products sold to the consumer public) will pay more.
- 11.28 These higher prices are the adverse effects referred to in Article 88. The authority of Article 88 of the LCE in order to impose the lowest possible antidumping duties on products entering the country under conditions of price discrimination and that cause injury to the domestic industry, should avoid adverse effect in other productive sectors and the consumer public.
- 11.29 The LCE does not indicate in any Article the authority that the IA has to act as a consumer protection agency. To the contrary, the law contains provisions that limit and circumscribe the powers of the Secretary: Article 5 (lists the powers of the Secretary); Article VII gives it the power, inter alia, “To carry out and issue Final Determinations in investigations concerning unfair international trade practices and to determine the antidumping and countervailing duties resulting thereof;” while Article 17 on non-tariff measures includes “antidumping and countervailing duties,” paragraph 2 in its last sentence says that “Antidumping and countervailing duties shall be applied only in the case contemplated by paragraph 5 of [Article 16].”
- 11.30 Article 16 of the LCE states “when necessary to avoid products entering the national market under unfair trade practices, in accordance with this Law.” Thus, Article 17 of the LCE forbids the use of antidumping duties to prevent the

⁵³ Article 2.1 of the ADA, see also Article 30 and 31 of the LCE.

entry of goods into Mexico which might have “negative impact...on the consumer public.”⁵⁴ and concludes that the antidumping duties can **only** (emphasis added by the Panel) be used in the case established under section V of the mentioned Article.

- 11.31 In Paragraph 264 of its brief, the IA stated “the benefit of imposing antidumping duties that limit the entrance of merchandise through the certificates established in paragraph 654 of the Final Determination.”
- 11.32 To continue with the provisions of the LCE which limit the powers of the IA to use antidumping duties as a consumer, protection device, one should also consider Articles 26 and 27. Article 26 provides:
- 11.33 “In any case, the importation, circulation, or transit of merchandise shall be subject to official Mexican standards in accordance with the law on this subject. Normalization provisions shall not be established with respect to the importation, circulation, or transit of merchandise which differ from the official Mexican standards. The merchandise subject to the official Mexican standards shall be identified according to their tariff fraction and corresponding nomenclature in accordance with their respective tariff.
- 11.34 The Secretary shall determine the official Mexican standards that the customs authorities shall enforce at the point of entry of the product into country. This determination shall be previously submitted to the opinion of the Commission and shall be published in the *Diario Oficial de la Federación*.”
- 11.35 Clearly in this case the Secretary has not determined an official Mexican standard for the age of meat entering Mexico which has, for obvious reasons, not been submitted to the Commission. Article 27 is equally definitive concerning, “any other administrative measure issued..., the purpose of which is to regulate or restrict the country’s foreign trade and the circulation or transit of foreign merchandise...”
- 11.36 Thus the LCE simultaneously forbids the use of antidumping duties for any purpose other than to counteract the entry of goods under price discrimination, conditions causing injury to the domestic production and requires submission of any other standardization measures (as per Article 27) to be submitted to the Commission for its opinion before issuance. Although the Final Determination was, as required by the law, submitted to the Commission before issuance, it is unlikely that the Commission specifically focused on paragraph 654 as a standardization measure aimed at protecting the Mexican consumer public from imported meat aged more than 30 days from slaughter.
- 11.37 As for the impact of the ADA on the permissible interpretation of Article 88 of the LCE, it should be noted that the persistent concern of the first Panels

⁵⁴ See IA’s brief paragraph 264.

established under the General Agreement on Tariffs and Trade 1945 and then under the General Agreement on Tariffs and Trade of 1994 has been to interpret proceedings (antidumping investigations) authorized under Article VI of the General Agreement on Tariffs and Trade.⁵⁵

- 11.38 The purpose of the ADA was to circumscribe these proceedings so as to insure that the imposition of antidumping duties truly corresponded to actual margins of dumping found in the course of investigations and that investigating authorities did not use their powers to counteract the precise definition of “unfair trade practice” in such a manner that resulted in the avoidance of a member country’s GATT obligations to reduce trade barriers.⁵⁶
- 11.39 However, the IA offered in its original brief, and in its memorandum submitted January 9, 2003 and its oral pleading in the January 10, 2003 hearing another justification for the imposition of, by means of the requirements of paragraph 654 of the Final Determination, an antidumping duty equal to the highest margin of dumping found in the course of the investigation.
- 11.40 The IA in its January 9, 2003 written presentation defends paragraph 654 of the Final Determination as the proper application of the residual duty (based on the best available information) on the basis of Article 54 of the LCE and Article 6.8 and Annex II of the ADA.
- 11.41 Essentially, the IA argues,⁵⁷ that it could not calculate a margin of dumping for the non-certified meat because the IA did not have the information during the investigation ...and the participants did not (emphasis in the original) provide it, regardless of the reference to the topic of the push lists during the public hearing of the antidumping investigation. Since the participants “failed to supply the information on the price of older beef,” the IA claims it has the authority under Article 54, paragraph 2 which states “Should there be a failure to satisfy the requirement referred to in the previous paragraph, the Secretary shall take into account the best available information” or “information available” and under Article 6.8 of the ADA.”⁵⁸

⁵⁵ Although these interpretations are not mandatory under Mexican law, they are mirrored in Articles 17, 26 and 27 of the LCE, previously discussed.

⁵⁶ Durling and Nicely, *Understanding the WTO ADA, Negotiation History and Subsequent Interpretation*, Introduction, page 2, Cameron, May 2002, hereafter referred to as “Durling”. See also the statements made by the Panel in the United States – Antidumping measures on the hot rolled steel plates originating in Japan. Panel Report (February 25, 2001) in paragraph 7.55: “One of the principle elements that govern the antidumping investigations that develop from the ADA is the goal of assuring that objective decision making based on the facts. In this manner the interpretation of Article 88 of the IA, with the purpose of sustaining point 654 of the Final Determination, is not only contrary to the LCE but also to the ADA. Extract of the Panel Report on page 366 of Durling.

⁵⁷ See pages 36 and 37 of the English transcript of the Public Hearing of January 10, 2003.

⁵⁸ Oral presentation made by the IA in the Public Hearing of January 9, 2003.

- 11.42 The IA fully admits that it at no time asked for the information (normal value and export price) which would have permitted it to calculate a dumping margin for each participants exporting meat aged over 30 days.
- 11.43 This, however, according to the IA is immaterial: “This information should have been submitted by the complainants, for they are the ones who have access to the records and the information on transactions involving such types of meat. The exporters know the meat market and they simply cannot argue they were unaware at the time they filled out the forms that meat that is older than 30 days is sold at a lesser price.”⁵⁹
- 11.44 Thus, the apparent failure of the participants in not providing that information (information that is not in their records) becomes an authorization to the IA to use “facts available” (that is, knowledge of “push lists”) to impose an antidumping duty, calculated by reference to the highest dumping margin found in the course of the investigation, to meat which cannot meet the certification requirements of paragraph 654.

ANALYSIS.-

- 11.45 This Panel cannot accept the IA’s arguments for the following reasons:
- a) The IA in Article 54 of the LCE is authorized to “...request from interested parties the evidence, information and data that it deems relevant, basing itself on questionnaires. If the request, referred to in the above paragraph, is not complied with in a satisfactory manner, the Secretariat will decide with the available information.” From this evidence, information, and data (presented at the Secretariat’s request), “the Secretariat will decide the antidumping duties, which, in the case of price discrimination, shall be equal to the difference between the normal value and the export price.”⁶⁰
 - b) Pursuant to the second paragraph of Article 54, the Secretariat will “make a determination based upon the information available” if the request (of probative evidence, information, and data that has been requested by the Secretariat) “is not satisfied.” It is, however, clear that in this second paragraph of Article 54, the said determination, in an investigation of price discrimination, the difference between normal value and the export price of the merchandise (our underlining) with regards to the request for evidence and data by the Secretariat.
 - bb) The second paragraph of Article 54 cannot be reasonably interpreted to permit the imposition of a duty, based on available information, if the Secretariat never requested evidence or data on the margin of dumping.

⁵⁹ Id., Attorney Vargas. See also paragraph 12 of the English translation of the written motion, page 7 paragraph 16, page 8.

⁶⁰ Article 62 of the LCE.

- c) This interpretation of Article 54 can be related to Article 6.8⁶¹ of the ADA and Annex II of the ADA which sets out how information for antidumping investigations is to be treated by investigating authorities.⁶²

- 11.46 Because the IA in its Final Determination cites Article 6.8 of the ADA it is worth clarifying that the national legislation, as well as the ADA coincide in that the IA has the authority to: i) carry out a fair comparison between the normal value and the export price; ii) inform the affected parties what information it needs to guarantee a fair comparison without imposing a burden of proof that is not reasonable; and iii) that the amount of the antidumping duty does not exceed the margin of dumping established.⁶³ That is to say, if the information is not requested in the investigation, pursuant to first paragraph of Article 54 of the LCE the authority does not have a basis to calculate the margin of dumping, nor does it have any justification to impose a residual antidumping duty based on the available information.
- 11.47 If the IA uses information “from a secondary source” as a basis for its determinations (and certainly a “push list” referred to in a hearing or consumer preference studies on the age of meat are secondary sources), it should do so “with special care.”
- 11.48 It is clear, however, that if an interested party does not co-operate, and thus relevant information is not given to the IA, this could lead to a result which is less favourable for this party than if the party had cooperated.”
- 11.49 In effect, by arguing that the complainants had a duty to come forward with the information necessary to calculate a dumping margin on the meat aged over thirty days or suffer the consequences of the imposition of an antidumping duty pursuant to paragraph 2 of Article 54 of the LCE and Article 6.8 of the ADA, the IA is essentially saying that the complainants did not “cooperate.”
- 11.50 The Panel rejects the claim that a failure to come forward with information, requested at no time by the IA, is a failure to “cooperate”, in accordance with Article 54 of the LCE and 6.8 of the ADA and its Annex II, in order for the IA to justify the use of paragraph 654 of the Final Determination.

⁶¹ Article 6.8 states, “in case where the interested party denies access to the necessary information or does not provide it within a reasonable time or significantly impedes the investigation, preliminary or final determinations can be made, positive or negative, based on the available information. In apply this paragraph Annex II is observed.”

⁶² This analysis on the arguments of the participants with regards to the use of the available information can also be related to the manner in which two recent panel reports from the WTO have treated Article 6.9 and Annex II of the ADA. U.S.-Antidumping measures on certain hot-rolled steel products from Japan (February 28, 2001), confirmed by the Appellate Body on July 24, 2001; Argentina-Antidumping duties applied to the exports of ceramic floor tiles from Italy (September 28, 2001). It is worth clarifying that the decisions of NAFTA Panels are not binding, as stated in the Treaty itself, and that in Mexico the jurisdictional precedents are not binding. Only the jurisprudence issues by the competent bodies are binding. Notwithstanding the above, with is instructive that this panel agrees with the above decisions.

⁶³ See Articles 2.4, 9.3 first paragraph, 2.4, 6.2, 6.9, 6.8 and Annex II, paragraph 7 of the ADA.

- 11.51 In rejecting this claim we take note of several recent WTO Panel decisions and one Appellate Body Report interpreting Article 6.8 and Annex II of the ADA.⁶⁴ We first consider the Panel Report⁶⁵ (February 28, 2001) in *United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*. In this case, some Japanese exporters provided some information after the U.S. Department of Commerce requested it. The U.S. rules provide for time limitations and when the exporters in question provided some information late, the USDOC applied the “facts available” to make its determination. The Panel concluded that although the information was not submitted on time under the U.S. rules, all the ADA requires is that facts available may be used only if the necessary information is not provided within a reasonable period and that under the circumstances in the case, the exporters had in fact supplied the information within a reasonable period and so the USDOC was not entitled to apply the “facts available” under Article 6.8.
- 11.52 An case closer to the facts of the case at hand is *Argentina – “Definitive Antidumping Measures on Imports of Ceramic Floor Tile from Italy”*⁶⁶ (September 28, 2001), in which the Panel found that the Argentine authority was not entitled to disregard information submitted and to resort to facts available under Article 6.8 on the grounds that the exporters had failed to provide sufficient supporting documentation.
- 11.53 In the case mentioned above the Panel stated:
- a) The authorities may not resort to available information for lack of information, unless there has been a clear request for such information.
 - b) 6.53 The question before us is whether the DOC was entitled to resort to facts available because of the alleged failure of the exporters to provide sufficient supporting documentation. We recall that in our view under Article 6.8 to resort to the facts available is authorized only where a party refuses access to, or otherwise does not provide necessary information, or where a party significantly impedes the investigation. Thus, the question before us is whether the DOC acted consistently with Article 6.8 by resorting to facts available on the grounds that the exporters allegedly failed to provide sufficient documentation.
 - c) 6.54 In considering this question, we first observe that a basic obligation concerning the evidence-gathering process is for the investigating authorities to indicate to the interested parties the information they require for their determination. This obligation is set forth in Article 6.1 of the AD Agreement which states as follows: [...]

⁶⁴ Durling and Nicely, *Understanding the WTO ADA, Negotiating History and Subsequent Interpretation*, Introduction, page 2, Cameron. May 2002. Hereafter referred to as “Durling.”

⁶⁵ Paragraphs 7.51-7.52 of the Report.

⁶⁶ Paragraphs 6-53- 6-55 of the Report.

- d) Article 6.1 of the AD Agreement thus requires that interested parties be given notice of the information which the authorities require. In our view, it follows that, independently of the purpose for which the information or documentation is requested, an IA may not fault an interested party for not providing information it was not clearly requested to submit.
- e) 6.55 This consideration is particularly relevant to the question of whether an authority is justified in resorting to the use of available information under Article 6.8 of the ADA. Paragraph 1 of Annex II of the ADA on the “Use of Best Information Available in Terms of paragraph 8 of Article 6” reiterates the obligation of Article 6.1 It states that [...]
- f) The first sentence of paragraph 1 requires the investigating authority to “specify in detail the information required,” while the second sentence requires it to inform interested parties that, if information is not supplied within a reasonable time, the authorities may make determinations on basis of the available information. In our view, the inclusion, in an Annex relating specifically to the use of best information available under Article 6.8, of a requirement to specify in detail the information required, strongly implies that investigating authorities are not entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required.⁶⁷
- 11.54 This Panel agrees with the WTO Panel in its analysis of the requirements of Article 6.8 and Annex II of the ADA and in order to interpret Article 54, paragraph 2 harmoniously with those requirements, rules that the IA may not resort to “available information” when the particular information necessary to calculate a dumping margin for the non-certified meat was never requested by the IA from the participants.

CONCLUSION.-

- 11.55 This Panel disagrees with the IA’s contention that it has authority under Article 88 of the LCE to impose the residual duty on imports from the participants of non-certified meat, based on the claim that it protects the consumer public.
- 11.56 The Panel disagrees with the IA’s claim that because the exporters investigated had not supplied the information necessary to calculate the margin of dumping on such beef, the IA was entitled to use the “information available” of Article 54, paragraph 2 of the LCE to impose the antidumping duty in Point 654 of the

⁶⁷ Once again this Panel insists that if even though it is true that the decisions of NAFTA panels lack binding effect, as the Treaty itself indicates, and that jurisdictional precedents are not binding in Mexico, and only those issued by the competent bodies are binding. Notwithstanding, it is instructive that the decisions of those panels coincide in great measure to the analysis made by the Panel in the case at hand, based on the applicable laws and regulations.

Final Determination. Therefore, it is remanded so that this issue is resolved and that the necessary measures be adopted in accordance with the analysis made.

12. ISSUE V. APPLICATION OF A FINAL ANTIDUMPING DUTY BASED ON A SAMPLE argued by Packerland Packing Company, Inc., Murco Foods, Inc., and PM Beef Holdings, LLC. arguing the following:
 - 12.1 In their complaints⁶⁸ PM Beef Holdings, LLC and Murco Foods, Inc., argued that the calculation done by the IA was erroneous in relation to the margin of price discrimination, based on a sample of seven exporting companies of a total of sixteen, without stating legal grounds for the exclusion of the complainants from such sample.
 - 12.2 These two participating companies, PM Beef Holding, LLC. and Murco Foods, Inc., submitted their briefs⁶⁹ and, in analyzing them, it seems that they did not have any injury in reference to this topic. That is, it lacks an injury statement and thus, the topic analyzed in this section is moot,⁷⁰ specifically in regards to these two companies because the statement of injury is a *sine qua non* requirement to review the issue because if there is a lack of an injury statement then the Panel is legally incapable of making a determination. Such limit is imposed by Rule 7 of the Rules of Procedures.⁷¹
 - 12.3 Packerland Packing Company, Inc., argued in its brief that SECOFI calculated the margin of price discrimination based of a sample on seven exporting companies of a total of sixteen, without stating legal grounds for the exclusion of the complainant from such sample. Consequently, it was not allowed to request its own margin of price discrimination, derived from the facts that [SECOFI] did not request the consent from the exporters nor did it consult with them, and therefore, the determination of the sample left the complainant without recourse, and according to Article 6.10.2 of the ADA, Packerland's right to present a voluntary response for the determination of its own margin of price discrimination was denied.

ANALYSIS.-

- 12.4 This Panel finds that the causes of complaint stated by Packerland are unsustainable (and for this reason and the principle of judicial economy, this Panel will not

⁶⁸ Presented to the Mexican Section of the Secretariat of the Free Trade Agreements on June 26, 2000, in paragraph 3 of page 5 for the former and on June 16, 2000 paragraph 4 of page 5 for the latter.

⁶⁹ On September 25, 2000.

⁷⁰ AGRAVIOS EN LA REVISIÓN FISCAL. EXPRESIÓN DE. Jurisprudencia. Novena Época. Tribunales Colegiados de Circuito. Semanario Judicial de la Federación y su Gaceta, Tomo IX. Enero de 1999. Tesis VI.2° J/152, Página 609. Registro 194,823. (STATEMENT OF INJURY IN TAX REVIEW. Jurisprudence. 9th Period. Collegiate Circuit Courts, Weekly Judicial Journal of the Federation and its Gazette, Volume IX, January 1999. Thesis VI.2.J/152, page 609, Register 194,823.)

⁷¹ See Rule 57(I), 59 (II) and (IV) of the Rules of Procedure of Article 1904 of the NAFTA.

summarize or transcribe the arguments presented by the IA), because there is no interest in complaining about violations that are not to its injury, because the judgment was in Packerland's favor because the IA recognizes the right⁷² complained about before this Panel This was established in paragraph 383 of the Final Determination which states, "Packerland Packing Company, Inc., can request that the Secretariat determine an individual margin of price discrimination for it (emphasis added by the Panel), for which it should provide the necessary information pursuant to Article 9.5 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994, so long as it demonstrates that it is not related to any of the exporters or producers from the exporting country that are subject to final antidumping duties on the investigated product." From the above text, it can be noted that if the complaint was basically that an individual margin of price discrimination was not calculated, then this will be obtained once the necessary information is provided and Packerland demonstrates that it was not related to any of the exporters or producers from the exporting country that are subject to the investigation. These conditions exist in the uncontested part of the challenged determination, in which there is no injury expressed by Packerland, and thus, because of the failure to challenge these, these conditions continue.⁷³

CONCLUSION.-

12.5 Consequently, this Panel sustains that there is no injury to Packerland Packing Company, Inc., because its right was recognized.

⁷² See paragraph 379 of page 88 of the Final Determination where Murco is also given the opportunity to have its own margin of price discrimination. The same did not occur with PM Beef for the reasons stated in paragraph 374, page 87 of the same determination.

⁷³ AGRAVIOS INSUFICIENTES. Séptima Época. Apéndice de 1995, Tomo VI, Parte SCJN. Tesis 38.Registro 393,994.
 AGRAVIOS INSUFICIENTES EN LA APELACIÓN, SON AQUELLOS QUE NO ATACAN TODAS LAS CONSIDERACIONES QUE SUSTENTAN EL FALLO DE PRIMERA INSTANCIA. Novena Época Tribunales Colegiados de Circuito. Semanario Judicial de la Federación y su Gaceta. Tomo I, mayo de 1995. Tesis VI.1^o 2 C. Registro 205,174.
 AGRAVIOS INSUFICIENTES. ES INNECESARIO SU ESTUDIO SI LO ALEGADO NO COMBATE UN ASPECTO FUNDAMENTAL DE LA SENTENCIA RECURRIDA, QUE POR SÍ ES SUFICIENTE PARA SUSTENTARLA. Novena Época Tribunales Colegiados de Circuito. Semanario Judicial de la Federación y su Gaceta. Tomo IX, mayo de 1999. Tesis II^o 2 C. J/9. Registro 194,040.
 (INSUFFICIENT INJURIES. 7th Period. Appendix of 1995, Volume VI, Part SCJN. Thesis 38, Register 393,994.
 INSUFFICIENT INJURY IN THE APPEAL ARE THOSE THAT DO NOT CHALLENGE ALL THE CONSIDERATIONS THAT SUSTAIN THE DECISION FROM THE COURT BELOW. 9th Period. Collegiate Circuit Tribunals, Weekly Journal of the Federation and its Gazette. Volume I, May 1995, Thesis VI.1 2 C. Register 205,174.
 INSUFFICIENT INJURIES. IT IS UNNECESSARY TO ANALYSE THEM IF THAT ALLEGES DOES NOT CHALLENGE A FUNDAMENTAL ASPECT OF THE JUDGMENT APPEALED, THAT ON ITS OWN IS SUFFICIENT TO SUSTAIN IT). 9th Period. Collegiate Circuit Tribunals. Weekly Journal of the Federation and its Gazette. Volume IX, May 1999, Thesis II 2 C J/9. Register 194,040.)

13. ISSUE VI. THE INCORRECT APPLICATION OF THE METHODOLOGY TO CALCULATE THE MARGIN OF PRICE DISCRIMINATION TO DETERMINE THE ANTIDUMPING DUTIES, presented by: CKE Restaurants, Inc., Carl's Junior de Monterrey, S.A. de C.V., Industrializadora de Comida Rapida, S.A. de C.V. arguing that:
- 13.1 The complainants claim⁷⁴ that an antidumping duty greater than the margin of dumping calculated was applied, in violation of Articles 9.3 and 9.4 of the ADA and Article 62 of the LCE because SECOFI determined that the antidumping duty of 0.07 dollars per legal kilogram, according to the determination made in paragraph 653 F.b. of the Final Determination, would be applied, conditioned on the purchase of the product from certain companies. If, on the contrary, then a residual antidumping duty of 0.63 dollars per legal kilogram would be applied, pursuant to paragraph 654 of the determination. Because it has a right, as an exporter, to have its own antidumping duty applied, then no condition should have been imposed.
- 13.2 In its brief the IA sustains the legality of the Final Determination,⁷⁵ arguing that the individual antidumping duty imposed on CKE, that is the 0.07 dollars, is related with the companies that appeared in the investigation. That the residual duty, of 0.63, only takes effect when the product is obtained from an exporter that did not appear [in the investigation]. The IA affirmed that even though CKE submitted correct and complete information in this case, that it applied the exception contemplated in Article 6.10 of the ADA, and therefore, calculated the residual margin of discrimination, taking into account the available information. Furthermore, the IA added that CKE acknowledged during the investigation period that its suppliers were companies that did not appear and for this reason the IA applied the margin of dumping for companies that did not appear.
- 13.3 The IA stated that pursuant to the general rule of Article 6.10 of the ADA, the IA cannot deny a broker company, at first instance, the right to have its own margin of price discrimination, but, based on the exception established in this same Article, it can limit its review to a reasonable number of interested parties, and with the support of this exception, it made its determination.

ANALYSIS.-

- 13.4 From an analysis of the Final Determination this Panel finds that CKE has the characteristic of an exporter, as it states in paragraph 32. B. b (page 17). The IA explicitly recognized that CKE is an exporter, as stated in paragraph 397, page 178 of its brief, in which states, "Consequently, the IA, pursuant to Article 6.10 of the

⁷⁴ The briefs from Industrializadora de Comida Rapida S.A. de C.V. y Carl's Jr. de Monterrey S. A. de C.V. submitted on September 25, 2000, on page 10 and in accordance with Rule 57(5) of the Rules of Procedure incorporated the brief of CKE of the same date in its totality and thus the Panel considers them in this manner, and when referring to CKE the other two companies are included.

⁷⁵ See pages 175 to 179.

ADA, explicitly recognized the exporter characteristic of the Complainant...”⁷⁶ By the same token, the complainant CKE does not contest the characteristic of exporter that was determined and thus recognizes this, claims it, and demands it its brief, in which it states, “It is irrelevant for the case at hand that the complainant is a broker and does not produce the product under investigation because such circumstance does not remove its character of an exporter.” (See page 33 of its brief). Due to the fact that this is an uncontested point, this Panel confirms it based on Article 1904.8 of the NAFTA.

- 13.5 In paragraph 653.F.b of the Final Determination the IA determined, “the imports of fresh, chilled, or frozen boneless meats is subject to the payment of an antidumping duty of 0.07 U.S. dollars per legal kilogram: b. exported by ... CKE Restaurants, Inc.” Due to the fact that this is an uncontested point and accepted both by the IA and CKE, this Panel confirms it based on Article 1904.8 of the NAFTA.
- 13.6 In regards to that decided in paragraph 653 of the Final Determination, it appears that the individual antidumping duty imposed on CKE is conditioned on complying with the requirements stated in that paragraph, upon which the claim of injury is made by the complainant.
- 13.7 This Panel also holds as true, because the IA and CKE agreed, that this company undoubtedly reported complete and accurate information and, based on an analysis of that information, the IA determined an individual antidumping duty of 0.07 dollars per legal kilogram.
- 13.8 A reading of Article 62 of the LCE states that the antidumping duties will be equivalent to, in the case of price discrimination (which we are dealing with), the difference between the normal value and the export price. In the second paragraph the legislature determined that the antidumping duties could be below the margin of price discrimination so long as the assumption in the hypothesis arises, which means in interpreting *a contrario sensu* the antidumping duties cannot be greater than the margin of price discrimination.
- 13.9 In the case at hand, it appears that the IA imposed a condition on CKE in order to respect the antidumping duty established by the IA itself, and the result lead to a new greater antidumping duty. This evidently translates into an incorrect and inaccurate application of Article 62 of the LCE. Thus, pursuant to paragraphs II and IV of Article 238 of the CFF, the administrative determination being reviewed, in regards to the issue being analyzed, is declared illegal. Due to the above, it is decided that the IA did not adequately state the legal grounds for its determination.
- 13.10 Similarly, and for the same reasons stated in the two previous paragraphs, paragraph 653 of the Final Determination violates Article 9.3 of the ADA that establishes that the amount of the antidumping duty shall not exceed the margin of

⁷⁶ That is, 0.63 U.S. dollars per legal kilogram.

dumping as established under Article 2, that in the present case was 0.07, as was determined by the IA. Thus, pursuant to paragraphs II and IV of Article 238 of the CFF, the administrative determination being reviewed, in regards to the issue being analyzed, is declared illegal. Due to the above, it is decided that the IA did not adequately state the legal grounds for its determination.

13.11 Lastly, this Panel rejects the arguments presented by the IA intending to justify its actions based on Article 6.10 of the ADA, which prescribes a rule with the exception. It is evident that the IA intends to justify the imposition of a condition on CKE in the exception established in this Article. In this case the exception is not applicable because the Article refers to cases where the number of exporters, importers, or types of products is so great as to make such a determination impossible. This assumption is not complied with in this case, as is demonstrated by the fact that the IA itself determined an individual margin of dumping for CKE of 0.07 U.S. dollars per legal kilogram. This demonstrates that it was not impossible for the IA to make a determination. Furthermore, that Article does not authorize the IA to condition an exporter in the terms established in paragraph 654 of the Final Determination.

13.12 In regards to the companies Carl's Jr. de Monterrey, S.A. de C.V. and Industrializadora de Comida Rapida, S.A. de C.V. this Panel finds that their injuries are unsustainable because there are no violations that cause them injury, because the determination challenged was favorable to them as the IA did not impose any antidumping duties against them, as can be seen with a reading of paragraphs 651, 652, 653, and 654 of the Final Determination.

CONCLUSION.-

13.13 Consequently, the Panel, based on Article 1904.8 of the NAFTA, and pursuant to the standard of review established in annex 1911, Article 238 of the CFF in the case of Mexico, and in accordance to paragraphs two and four of the CFF, remands this case to the IA so that it adopts the corresponding measures that are in accordance with paragraphs 13.9, 13.10, and 13.11 of this decision.

14 ISSUE VII. EXTENSION OF THE TERM OF THE PROVISIONAL ANTIDUMPING DUTIES, issue presented by IBP, Inc., Sun Land Beef Company, Inc., Farmland National Beef Packing Company, L.P., Murco Foods, Inc., PM Beef Holdings, LLC., Packerland Packing Company, Inc., Mayoreo en Carnes y Embutidos de Importacion, S.A. de C.V., Comercializadora de Carnes de Ciudad Juárez, S.A. de C.V. and Rose Comercio Internacional, arguing the following:

14.1 That paragraphs 172 and 173 of the Final Determination did not comply with the requirements established in Articles 14 and 16 of the Constitution. Paragraph 172 is illegal because there is no legal basis that allows the IA to extend the

- provisional antidumping duties on the investigated products beyond the legal general maximum time for their application.
- 14.2 The IA argues that the application of the term of the provisional antidumping measures is correct and that this point should not be subject of review before this Panel because those duties were no longer applied once the Final Determination was published and thus, they do not transcend the reach of the Final Determination. The argument by the complainants should be declared moot, including the analysis made because it lacks legal grounds and therefore, there cannot be, nor should there be a favorable response by the Panel in relation to the argument presented.
- 14.3 The IA states that its performance was carried out in accordance with the law in this subject, specifically with Article 7.4 of the ADA. The IA decided on December 13, 1999 to extend the provisional measure from four months to six months because it was reviewing if it would establish an antidumping duty lower than the margin of dumping to eliminate the injury to the national production. In response to a pleading presented by several companies, on December 13, 1999 it declared that the provisional antidumping measures would not be terminated. It is worth noting that Article 7.4 of the ADA specifically addresses the cases in which the extension of provisional measures can be made and it does not establish any type of guidelines or methodology, formality, or requirement that the IA should comply with, and thus, leaves to the IA's discretion, the manner in which it can adopt such determination.

ANALYSIS AND CONCLUSION.-

- 14.4 This Panel cannot analyze the arguments presented by the complainants because it does not have the authority to review the provisional measure determined during and investigation. The authority that this Panel has is limited to review the definitive determinations, in accordance with Article 1904.1 of the NAFTA that states that each one of the Parties will replace internal judicial review of Final Determinations on antidumping and countervailing duties with the review carried out by a Binational Panel.
- 15 ISSUE VIII. DETERMINATION OF THREAT OF INJURY TO THE NATIONAL PRODUCTION OF FRESH, CHILLED, OR FROZEN MEAT IN CARCASS presented by: IBP Inc., Sun Land Beef Company, Inc., Murco foods, Inc., Packerland Packing Company, Inc., and PM Beef Holdings, LLC arguing the following:
- 15.1 That the determination does not comply with the provisions found in Articles 39, 41, and 42 of the LCE, 59, 64, 68, and 69 of the RLCE and 3 and 4 of the ADA because in carrying out its review of the economic factors that would supposedly affect the national industry it reached a conclusion inconsistent with these provisions.

- 15.2 The IA argues that in no part of Article 59 of the RLCE does it state that in order to determine the existence of a threat of injury all the factors mentioned in Article 42 of the LCE should be present. Article 59 of the RLCE only establishes that the minimum analysis on the threat of injury should encompass the elements of Article 42 of the LCE and that its conclusions should derive from an analysis of those elements, but, nowhere does it establish that all mentioned presumptions in that Article should be complied with in order to reach a positive finding of threat of injury.
- 15.3 The IA continues by stating that it not sufficient that margins of price discrimination exist to determine that a threat of injury exists. SECOFI made its analysis of threat of injury, as can be observed in the Final Determination in which there is a complete section in paragraphs 499 to 535, where topics such as imports subject of dumping, available capacity, inventories, effects on the prices and on production, and conclusions. It is evident that that all the elements stated in the applicable provisions were considered.

ANALYSIS.-

15.4 Arguments by the Participants

15.5 In the Final Determination, the IA found that “imports of carcass meat originating in the U.S. threaten to cause injury to the branch of the domestic industry that produces meat in carcass,” such that countervailing duties should be imposed.⁷⁷ Complainants Sun Land, IBP, PM Beef, Packerland and Murco⁷⁸ (collectively, “complainants”) argue that the IA’s (IA’s) Final Determination (paragraphs 498 to 535) does not comply with the provisions for making such a finding, specifically, those of Articles 39, 41 and 42 of the LCE (LCE), 59, 64, 65 and 69 of the RLCE and 3 and 4 of the GATT ADA.

15.5.1 Complainants specifically refer to Article 42 of the LCE, which establishes that the IA shall take into account all the factors listed in the Article to determine the existence of threat of injury to the national production. According to the complainants,⁷⁹ this provision obliges the IA to determine threat of injury *only if all the factors* described by Article 42 are present in the particular case. The factors and indices established in Article 42 include: 1) A rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation; 2) free available capacity of the exporter or an imminent substantial increase in capacity of the exporter; 3) whether the imports are carried out at prices that will have repercussion on the national prices, whether a

⁷⁷ Paragraph 535 of the Final Determination.

⁷⁸ See Briefs of Sun Land at 137, IBP at 128-129, PM Beef at 88, Packerland at 141 and Murco at 125 (Spanish versions).

⁷⁹ See IBP’s Brief at 130 (Spanish version).

depressing or suppressing effect; and 4) the inventories of the product being investigated.

- 15.6 In addition, complainants refer to Article 68 of the RLCE, which establishes that, for the application of Article 42 of the LCE, the IA shall take into account, *inter alia*, whether there is a *significant* rate of increase of dumped imports. Also, Article 59 of the RLCE establishes that, for the determination of injury and threat of injury, the IA shall take into account all the factors and indices established in Article 42 of the LCE, as well as Articles 68 and 69 of the RLCE.⁸⁰ As a consequence, according to the complainants, the IA did not demonstrate in the Final Determination that it is possible to conclude the existence of threat of injury from the analysis of every factor.
- 15.7 The complainants also argue that the Final Determination, with respect to threat of material injury, does not comply with Article 3.7 of the ADA. This Article provides that a determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. It also establishes that the change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. The factors that the IA shall take into account in its determination, according to this Article, are very similar (or identical) to those established in Article 42 of the LCE. In addition, Article 3.8 of the ADA provides that with respect to cases where injury is threatened by dumped imports, the application of antidumping measures shall be considered and decided with special care. The complainants analyze both Article 42 of the LCE and Article 3.7 of the ADA in tandem, concluding that if any of the factors established in both provisions is not present in a particular case, the IA cannot determine the existence of threat of injury.⁸¹
- 15.8 The IA does not share the complainants' approach. In its view, a correct interpretation of Articles 42 of the LCE and 3.7 of the ADA leads to the conclusion that the IA shall consider all the factors and indices established in the provisions but it does not follow that all those factors and indices must actually be present in the specific case to determine the existence of threat of injury. According to the IA, from the reading of Article 3.7 of the ADA, there is no restriction with respect to the possibility of making a threat of injury determination only if all the factors and indices enlisted in the Article are actually present in the particular case.⁸²
- 15.9 On the other hand, the IA argues that it in fact analyzed and took into account all the relevant factors as it is explained in detail in points 499 to 532 of the Final Determination. From this analysis, the IA found: (a) a 102.7% rate of increase of investigated imports⁸³ and a clearly foreseen likelihood of increased importation in

⁸⁰ *Id.* at 132.

⁸¹ See Brief of IBP at 135 (Spanish version).

⁸² See Brief of SECOFI at 214 (Spanish version).

⁸³ *Id.* at 215; paragraph 501 of the Final Determination.

the near future;⁸⁴ (b) an increase in the freely disposable capacity aimed at the Mexican market and a decrease in exports to other countries;⁸⁵ (c) a decrease in the import prices,⁸⁶ which would permit a future increase in imports;⁸⁷ and (d) an increase in the relevant product's inventories.⁸⁸ In sum, the IA concludes that it took into account all the factors in its analysis, as established in Articles 42 of the LCE and 3.7 of the ADA.

- 15.10 The complainants argue that the IA decided to modify the grounds on which it had based the Preliminary Resolution. The IA changed the methodology by considering actual prices in pesos instead of prices in U.S. dollars, which is the customary administrative practice. This modification in the methodology was made upon request of the national production. The complainants argue that the IA did not provide any technical reason or legal basis for accepting the proposal.
- 15.11 The complainants argue that the only reason to change the original methodology was because the IA did not make a finding of material injury to the national production in the preliminary determination and, therefore, the IA could not impose antidumping duties.⁸⁹ The IA responds [argues] that, when it received the motion from the national production requesting the change in the methodology, it found the request reasonable because it implied a more objective comparison of import prices of the relevant product. This explanation is stated in paragraph 517 of the Final Determination.⁹⁰
- 15.12 The IA also argues that the claimants never challenged this modification in the methodology during the investigation, although they had ample procedural opportunities to do so. In addition, the IA contends that the modification does not provoke a distortion, as the complainants maintain, because its goal is to achieve a more objective price analysis. Moreover, neither the LCE nor the RLCE or the ADA establishes the methodology for determining the effects on prices. Finally, the IA argues that, even though the analysis in U.S. dollars has been a standard practice, no legislation obliges the domestic IA to make an analysis in this matter based on a foreign currency.⁹¹
- 15.13 The complainants argue that the IA did not comply with Article 68 of the RLCE, which establishes that there should be a significant rate of increase of dumped imports into the domestic market, indicating the likelihood of substantially increased importation to a level that can cause injury to the domestic production. According to paragraph 504 of the Final Determination, there was only a 0.5%

⁸⁴ *Id.*; points 502-507 of the Final Determination.

⁸⁵ *Id.*; points 508-513 of the Final Determination

⁸⁶ *Id.*; paragraph 518 and 520 of the Final Determination.

⁸⁷ *Id.*; paragraph 532 of the Final Determination.

⁸⁸ *Id.*; paragraph 514 of the Final Determination

⁸⁹ See Brief of IBP, at 136-137.

⁹⁰ See Brief of SECOFI, at 217 (Spanish version).

⁹¹ *Id.* at 219.

increase of the imports' participation in the domestic market, which in the complainants' view is not a substantial or accelerated growth.⁹²

- 15.14 The IA argues in this respect that in fact there was an increase of the investigated imports. Nevertheless, it is also important to mention that, as the Final Determination describes in paragraph 501, the investigated imports had sustained high rates of increase: 1,054.9% in the period of June - December 1996 as compared to the same period in 1995 and 102.7% in the investigated period, June-December 1997, as compared to the same period of 1996.⁹³ In addition, as it is described in paragraph 502 of the Final Determination, the imports of all the importing companies participating in the investigation had a 58% increase in the investigated period.⁹⁴
- 15.15 In sum, the IA calculated, as stated in paragraph 506 of the Final Determination, the rate of increase of imports for the near future *vis à vis* the investigated period. The resulting conclusion was that there would be a 9.41% increase. Thus, the IA determined that if these rates of increase continued, the imports would also increase their share of the domestic market.⁹⁵ The complainants argue that the projection made by the IA is just a remote possibility and conjecture, which complies with neither Article 39 of the LCE nor Article 3.7 of the ADA.⁹⁶
- 15.16 The complainants indicate that the IA does not mention in the Final Determination that the projected increase refers only to dumped imports. They argue that, the IA should have included only such imports in its analysis; otherwise, the projection is distorted.⁹⁷ The IA states that, as it is established in paragraph 506 of the Final Determination, the IA made a projection or forecast based on the historic information about meat imports, and using “recognized econometric techniques.”
- 15.17 The result of this projection is very similar to the imports' historic pattern, and that is why it was considered adequate to reach a conclusion. The model used by the IA predicted that meat imports from the US would increase [in] 9.41% in the period following the investigated one. In sum, according to the IA, if the relevant econometric model accurately reflects the previous trends in imports, it is reasonable to conclude that the imports will substantially increase in the future.⁹⁸
- 15.18 The IA argues that Article 68 of the RLCE provides that the increase of the investigated imports shall be taken into account. The complainants conclude that the investigated imports are only those in which a margin of dumping has been found. For the IA, the term “investigated imports” refers to all relevant imports

⁹² See Brief of IBP at 138 (Spanish version).

⁹³ See Brief of SECOFI at 220.

⁹⁴ *Id.* at 221.

⁹⁵ *Id.*

⁹⁶ See Brief of IBP at 139.

⁹⁷ See Brief of IBP at 140.

⁹⁸ See Brief of SECOFI p. 223-224.

and not only the dumped ones, because the IA does not determine until the end of the investigation whether there is a margin of dumping.⁹⁹

- 15.19 In response to the IA's arguments, the complainants insist there was a violation of Article 68 of the RLCE and also of Article 42, paragraph I of the LCE, which expressly provides that for the determination of injury, the IA shall take into account the increase of *dumped imports*. Article 3.7 (i) of the ADA also refers to "a significant rate of *dumped imports*..." According to the complainants, a harmonious interpretation of these provisions reflects the illegality of the IA's Final Determination in this respect.¹⁰⁰
- 15.20 With respect to the freely disposable capacity, according to the complainants the IA violated Article 68, paragraph II, of the RLCE because in its analysis it included companies that did not export dumped products.¹⁰¹ Even in these circumstances, the capacity in the U.S. had only a 0.2% increase, and the IA considers that percentage increase [is] sufficient to determine the existence of a threat of injury. Nevertheless, the IA argues that paragraph 512 of the Final Determination shows that the total exports of the investigated product decreased during the investigated period, yet the exports to Mexico specifically show a significant increase. Also, the exports to Mexico increased their share in the total exports of meat in carcasses from the U.S.¹⁰²
- 15.21 In the view of the IA and according to Article 68, paragraph II, of the RLCE, the situation found by the IA during the investigation was a general decrease of the demand in the export market, and a decrease of the demand in other export markets that could eventually absorb the relevant exports. Evidently, in light of these circumstances, there are pressures for the U.S. producers to export to Mexico under conditions of dumping. That pressure, according to the IA, is not necessarily related to those companies that are already exporting dumped goods, but is related to the relevant industry in general, including those companies that do not export dumped products. Indeed, the objective of the IA is to avoid an injury to the national production in the future.¹⁰³
- 15.22 According to the complainants, Article 42, paragraph II, of the LCE, Article 68, paragraph II, of the RLCE, and Article 3.7 (ii) of the ADA, clearly establish that the IA should consider "a sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased *dumped exports* to the market of the importing member."¹⁰⁴ In sum, according to the complainants, these provisions establish as a necessary condition that an *exporter*, whose freely disposable capacity is analyzed, *had exported*

⁹⁹ *Id.* at 224.

¹⁰⁰ See Brief in response, of IBP, *et al.*, of December 11, 2000, at 86-87. Emphases added.

¹⁰¹ See Brief of IBP at 141 and paragraph 509 of the Final Determination.

¹⁰² See Brief of SECOFI at 226.

¹⁰³ See Brief of SECOFI at 228-229.

¹⁰⁴ The language is from the English version of Article 3.7 (ii) of the ADA (emphasis added), although the language in the relevant provisions in Spanish is very similar.

dumped goods. For these reasons it is illegal, in the view of the complainants, to include in the analysis those companies not exporting dumped products.¹⁰⁵

- 15.23 From the analysis of paragraphs 531 and 532 of the Final Determination, with respect to import prices, the complainants argue that, out of the total imports, 90.4% were effectuated under fair trade conditions. Thus, the IA considers the remaining 9.6% of imports as sufficient to decrease abnormally the sales price to domestic producers, or to impede a reasonable increase in that price. According to the complainants, from the language of paragraph 532 of the Final Determination it is not possible to conclude that the IA has only analyzed dumped imports. That leads the complainants to conclude that the 90.4% of total exports under fair trade conditions represented a threat of injury to the national production, which in the view of the complainants is contradictory and absurd.¹⁰⁶ Therefore, they assert that the IA's conclusion violates Articles 3.5 of the ADA and 39 of the LCE, which establish that the threat of injury shall be a direct consequence of the dumped imports.¹⁰⁷
- 15.24 The IA responds that, in paragraphs 499 to 535 of the Final Determination, it made an accurate analysis of threat of injury and it took into account all the factors established by the relevant provisions.¹⁰⁸ In its brief, the IA apparently does not clarify whether it considers the remaining 9.6% of the total imports as sufficient to abnormally decrease the sales price to domestic producers, or to impede a reasonable increase in that price.¹⁰⁹
- 15.25 Analysis of the law and allegations concerning the Final Determination of threat of injury.
- 15.26 The threat of injury, as defined by the LCE in Article 39, is the "imminent and clearly foreseeable danger of injury to the domestic industry." Furthermore, in this same Article the LCE requires that the IA prove, during the administrative investigation, "that the...threat of injury to the domestic industry is the direct consequence of the merchandise imported into the national territory under conditions involving price discrimination."
- 15.27 The formulation in Article 39 of the LCE reflects the concept of threat of injury found in the ADA, Article 3.7: "The change in circumstances that would create a situation in which the dumping would cause injury must be clearly foreseen and imminent."¹¹⁰
- 15.28 Thus, there are two components to a finding of threat of injury. One element is that, while the IA finds no injury from the unfairly trade imports, the potential for

¹⁰⁵ See Brief in response, IBP, *et al.*, at 92.

¹⁰⁶ See Brief of IBP at 143.

¹⁰⁷ *Id.* at 144.

¹⁰⁸ See Brief of SECOFI at 230-231.

¹⁰⁹ See Brief in response, IBP *et al.*, at 94.

¹¹⁰ See ADA Art. 3.7.

injury must be perilously close. The second is the requirement that the IA show a causal link between the sales of the merchandise at less than normal value and the threatened injury. In addition, it seems clear that the LCE and the ADA do not favor a finding of threat of injury because such a finding would impose antidumping [countervailing] duties on countries that adhere to that agreement even without a straightforward determination of injury. Because the law disfavors finding of threat of injury, Article 39 of the LCE mandates that such a finding be “based upon facts and not merely on allegations, conjecture or remote possibility.” The ADA incorporates a comparable requirement.¹¹¹

15.29 Article 42 of the LCE sets forth the factors that the IA is to take into account, *inter alia*, whether there has been a significant increase in the rate of importation of unfairly traded goods, capacity utilization of an exporter and its relationship to potential imports into Mexico or to other markets, the effect of import prices on domestic producers’ prices and demand for imports, inventories of the merchandise under investigation, and any anticipated return on investments. The requirements contained in the ADA are similar, although the LCE adds the additional “catch-all” factor VI of Article 42, “Such other factors that the Secretary deems relevant.”¹¹² Article 68 of the RLCE provides further detail as to how the IA is to conduct its investigation to take into account each of the factors.¹¹³ This panel must therefore ascertain whether the IA did indeed consider each of the elements before rendering a determination of threat of injury.

15.30 In its Final Determination, the IA first examined the national production of whole and half carcasses. The IA then considered the volume of imports of carcass meat, examining total imports, all of which originated in the U.S., during these same time periods, as well as imports by the importers that participated in the investigation. The IA found that Apparent National Consumption fell during the period and that the participation of imports of carcass meat from the U.S. rose from 0.3% to 0.5%, which the IA acknowledged to be low.¹¹⁴ Nevertheless, using this information, the IA projected that imports would increase 9.41% during the same six-month period in 1998, which would in turn lead to a higher percentage participation of imports in Apparent National Consumption.¹¹⁵

15.31 With respect to the capacity of exporters, the IA reviewed the amount of freely available capacity of each exporter involved in the investigation, both during the prior period and during the period of investigation. As a percentage of total exports from the U.S., exports to Mexico rose quite sharply and shipments to other markets decreased markedly, although exports to Mexico remained a very small fraction of total U.S. production of carcass meat.¹¹⁶

¹¹¹ ADA Article 3.7.

¹¹² ADA Article 3.7., second sentence until the end.

¹¹³ The regulation differs from the law and ADA in a significant way. The regulation refers to “investigated imports,” rather than “unfairly traded” or “dumped” imports. This is discussed further below.

¹¹⁴ Final Determination, paragraphs 503, 504, and 507.

¹¹⁵ *Id.*, paragraphs 506 and 507.

¹¹⁶ *Id.*, paragraphs 512-513.

- 15.32 The IA also examined U.S. inventories of carcass meat, finding increases over a two-year period.¹¹⁷ Concerning the effect of U.S. imports on prices in Mexico, the IA analyzed diverse, and sometimes conflicting, data. Nevertheless, the IA ultimately concluded that, despite the facts that 94% of the imports were not traded at unfairly low prices and that imports account for a fairly low share of apparent national consumption, “the presence of imports under illegal conditions during the investigated period provoked a declining tendency in the moderated average price of the investigated imports,” the continuation of which “will influence the future growth of imports.”¹¹⁸ The IA does not state that it has found that prices of imports exert downward pressure on prices of domestically produced carcass meat, although it did find “a diminution of income obtained by national producers for sale of carcass meat.”¹¹⁹ All the foregoing tendencies, while not sufficient to lead to a finding of injury, were sufficiently troubling to the IA that it concluded that antidumping [countervailing] duties were necessary to prevent injury.¹²⁰
- 15.33 The IA did, therefore, appear to address each of the factors specified in the LCE, the RLCE, and the ADA. The complainants challenge not only how the IA interpreted the rules for addressing the factors but the adequacy of several of the individual findings. We now examine each of the complainants’ allegations to determine whether the IA complied with the law and regulation.
- 15.34 The complainants maintain that the law requires that the IA render a positive finding with respect to each of the elements in order to find that imports of whole and half carcasses threaten to cause injury to the Mexican producers. This position is without basis. Article 42 uses similar language twice, stating, first, “The Secretary shall have the responsibility to make the determination of the existence of a threat of injury to the domestic industry, taking into account...,” and adding at the end, “In determining the existence of a threat of injury the Secretary shall take into account all of the factors listed.” To “take into account” all the factors does not mean that the IA must make a positive finding with respect to all of them; rather, it means that the IA must consider each one of them.
- 15.35 In the same vein, the complainants rely upon the following language of Article 3.7 of the ADA for the proposition that the IA must find each of the factors: “No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.”
- 15.37 The complainants’ reading of the text of the ADA is a misinterpretation, however. To the contrary, the words “*No one of these factors by itself...but the totality of the factors considered*” do not mean that all the factors must be satisfied but that,

¹¹⁷ *Id.*, paragraphs 514-516.

¹¹⁸ *Id.*, paragraph 532.

¹¹⁹ *Id.*, paragraph 535.

¹²⁰ *Id.*

although the IA may not rely solely upon one positive factor, the preponderance of the factors must be positive. When the IA examines all the factors together, it must weigh them and be able to conclude that, even if not all factors indicate threat of injury, the balance falls in favor of such a finding. That is to say, there is a threat of injury.

15.38 The complainants' next argument concerns the shift in methodology from the Preliminary Determination, in which the IA made price comparisons using U.S. dollars, to the Final Determination, in which the IA used so-called "real prices," denominated in pesos. The IA made this methodological change in response to a request from the national production.¹²¹ It is important to note that nothing in the law or regulations dictates which currency the IA is to use for making price comparisons. Although it is true that the IA should not change longstanding administrative practice without notice and explanation, it is not clear that the IA has used U.S. dollars for price comparisons so consistently that the practice can be considered well-established or longstanding. Finally, during the investigation the complainants never challenged the national production's proposal to change the pricing methodology, although the complainants had adequate opportunity to do so. Normally, when a party to an administrative proceeding submits a proposal for a change in methodology to the administrative agency, it is incumbent upon the opposing party to respond in order to preserve its right to contest the methodology. The Panel cannot contemplate a challenge to a methodology when the participants fail to raise the issue during the administrative proceeding.

15.39 The Panel must next address the complainants' contention that the rate of increase of imports of carcass meat was not significant generally and, more specifically, that the IA's projection that future imports would increase by 9.4% is a remote possibility and conjecture, in contravention of Article 39 of the LCE and Article 3.7 of the ADA. Furthermore, the complainants argue that the projection includes all imports, not only those that would be sold at less than normal value. This Panel will address, in the paragraphs below, allegations concerning the rate of increase and the inclusion of fairly traded imports below.

15.40 As to whether the future projection constitutes remote possibility and conjecture, it is important to recognize that the fact that the IA uses a projection does not indicate that the determination is based on a simple speculation. Any consideration of threat of injury requires the IA to "demonstrate the likelihood of a substantial increase in such imports in the immediate future." By its very nature, such a finding involves a certain degree of future estimation; that estimation, however, must be based on fact. The Final Determination is not clear how the percentage was derived but the IA argues that it used accepted econometric modeling to arrive at the projection of a future increase of 9.4%. The complainants do not suggest that the calculation, on its face, is inaccurate. On this point the Panel must defer to the expertise and technical capacity of the IA based on the principle of good faith

¹²¹ *Id.* at paragraph 517.

that all act by an authority has. Thus, the Panel accepts the notion of a future projection, although the calculation of this particular projection must be based on the imports of those exporters, producers, and importer that sold at below the normal value.

- 15.41 The complainants make two allegations that we will address together because they essentially concern the same underlying issue. The first allegation is that the IA should have excluded *fairly* traded imports from the rates of increase during the period of investigation and the previous comparable period. Second, in making its projection of future increases in imports, the IA should have excluded imports that were not sold at less than normal value. Both of these allegations share the central issue in this analysis of the IA's threat of injury finding, which is that, when making its determination, the IA included fairly traded imports from the U.S., not only those for which it found dumping margins. Article 42, paragraph I, of the LCE, and Article 3.7.(i) of the ADA both state that the IA is to consider only "unfairly traded" or "dumped" imports when analyzing the rate of importation and the likelihood of a substantial increase in the rate in the immediate future. The IA's response that it included all imports in these analyses because it does not make a determination of sales at less than normal value until the end of the investigation is not adequate. Rather, the IA should have tailored its administrative practice to adhere to the requirements and terms of the law and the applicable international agreements harmoniously.
- 15.42 Article 68 of the RLCE, however, refers to "investigated imports," rather than dumped or unfairly traded imports. Investigated imports are all those imports investigated from the initiation of the investigation. If not all imports are sold at prices less than normal value, "investigated imports" constitutes a larger group of imports than "dumped" or "unfairly traded" imports. In this way, the regulation is inconsistent with the controlling legislation, despite the chapeau language that identifies the purpose of the regulation as being "[f]or the purposes of Article 42 of the Law." It is well established in Mexican law that, when there is a conflict between the enabling legislation and a regulation, the regulation is subordinate to the dictates of the legislation.
- 15.43 Thus, making an analysis based on "investigated imports" does not comply with the letter or spirit of the law.
- 15.44 Closely related to the issue of inclusion of fairly traded imports in the analysis is the complainants' allegation that, in examining the unused capacity and available capacity of the exporters, the IA violated the law and regulation by considering all exporters, not only those that were exporting carcass meat at less than normal value. The LCE, RLCE, and ADA all use similar terminology in the description of this factor, directing the agency to take into account capacity utilization by "the exporter," not "the exporters." The term "the exporter" is not used elsewhere in these provisions and there is no specific definition for it. Given the overall context of the provisions to determine "the likelihood of a significant increase in the

unfairly traded exports to the Mexican market,” the clear inference is that the IA is to limit its examination to the party whose exports are unfairly traded, not all exporters. Otherwise, the peculiar use of the term “the exporter” would have no meaning. Therefore, The IA should investigate only the used and available capacity of those exporters found to have sold at less than normal value.

15.45 The complainants’ final allegation with respect to the IA’s finding of threat of injury concerns the finding that the importations were at prices that would have an adverse effect on the prices of domestic producers in Mexico. Contrary to the arguments of the complainants, Article 42, paragraph III, of the LCE does not specify that the import prices that could adversely affect domestic prices should be prices set below the normal value. The law refers instead to “[i]mportations made at prices that will have an adverse effect upon domestic prices....” In other words, the prices could be low, forcing domestic prices to lower, without having been set at less than normal value. Similarly, Article 68, paragraph III, of the RCLE more precisely refers to “investigated imports” and Article 3.7(iii) of the ADA merely refers to “imports.” Regardless of the logic of this factor, it does not require that the downward pressure on, or inhibition of increase of, prices result from unfairly traded imports.

15.46 Notwithstanding the individual factors and allegations respecting the IA’s analysis, the overarching theme of the issue of threat of injury is that the threat must be caused by imports at unfairly traded prices. The last paragraph of Article 42 identifies the relationship of the factors to one another when it states that the IA must consider all the factors in order “to conclude whether additional unfairly traded imports will be imminent.” The purpose of the entire exercise, therefore, is to examine the individual factors to permit the IA to determine whether unfairly traded imports would cause injury. That is why the questions whether the IA considered an increase in unfairly traded imports and the capacity of those exporters found to be selling carcass meat at unfair prices is key to the determination of threat of injury.

CONCLUSION

15.47 This Panel does not agree with the complainants in their interpretation of the Article 42 of the LCE and Article 3.7 of ADA in the terms above-mentioned.

15.48 This Panel does agree with the complainants that the IA erred when it included all imports in its consideration of the rate of increase and [when it analyzed] the unused and available capacity of all U.S. exporters. In this context, the Panel requires a clearer and more concrete explanation of the methodology used to project the rate of increase. The Panel therefore remands the Final Determination to the IA to reconsider these two factors in accordance with the law and its regulation.

- 16 ISSUE IX. DETERMINATION OF THREAT OF INJURY TO THE NATIONAL PRODUCTION OF FRESH, CHILLED, OR FROZEN BEEF IN CARCASSES presented by: IBP Inc., PM Beef Holdings, LLC., Sun Land Beef Company, Inc., Murco foods, Inc., Packerland Packing Company, Inc., Asociación Nacional de Tiendas de Autoservicio y Departamentales, and Le Viande Comercializadora arguing the following:
- 16.1 That the Final Determination in paragraphs 582 through 614 does not comply with the provisions found in Articles 39 and 41 of the LCE, 59, 64, and 65 of the RLCE and 3 and 4 of the ADA because the IA, in reviewing the economic factors that could allegedly affect the national industry it reached conclusions incompatible with the above provisions.
- 16.2 The IA argued that there are legal provisions that authorize it to consider, in the analysis of injury to the national production, factors other than those listed in the provisions of the LCE and the ADA. The Authority must determine the measure necessary for the adequate application of the antidumping duties in order to provide a timely defense to the national production that avoids, wherever possible, a negative repercussion on the consumer public, which can only be carried out through adequate instruments, as in this case, through classification and age certificates.
- 16.3 The IA argues that nowhere in Article 41 of the LCE does it state that injury to the national production can only be established when all the factors mentioned in this Article are met. It only states that the determination will be made taking into consideration the different elements mentioned in the four sections of the Article.

ANALYSIS.-

- 16.4 The arguments and points made in regards to the IA's Final Determination concerning material injury to the national production of meat in cuts with bone are the same as the presented in regards to the Final Determination of material injury to the national production of boneless meat in cuts. Thus, for purposes of efficiency, this Panel will discuss those two points jointly.
- 16.5 The complainants Sun Land, IBP, PM Beef, Packerland, and Murco argue that the Final Determination did not comply with Articles 39 and 41 of the LCE, Articles 59, 64, and 65 of the RLCE and Articles 3 and 4 of the ADA because the Authority reached conclusions not compatible with these provisions. There are three main arguments presented by the complainants in regards to the determination of material injury to the national production of boneless meat: 1) In accordance to Article 59 of the RLCE, the IA can only find injury when all the factors and indices described in Article 41 of the LCE are present; 2) The IA modified the methodology to consider real prices in Mexican pesos instead of U.S. dollars, without stating the legal grounds for doing so; and 3) The IA should

- have made a special analysis of the Mexican Federal Inspection Type (TIF) slaughterhouses because the imports of boneless meat from the United States of America directly compete with the meat produced in these types of slaughterhouses.
- 16.6 The complainants argue that the IA did not comply with Article 59 of the RLCE because the existence of injury can only be found when all the circumstances found in Article 41 of the LCE are present. This argument is similar to one presented by complainants in regards to the threat of injury. The elements of Article 41 of the LCE include: The volume of imports in dumping conditions, the impact of the dumped imports on the prices of identical or similar products, and the impact on the national production of similar products, taking into consideration the relevant economic factors, the percentage of participation in the market, the productivity, the installed capacity, the employment, and the salaries.
- 16.7 The IA does not share the complainants' approach. In its view, a correct interpretation of Article 59 of the RLCE and Article 41 of the LCE clarifies that the IA shall consider all the factors and indices established in the provisions but it does not follow that all those factors and indices must actually be present in the specific case to determine the existence of injury. The IA emphasized that its conclusion is in accordance to Articles 3.2 and 3.4 of the ADA which states that no one of the factors in an isolated manner shall be sufficient to determine the existence of material injury. The IA should analyze all the elements but it is not essential that there is an affirmative finding with respect to each one of them to find injury in a specific proceedings.
- 16.8 The complainants also argue that the IA accepted the request by the national production to modify the methodology to use real prices, in such a manner that the IA carried out conversion in the exchange rate that caused adjustments with respect to the national index of prices for the producers (paragraph 589, A and B of the Final Determination). These changes, according to the complainants, distort the reality found in the Preliminary Determination. The complainants argue that the IA did not provide a legal basis for the change in methodology. This argument is very similar to the one stated by the complainants in regards to the threat of material injury. The IA's arguments are also similar. Furthermore, in addition to the relevant argument already stated with regards to the threat of injury, the IA insisted that in an investigation and with the purpose of reaching a Final Determination, the IA is not obligated to use the same methodology as used in the Preliminary Determination. An interpretation such as this one would render meaningless the next procedural stage, where evidence is presented, there are inspections in situ, and a public hearing is carried out in which the participants present their arguments. The IA also noted that the complainants did not mention any legal provision which obliges the IA to use the same methodology as applied to the Preliminary Determination.

- 16.9 The complainants argue that paragraph 602 of the Final Determination establishes that TIF slaughterhouses increased production of boneless cuts by 27.2% and that boneless meat from the U.S. directly competes with the meat produced in this type of facility. For these reasons, the IA should have analyzed the national production's performance of TIF slaughterhouses in order to determine whether the domestic production had suffered injury from competing imports.
- 16.10 In response, the IA argues that the complainants' argument is novel because, in various submissions during the investigation, the complainants pointed out that even butcher shops and supermarkets should be deemed as part of the national production; *i.e.*, the objective of the exporters was always to broaden the concept of national production and not to restrict it only to consider the TIF slaughterhouses. Moreover, the IA establishes that in paragraphs 602 and 603 of the Final Determination there is an analysis of the production in all the TIF slaughterhouses and specifically in the TIF slaughterhouses included in the petition of the antidumping investigation. In both cases, the IA recognized a growth in the production. In sum, for the IA, the complainants are requesting an analysis already performed during the administrative proceeding.
- 16.11 Analysis of the law and allegations concerning Final Determination of material injury
- 16.12 Like the argument with respect to the finding of threat of injury, the complainants focus on the IA's failure to make a positive finding of each of the factors listed in Article 41 of the LCE and Article 64 of the RLCE. Although the factors to consider for a determination of material injury differ from those that the IA should take into account in making a determination of significant injury, the approach remains the same. Article 41 lists three factors that the investigating authority "shall take into account," plus a fourth general category of "[a]ny other factor that the [investigating authority] may consider relevant." Even within some of the individual factors, the language of the law gives the IA considerable flexibility. For example, while the second factor requires that the investigating authority consider "the effect that the unfairly traded imports have upon the domestic prices of identical or similar products in the domestic market," the statute lists several elements to "take into account," without specifying precisely what constitutes a direct or potentially direct effect on prices. The third factor, impact on domestic producers, offers a comparable list of elements to consider. Contrary to the complainants' argument, the language of the legislation does not require the IA to find all the factors; rather, the law establishes parameters within which the investigation must operate and gives the investigating authority considerable discretion.
- 16.13 The complainants' reliance on the language of Articles 3.2 and 3.4 of the ADA is also misplaced. The statements in those provisions to the effect that no one or several findings are conclusive does not mean that the investigating authority must make an affirmative determination of each factor. Rather, it signifies that

- the authority has discretion in how it arrives at its determination, although it must consider each factor and then analyze the factors as a group to evaluate whether, overall, the weight of the elements militates in favor of or against a finding of significant injury.
- 16.14 Nevertheless, the IA's affirmative findings bear scrutiny. In its determination of material injury to the domestic industry of meat in cuts with bone, the IA does examine the volume of imports. In paragraphs 546-557, the Final Determination addresses the effects of imports on domestic prices. The Final Determination also considers the effects on the national production, including the decrease in output, national apparent consumption and the percentage applicable to imports and national production, installed capacity in Mexico, and utilized employment in TIF plants in Mexico. Thus, it would appear that the IA took into account each of the factors with respect to cuts of meat with bone.
- 16.15 The investigating authority made a similar analysis in its consideration of boneless cuts. In that section of the Final Determination, paragraphs 583-588 contain the analysis of import volumes. Paragraphs 589-600 address the effects of import prices on the prices of domestically produced boneless cuts. The Final Determination also examines the effects on the national production, including: The national offer, in paragraphs 601-605; apparent national consumption in paragraphs 606-611; installed capacity, in paragraph 612; and utilized employment, in paragraph 613. On the face of the Final Determination, therefore, it would appear that the IA took into account each of the factors with respect to boneless cuts.
- 16.16 The analysis does not end there, however. First, concerning volumes of imports for both product categories, the IA examines the total volume, not the "volume of the merchandise imported under conditions involving price discrimination," as Article 41, paragraph I, of the LCE requires. Thus, the conclusions concerning volume increases are distorted because they are based on total imports, not only on those exporters and producers that were found to sell the investigated products at unfairly low prices.
- 16.17 Second, with respect to price effects, again the IA considered the prices of all imports of meat in cuts with bone and imports of boneless cuts. Article 4, paragraph II, also directs that the consideration shall be of the effect of unfairly traded imports, not all imports, of the products.
- 16.18 The Final Determination does, however, acknowledge the argument that merchandise not sold at unfair prices should be excluded from its injury analyses. The authority observed that only 24.4 percent of imports of cuts of meat with bone realized during the investigated period entered Mexico under legal conditions. By the same token, the IA observed that only 31.2 percent of imports of boneless cuts of meat realized during the investigated period was demonstrated to enter Mexico under legal trade conditions. For each of these products, the

- Final Determination states that, because the majority of imports were sold at less than normal value, it was the presence of these illegal imports that provoked the diminution of prices. The conclusion was that, because import prices were lower and a majority of imports were sold at unfair prices, the dumped imports caused the domestic producers to lower their prices so that they could not compete fairly.
- 16.19 This conclusion may sound plausible enough as a matter of reasoning, yet it is not based on a careful analysis of the effects of the prices of the unfairly traded *imports*, as Article 41, paragraph II, requires. The IA cannot look at prices of all imports and impose those prices on the unfairly traded imports. Although the ultimate conclusion may not change, the IA must isolate the prices of the unfairly traded imports and analyze their impact on the prices of the domestic producers. The cursory and conclusory statements such as those in paragraphs 557 and 600 of the Final Determination do not suffice or substitute for the economic analysis the law contemplates.
- 16.20 Furthermore, Article 41, paragraph III, instructs the investigating authority to take into account the impact that the unfairly traded imports have on the domestic producers. Again, the Final Determination takes into account the impact of all imports from all the exporters and importers under investigation. Therefore, the Final Determination is flawed because it does not limit its review to those exporters, producers, and importers whose imports were sold under unfair trade practices. Thus, the Final Determination does not comply with the law.
- 16.21 The complainants also call the Panel's attention to the ADA, Article 3.1. The text of the agreement fully supports our reading of Article 41 of the LCE. Article 3.1 states that an injury determination shall involve an objective examination of both (a) the volume of the *dumped imports* and the effect of the *dumped imports* on prices in the domestic market for like products, and (b) the consequent impact of *these imports* on domestic producers of such products. (Emphasis added.) The ADA does not permit the investigating authority to base its determination on all imports, only on those specific companies that traded unfairly.
- 16.22 Finally, the complainants refer to Article 64 of the RLCE. It is worth noting that the regulation does *not* comport with Article 41 of the LCE or with the ADA. Like Article 68 of the RLCE, previously analyzed, instead of referring to unfairly traded or dumped imports, the regulation refers to "investigated imports," which are all imports of the product under investigation. Despite this anomaly, and for the same reasons articulated in the discussion of Article 68, *supra*, the Panel concludes that the terms of the legislation prevail. Indeed, the regulation itself states that its provisions are "[f]or the purposes of Article 41 of the Law." Therefore, although the Final Determination is consistent with the regulation in its approach, it does not comply with the law.
- 16.23 The final allegation that the investigating authority erred because it did not limit its analysis to the national production of both boneless cuts and bone-in cuts to

- TIF slaughterhouses is not entirely clear. The argument seems to be that the product of the TIF slaughterhouses is most directly competitive with the imported product and, therefore, the injury analysis should have been restricted to TIF slaughterhouses.
- 16.24 Apparently, the IA did analyze the performance of TIF slaughterhouses but did not do so specifically with regard to installed capacity. The IA maintains that it did consider TIF slaughterhouses.
- 16.25 This Panel agrees with the rebuttal arguments of the investigating authority and rejects this allegation. First, the complainants do not articulate a clear reason why the IA erred or why the Panel should remand for a more limited analysis. Unless the Panel is convinced that the determination does not comply with the law, the Panel must acquiesce to the expertise of the IA. Second, as the Panel explained above, the complainants cannot now raise an argument that they failed to submit to the IA during the administrative proceeding. For these reasons, the Panel upholds the Final Determination with respect to the treatment of TIF slaughterhouses in the injury analysis.

CONCLUSION.-

- 16.26 The Panel disagrees with the complainants' allegation that the IA can reach a final affirmative determination of material injury only if all the factors in Article 41 of the LCE and Article 3.1-3.6 of the ADA are present. The Panel does hold that the IA failed to satisfy the requirements for reaching a final affirmative determination of injury because the IA did not determine that the [unfairly traded] imports were the cause of the alleged material injury. Therefore, the Panel remands to the investigating authority to conduct the causation analysis required by Article 41 of the LCE.
- 16.27 The Panel disagrees with the complainants' allegation that the IA erred in changing its methodology between the Preliminary Determination, when it used U.S. dollars in its analysis, and the Final Determination, where the IA used "real" prices, in Mexican pesos. Therefore, the Panel upholds the Final Determination regarding the currency in which prices are denominated.
- 16.28 As discussed above, the Panel disagrees with the complainants' allegation that the IA erred in failing to limit its consideration of installed capacity to TIF slaughterhouses. Therefore, the Panel upholds the Final Determination regarding the analysis of the national offer for both bone-in and boneless cuts of meat.
- 17 ISSUE X. DETERMINATION IN RESPECT TO THE NATIONAL PRODUCTION OF TONGUES, LIVERS, AND OTHER EDIBLE OFFAL BECAUSE THEY DO NOT SUPPLY THE SAME MARKETS AS THE IMPORTED PRODUCTS presented by Vizur, S.K. Romar, Confederación Nacional Ganadera y Productos de Carne de Engorda agreeing that:

- 17.1 This Panel will not analyze the issues due to the fact that the national production is not in the review procedure.
18. ISSUE XI. VIOLATION OF ARTICLE 6.8 AND ANNEX II OF THE ANTIDUMPING CODE BECAUSE [THE IA] DID NOT CONSIDER THE INFORMATION PRESENTED BY PM BEEF HOLDINGS, LLC. TO DETERMINE ITS INDIVIDUAL MARGIN OF PRICE DISCRIMINATION.
- 18.1 PM Beef Holdings, LLC. (hereafter PM Beef) argues in its brief that the IA violated Article 6.8 and annex II of the ADA because the information PM Beef presented was not considered (paragraph 374 of the Final Determination) and thus, the IA decided to impose the highest margin of price discrimination found during the proceedings, therefore, alluding that the complainant failed to present a series of transactions referring to the export price to Mexico.
- 18.2 The complainant further argues that through an involuntary error, it failed to present some export transactions to Mexico, but, that the IA remained silent in this regard. It was not until the Final Determination that the complainant realized that it had omitted those transactions. In response to the official questionnaire, the IA requested additional information and clarification on some points. However, in that request there was no request for information related to the totality of the sales exported to Mexico.
- 18.3 PM Beef further added that after analyzing the information presented to the IA, it realized that it had not reported three invoices of the total export transactions to Mexico and that in the spirit of cooperation it presented a copy of those transactions. From this it is inferred that the IA never requested a clarification of whether PM Beef had reported the totality of the transactions, even though it knew that the evidence presented by the complainant was not ideal. The IA did not request or explain the reasons why it would not accept such evidence, nor did it allow PM Beef the opportunity to clarify or present related information to the information submitted. Due to the above, a fundamental principle was violated that would have guaranteed the complainant the possibility of correcting its error.
- 18.4 Lastly, PM argues that Article 6.8 of the ADA does not apply because it does not fall within one of the presumptions of this provision. The failure of the IA to act, in not complying with paragraph six of annex II, resulted in the inability of the complainant submit the information that was necessary for the IA to calculate its margin of price discrimination. Therefore, paragraph 374 of the Final Determination is illegal.
- 18.5 In response, the IA, argues that it performed a detailed analysis of the response to the official questionnaire. However, during the investigation period the complainant did not present correct nor complete information. PM Beef tries to cause confusion it indicating that it only failed to report three invoices of the total

- transaction of the export price and that were later reported to the IA. Nevertheless, the information that it failed to report refers to information regarding three transactions referring to a sample of invoices of the database of the export price that the IA requested. Consequently, it false that by reporting the three invoices of the sample the database of the export price would supplement the totality of the sales of the investigated product and consequently the totality of the information requested.
- 18.6 The IA indicates that paragraph 3.1 of section C of the official questionnaire for exporting companies requires a list of all the individual export operations of the investigated product and that the complainant stated in that same questionnaire that the information provided was from the accounting system of the company, and that in order to assure that all the operations were reported, it was necessary to obtain the information manually.
- 18.7 It is clear that the complainant did not proceed within its possibilities in not reporting, to an explicit question in the official questionnaire as well as to a request for additional information, the totality of the export sales to Mexico, especially when it stated that it had done so.

ANALYSIS.-

- 18.8 The complainant PM Beef on page 58 of its brief states, “If it is true that because of an involuntary error, or perhaps a typing error, the complainant failed to present some export transactions to Mexico, it is also true that that the investigating authority remained silent in regards to such failure and it was not until the Final Determination that the complainant became aware that it had failed to report some transactions related to the export price to Mexico.”
- 18.9 From the text above it can be derived that the complainant makes contradictory statements. On the one hand, it stated that it became aware of this fact until the Final Determination and on the hand, on page 60 of its brief its argued, “the complainant, after analyzing the information presented to the investigating authority, it became aware that it had not reported three invoices of the total export transactions to Mexico and in the spirit of cooperation with the investigation, it presented to the investigating authority a copy of the cited transactions.” Then, this Panels asks in which one of these two instances did the complainant [become aware] that its information was incorrect? The response is obvious to the Panel. Considering that, as the complainant affirms, if in the request for information there was no request for the totality of the export sales, then, this Panel once again asks, why did the complainant later present three invoices of the total transactions? The response lead to the contradiction by the complainant. This Panel does not lose sight of the fact that the obligation to present all the information is on the complainant, as set out in Articles 53 and 54 of the LCE.

- 18.10 If we assume that the complainant indeed became aware of the omission and later presented the three invoices, then it should be noted that Rule 59(II)(c) of the Rules of Procedure establish that reference should be made in the briefs to the evidence that is in the Administrative Record, and the page should be identified, and when possible the line should be cited.
- 18.11 From an analysis made by the Panel of PM Beef's brief, it is derived that the complainant did not comply with the Rule because it made general statements, without specifying or locating the evidence that it said to have presented and that the IA did not take into account. Additionally, the complainant assures that only three invoices were missing of the total of its transactions, while the IA sustains that it was information omitted relating to three transactions in reference to a sample of invoices from the database of the export price. Consequently, the complainant failed to provide this Panel with the necessary elements to identify, with complete precision, the evidence that it asserts were not taken into consideration by the IA. This Panel cannot review allegations or defenses that were not presented because it is not its jurisdiction to replace the deficiencies that the parties have and thus, this Panel concludes and confirms the IA's decision on the point that PM Beef did not present the information in a complete and correct manner, as it appears in paragraph 374 of the Final Determination.
- 18.12 On the other hand, in PM Beef's brief on page 59, third paragraph, it accepts that as a consequence of its response to the official questionnaire, the IA requested additional information and to clarify certain points. Additionally, it complained that in the IA's request the IA did not request that PM Beef report information related to the export sales. That is, that the IA did not request that PM Beef verify if it had reported the totality of the export sales to Mexico, thus, the IA incorrectly interpreted Article 6.8 and Annex II of the ADA because it remained silent in regards to the omission and it was not until the Final Determination that the complainant became aware that it had omitted some transactions.
- 18.13 In reference to the above paragraph, this Panel holds that the violation complained about does not exist because in the present case the problem was not that the IA did not accept the information because it is clear that it did. The issue is that the IA found the information to be incomplete and incorrect and thus, made its determination on the information it had available.
- 18.14 Furthermore, PM Beef stated in the official questionnaire that it had reported the totality of its sales. Thus, the IA does not have the obligation to request, once again, that the complainant declare whether it has reported the information in a complete manner and there is no legal provision that places this burden on the IA.
- 18.15 Contrary to the complainant's arguments, the IA requested additional information and a clarification on certain points in the response to the official questionnaire (as admitted to by the complainant on page 59 of its brief) of the information provided, which did not violate any provision. It is clear that the obligation to

provide evidence, proof, information, and date, in an investigation is on the participating companies and not on the IA.

- 18.16 On the other hand, the allegation that the IA did not accept the complainant evidence or information presented is absurd. It can be verified in the Administrative Record that the IA accepted the evidence from PM Beef and this fact should not be confused with the evaluation of the evidence, that is in fact the substance of the problem. If the evidence and information presented by PM Beef was incomplete but sufficient or if they were insufficient the IA has the authority to seek other information, as it did. This Panel considers that it is impossible to accept information that was not presented in a complete manner.
- 18.17 In the present case, the right and the burden of proof was on the complainant that on the one hand admits that it had not presented complete information and, additionally, fails to provide in its argument to this Panel the manner in which it complied with its obligation imposed by Article 54 of the LCE. That is, to present all the information requested and only making general allegations that do that prove the statements made. Thus, this Panel considers that the cause of complaint cannot be considered because there are not sufficient elements to make a ruling.¹²²

CONCLUSION.-

- 18.18 This Panel confirms the IA's determination in respect to the antidumping duty imposed on PM Beef because it considers that no applicable provision was violated.

19. REVIEW APPLICATION MADE BY TROSI DE CARNES AND THE COMPLAINT BY LE VIANDE

- 19.1. Trosi de Carnes made a request for review before this Panel in an extemporaneous manner, presenting its complaint on June 26, 2000 and thus it was not considered timely. Similarly, Le Viande Comercializadora made its request on September 7, 2000.

20 PANEL ORDER

- 20.1 In accordance to Article 1904.8 of the NAFTA, and based on the above, the Panel decides unanimously and orders the following:
- 20.2 The Final Determination issued by the Secretariat of Commerce and Industrial Development (currently the Secretariat of Economy), published in the *Diario*

¹²² STATEMENT OF INJURY IN TAX REVIEWS.. 9th Period. Collegiate Circuit Tribunals, Weekly Judicial Journal of the Federation and its Gazette. Volume VI. January 1999. Thesis VI.2 J. 152. Register.194,823.

Oficial de la Federación, on April 28, 2000 is upheld in all of its paragraphs, except those remanded and specified below

- 20.3 In reference to violations reviewed in Issue I (Lack of competence of the Deputy Director of Legal Affairs of the Secretariat of Commerce and Industrial Development), these claims are dismissed for lack of legal grounds.
- 20.4 In reference to violations reviewed in Issue II (Illegal receipt of the official questionnaires, evidence, and arguments presented beyond the legal time limit), these are dismissed because the issue became moot when the interested parties did not proceed in their claim.
- 20.5 In reference to violations reviewed in Issue III (Determination of a relevant market, as well as the establishment of the classification certificate and of useful shelf life), it is remanded¹²³ so that this issue is corrected in accordance with the terms specified in the body of this resolution.
- 20.6 In regards to the violations reviewed in Issue IV (An antidumping duty greater than the margin of dumping calculated for each one of the products subject of the investigation), it is remanded so that this issue is re-determined, adopting the necessary measures compatible with the guidelines stated in the body of the resolution.
- 20.7 In reference to violations reviewed in Issue V (Application of a final antidumping duty based on a sample) it is decided that, because there is no injury to Packerland Packing Company, Inc., because its right was recognized, this issue, as decided by the IA, is upheld.
- 20.8 In regards to the violations reviewed in Issue VI (Incorrect application of the methodology used to calculate the margin of dumping to determine the antidumping duties for broker companies), it is remanded so that the IA adopt measures in conformity with the decision of this review.
- 20.9 In regards to the violations reviewed in Issue VII (Extension of the deadline for the preliminary antidumping duties), this Panel abstains from resolving this issue as it lacks the authority to review preliminary measures issued during the investigation.
- 20.10 n regards to the violations reviewed in Issue VIII (Determination of a threat of injury to the national production of meat in carcasses, fresh, chilled, or frozen):
- 20.10.1 The decision of the IA is confirmed as far as the following points claimed by the complainants; (i) that each factor considered should be satisfied to find a threat of injury; (ii) modification of the methodology to use real prices in

¹²³ This Panel uses the procedural concept of remand in terms of Article 1904.8 of the NAFTA.

Mexican pesos; (iii) projection of a future increase in the relevant imports; and (iiii) determination in relation to the export prices.

20.10.2 It is remanded to the IA so that it take into consideration the LCE and the RLCE and it not include the totality of the imports in its consideration of the rate of increase and for it to properly analyze the available and not used capacity of all the exporters from the United States of America following the guidelines stated in the body of this resolution.

20.11 In regards to the violations reviewed in Issue IX (Determination of injury to the national production of meat in boneless cuts and with both, fresh, chilled or frozen):

20.11.1 The IA's decision is upheld in reference to the allegation by the complainants regarding the affirmative finding of injury.

20.11.2 It is remanded so that the IA complies with all the requirements established in the law to reach a finding of harm, carrying out the causality analysis required by Article 41 of the LCE.

20.11.3 The IA's decision with regards to the change of methodology is upheld.

20.11.4 The IA's decision to limit its consideration of installed capacity in the TIF slaughterhouses is upheld.

20.12 In regards to the violation reviewed in Issue X (Determination that the national production of tongues, liver, and other eatable offal do not supply the same markets and the imported products), this issue is not decided because it became moot when the national production abandoned the review.

20.13 In regards to the violations review in Issue XI (Violation of Article 6.8 of Annex II of the Antidumping Code in not considering the information presented by PM Beef Holding, LLC, for the determination of an individual margin of dumping), the IA's decision is upheld for the reasons stated in the analysis of this issue.

21. TERM FOR REMAND

21.1 Pursuant to Article 1904.8 of the NAFTA, this Panel remands this case to the IA and orders it to comply with this decision in the time of three months from the date of the order, taking into consideration the complexity of the matters of fact and of law implied, and the nature of the finding of this Panel, and to inform the Panel of its compliance.

Date of issuance: March 15, 2004.

Signed in original by:

Eduardo Magallón Gómez
Eduardo Magallón Gómez
Chairman

March 11, 2004
Date

Lisa B. Koteen
Lisa B. Koteen

March 12, 2004
Date

Cynthia Crawford Lichtenstein
Cynthia Crawford Lichtenstein

March 12, 2004
Date

Ruperto Patiño Manffer
Ruperto Patiño Manffer

March 11, 2004
Date

Jorge Alberto Silva Silva
Jorge Alberto Silva Silva

March 12, 2004
Date

ABBREVIATIONS

ADA – Antidumping Agreement

CFF – Código Fiscal Federal (Federal Tax Code)

CFPC – Código Fiscal de Procedimientos Civiles (Tax Code of Civil Proceedings)

DGATJ – Dirección General Adjunto Técnica Jurídica (General Technical Legal Office)

DOC – Department of Commerce of the United States of America.

DOF – Diaria Oficial de la Federación (Official Federal Gazette)

GE-OMC Grupo Especial – Organización Mundial de Comercio (Panel-WTO)

IA – Investigating Authority

LCE – Ley de Comercio Exterior (Mexican Foreign Trade Law)

LOAPF – Ley Orgánica de la Administración Pública Federal (Organic Law for Federal Public Administration)

OSD – Órgano de Solución de Controversias (Dispute Settlement Body)

RLCE – Reglamento de la Ley de Comercio Exterior (Regulation of the Mexican Foreign Trade Law)

SE – Secretaría de Economía (Secretariat of Economy)

SECOFI – Secretaría de Comercio y Fomento Industrial (Secretariat of Commerce and Industrial Development)

TFJFA – Tribunal Federal de Justicia Fiscal y Administrativa. (Federal Tribunal of Tax and Administrative Justice)

TLCAN – Tratado de Libre Comercio de América del Norte (North American Free Trade Agreement)

UPCI – Unidad de Prácticas Comerciales Internacionales (International Commercial Practices Unit)