

**BINATIONAL PANEL REVIEW UNDER ARTICLE 1904 OF THE NORTH
AMERICAN FREE TRADE AGREEMENT**

**REVIEW OF THE FINAL DETERMINATION OF DUMPING INVESTIGATION ON
IMPORTS OF CHICKEN LEGS AND THIGHS COMING FROM THE UNITED
STATES OF AMERICA**

RECORD: MEX-USA-2012-1904-01

FINAL DECISION OF THE PANEL

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GLOSSARY	
Antidumping Agreement or ADA	Agreement on the Implementation of Article VI of the General Tariffs Agreement and Trade 1994
BACHOCO	Bachoco, S.A. de C.V.
BUENAVENTURA	Buenaventura Grupo Pecuario, S.A. de C.V.
CENTRAL DETALLISTA	Central Detallista, S. A. de C. V.
CERVANTES	Cervantes Distributor Inc.
CFPC	Federal Code of Civil Procedure
COMERCIAL DE CARNES FRIAS	Comercial de Carnes Frias del Norte, S. A. de C.V.
DELATO	Delato Corporation
DOF	Official Journal of the Federation
Administrative Record o AR	Administrative Record sent by the Investigating Authority to the Secretariat of the Mexican Section of Free Trade, composed on the occasion of the Antidumping Investigation
EUA	United States of America or United States
GATT	General Agreement on Tariffs and Trade 1994
INEGI	National Institute of Statistics, Geography and Informatics
Antidumping Investigation	Dumping Investigation on Imports of chicken, legs and thighs, classified under tariff items 0207.13.03 and 0207.14.04 of the Tariff of the Law on General Import and Export Taxes, coming from the United States of America, merchandise regardless of country of origin
JUAN MANUEL DE LA TORRE	Juan Manuel de la Torre Cardenas
LARROC	Larroc Inc. (antes Larroc, LTD)
LCE	Foreign Trade Law
LFPCA	Federal Law of Administrative Dispute Procedures
LOAPF	Organic Law of the Federal Public Administration
NORTHERN BEEF	Northern Beef Industries Inc.
PATSA	Productos Agropecuarios de Tehuacán, S.A. de C.V.
PECO	Peco Foods Inc.
PILGRIM'S PRIDE MEXICO	Pilgrim's Pride, S. de R. L. de C. V.

PILGRIM'S PRIDE	Pilgrim's Pride Corporation
RULES OF PROCEDURE	NAFTA Chapter XIX Rules of Procedure
RLCE	Regulation of the Foreign Trade Law
INITIAL DETERMINATION or (ID)	Resolution by which the request of an interested party is accepted and the initiation of the antidumping investigation is declared on imports of chicken legs and thighs, classified under tariff items 0207.13.03 and 0207.14.04 of the Tariff of the General Import and Export Taxes Act, coming from the United States, merchandise regardless of the country of origin, published in the Official Journal of the Federation of February 8, 2011
FINAL DETERMINATION o (FD)	Final Determination of the antidumping investigation on imports of chicken legs and thighs, classified under tariff items 0207.13.03 and 0207.14.04 of the Tariff of the General Import and Export Taxes Act, coming from the United States merchandise regardless of the country of origin, published in the Official Journal of the Federation of August 6, 2012
PRELIMINARY DETERMINATION (PD)	Preliminary Determination of the antidumping investigation on imports of chicken legs and thighs, classified under tariff headings 0207.13.03 and 0207.14.04 of the Tariff of the General Import and Export Taxes Act, coming from the United States of America, merchandise regardless of the country of origin, published in the Official Journal of the Federation of January 19, 2012
ROBINSON & HARRISON	Robinson & Harrison Poultry Co. Inc.
SANDERSON	Sanderson Farms Inc.
SE or Investigating Authority or IA	Secretariat of Economy or Investigating Authority
Mexican Secretariat	Mexican Section of the Secretariat of the Free trade agreements
SIGMA	Sigma Alimentos Importaciones, S.A. de C.V. and Sigma Alimentos

	Congelados, S.A. de C.V.
SIMMONS	Simmons Prepared Foods Inc.
SUKARNE	Sukarne, S.A. de C.V.
TIGIE	Tariff of the General Export and Import Taxes Act
TFJA	Federal Court of Administrative Justice
TYSON MEXICO	Tyson de Mexico, S. de R.L de C.V.
TYSON	Tyson Foods Inc.
UNA	Unión Nacional de Avicultores
UPCI	Unit of International Trade Practices
USAPEEC	USA Poultry & Egg Export Council

A. IN GENERAL

I. INTRODUCTION

1. Binational Panel Review of the Final Determination of the anti-dumping Investigation on imports of chicken legs and thighs, classified under tariff items 0207.13.03 and 0207.14.04 of the Tariff of the General Export and Import Taxes Act ("TIGIE"), originating in the United States of America ("USA"), regardless of the country of origin, published in the Official Journal of the Federation ("DOF") on August 6, 2012.

II. PANEL MEMBERS

Edward Hayes

David Yocis

Mark Sandstrom

Mariano Gomezperalta

Lucia Reina Antuña

III. PARTICIPANTS

2. The Government of Mexico.

INVESTIGATING AUTHORITY: Ministry of Economy ("SE" or "Investigating Authority" or "IA").

3. Interested Parties:

IMPORTERS. Pilgrim's Pride, S. de RL de C.V. (PILGRIM'S PRIDE MÉXICO), Tyson de México, S. de RL de C.V. ("TYSON MÉXICO"), Larroc Inc. (formerly Larroc, Ltd.) ("LARROC"), Central Detallista, S.A. de C.V. ("CENTRAL DETALLISTA"); Comercial de Carnes Frías, S.A. de C.V. ("COMERCIAL DE CARNES FRÍAS"); Juan Manuel de la Torre Cárdenas ("JUAN MANUEL DE LA TORRE"), Operadora de Ciudad Juárez, S.A. de C.V. ("OPERADORA"); Sigma Alimentos Importaciones, S.A. de C.V. and Sigma Alimentos Congelados, S.A. de C.V. (jointly, "SIGMA") and Sukarne, S.A. de C.V. ("SUKARNE").

EXPORTERS. Sanderson Farms, Inc. (SANDERSON), Northern Beef Industries Inc. ("NORTHERN BEEF"), Simmons Prepared Foods Inc. ("SIMMONS"), Robinson & Harrison Poultry Co. Inc. (ROBINSON & HARRISON), Tyson Foods Inc. ("TYSON"), Pilgrim's Pride Corporation ("PILGRIM'S PRIDE"), USA Poultry & Egg Export Council ("USAPEEC"), Peco Foods Inc. ("PECO"), Cervantes

Distributor Inc. ("CERVANTES") and Delato Corporation (DBA Am-Mex Services Co.) ("DELATO").

DOMESTIC INDUSTRY. Bachoco, S.A. de C.V. ("BACHOCO") Productos Agropecuarios de Tehuacán, S.A. de C.V. ("PATSA") and Buenaventura Grupo Pecuário, S.A. de C.V. ("BUENAVENTURA").

IV. JURISDICTION.

4. This Binational Panel has jurisdiction to review the Final Determination of the Antidumping Investigation on Imports of chicken legs and thighs, originating in the United States, regardless of the country of origin, classified under tariff items 0207.13.03 and 0207.14.04, the TIGIE, issued by the SE, whose file number assigned by the Unit of International Trade Practices ("UPCI") was 13/10 pursuant to Article 1904, Chapter XIX of the North American Free Trade Agreement.

5. In accordance to NAFTA Article 1904.8 and Rule 72 of the Rules of Procedure of Chapter XIX of NAFTA ("Rules of Procedure"), the Panel issues its decision in writing.

V. RELATED RESEARCH

6. On July 25, 2010 was published in the DOF, the Decree establishing a definitive measure of bilateral safeguards on imports of chicken legs and thighs coming from the USA (the "Safeguard Decree"), which are classified under the same tariff items as in this case.

7. The safeguard measure consisted in a rate of 98.8% lineally untaxed in the course of five years from January 1st each year, as follows: 79% in 2004; 59% in 2005; 39.5% in 2006; 19.8% in 2007 and zero as of 2008. Likewise, it was established a duty free quota of 100,000 metric tons per year with an annual increase of 1% during the time the measure was bilaterally applied.

VI. BACKGROUND.

8. Administrative Investigation Procedure. Chronology of the Proceedings.

9. On July 2, 2010, BACHOCO, PATSA and BUENAVENTURA, (jointly, the "Petitioners"), through their legal representatives, appeared before the SE to request the initiation of an antidumping investigation of unfair trade practices in the form of price discrimination, against imports of chicken legs and thighs, originating in the United States, regardless of the country of origin.

10. On February 8, 2011 a Resolution was published in the DOF, whereby it was accepted the petition and it was declared the initiation of the antidumping investigation on imports of chicken legs and thighs (the "Initial Determination" or "ID") originating in the United States, regardless of the country of origin ("Anti-

Dumping Investigation"), for which was set as the period of investigation from October 1st, 2009 to September 30, 2010 and as the period of analysis of the injury cause to the domestic production from January 1st, 2007 to September 30, 2010.

11. The Petitioners argued that in recent years, mainly from April 2009 to March 2010 (proposed as the period of investigation), imports of chicken legs and thighs from the United States have increased significantly in the Mexican market and prices at which they are sold are dumped, which has shifted the domestic industry and has put such domestic industry at risk because they have low or no added value and low profitability.

12. SE determined that during the investigated period, the representation of the domestic producers of chicken legs and thighs was of 41%.¹

13. On January 19, 2012, was published in the DOF the preliminary determination of the investigation (the "Preliminary Determination" or "PD") whereby it was determined to continue with the administrative investigation without the imposition of provisional countervailing duties pursuant that the parties expressed their interest to reach a mutually satisfactory agreement and therefore was ordered to continue the investigation of the investigated goods, under the terms that appear in such resolution.

14. SE determined that the subject merchandise are chicken legs and thighs in different presentations for human consumption, also known as dark meat chicken hindquarters, legs or thighs (except fillets), leg attached to the chicken thigh or leg bone, among others.

15. The products for which the investigation was continued, enter through the following tariff items:

Table 1. Tariff description of the products under investigation

Section	Description
Chapter: 02	Meat and edible meat offal.
Item: 0207	Meat and edible offal of poultry under item 01.05, fresh, chilled or frozen. -Of fowls or chicken
Sub-item: 0207.13	-- Pieces and offal, fresh or chilled.
0207.13.03	Legs, thighs or legs attached to the thigh.

¹ Preliminary Determination, paragraph 453.

Sub-item: 0207.14	-- Pieces and offal, frozen.
0207.14.04	Legs, thighs or legs attached to the thigh.

16. On August 6, 2012, the final determination (“Final Determination” or “FD”) was published whereby final countervailing duties to imports of chicken legs and thighs from the United States were imposed. This Binational Panel reviews such Final Determination in accordance with NAFTA Article 1904.1. Such Final Determination resolve as follows:

"707. The Secretariat considered it justified to seek that the correction of distortions by unfair practice should not lead to the imposition of excessively high compensatory measures that could have a negative impact on the consumer and the rest of the food production chain. For this reason, it was decided to assess the relevance of a quota lower than the dumping margins."

"708. It is in this context that the WTO Members' recommendation under Article 9.1 of the Anti-Dumping Agreement that "It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry", a principle which the LCE states in the second paragraph of Article 62:" Countervailing duties may be less than price discrimination or amount of the subsidy as long as they are sufficient to discourage the importation of goods under conditions of unfair international trade practices. "

"709. To this end, the Secretariat proceeded to identify which reference of relative prices could be considered allowable for the operation and competence of the domestic industry. It was noted that in 2007, when still existed safeguard measures, import prices (with the use ad valorem for the safeguarding, DTA and customs expenses included) were 28% below the domestic prices. Such year was considered relevant due to the existence of the quota and the ad valorem duty as evidence to establish the behavior of prices in conditions not detrimental to national production. Also, in order to isolate the effects of price erosion and containment, the levels of domestic prices observed in that year (2007) were considered. Under these conditions, the percentage by which import prices in 2010 should be increased to restore the price differential mentioned and the observed relative prices to restore conditions to support the domestic industry should be 25.7%. Therefore, it is considered appropriate to apply an antidumping duty lower than the dumping price margins calculated on that amount."

"710. However, paragraph 7 of Annex II of the Antidumping Agreement states that if an interested party does not provide relevant information could get less favorable results than if it had cooperated. In this virtue, the lower quota of margin of prices discrimination shall apply only to exporters who appeared and provided enough information for such purpose (Simmons, Sanderson, Tyson Foods and Pilgrim's Pride Corporation); in the case of all other exporters shall be applicable the countervailing duty equivalent to the highest of the dumping margins found, which is of 127.5%."

"K. Extraordinary circumstances

"713. Although the requirements for the establishment of antidumping duties were fulfilled, as it was proven in this Determination, considering that due to the contingency on avian influenza type A, subtype H7N3, there have been distorting effects over the

prices of the products under investigation that are not explained by the fundamental market factors, in accordance with Article 9.1 of the Antidumping Agreement, the Secretariat determined not to apply the countervailing duty set out in points 709 and 710 of this Resolution, with the purpose not to overestimate the effect of these on the market, until such time as the situation is regularized.”

“714. Based on the foregoing and pursuant to Article 59 section I and 62 of the LCE and 9.1 of the ADA is appropriate to issue the following:

“715. It is declared that this investigating procedure on unfair international trade practices in its modality of price discrimination is concluded, and subsequent definitive countervailing duties on imports of chicken legs and thighs, entering by tariff items 0207.13 .03 and 0207.14.04 of the TIGIE, or others, from the United States of America, regardless the country of origin, are imposed:

a. For imports from Simmons, Sanderson, Tyson Foods and Pilgrim's Pride Corporation of 25.7%, and

b. For imports from the rest of the exporters of 127.5%.”

“716. Countervailing duties established in the preceding paragraph shall not apply as set forth in point 713 of this Resolution.”

“717. The application of the countervailing duties will be announced through a Notice to that effect, published in the DOF by the Secretariat, priory submitting such Notice to the opinion of the Commission.”

17. Proceedings before the Panel

18. Chronology of Proceedings

19. On September 3, 2012, SANDERSON, ROBINSON & HARRISON, NORTHERN BEEF, SIMMONS, TYSON, TYSON MEXICO, PILGRIM'S PRIDE MEXICO, PILGRIM'S PRIDE and USAPEEC submitted their application to review the Final Determination of the antidumping investigation on imports of chicken legs and thighs from the United States, regardless of the country of origin, with the Mexican Secretariat of the North American Free Trade Agreement (“Mexican Secretariat”). LARROC and OPERADORA and PECO submitted their application on September 5, 2012.

20. On October 2, 2012, USAPEEC and SANDERSON and on October 3, 2012, ROBINSON & HARRISON, NORTHERN BEEF, SIMMONS, TYSON, TYSON MEXICO, PECO, DELATO, CERVANTES, PILGRIM'S PRIDE, PILGRIM'S MEXICO, OPERADORA and LARROC (jointly, the "Complainants") filed with the Mexican Secretariat, their complaints (“Complaints”), having exhibited the certificate of service.

21. On 11 October 2012, SIGMA submitted its notice of appearance (“Notice of Appearance”) to support the Complaints.

22. On October 16, 2012, JUAN MANUEL DE LA TORRE submitted its Notice of Appearance to support the claims that were filed by USAPEEC, DELATO, SANDERSON, ROBINSON & HARRISON, NORTHERN BEEF, SIMMONS, TYSON, TYSON MEXICO, PILGRIM'S PRIDE, PILGRIM'S PRIDE MEXICO and LARROC.

23. On October 16, 2012, COMERCIAL DE CARNES FRIAS submitted its Notice of Appearance to support the claims that were filed by USAPEEC, DELATO, SANDERSON, ROBINSON & HARRISON, NORTHERN BEEF, SIMMONS, TYSON, TYSON MÉXICO, PILGRIM'S PRIDE, PILGRIM'S PRIDE MEXICO and LARROC. However, COMERCIAL DE CARNES FRIAS did not submit its Brief or its Reply Brief to the IA's Brief, nor appeared to the Public Hearing.

24. On October 18, 2012, through the Head of the Legal Affairs Unit, the Unit of International Trade Practices ("UPCI") of the SE submitted a Notice of Appearance, opposing each and every one of the arguments raised by the Complainants in their respective Complaints.

25. On October 18, 2012, CENTRAL DETALLISTA submitted its Notice of Appearance to support some of the allegations made in the Complaints.

26. On October 18, 2012, SUKARNE filed its Notice of Appearance to support some of the allegations made in the Complaints. In this regard, on October 24, 2012, SUKARNE filed its withdrawal to the Notice of Appearance.

27. On October 19, 2012, BACHOCO filed its Notice of Appearance, opposing to some or all of the arguments raised in the Complaints.

28. On October 19, 2012, UNA filed a Notice of Appearance in opposition to some or all of the arguments raised in the Complaints. However, UNA did not submit its Brief or its Reply Brief to the IA's Brief.

29. On October 19, 2012, BUENAVENTURA and PATSA filed their Notices of Appearance in opposition to some or all of the arguments raised in the Complaints. In this regard, on February 8, 2013, BUENAVENTURA and PATSA filed their respective withdrawals to their Notices of Appearance.

30. On November 1st, 2012, SE filed before the NAFTA Mexican Secretariat, nine copies of the Final Determination, two copies of the administrative record ("Administrative Record") in its non-confidential and confidential versions, and the relevant index.

31. On January 7, 2013, LARROC and OPERADORA, NORTHERN BEEF, ROBINSON & HARRISON, TYSON, TYSON MEXICO, SIMMONS, SANDERSON, CERVANTES, USAPEEC, PECO, DELATO and JUAN MANUEL DE LA TORRE, and PILGRIM'S PRIDE MEXICO and PILGRIM'S PRIDE filed their respective

briefs ("Briefs"). Also CENTRAL DETALLISTA filed its Brief in support of the Complainants.

32. On January 16, 2013, NORTHERN BEEF, ROBINSON & HARRISON, TYSON, TYSON MEXICO, SIMMONS filed Annexes to their Briefs on March 19, 2013, USAPEEC, DELATO, JUAN MANUEL DE LA TORRE, PECO and CERVANTES filed Annexes to their Briefs and on March 20, 2013, LARROC and OPERADORA filed Annexes to their Briefs.

33. On March 8, 2013, UPCI of the SE filed its Brief and on April 4, 2013, the Annexes thereto.

34. On March 11, 2013, BACHOCO filed its Brief in opposition to the Complaints and on April 1st, 2013, the Annexes thereto.

35. On March 25, 2013, NORTHERN BEEF, ROBINSON & HARRISON, SIMMONS, TYSON, and TYSON MEXICO filed their response to the IA's Brief, in both confidential and public versions and on the same date, LARROC and OPERADORA, USAPEEC, DELATO, JUAN MANUEL DE LA TORRE, PECO and CERVANTES filed their Briefs in response to the IA's Brief, SANDERSON filed a response to the IA's and BACHOCOS' briefs. On March 26, 2013, PILGRIM'S PRIDE and PILGRIM'S PRIDE MEXICO filed their Briefs in response to the IA's Brief and on April 4, 2013, the annexes to their Briefs.

36. On July 3, 2014, in accordance with Rule 42 of the Rules of Procedure, the Binational Panel was integrated with Edward Hayes, David Yocis, Trossevin Marguerite, Lucía Reina and Mariano Gomezperalta as members.

37. On July 9, 2014, panelist Marguerite Trossevin notified her resignation to the Panel due to her lack of time to comply the tasks as panelist.

38. On July 9, 2014, a Notice of Suspension of the Panel was issued due to the resignation of one of the panelists.

39. On July 15, 2014 the panelists were informed that panelist Marguerite Trossevin resigned her commission as a panelist, so the procedure was temporarily suspended on July 9, 2014.

40. On November 10, 2014, pursuant to Rule 42 of the Rules of Procedure, the Binational Panel was integrated with Edward Hayes, David Yocis, Mark Sandstrom, Lucía Reina and Mariano Gomezperalta as members.

41. The case was reactivated with the Panel definitely being integrated and the public hearing was held on August 25, 2015 and August 26, 2015, whereby the Complainants, the SE and the Petitioners expressed their allegations.

VII. MOTIONS AND ORDERS

42. During the review procedure, the Panel issued various orders in response to motions filed by the parties. Hereinafter, the legal grounding and reasoning of each motion is detailed. The Panel states that, in addition to the specific merits of each order, all orders that were issued to decide a motion are legally grounded in Rule 63 of the Rules of Procedure.

43. On January 7, 2013, CERVANTES filed a notice of motion ("Motion") requesting to dismiss the Notices of Appearance submitted by UNA, BACHOCO, PATSA and BUENAVENTURA and as consequence, their participation as interested parties in the procedure as set forth in NAFTA Article 1904. The argumentation of its Motion was based on the noncompliance of Rule 40 of the Rules of Procedure, since CERVANTES considered that they did not "PRECISE" the sense of their appearance regarding the Complaints contained in the record for their review.

44. On January 21, 2013, UNA answered the Motion filed by CERVANTES, arguing that UNA did fulfill Rule 40 (1) (d), and according to Rule 3 of the Rules of Procedure UNA can appear as an interested person, and that as interested person UNA shall exclusively specify in which term of the Rule 40 of the Rules of Procedure its appearance was made, which in this case refers to subrule 40(1)(d)(ii), this is in opposition of some or all of the allegations set out in a complaint submitted under subrule 39(2)(b).

45. On February 8, 2013, BACHOCO filed a response to the Motion filed by CERVANTES noting that in accordance with Rule 3 of the Rules of Procedure is entitled to appear as interested party and that BACHOCO complied with Rule 40(1) and with all the requirements of Rule 55(1) of the Rules of Procedure to file its Notice of Appearance, and that Rule 40(1)(d) does not require a detailed description of the arguments alleged by any interested party, but only to specify under which of the three scenarios BACHOCO appears and BACHOCO specifically appeared under the assumption of paragraph 40(1)(d)(ii) that is, in opposition of some or all of the allegations set out in a complaint submitted under subrule 39(2)(b). Also BACHOCO alleges that the Rules of Procedure contemplate a different moment on the procedure for the participants to develop their arguments and therefore, the Motion is not legally grounded and should be dismissed by the Panel.

46. After analyzing the documents and proceedings submitted by the parties, this Binational Panel concluded that UNA, PATSA, BACHOCO and BUENAVENTURA complied with subrule 40(1)(d), due to the fact that in their Motions of Appearance they stated their position regarding this Review Procedure, this is: "in opposition to some or all of the allegations set out in a Complaint under subrule 39(2)(b)", according to subrule 40(1)(d)(ii) of the Rules of Procedure.

47. Likewise, this Binational Panel determines that the procedural moment whereby the appearing parties may develop their arguments in accordance with the Rules of

Procedure is until they submit their respective Briefs and not in the Notice of Appearance.

48. For the reasons previously established, the Panel ordered that the Notice of Motion submitted by CERVANTES, to dismiss the Notices of Appearance of UNA, BACHOCO, PATSA and BUENAVENTURA is **DISMISSED**.

49. On March 6, 2013, the IA filed a Motion requesting the Binational Panel: (i) to order every party of the reviewing procedure, to comply on time with the correct service of their submissions and since PILGRIM'S PRIDE and PILGRIM'S PRIDE MEXICO did not notify the submission of their corresponding Briefs, any action involving such companies is deemed invalid or null until the omission of notification is cured, and (ii) to order that the Authority's term to answer the arguments raised by PILGRIM'S PRIDE and PILGRIM'S PRIDE MEXICO in their Briefs, has not started yet.

50. Regarding the above Motion, this Binational Panel considered that it cannot order that the term for the Investigating Authority to answer such Briefs has not yet started and it seems unnecessary for the Panel to order the participants as requested by the Investigating Authority, to duly comply with Rules 24, 25 and 27 of the Rules of Procedure, since it is of the knowledge of all the participants that they are required to comply with such Rules, and therefore ordered that the Notice of Motion to order every party of this reviewing procedure, fulfill their obligation to serve other participants any document required to be served is **DISMISSED**.

51. On March 6, 2013, the Investigating Authority filed a notice of motion requesting the Binational Panel (i) to dismiss the Notices of Appearance submitted by JUAN MANUEL DE LA TORRE and COMERCIAL DE CARNES FRIAS; (ii) to deny the character of "Participants" to JUAN MANUEL DE LA TORRE and COMERCIAL DE CARNES FRIAS in this review procedure, and (iii) to dismiss all proceedings filed by JUAN MANUEL DE LA TORRE and COMERCIAL DE CARNES FRIAS before the Binational Panel, because they breached their obligation to file the Notice of Intent to request a judicial review and such Complainants not only commence internal judicial proceedings before the appropriate District Court but also appeared to the review procedured before the Binational Panel and they should not do so, and by doing so, two judicial forums could issue contradictory decisions.

52. Regarding procedural issues raised by the Investigating Authority, this Binational Panel considers that a panel of Chapter XIX keeps some degree of equivalence with the Federal Court of Fiscal and Administrative Justice, and that if this issue should have been submitted to the Federal Court of Fiscal and Administrative Justice, it cannot be thought that such Court could deny access to a plaintiff to a nullity procedure when the applicant (ie, complainant) has submitted a constitutional procedure (Amparo) with the corresponding constitutional court. In any case, it may correspond to the appropriate District Court to refer the complainant to the Federal Court of Fiscal and Administrative Justice to exhaust

this instance according to the principle of definitiveness of the Constitutional procedure (Amparo).

53. As regards the alleged possibility of conflicting rulings that may occur from the decision issued by this Binational Panel and the judgments of the corresponding District Court, this Binational Panel considers the possibility of contradiction mentioned by the Investigating Authority (possibility about which this panel is silent) cannot be remedied with the order requested by the Investigating Authority.

54. This Binational Panel also considers that COMERCIAL DE CARNES FRIAS and JUAN MANUEL DE LA TORRE appeared in this review procedure under Rule 40 (1) (d) (i) and therefore, is not legally feasible to deny them their character of "Participants" as this would clearly be contrary to a basic principle of constitutional right to a hearing.

55. For the reasons previously established, the Panel ordered that the Notice of Motion submitted by the IA, to dismiss the Notices of Appearance of COMERCIAL DE CARNES FRIAS and JUAN MANUEL DE LA TORRE, and in consequence to deny them their character of participants in this review procedure, is **DISMISSED**.

56. On March 21, 2013, USAPEEC filed a Motion to dismiss the Brief of the IA in this review procedure, arguing that the IA did not comply with that set forth in paragraph 7 of NAFTA Article 1904, alleging that the professional character that the counsels of the competent authority that issued the Final Determination should have to appear before the Binational Panel is a law degree and a licence to practice law, and that such character was not credited by the UPCI of the SE. To support its motion, USAPEEC cited, among others, Article 5 of the LFPCA and Section VII of Article 14 of the Internal Regulation of the SE and paragraph 10.1 of the General Manual of Organization of the SE ("RISE"), and reiterated that the Head of UPCI, while not being a lawyer, does not have the legal capacity to appear before the Binational Panel.

57. On April 1st, 2013, the UPCI answered the Motion referred to in the preceding paragraph, stating that NAFTA Articles 1904.7 and 5 of the LFPCA allows the IA to appear before a binational panel directly to submit any motion it deems appropriate.

58. Regarding the claim of USAPEEC that the IA cannot appear directly in the review procedure in question, this Binational Panel finds that the applicable regulations, including Articles 14 and 16 of the LOAPF, Article 5 of the LFPCA, Articles 2, 5 and 15 of RISE, Articles 1 and 19, Section XVIII of the Delegation Agreement of SECOFI, published in the DOF on July 24, 1996, as well as the court interpretations provided by the IA, allows to conclude that the Head of the UPCI has the powers necessary to appear directly in these proceedings as permitted by Article 5 of the LFPCA and, due to the fact that the IA has proved to the satisfaction of this Binational Panel that (i) the authority delegated to the Head of the UPCI are not "non delegated" powers under Article 5 of the RISE and (ii) the

delegation of powers has been done through an instrument published in the DOF as required by Article 16 of the LOAPF, whereby it expressly states that the IA has all the powers of the SE in international trade practices and the opportunity to participate in proceedings arising from instances of dispute on unfair practices by issuing official letters, submit motions and allegations, appear at public hearings, and any other manner established by the laws and international treaties and conventions. This Binational Panel finds that it cannot dismiss the IA's Brief as intended by USAPEEC and concludes that the IA has the authority to handle the legal defense and appear in these proceedings before the Binational Panel, acting directly, without requiring that the Head of the UPCI is a lawyer, therefore, said officer is authorized to sign and submit the corresponding brief, by exercising the powers and duties that were delegated to the Head of the UPCI.

59. For the reasons previously established, this Panel ordered that the Motion to dismiss the Brief of the IA by USAPEEC is **DISMISSED**.

60. On March 21, 2013, USAPEEC, DELATO, JUAN MANUEL DE LA TORRE, PECO, CERVANTES and COMERCIAL DE CARNES FRIAS filed a Motion for dismissing the Reply Brief of BACHOCO in the reviewing procedure, due to the fact that it was submitted out of time, i.e., after the term set out in Rules 57(1) and 57(2) of the Rules of Procedure, stating that the term to file such brief expired on March 8, 2013 and BACHOCO submitted its Brief until March 11, 2013.

61. On April 1st, 2013, BACHOCO filed its answer to the motion referred to in the preceding paragraph, stating that the motion lack of legal grounding, since BACHOCO filed its Brief on time, in accordance with Rules 57(2) and 19 of the Rules of Procedure, and that the deadline was on March 11, 2013.

62. After Analyzing the documents and arguments submitted by USAPEEC, DELATO, JUAN MANUEL DE LA TORRE, PECO, CERVANTES and COMERCIAL DE CARNES FRIAS and BACHOCO, this Binational Panel considered that BACHOCO's Reply Brief was filed within the corresponding term according with the computation resulting from the application of subrules 57(1) and (2), 19 and 3 of the Rules of Procedure, and in Article 286 of the CFPC complementary to the LFPCA (which substitutes the Federal Fiscal Code as referred to in NAFTA Annex 1911.

63. In virtue of the foregoing, to determine the terms referred to in the Rules of Procedure abovementioned, it is correct to suspend the computation of the term during the Mexican Secretariat holidays from December 20, 2012 to January 6, 2013, as published in the DOF on December 19, 2012.

64. Given that BACHOCO filed its Reply Brief on March 11, 2013, in due time, within the term set forth in subrule 57(2) of the Rules of Procedure, this Binational Panel concludes that it cannot grant the Motion requested by the Petitioners, and ordered that the Motion to dismiss the Reply Brief of BACHOCO submitted by USAPEEC,

DELATO, JUAN MANUEL DE LA TORRE, PECO, CERVANTES and COMERCIAL DE CARNES FRIAS is **DISMISSED**.

65. On July 29, 2015, the Panel issued an Order in which it determined the agenda of the public hearing ("Public Hearing") to be held on August 25 and 26, 2015 in the Auditorium of the Universidad Nacional Autonoma de México.

VIII. STANDARD OF REVIEW

66. The standard of review applicable to this proceeding is determined by NAFTA. This Panel must apply the standard of review set out in NAFTA Article 1904.3 and Annex 1911. It is a two-part standard of review.

67. The first part is:

"... the standard set out in Article 238² of the Federal Fiscal Code (Código Fiscal de la Federación), or any successor statutes, based solely on the administrative record"³

68. Artículo 51 of the LFPCA provides:

"Article 51. An Administrative determination shall be declared illegal when one of the following grounds are proven:

I. Incompetence of the official who issued, ordered, carried out the proceeding from which said resolution derives.

II. Omission of the formal requirements provided by law, which affects an individual's defenses and impacts the result of the challenged resolution, including the lack of legal grounding or reasoning, as the case may be.

III. Procedural errors which affect an individual's defenses and impact the result of the challenged resolution.

IV. If the facts which underlie the resolution do not exist, are different or were erroneously weighed, or if (the resolution) was issued in violation of applicable legal provisions or if the correct provisions regarding the merits of the case were not applied.

V. When an administrative determination issued in an exercise of discretionary powers does not correspond to the purposes for which the law confers such powers.

...

The Court ("Federal Court of Fiscal and Administrative Justice")⁴ may declare sua sponte, because it is a matter of public order, the incompetence of the authority to render the challenged determination and the total absence of basis or motivation of the determination.

² Article 238 of the Federal Fiscal Code was abrogated with the promulgation of the Federal Law of Administrative Dispute Procedures ("Ley Federal de Procedimiento Contencioso Administrativo" or "LFPCA") and the current applicable standard is set out in Article 51 of such Law since January 1, 2006.

³ NAFTA, Annex 1911.

⁴ On July 18, 2016 was published in the DOF the new Organic Law of the Federal Court of Administrative Justice, reason why the Federal Court of Fiscal and Administrative Justice changed its name to Federal Court of Administrative Justice.

Where the incompetence of authority is grounded and there are also grievances aimed to contest the merits of the case, the Court must analyze them and if any of them is grounded, based on the principle of greater benefit, shall proceed to resolve the merits effectively raised by the plaintiff.

Arbitral organisms and of other nature derived from alternative dispute mechanisms concerning unfair practices, contained in treaties and international agreements in which Mexico is a party, will not be able to review sua sponte the grounds referred to in this article."

69. Under the second part of the standard of review, this Panel may also consider:

"... The general legal principles that a court of the importing party otherwise would apply to review a determination of the competent investigating authority".⁵

70. NAFTA Article 1911 defines the term "general legal principles, including principles such as standing legal interest, correct process, rules of statutory interpretation, disputes without legal value and exhaustion of the administrative resources."

71. As established in NAFTA Article 1904.2, the Binational Panel has the authority to review "based on the administrative record, a final determination on anti-dumping and countervailing duties issued by a competent investigating authority, of an importing Party, to determine if such resolution was in accordance with the legal provisions in the matter of antidumping and countervailing duties of the importing Party. "

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

73. The Mexican legal system includes two regulatory schemes: the international, consisting of the provisions of NAFTA and other related provisions such as GATT and its Codes of Conduct; and the domestic, which consists of special legal provisions such as the LCE and its regulation, the LOAPF that relates in matters of jurisdiction of the authorities, as well as the internal regulations of SE and the delegative directives that derive from these regulations.

74. A Binational Panel at all times is able to interpret the legal framework governing it, subject in all cases to distinguish what is the nature of the rule subject to interpretation and, for the interpretation of the NAFTA, and of the Rules of Procedure, the standard of review set out in Annex 1911, or any other international

⁵ NAFTA, Article 1904.3.

legal instrument, the panel must follow the criteria included in Section 3, entitled INTERPRETATION OF TREATIES of the Vienna Convention on the Law of Treaties⁶, which contains three general rules of interpretation: a) good faith; b) The literal meaning of the rules, and c) the object and purpose of the corresponding treaty.

75. On the other hand, if the legal provisions on antidumping and countervailing duties of the Importing Party must be interpreted, as established by paragraph 2 of NAFTA Article 1904, this means the LCE and its regulation, the binational panel must follow the interpretative rules that are commonly used by the jurisdictional bodies of the country in question.

76. Judicial precedents that a Panel in Mexico may or must apply are understood in two ways: those that imply a simple precedent or illustration, but do not bind the tribunal and can be cited as a reference are the relevant or isolated precedents, that have not attained the status of court precedent (“jurisprudencia”), and the “jurisprudencia” that has a binding character that should be observed by other judicial authorities of lower rank. In antidumping and countervailing cases, there is binding “jurisprudencia” issued by the circuit courts and the Federal Supreme Court of Justice, and the TFJFA (priory, Tribunal Fiscal de la Federación) by the plenary of its superior chamber or by any section of the superior chamber.

77. As well, this Panel considers that the legislative history contained in the archives of the Congress of Union, including the reasons for the initiatives and decisions of the Houses, and the debates of the Members of Congress should be considered. Also to be considered are the administrative practices of the Executive branch pursuant to its delegated powers. These consist in the execution of material acts, or acts that decide individual legal cases.

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

79. On the other hand, this Panel has jurisdiction to grant only those remedies that are authorized by NAFTA Article 1904.8. This provision states:

"The Panel may uphold a Final Determination, or remand it for action not inconsistent with the Panel's decision ...".

80. The above implies that the authority to annul that determination is not conferred.

81. The Panel's interpretation of national laws in light of international agreements,

⁶ This important instrument of international law is part of Mexican positive law, according to the applicable Constitution and legal provisions, was adopted by Mexico on May 23, 1969, was ratified on September 25, 1974, and was published in the DOF on February 14, 1975. It entered into force on January 27, 1980.

which shall be cited further on, is done with the sole purpose to maintain harmony among such normativities, and within 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 antidumping and countervailing duties, to be in harmony with the provisions of the AAD, as shown in Section 1902.2 d) i).

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

83. In the following paragraphs of this decision, the Panel examines each one of the issues raised by the Complainants or arising in the review as well as the responses of these issues. The Panel has applied the standard of review in the terms defined above to each one of these issues and defenses, and examines the measure in which the Final Determination would be declared illegal according to the standard of review, and will issue its decision in the terms allowed by NAFTA Article 1904.8.

B. ISSUES BEFORE THE PANEL

IX. DECISION RELATIVE TO THE INEFFECTIVENESS ("INOPERANCIA") INVOKED BY THE INVESTIGATING AUTHORITY OF DIFFERENT ALLEGATIONS SUBMITTED BY THE COMPLAINANTS.

84. The Investigating Authority argues that this Panel must determine the ineffectiveness of multiple allegations submitted by the Complainants in their Briefs and, consequently, would not be required to enter into the study of the merits of those allegations. According with the Investigating Authority, the Complainant's allegations are ineffective ("inoperantes")⁷ because they do not establish the cause of the action, they do not explain adequately the legal basis, facts and reasons on which their claims are based on, and even when some articles are cited by the Complaints, they do not explain the concrete application of such provisions⁸, neither they explain the affectation or damage that the Authority acts caused to their legal rights, and they do not explain the reasons why the

⁷ The IA transcribed regarding the ineffectiveness "inoperancia", various court precedents and isolated precedents that, in accordance with NAFTA article 1904.2 form part of the legal provisions that the Panel should consider in its review, which items are the following: "ASSIGNMENT OF ERRORS. MINIMUM PROCEDURAL BURDEN."; "ASSIGNMENT OF ERRORS OR GRIEVANCES. THEY ARE INEFFECTIVE IF THEY DO NOT REFER TO THE CLAIM AND THE CAUSA PETENDI."; "ASSIGNMENT OF ERRORS AND GRIEVANCES. EVEN IF TO STUDY THEM, IT IS ENOUGH TO EXPRESS THE CAUSA PETENDI, IT DOES NOT IMPLY THAT THE COMPLAINANTS OR PETITIONERS SHOULD LIMIT ONLY TO MAKE ASSERTIONS WITHOUT LEGAL GROUNDS" and "ASSIGNMENT OF ERRORS OR GRIEVANCES ARE INEFFECTIVE WHEN THE ARGUMENTS RAISED BY THE COMPLAINANT OR THE RECURRENT ARE AMBIGUOUS OR SUPERFICIAL."

⁸ The IA transcribed in response to the citation of legal provisions from the Complainants, the following court precedent which item is: "COURT PRECEDENTS. ITS SOLE CITATION IS NOT EQUATED TO THE EXPRESSION OF A GRIEVANCE OR AN ASSIGNMENT OF ERRORS, THEREFORE, THE AUTHORITY RESOLVING THE CASE IS NOT BOUND TO MAKE ANY PRONUNCIATION REGARDING THE APPLICABILITY IN THE SPECIFIC CASE."

illegalities contained in article 51 of the LFPCA are activated, which constitutes the standard of review of this Panel, or inclusively, in some cases, why the Complainants do not specify which illegality cause of article 51 is updated in every case.

85. In this regard, given that the Investigating Authority invoked this causes of ineffectiveness throughout Its Brief with respect to different allegations made by the Complainants, this Panel then refers to the criteria that will generally follow when considering such adduced defenses by the Authority and, only if its needed, will enter into the study, case-by-case, of the alleged claims identified as ineffective by the Investigating Authority.

86. As it has already been addressed, NAFTA article 1904.3 and Annex 1911 provide the standards of review of this Panel, which is limited to a determination of illegality in accordance with the provisions of Article 51 of LFPCA. Article 1904.2 determines the subject to review, which consists in establishing if the authority determination was in accordance with the antidumping or countervailing duty law of the importing Party, which consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.

87. Under this standard, this Panel notice that LFPCA contains relevant provisions that can be applied by a court of the importing Party, in this case, the TFJFA, in an equivalent review carried out by this Panel to determine the admissibility of the Complainants' allegations and the ineffective defenses alleged by the Investigating Authority. Specifically, article 50 of LFPCA makes reference to the manner in which the judgments of the TFJFA will resolve the claims of a complainant.

88. Article 50 of LFPCA, in its relevant part, explicitly states the following:

"Article 50. The judgments of the Court shall be based on law and shall solve the claim of the plaintiff that is deduced from his claim, in relation to a contested decision, having the power to invoke well-known facts.

(...)

The Courtrooms will be able to correct the errors they notice in the quotation of the precepts that are considered violated and to examine as a whole the grievances and grounds of illegality, as well as the other arguments of the parties, in order to resolve the question actually raised, but without changing the facts set forth in the claim and defense.

(...)"

89. This Article provides that the judgments of the TFJFA must resolve the claim of the plaintiff that is deduced from his claim, in relation to a contested decision. In addition, this Panel warns that there are precedents in the Mexican judicial system that have interpreted the meaning of this law and are of mandatory observance for the TFJFA. Specifically, with respect to article 50 of the LFPCA, there are court precedents "jurisprudencia" in administrative matters in which the Federal Judicial

Power has indicated that the judge, on the non-formalist basis or a de facto basis, must assess whether the essence and relevance of what is proposed is in accordance with the law in a reasonable, comprehensive and non-rigoristic manner, privileging a response based on factual and real truth above procedural, involving a fundamental solution to the legal problem and controversy, according to the next:

“JUDGEMENTS OF THE FEDERAL COURT OF TAX AND ADMINISTRATIVE JUSTICE. ITS CONTENT AND PURPOSE IN RELATION TO THE DEDUCED CLAIM (INTERPRETATION OF ARTICLE 50 OF LFPCA). Article 50 of the Federal Law on Administrative Dispute Procedures states that the Courtrooms of the Federal Court of Tax and Administrative Justice, when ruling on its decisions, will resolve "on the claim of the plaintiff that is deduced from his claim, in relation to a contested resolution", Which determines the content and purpose of the judgments and involves considering: a) the petitem in relation to a legal good; and, b) the reason for the disputed claim or cause of action that is the petendi cause. Thus, on the non-formalist basis or a de facto basis, the judge must evaluate whether the essence and relevance of the matter is consistent with the order, all in a reasonable, comprehensive and non-rigorist manner, without dissociating it from the effects or consequences of the essence of the claim, favoring a response based on factual and real truth over the procedural. The foregoing will imply a complete and comprehensive pronouncement of the proposed litigation in light of the fundamental solution, the legal problem and the controversy as ordered by Article 17 of the Political Constitution of the United Mexican States. In addition to the foregoing, the aforementioned law empowers and orders the Courtrooms of the said court to rule on the following aspects: a) an open litigation, b) any substitution in what the defendant authorities must resolve, c) invoke notorious facts, D) resolve the issue of merits of the case in preference to formal violations, e) correct errors in the quotation of precepts and supplement grievances in the case of certain causes of illegality, f) jointly examine the grievances, grounds of illegality and arguments, g) To verify the right that actually attends the parties and, h) to apply the criteria and court precedents principles dictated and recognized by the courts of the Judicial Power of the Federation.”⁹

90. Under any circumstances it could be thought that the TFJFA would ignore the provisions of article 50 of LFPCA. In consequence, this Panel considers that it should take into account this provision in the present procedure of Chapter XIX in follow-up to the provisions of NAFTA Article 1904.2 and to address the arguments of ineffectiveness adduced by the Investigating Authority under this criteria. Therefore, this Panel will address the Complainants' allegations, if necessary, on the basis of the claims arising from their allegations. Based on the foregoing, the Panel proceeds to study the claims presented by the Complainants in relation to the contested decision.

91. Regarding all the issues before the panel, this Panel examines the Administrative Record of this proceeding, the Preliminary and Final Resolutions, the Claims submitted to the Binational Panel and the Briefs submitted by the

⁹ Court precedent (administrative). Record No. 168417. JUDGMENTS OF THE FEDERAL COURT OF FISCAL AND ADMINISTRATIVE JUSTICE. ITS CONTENT AND PURPOSE REGARDING THE DEDUCTED CLAIM (INTERPRETATION OF ARTICLE 50 OF THE FEDERAL LAW OF ADMINISTRATIVE DISPUTES PROCEDURE).

Parties. The Panel has additionally taken into account the arguments presented at the Public Hearing held on August 25 and 26, 2015.

X. DECISION ON THE SUSPENSION OF THE ANTIDUMPING DUTIES BY THE INVESTIGATING AUTHORITY

A. USAPEEC, DELATO, PECO AND CERVANTES, JUAN MANUEL DE LA TORRE, OPERADORA AND LARROC

92. Derived from what was stated by USAPEEC, DELATO, PECO, CERVANTES, JUAN MANUEL DE LA TORRE, OPERADORA and LARROC (hereinafter in this section, the “Complainants”), in this Chapter XIX proceeding, the following arguments are drawn. This Panel refers to them without attempting to repeat *verbatim* what has been stated by the Complainants in their briefs, the Public Hearing or the Administrative Record:

1. A binational panel review is appropriate when the legal requirements of paragraphs 1 and 2 of NAFTA Article 1904 are met. Given the existence of a final determination on dumping, no complaining party must prove that its legal interests have been affected by the IA or that there has been any actual loss;
2. The IA did not act in accordance to Articles 1, 29, 39, 62 and 67 of the LCE; Article 80, Section II of the LCE Rules; and Articles 9 and 9.1 of the Antidumping Agreement since there is no basis or reason, economic or legal, to determine antidumping duties and not apply them;
3. There is no legal basis in the LCE or the Antidumping Agreement to impose an antidumping duty and not to collect it, or to apply it through the concept of a “notice” as it was established by the IA in its Final Determination;
4. The Final Determination creates legal uncertainty on the importers since the collection of antidumping duties by the IA is subject to a subsequent condition – a future event which is uncertain to occur;
5. The IA should have concluded the administrative procedure with the “non-application” of the antidumping duties (understood by the Panel as the “non-imposition of duties”) instead of suspending their application since there is no legal basis allowing the IA to suspend the application of such duties;
6. The future application of the antidumping duties by the notice referred in the Final Determination would not have the effect of correcting the imports in alleged dumping conditions but the effects of avian flu, thus challenging the economic need of the duty and its legal basis;

7. OPERADORA and LARROC argue that the only case in which the Investigating Authority may refrain from ordering the imposition of definitive countervailing duties is in relation to price undertakings under the terms of Articles 72, 73 and 74 of the LCE and Articles 8.1 and 8.4 of the ADA, and
8. OPERADORA and LARROC also argues that Section 9.3.1 of the ADA establishes that when the Investigating Authority set a final countervailing duty, it must be satisfied (ie, be applied to imports affected to such an extent) as soon as possible, normally within 12 months, and in no case more than 18 months and up to date not countervailing duties have been implemented.

93. In support of their arguments, the Complainants mainly refer to Articles 1, 29, 39, 62 and 67 of the LCE; Article 80, Section II of the RLCE; Article 9.1 of the Antidumping Agreement; NAFTA Article 1904 and for purposes of the review before this Panel, the provisions on Sections II, IV and V of Article 51 of the LFPCA.

B. The Investigating Authority

94. For purposes of the analysis, the Panel outlines below the main arguments of the IA without trying to repeat *verbatim*, as already noted, what it stated in its brief, the Public Hearing or the Administrative Record:

1. In general, the “non-application” of the antidumping duty does not cause any loss to the Complainants. Moreover, the Complainants do not establish the reasons by which the “non-application” of the duty affects its legal interest and therefore do not meet the *causa petendi* in its argument, as required by Section I of Article 8 of the LFPCA. The same applies to a future event of uncertain realization such as the application of duties at the time the IA issues the respective notice;
2. The arguments of the Complainants do not meet the necessary requirements to be considered legal arguments, do not establish which is the *causa petendi* and are ineffective (“inoperantes”);
3. Contrary to the assertions of the Complainants, there is a legal basis to impose an antidumping duty and not applying it, and this basis is found in Article 9.1 of the Antidumping Agreement;
4. The antidumping duty established in the Final Determination meets the legal requirements of dumping, damage and causal link to be considered necessary under the applicable laws, and was established only to counteract the damage by dumping;

5. The Complainants did not establish clearly (and in some cases at all) in what consisted the illegality or why the Final Determination is contrary to Article 51 of the LFPCA, and
6. The Complainants have requested the annulment of the administrative act and the Panel is impeded to order such nullity since it is outside of the Panel jurisdiction under NAFTA Chapter XIX.

C. Analysis of the Panel

95. Considering the arguments of the Parties, the Panel proceeds to analyze point A.1 submitted by the Complainants and the grounds for inadmissibility of the claim contained in point B.1 submitted by the IA. Given that these are arguments with respect to the procedural admissibility of the claim and that this can affect the viability of the rest of the arguments, this Panel will address this issue first.

96. In this regard, the Panel considers that this claim must be resolved by examining the following matters:

1. The standard of review applicable to arbitral proceedings under NAFTA Chapter XIX;
2. The relevance of Section I of Article 8 of the LFPCA in the analysis of Article 51 of the LFPCA; and
3. The implications of the above matters in the arguments raised by the Parties.

97. 1. Standard of Review

98. As it has already been addressed by this and other Chapter XIX Panels, NAFTA Article 1904.3 and Annex 1911 provide that in the case of the United Mexican States, the panel established pursuant NAFTA Article 1904 must apply the standard of review provided in Annex 1911 of Chapter XIX, which in the case of the United Mexican States is Article 238 of the *Código Fiscal de la Federación*, or any law that replaces it. In this case, such Article corresponds to Article 51 of the LFPCA. The Panel has also stated that the review before a panel established under NAFTA Chapter XIX bears certain equivalence to the review performed by the TFJFA as provided by Articles 1904.2 and 1904.3 and Annex 1911. That is, a binational panel established under Chapter XIX does not have [exactly] the same jurisdiction as the TFJFA in its review procedures. The standard of review of the panel is limited to the provisions of Article 51 of the LFPCA, this is, to determine the legality of an administrative decision based on the grounds mentioned in such Article, and the application of the general principles of law that the TFJFA will use when reviewing an antidumping duties determination.

99. 2. Relevance of Section I of Article 8 of the LFPCA

100. In opinion of this Panel, the inadmissibility rule in Section I of Article 8 of the LFPCA that appears below is part of the standard of review of this Panel as it contains the grounds for inadmissibility relating to a claim under Article 51 of the LFPCA, which can be invoked by the Parties in a Chapter XIX procedure and that constitute a legal prerequisite that the competent court must resolve prior to reviewing the merits of the grounds of Article 51 of the LFPCA.

“Article 8o.- The trial before the Court is inadmissible in the cases, on the grounds and against the following acts:

I. [Acts] that do not affect the legal interest of the complainant, except in the cases of legitimacy expressly recognized by the laws governing the contested act.
...”

101. Indeed, although such inadmissibility rule to the provisions of Article 51 of the LFPCA is contained in another Article of the LFPCA (i.e., Section I of Article 8), this cannot alter the fact that it is the same provision. That is, a provision that contains the logical and legal relationship of “general rule-exception” even when the exception (i.e., the inadmissibility rule) is contained in another Article of the statute. A different reading would imply a modification by this Panel to the standard of review established in Article 1904.3 as it would be removing a rule of admissibility that is directly related to the operation of Article 51 in question. It would also be a violation of Article 1904.3 since it is unconceivable that the court of the importing party (i.e., the TFJFA) would entirely disregard the provisions of Section I of Article 8 when reviewing this matter if such inadmissibility rule was validly brought by the authority.

102. It should be noted that the Panel has considered the arguments of the Complainants that the concept of “loss” as a requirement of admissibility only applies in Mexican constitutional courts via the *amparo* trial but that it has no place in this arbitration proceeding. The Panel does not agree with this assertion and considers that there is an express provision in the LFPCA (i.e., Section I of Article 8) that specifically applies to the standard of review of the Panel and the TFJFA, contained in Article 51, which is independent of the inadmissibility rule set out in Section V of Article 73 of the *Ley de Amparo (Constitutional Procedure Act)* and thus is legally viable to raise this objection both in an arbitration proceeding under NAFTA Chapter XIX and the proceedings before the TFJFA. Therefore, when such inadmissibility rule has been validly brought by the IA, this Panel is required to verify compliance with the procedural requirement established in Section I of Article 8 of the LFPCA and order the admissibility or inadmissibility of the claim, as appropriate.

103. 3. Implications for the Parties

104. The IA has pointed out that the claim of the Complainants in this matter does not meet the requirements to be considered admissible since in accordance to Section I of Article 8 of the LFPCA, the suspension in the collection of the

antidumping duties does not affect the legal interests of the Complainants. In this respect and as stated in the Administrative Record, the Parties acknowledge that the antidumping duties have not been collected. This fact is not in dispute. However, the Complainants maintain that they have suffered an affectation in their legal interests even though the antidumping duties have not been collected. Some of the Complainants (USAPEEC, DELATO, PECO, CERVANTES and JUAN MANUEL DE LA TORRE) stated that the suspension in the collection of antidumping duties constitutes an affectation to their legal interests since they were left in “legal uncertainty”.

105. The Panel also notes the arguments submitted by OPERADORA and LARROC in this matter. For these Complainants, the legal affectation consists in *“the fact that the IA maintained on hold the order to collect the antidumping duties instead of proceeding according to law, this is, to terminate the proceeding without the final application of antidumping duties, because the other option available would had been ordering its application in detriment of the consumer, which was not accepted by the IA itself”*¹⁰.

106. For purposes of analysis, this Panel considers important to note that the issue raised in this section has three main parts:

1. The determination of the IA consisting on imposing antidumping duties to the Complainants on the basis of Section I of Article 59;
2. The suspension of the antidumping duties based on the statement of the IA in paragraphs 713, 716 and 717 of the Final Determination; and
3. The affectation of the legal interests of the Complainants as grounds for admissibility of the claim in accordance to Section I of Article 8 of the LFPCA.

107. In this point of the decision, this Panel analyzes whether the rule of inadmissibility set forth by the IA is valid by virtue of the fact that the Complainants have not suffered any affectation in their legal interests. This clarification is important because the Panel does not address in this section the legality of the determination by the IA to impose antidumping duties to the Complainants, nor the legality of suspending the collection of antidumping duties imposed by the IA through the issuance of a further notice, as was done by the IA, nor other arguments filed by OPERADORA and LARROC. In this section, taking into account the arguments presented by the Complainants in this case, the Panel only examines whether the suspension in the collection of antidumping duties has affected the legal interests of the Complainants as required by the admissibility rule of Section I of Article 8 of the LFPCA.

¹⁰ Response of LARROC and OPERADORA to the IA's Brief, page 15.

108. For the determination as to whether the suspension of the duties contested by the Complainants has affected their legal interests, the Panel has taken into consideration, among others, relevant court precedents¹¹ and the criteria of Mexican doctrine on administrative procedural law.¹² This Panel considers that such materials clearly establish that, for purposes of the affectation to the legal interests referred to in Section I of Article 8 of the LFPCA, the holder of such interests must suffer a real and positive affectation, a specific and direct damage which may include, for example, an economic damage or some sort of economic loss, among others.

109. As regards to the statement by USAPEEC, DELATO, PECO, CERVANTES and JUAN MANUEL DE LA TORRE, this Panel agrees with the IA that the simple act of stating that the suspension has left the Complainants in “legal uncertainty” without supporting how such uncertainty translates in a direct, material or actual affectation (or a real and positive loss) is not enough to demonstrate that said uncertainty has injured the legal interests of the Complainants. The Panel therefore considers that the “legal uncertainty” argued by the Complainants does not constitute an affectation to its legal interests and does not meet the admissibility requirement of Section I of Article 8 of the LFPCA. Neither the Panel has found that said Complainants have supported that the suspension may have a potential affectation to their legal interests. The fact that the duties can be collected by the IA in the future, as argued by the Complainants, does not constitute *per se* an affectation to the legal interests of those Complainants, which is separate and apart from the affectation resulting from the determination of establishing antidumping duties by the IA (i.e., the matter referred to in number 1 above).

110. Similarly, this Panel finds that the affectation argued by OPERADORA and LARROC bears no relation with the rule of inadmissibility of Section I of Article 8 of the LFPCA. These Complainants have indicated that their affectation consists in the fact that the IA should have terminated the proceeding without imposing antidumping duties which was what legally proceeded under the statute and that the IA erred in law by suspending the application of the antidumping duties. In opinion of the Panel, this is an argument that relates to the determination of the IA to impose antidumping duties or even to the legality of the suspension itself; but in no way proves that such suspension affects the legal interests of the Complainants causing them a direct, actual (or real and positive loss) or even potential affectation, which as noted by the Panel, is separate and apart from the loss that may result from the IA’s determination itself to impose antidumping duties. The arguments presented by the Complainants regarding the affectation of their legal interests are applicable to the decision of the IA to impose antidumping

¹¹ Ninth Epoch; Registry 171511; Instance: Circuit Collegiate Courts, Jurisprudence; *Semanario Judicial de la Federación y su Gaceta*, XXVI, september, 2007, Thesis I.4º.C J/27; page 2362.

¹² Lucero Espinosa, Manuel (2000). Theory and Practice of Administrative Disputes before the Federal tax Court (“Teoría y Práctica del Contencioso Administrativo ante el Tribunal Fiscal de la Federación”), page 48; Margain Manatou, Emilio (2004). Of Administrative Disputes, of Annulment or of Legitimacy “De lo Contencioso Administrativo, de la Anulación o de Ilegitimidad”, page 124.

duties but these arguments do not prove the existence of an affectation resulting from the suspension of the collection of duties itself.

111. 4. Conclusion

112. Hence, this Panel considers that the Complainants failed to establish that the Final Determination, with respect to the “non-application/collection” of the antidumping duties by the IA, affected their legal interests. Because the existence of such affectation was not established, this Panel finds that the claim of the Complainants in this matter is inadmissible and therefore it does not review or rule on whether the IA’s determination is legal or illegal under Sections II, IV and V of Article 51 of the LFPCA and orders its dismissal as it relates to this point of the Final Determination.

XI. ISSUES RELATED TO THE PERIOD OF INVESTIGATION AND OF THE PERIOD OF ANALYSIS

A. SETTING OF THE PERIOD OF INVESTIGATION AND OF THE PERIOD OF ANALYSIS

113. 1. Introduction

114. USAPEEC requests Panel review of the IA’s Antidumping Investigation and Final Determination since the Complainant asserts that there is no timing coincidence in the setting of the investigation period and the analyzed period, because, for the latter, it was determined the inclusion of nine additional months.

115. USAPEEC argues that the IA omitted essential information to initiate the administrative procedure and claims that the Investigating Authority credited the injury based on indicators filed up to the first quarter of 2010, however it imposed on importers and exporters the burden of proof of the existing injury up to September 2010, ie, imposed a burden of proof that was never requested to domestic producers.

116. USAPEEC notes that the analysis of increased imports and their consequent impact on the indicators of the domestic industry, is a violation, because the IA took into account imports of the subject merchandise in 2007, imports that were made under a trade remedy measure as is the safeguard.

117. The Panel notes that regarding the investigation period and analyzed period and about the omission of necessary information to initiate a procedure, the Complainant cited Article 2.2.1 of the Antidumping Agreement; Articles 65, 76 and 77 of the RLCE and for purposes of the review before this Panel, the provisions on Section IV of Article 51 of the LFPCA.

118. Likewise, regarding the inclusion in the analysis of imports made under a trade remedy measure, USAPEEC cited: Articles 3.1, 3.2, 3.4 and 3.5 of the Antidumping Agreement and for purposes of the review before this Panel, the provisions on Section II of Article 51 of the LFPCA.

119. 2. Issues for Review

120. Did the IA err by considering within the analyzed period an additional period or nine months?

121. Did the IA err by imposing on importers and exporters the burden of proof of the existence of injury up to September 2010, different from the burden of proof imposed to domestic producers?

122. Did the IA err while considering in its analysis imports made under a trade remedy measure as is the safeguard?

123. 3. Law & Analysis

124. 3.1 Decision regarding the setting of the Period of Investigation and of the Period of Analysis

125. USAPEEC states that the Investigating Authority set as investigation period, October 1, 2009 to September 30, 2010, and as period of analysis of the domestic production from January 1, 2007 to September 30, 2010, claiming that there is no coincidence in the timing of the establishment of the investigated period and the analyzed period, since for the analyzed period it was determined to include nine additional months. According to USAPEEC, this fact breaches articles 65, 76, 77 of RLCE and 2.2.1 of ADA, and therefore, breaches section IV of Article 51 of LFPCA.

126. USAPEEC states in its Brief that the Investigating Authority has the discretionary power to set the analyzed period greater to 3 years, however, it cannot act arbitrarily; pointing out that in point 35 of the ID it established a period of injury analysis from January 1, 2007 to September 30, 2010, with no legal grounds or the facts that justify such undertaking. However, this Panel becomes aware that in the same Brief, subsequently, the Complainant contradicts itself by stating that article 77 of RLCE allows the Authority to extend its term to five years, point 35 of the ID does not give in a correct manner the reasons that justify why the period of 45 months allows to obtain a more complete information, which implies that point 35 of the ID contains legal grounds and the facts that justify such undertaking contrary to that stated by USAPEEC.

127. Also, USAPEEC stated that the setting of the analyzed period of injury contradicts what is stated in item 2.15¹³ of the questionnaire sent to the exporters.

¹³ USAPEEC quotes on page 141 of its Brief, item 2.15 of the official investigation form that is transcribed below:

In such questionnaire, the IA limits the period to 36 months, which is the period that is requested through the questionnaires, to the interested parties to submit the information of that time frame for the current investigation.

128. USAPEEC states that the consequences resulting from the non-coincidence in the setting of the investigation period and the analyzed period, are that:

1. The IA, when initiating the investigation did not have all the information. It only had information until March 2010, when the analyzed period and investigated period cover until September of that same year, contrary to Article 3.1 of ADA, by not basing the existence of injury on positive evidence, and contrary to Article 5.2 of ADA by not having relevant evidence.

2. Concludes that the IA credited injury based on indicators presented until the first quarter of 2010. However, the IA imposed on importers and exporters the obligation to provide proof of injury until September 2010, i.e., the IA imposed a burden of proof that never was demanded to the domestic producers.

129. In response to the above statements, the Investigating Authority stated that the Complainant did not file "any arguments that explain how or in what way the IA has breached articles 65, 76, 77 of RLCE and 2.2.1 of ADA, and therefore, breaches section IV of Article 51 of LFPCA mentioned above, that these are mere assertions without support, in addition, that the Complainant did not state what affectation or damage was caused to its legal interests, therefore, the alleged grievances are ineffective ("inoperative").

130. On the other hand, it is important to point out that the Investigating Authority decided to answer each one of the allegations raised by the Complainant.

131. For its part, the Investigating Authority noted in its Brief, that the legal grounds and the facts that justify that the analyzed period shall exceed the three years, are contained in point 35 of the Initial Determination¹⁴, which states the following:

"35. To be able to analyze the existence of dumping, the Secretariat used for this phase of the investigation the investigated period that was proposed by Bachoco, Patsa and Buenaventura (April 2009 to March 2010) and as the analyzed period from January 2007 to March 2010. However, **to have the most complete and updated information as possible**, the Secretariat considered accurate to set as investigating period from October 1, 2009, to September 30, 2010, and as injury analysis period in the domestic production industry, from January 1, 2007, to September 30th, 2010, in accordance with Articles 76 and 77 of the RLCE."

"2.15 Give information on the economic indicators of the production industry of the investigated merchandise. The answer must have information on the 36 months analyzed period concerning the following issues: Use the format of Annex A.2"

¹⁴ Initial Determination published in the DOF dated February 8, 2011, point 35.

(Emphasis added)

132. Indeed, this Panel notes that the Investigating Authority gave as a reason to set as investigation period of October 1, 2009, to September 30, 2010, and the period of analysis of injury to the domestic industry the period from 1 January 2007 to 30 September 2010 as is apparent from paragraph 35 quoted above, that **“the information provided is as complete and updated as possible”**, based on articles 76 and 77 and in Section VIII of Article 80¹⁵ of the RLCE, as set forth in point 135 of the FD.

133. This, on the understanding that the definition of the investigation period and the analyzed period is a discretionary power of the Investigating Authority, as recognized by USAPEEC. However it is important to note that the applicable law limits such discretion to the Investigating Authority, consistent with those reported by articles 65, 76 and 77 of RLCE.

134. In fact, Article 65 of the regulation states:

"ARTICLE 65. The Secretariat shall assess the economic factors described in the previous article within the context of the economic cycle and the specific competition conditions of the affected industry. For such case, the Petitioners will submit the information of the factors and indicators relevant and distinctive of the industry under consideration, **at least** three previous years to the submission of the application, including the investigated period, unless that the relevant company was established in a lesser period. Furthermore, the domestic producers or the organizations which represent them will submit economic studies, monographs, technical literature, and international and domestic statistics on the market behavior, or any other documentation that allows identifying the economic cycles and the competitors' conditions specific to the affected industry."

(Emphasis added)

135. Articles 76 and 77 of the RLCE establish:

"ARTICLE 76. The investigation of unfair international trade practices shall address the existence of price discrimination or subsidization and injury caused or may be caused to the domestic industry. It shall include a period covering imports of identical or similar products to those of the domestic industry that may be affected, imports that were made for **at least** six months prior the investigation.

The investigation period that it is referred to in the previous paragraph may be modified, according to the Secretariat judgment, for a period that includes the imports made after the investigation started. In this case, the resolutions that implement provisional countervailing duties or definite countervailing duties will be referred to in the original time frame as the extended period."

(Emphasis added)

¹⁵ Final Determination published in the DOF dated August 6, 2012, point 135.

"ARTICLE 77. However, what was provided in the previous article, for the injury or threat of injury assessment to the domestic industry, the Secretariat may request the petitioner or any other domestic producer or person deemed appropriate, the information or data that it considers necessary which correspond **to a maximum period of 5 years** previous to the application submission."

(Emphasis added)

136. According to articles 65, 76 and 77, this Panel points out that the analyzed period shall cover at least three previous years to the submission of the application, including the investigated period.

137. This Panel states that not even in the questionnaires or the applicable laws establish fatal timeframes for the determination of the investigated period and the analyzed period, nor are they prohibitive as to the consideration of a longer period. It is a discretionary power of the Investigating Authority and all members of the World Trade Organization.

138. According to USAPEEC claim, stating that the IA did not include the necessary information to initiate the administrative procedure, the Investigating Authority highlighted that BACHOCO, PATSA, and BUENAVENTURA's application was filed on July 2, 2010, and only two days had gone since the closure of the second quarter, and the information on the third quarter was not yet available; therefore, it was impossible on that date to have the required information on April to September 2010 and that Article 5.2 of the ADA does not seek to impose excessive burdens to the Petitioners.

139. In that regard, Article 5.2 of ADA states the following:

"5.2 An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. The simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. **The application shall contain such information as is reasonably available to the petitioner** on the following: ..."

(Emphasis added)

140. On the other hand, Article 3.1 of AAD states as follows:

"3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and 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."

141. Concerning the above, this Panel considers that article 5.2 of the ADA is not trying to impose an excessive burden on the Petitioners; therefore, the request to initiate the antidumping investigation of the present case, only needs to contain the

information that the Petitioners have at their disposal, and therefore, article 3.1 of ADA was not breached since the Investigating Authority did base its injury analysis and randomness in positive testing.

142. This Panel has confirmed that Article 2.2.1 of the Antidumping Agreement, allegedly infringed and that was pointed out by USAPEEC does not mention anything about the setting of the investigated period, added to the fact that the Complainant does not note in what manner Article 2.2.1 of ADA in particular, was breached, reason why this Panel is silent in this regard.

143. On the other hand, according to USAPEEC's claim that it is wrong that the IA imposed the Complainants a greater burden than to the Petitioners, since it requests them, information to prove injury based on indicators submitted until the first quarter of 2010; however it imposed the importers and exporters the obligation to present evidence of the existence of injury until the month of September 2010. This means it imposed a burden of proof, which was never required to the domestic producers. It is important to mention, that this Panel has been able to note in the Administrative Record there is evidence that the Investigating Authority did request the Petitioners to update the information on dumping and injury up to September 2010¹⁶, which was submitted on September 9, 2011¹⁷, as shown in point 199 of PD.

144. 3.1.1 Conclusion

145. In view of all the foregoing, this Panel considers that the determination made by the Investigating Authority on the setting of the analyzed period and the investigating period, as well as the request for information from importers and exporters, and to producers, it was done in ceteris paribus and made without any defect and therefore, in the absence of any defect affecting the Final Determination revised by this Panel in this regard, therefore, contrary to that stated by USAPEEC, the IA did not breach Articles 65, 76 and 77 of the RLCE, and Section IV of Article 51 of the LFPCA was not updated.

B. INCLUSION OF THE IMPORTS MADE DURING THE TERM OF THE SAFEGUARD MEASURE.

146. 3.2 Decision regarding the inclusion of the imports made during the term of the safeguard measure.

147. USAPEEC argues that the IA based its injury analysis and causal link under a false appraisal, for not having correctly applied the relevant legal provisions, and setting its period of analysis between January 1, 2007, to September 30, 2010.

¹⁶ Document UPCI.416.11.1779 of August 16, 2011, register 1035 from index of the Administrative Record, volume 52 of the non-confidential version and 84 of the confidential.

¹⁷ Page 1101663, register 1113 of index of the Administrative Record, volume 55 of the non-confidential version and 88 of the confidential.

Nevertheless, the analysis of the increase of imports, and its repercussion effect in the indicators of the domestic production, breach articles 3.1, 3.2, 3.4 and 3.5 of ADA since in 2007 the imports of the investigated merchandise were made under the protection of a safeguard measure. The Complainant claims that imports on year 2007 could not have been imported under dumping conditions since the safeguard measure, entailed a duty payment of 19.8%, which was sufficient to prevent any injury and eliminate the existence of any dumping margin. Likewise, USAPEEC states that to justify its analysis, the IA illegally concludes that the law does not establish that the analysis should be limited to three years.

148. USAPEEC refers to article 3.1 of the Antidumping Agreement that limits the analysis of every investigating authority to evaluate the repercussion of the imports object of dumping and the effect on the domestic market.

149. USAPEEC considers that even the complete analysis of the increase of imports had to have been done under the natural perspective of the increase that would be given from the elimination of the safeguard measure. It is evident that the expected result after the legal and economic protection is that there should exist an increase of the imports, due to the fact that such imports were artificially detained or limited by the same safeguard measure. The Complainant continues pointing out that even it was evident that the participation of national production tended to diminish in the year 2008 when the imports were given in free market conditions. The IA pretend to sanction that effect, as observed in the analysis made in point 627 of the Final Determination.

150. Making reference to the mistaken analysis of the IA, USAPEEC quotes the conclusion of “Special Group of the World Trade Organization” on salmon imports¹⁸ on the claim filed by Norway against the European communities, in which this Special Group studied the analysis of the European Communities for including in its analysis, imports with *minimis* margins, precedent that by analogy should be taken in consideration by the IA so as not to act illegally with the inclusion of the analysis of the behavior of imports made in 2007 and its repercussion in the industry indicators.

151. USAPEEC claims that the IA included for some of the indicators, information of 2007 and for others, it did not¹⁹, which makes the analysis bias in favor of the Petitioners, which results in a lack of motivation of the Final Determination, which gave as a result an omission of the formal requirements demanded by the law affecting the defenses of the individuals, which impacts the result of the challenged determination; including the absence of legal grounds and of reasons to undertake a specific determination, as set forth in section II of article 51 of

¹⁸ European Communities- Antidumping Measure on Salmon from Fish Farms Coming from Norway Report of the Special Group, WT/DS337/R, November 16, 2007, points 7.622, 7.627 y 7.636.

¹⁹ Points 599 (average of prices of domestic products), 612 (costs of raw material), 626 (diminishing of domestic production), 631 inventories) 633 (employments and wages), 636 (installed capacity) and 648 (operational results) of the FD.

LFPCA, and requests the Panel to adjust its determination of the analysis, excluding imports made during the protection of the safeguard measure.

152. Regarding all the foregoing, the Investigating Authority pointed out that the Complainant did not comply with its minimal procedural burden because it did not explain which the *causa petendi* is, or what is its legal affectation and that the Complainant only submits mere assertions that does not fall within the scope of Article 51, Section II of the LFPCA and that only cited Articles 3.2, 3.4 and 3.5 of the ADA without any explanation on its concrete application, and therefore, the IA claimed that the allegation is ineffective (“inoperative”) and it requested this Panel to give a ruling thereon.

153. The Investigating Authority answered *Ad Cautelam* that the IA acted in a correct manner when it considered during the analyzed period the chicken leg and thigh imports of 2007. It claimed that USAPEEC’s basis for reasoning was incorrect and that its statements were baseless and meaningless; since, in the first place, the existence of the safeguard measure has nothing to do with there being dumping conditions or not. Finally, dumping is a price difference that can be present when there is or there isn’t a safeguard measure, and in a second place, the fact that the imports of 2007 were object of dumping does not have anything to do with the fact to be considered as part of the analyzed period for injury purposes. The purpose of an investigation is to determine if the imports during the investigated period are object of dumping (and not those of the analyzed period), and if they caused damage or not (according to determined tendencies of the years previous to the investigated period, included in the analyzed period). Therefore, USAPEEC’s assertions have no sense.

154. The IA points out that as it can be shown in point 135 of the FD, it is clear that there are legal grounding and reasons in the setting of the investigation period and the injury analysis and causal link, therefore, USAPEEC’s assertion on the lack of legal basis and reasons is unsustainable and its claim is ineffective (inoperative).

155. The IA considers that the Complainant’s arguments are baseless because in the applicable law no disposition limits the IA to include in its analysis a period in which the safeguard measure is being applied, but it exists however, the obligation to analyze the information of the Petitioners, as a minimum, the three years previous to the submission of the application, as it is established in Articles 66 and 77 of LRCE. Also, it highlights Article 3.1 of ADA that only requires a general obligation that is to come to a determination on whether there is injury, but it does not establish to exclude a year from a period of analysis only because there was a safeguard measure or any other circumstance.

156. Likewise, the IA claimed in its Brief that it did comply with Article 3.1 of ADA and analyzed the import volume and its impact in the prices of like products and on the producers of such products, pointing out that the above can be proved by just reading points 577 to 712 of the FD.

157. On the other hand, the IA pointed out that the Complainant's argument on if some indicators are included in the information on 2007 and for others it isn't²⁰, it is wrong; because, even though 2007 is not specifically mentioned, the percentages of increase or decrease of 2008 were calculated in comparison to 2007. The IA did use 2007 information for such indicators as it can be proven in the case record, and that it was used correctly, as shown in the FD.

158. Furthermore, the IA continues stating that even if 2007 numbers are excluded, the behavior of the economic and financial indicators would not be modified, this means, the significant increase of imports at lower prices from the average price of the domestic production and the negative impact on the economic and financial indicators remain the same.

159. It is false that by excluding 2007, the analysis' results would be different. The IA did demonstrate in the FD that the domestic production participation in the national consume decreased during the analyzed period and that the salaries and employment also registered a decrease behavior during all the analyzed period as described in points 633 and 634 of the same determination. The previous shows that the analysis done by the IA was not bias, nor in favor of any party who participated in the investigation.

160. Finally, assuming *arguendo* that there was a lack of legal basis and reasoning, to claim the breaching of section II of Article 51 of the LFPCA, the Complainant would also have to prove that such situation impacts the result of the challenged determination and how it affects the Complainant's defenses.

161. Concerning the period of analysis, this Panel considers as mentioned in section **A. SETTING OF THE INVESTIGATION PERIOD AND THE ANALYZED PERIOD of this section XI**²¹, the IA has the discretionary power to set both the analyzed period as well as the investigated period, and confirms that the IA reasoned and justified the determination that the analyzed period needs to cover **at least** 3 previous years to the submission of the application (July 2, 2010), and therefore, the analyzed period can include 2007, as set forth in point 35 of the Initial Determination and in accordance with articles 65, 76 and 77 of the RLCE, which was made known to all interested parties through the Initial Determination and the legal notification of such Determination, as well as in point 135 of the FD, whereby the IA states the following:

"**135.** However, for purposes of the investigation, the Secretariat established as investigating period and period of analysis of injury and causal link to the domestic industry those from October 1, 2009 to September 30, 2010, and January 1, 2007 to September 30, 2010, respectively, to the effect that the information is as current as

²⁰ Points 599, 612, 626, 631, 633, 636 and 648 of FD.

²¹ See Final Decision of the Panel, [XI](#), ISSUES RELATED WITH THE INVESTIGATION PERIOD. A. DECISION REGARDING THE SETTING OF THE INVESTIGATION PERIOD AND THE ANALYZED PERIOD, *supra*.

possible, in accordance with articles 76 and 80 section VIII of RLCE, and the approach taken by the Committee on Anti-WTO concerning periods of data collection for dumping, injury and causal link during the investigation would be conducted, which is made known to all interested parties through the Initial Determination and the legal notification of that determination.”

162. Concerning whether if the year 2007 should have been included in the injury analysis, Articles 65 and 77 of RLCE require the Authority to analyze the information of the Petitioners corresponding to at least the three years prior to the filing of the application and allow the IA to extend that period up to 5 years (even the G7ADP/6 recommendation of the Committee on Anti-Dumping Practices WHO is consistent with the requirement).

163. In addition to this, Article 3.1 of the ADA does not oblige the IA to exclude one year from the analyzed period for certain causes including the existence at that time of a safeguard measure.

164. Regarding the inclusión of 2007, the IA established in paragraph 584 of the FD, the following:

“584. It is important to clarify that the inclusion of 2007 as part of the analyzed period does not breach the legislation on the matter, in virtue that it is not an obligation that the analysis is limited to the information of 3 years. Moreover, the information on 2007 gives elements to analyze the indicators behavior; however, the exclusion does not modify the described result”.

(Emphasis added)

165. Now, concerning the Complainants claim that in some indicators information on 2007 was included and for others it wasn't, what makes it seem to be a biased analysis in favor of the Petitioners, supporting its allegation of the lack of information of 2007 in the indicators in points 599, 612, 626, 631, 633, 636, and 648 of the FD. It is important to highlight that this Panel has made sure that even though it is not mentioned 2007, the percentages of the increase or decrease of 2008 were calculated in comparison to 2007, counting the IA with information from 2007 to these indicators, as corroborated from the information contained in the Administrative Record, as noted in the Final Determination itself in paragraph 6. Analysis of injury and causal link, paragraph 579, which is transcribed below:

“579. In this respect, at every stage of the investigation, the Secretariat used the best information available resulting from the hearings of the parties concerned, the answers to the requirements formulated the Secretariat itself and the information that was gathered using its investigatory powers. For this stage the analysis on the behavior of indicators of annual data from 2007 to 2010, and the period of October 2009 to September 2010. It analyzes the behavior of the indicators in a given year or period analyzed, unless otherwise indicated in contrast, over the same period of the previous year. ”

(Emphasis added)

166. From the foregoing, it follows that the conclusion that USAPEEC reached, that the analysis is biased in favor of the Petitioners due to the fact that some indicators include the information of 2007 and for other indicators such information is not included, and that this situation leads to a lack of motivation of the Final Determination that has impacted the challenged determination, is untenable.

167. In order to determine injury, this Panel considers that the IA acted according to article 3.1 of ADA. It analyzed the volume of the imports and their impact on prices of similar products in the domestic market, and how those imports affected the domestic producers of such products, as it can be seen in points 577 to 712 of the FD, included in the analysis on the impact of the growth of the imports at the end of the safeguard measure (points 665 to 669 of the FD).

168. The IA demonstrated in the FD that the participation of domestic production in the apparent domestic consumption declined throughout the analyzed period. Similarly, employment and wages also showed a decreasing trend throughout the period analyzed as described in points 633 and 634 of the same Determination, this means that even excluding the figures for 2007, the significant increase in imports at prices below the average price of domestic production and the negative effect on economic and financial indicators remains.

169. In fact, point 590 of the FD states the following:

"590. The behavior of imports under dumping conditions shows that its growth in absolute and relative terms (relative to the CNA and production) was not "natural" as is called by USAPEEC, in virtue that throughout the analyzed period the increase was constant even without considering 2007. This behavior would be more associated with dumping margins between 81.69 and 127.52%."

(Emphasis added)

170. Regarding the safeguard measure, in paragraph 669 of the FD, the IA established the following:

"669. The Secretariat does not rule out the tariff reduction or elimination of the safeguard measure as an element that can influence the increase in imports. However, the Secretariat considered that in the present case, not only an increase in imports of chicken leg and thighs was observed, but it was under dumping conditions with prices with significant undercutting margins compared to the price of the domestic like product. It was also noted the increase in the volume of imports in the year when the safeguard measures were removed. It was followed by subsequent increases resulting in the deterioration of import prices. Therefore, the Secretariat considered that the increase in imports cannot be described as "natural", but as the result of the practice of dumping."

(Emphasis added)

171. The above shows that the analysis by the IA is not biased or in favor of any party involved in the investigation since it was done from the information contained in the Administrative Record.

172. Finally, the Panel has found that Articles 3.2, 3.4 and 3.5 of the ADA allegedly breached and which were cited by USAPEEC, however such Complainant does not indicate how these Articles, in particular, were breached, which is why this Panel takes no position on the matter.

173. As to the precedent cited²² in which it is noted that the imports with a margin de *minimis* dumping should not be considered in the analysis of volumes on proof of injury, it should be noted that such precedent applies to the investigation period and not to the analyzed period, where the year of 2007 is included, therefore it is not applicable to the present case.

174. Likewise, this Panel agrees with the Investigating Authority, on the one hand, in the sense that the existence of the safeguard measure has nothing to do with there being dumping conditions or not, since dumping is a price difference that can be present when there is or there isn't a safeguard measure, and on the other hand, the purpose of an investigation is to determine if the imports during the investigated period are object of dumping (and not those of the analyzed period where 2007 was included). On the other hand, in opinión of this Panel, the Complainant did not submit evidence to show that the increase in imports (and consequential injury) were attributable to the termination of the safeguard measure, or even to what extent they might have been explained by the end of the safeguard measure. The Panel agrees in this particular point that the mere assertion by the Complainant that imports grew as a result of the end of the safeguard measure, cannot sustain its claim to reduce a period of investigation that the IA legally has the power to establish based on the parameters stated by the aforementioned legal provisions.

175. 3.2.1 Conclusion

176. Regarding all the foregoing, this Panel considers: (i) that the IA did not base its injury analysis and causal link under a false appraisal as stated by the Complainant; (ii) the Complainant did not submit evidence to show that the increase in imports (and consequential injury) were attributable to the termination of the safeguard measure, or even to what extent they might have been explained by the end of the safeguard measure and the Panel agrees in this particular point that the mere assertion by the Complainant that imports grew as a result of the end of the safeguard measure, cannot sustain its claim to reduce a period of investigation; iii) that the determination made by the Investigating Authority in the matter concerning the setting of the analyzed period and investigated period was made in agreement with the applicable laws; iv) that imports in 2007 used in the

²² European Communities-Antidumping Measure on Farmed Salmon from Norway, Panel Report, WT/DS337/R, 16 November 2007, 7,622 points, 7,627 and 7,636.

analysis of increased imports and their consequent impact on the indicators of the domestic industry does not breach Article 3.1 of the ADA, notwithstanding the existence of a safeguard measure and, v) that the behavior of the indicators in a given year or analyzed period, unless otherwise indicated, were compared with the same period of the prior immediate year (2008 in relation to 2007). Therefore, in the absence of any defect affecting the revised final resolution by the Panel in this regard, Section II of Article 51 of the LFPCA was not breached, because formal requirements stated by law were not omitted affecting individual's defenses or impacting the challenged determination, nor was omitted any legal grounding or reasoning.

XII. PANEL DECISION REGARDING THE DEFINITION OF DOMESTIC INDUSTRY

177. 1. Introduction

178. USAPEEC requests the Panel to review the Final Determination of the Anti-Dumping Investigation drafted by the IA regarding the definition of the domestic industry and the evidence regarding the representativeness of the domestic industry; USAPEEC and CENTRAL DETALLISTA request such review with regard to the exclusion of certain commercial agents who cut chicken and other participants in it and the non-division of the domestic industry in regional markets.

179. Likewise, USAPEEC, DELATO, PECO, CERVANTES, SANDERSON, CENTRAL DETALLISTA, PILGRIM'S PRIDE MEXICO, PILGRIM'S PRIDE, NORTHERN BEEF and SIMMONS (hereinafter in this Section, the "Complainants"), request Panel review of the IA's Antidumping Investigation and Final Determination with respect to the inclusion of BACHOCO of the domestic industry and TYSON and TYSON MEXICO request Panel review of the IA's Antidumping Investigation and Final Determination with respect to the exclusion of PILGRIM'S PRIDE MEXICO and TYSON MEXICO of such domestic industry.

180. The Panel examined the Administrative Record of this proceeding, the Preliminary and Final Determinations, the Complaints lodged with this Binational Review Panel, and the Briefs submitted by all Parties. The Panel has further considered the arguments of counsel at the Public Hearing conducted on August 25, 2015 and August 26, 2015.

181. The Panel notes the following legal authorities cited by the Complainants regarding the issues addressed in this section:

1. USAPEEC regarding the definition of domestic industry and the introduction as evidence of the SENASICA Report, after the public hearing and the presentation of Briefs, the Complainants quote articles 41 and 75 LCE; 75.IV, 75.V, 82.I and 163 RLCE; 5.1, 5.2, 5.3 and 6.9 ADA; 1 CFPC, for the Panel's review, section II of article 51 LFPCA.

2. USAPEEC, DELATO, PECO, CERVANTES, SANDERSON, PILGRIM'S PRIDE MEXICO, PILGRIM'S PRIDE, NORTHERN BEEF, SIMMONS, CENTRAL DETALLISTA, TYSON and TYSON MEXICO in regards to the inclusion of BACHOCO and USAPEEC regarding the exclusion of PILGRIM'S Mexico and of TYSON MEXICO from the definition of domestic industry, the Complainants quote articles 40 LCE; 60, 61 and 62 of the RLCE; 4.1 i) ADA; 50 and 330 CFPC; and for the Panel's review, section IV of article 51 LFPCA.
3. About the exclusion of certain quarterers and other industry participants from the domestic industry, USAPEEC cited articles 40, 41 and 49 of the LCE; 50, 59, 60, 63, 75, sections IV and V, 82, section I and 163 of the RLCE; 3.4, 4.1, 5.1, 5.2, 5.8, 6.1, 6.2 and 6.9 of the ADA; 79, 83 and 86 of the CFPC, and for purposes of the review before this Panel the provisions on section IV of Article 51 of the LFPCA. On the other hand, CENTRAL DETALLISTA cited Constitutional articles 14 and 16; 38, section IV of the CFF; section II of article 80 of the RLCE; paragraph 4 of article 5 of the ADA and its note 13, as well as articles 40 and 5 of the LCE.
4. Regarding the no division of the domestic industry into regional markets, USAPEEC cited Articles 41 of the LCE, 63, 64, 65, 66 and 69 of the RLCE; 3.2, 3.4 and 3.5 of the ADA and 79 of the CFPC, and for purposes of the review before this Panel the provisions on section IV of Article 51 of the LFPCA.

182. 2. Issues for Review

183. All of the issues reviewed in this section are linked to the definition of domestic industry. Complainants raise four particular domestic industry definition issues:

- a. Did the IA err by improperly altering the domestic industry definition during the course of the investigation and, particularly, in the Final Determination, by introducing the SENASICA Report as evidence, after the public hearing and the presentation of Briefs?
- b. Did the IA err by including BACHOCO as part of the domestic industry and by excluding PILGRIM'S PRIDE MEXICO and TYSON MEXICO from the domestic industry?
- c. Did the IA err by excluding certain quarterers and other industry participants from the domestic industry?
- d. Did the IA err by not dividing the domestic industry into regional markets?

184. 3. Law & Analysis

185. 3.1 The Definition of domestic industry and the introduction of the SENASICA report.

186. USAPEEC contests the validity of the Final Determination on the ground that the IA improperly changed the domestic industry definition multiple times during the course of the investigation and in the Final Determination. The IA allegedly utilized three different domestic industry definitions at the initial, preliminary and final determination phases, and Complainants challenge the Final Determination because of this purported lack of consistency. Complainants also assert a due process violation because the IA relied upon a SENASICA report that was incorporated into the record after the public hearing, thus according to the Complainants, deprived them opportunity to respond to the SENASICA report (See USAPEEC Memorial section D).

187. In its Brief (paragraphs 368 et ss.), the IA asserts that the definition of domestic industry established in its Initial Report was revised; yet not significantly altered, during the investigation. Even more, according to the IA, in its Final Determination it states that the SENASICA report serves to “corroborate” or “confirm” the findings the IA had made when analyzing the UNA Report. The revisions, the IA says, were made based on evidence discovered through the course of the investigation and it only served to supplement and refine the initial definition.

188. The IA mentions that such revisions are acceptable and do not violate the Complainants due process because they were based on the information provided by the parties, in addition to multiple sources investigated and analyzed by the IA. Additionally, the IA affirms that the domestic industry definition always included the same three producers that served as adequate industry representatives (Memorial paragraph 372). The IA refers to the “*Informe de GE, CE – Elementos de Fijación (China)*”, as a supporting evidence about the fact that revisions in the initial determinations of the definition of domestic industry are not improper.

189. The IA further responds that it utilized numerous sources of information during its investigation and analysis of the domestic industry definition, including information supplied by the Complainants. The SENASICA report is only one of numerous outside sources the IA relied upon in an effort to confirm and validate domestic industry information supplied by all interested parties. Moreover, the IA contends that all interested parties had various procedural opportunities throughout the course of the investigation to present information and evidence on this issue.

190. The Panel notes at the outset that NAFTA Article 1904 charges it with reviewing only Final Determinations as defined by NAFTA Article 1911. Article 1911 defines Final Determinations made by the Mexican Investigating Authority as “a final determination regarding antidumping or countervailing duties investigations

by the Secretaría de Comercio y Fomento Industrial ("Secretariat of Trade and Industrial Development"), pursuant to Article 13 of the Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior (*Foreign Trade Act Implementing Article 131 of the Constitution of the United Mexican States*), as amended."

191. The Panel lacks competence to address issues related to initial or preliminary determinations made by the IA in this case. However, notwithstanding the Panel's review authority, the Panel finds no error in the IA's process of reaching the definition of domestic industry in this case. The Administrative Record demonstrates that the parties contested the like product under investigation throughout this case. The like product and domestic industry requirements are interrelated and the IA cannot make a domestic industry definition determination until the scope of the like product is finally decided. The like product issue was not finally resolved until the Final Determination when the IA issued its findings on BACHOCO, PILGRIM'S PRIDE MEXICO and TYSON MEXICO, as well as its finding on certain quarterers and other industry participants. Once those determinations were final the IA was able to issue its final domestic industry definition to comport with the like product.

192. The Panel further finds that the Final Determination on the domestic industry definition comports with the like product determination made and discussed in a subsequent section. Contrary to the Complainants' argument, the mere fact that the same three petitioners were included in the domestic industry definition at different times during the investigative process does not negate the IA's reasonable conclusions on like product or domestic industry.

193. Even though this Panel's review is limited to the Final Determination, the Panel maintains competence over certain issues and procedures during the investigative process. In fact, this Panel is charged with ensuring that all interested parties are afforded adequate due process rights throughout the investigation. AD Agreement Article 6 generally provides that interested parties must be afforded fundamental due process rights during the conduct of the AD investigation, specifically including notice and the opportunity to respond to relevant evidence.

194. AD Agreement Articles 6.1 and 6.2 "require that the opportunities afforded interested parties for presentation of evidence and defense of their interests be 'ample' and 'full,' respectively."²³ AD Agreement Article 6.9 further requires that the IA inform all interested parties of the "essential facts under consideration which forms the basis for the decision" before a final determination is made. While these due process rights are certainly meant to ensure ample opportunities for interested parties to participate in the process and defend their rights, these due process rights are not indefinite.²⁴

²³ See US-Oil Country Tubular Goods Sunset Reviews, WT/DS268/AB/R, ¶241.

²⁴ Id.

195. The IA has the authority to alter its legal determinations throughout the course of the investigation, and may do so without infringing on the due process rights of the interested parties. A similar issue was raised regarding a changing injury determination in the *Guatemala-Cement II* case. The Panel rejected claims that the authority acted inconsistently with AD Agreement Articles 6.1, 6.2 and 6.9 because it made different injury determinations in the preliminary and final determinations. The Panel found that “[n]o provision of the AD Agreement requires an investigating authority to inform interested parties, during the course of the investigation that it has changed the legal basis for its injury determination.”²⁵

196. The Panel notes that the IA has no independent disclosure obligation to interested parties. “Article 6.4 does not obligate the investigating authorities to actively disclose information to interested parties... In our view, a violation of Article 6.4 would normally require a showing that the investigating authorities denied an interested party’s request to see information used by the authorities, which was relevant to the presentation of that interested party’s case and which was not confidential.”²⁶ The Panel also notes that in essence, the three (3) definitions of domestic industry implemented by the IA were not so different as to cause a violation of due process; therefore, the adjustments made during the investigation to the definition of domestic industry and the producers representing it were reasonable, considering the timing when the IA received and analyzed the evidence in which it based its decisions.

197. Mexican Law establishes the constitutional principle of due process in article 16 of the Constitution. According to this principle, in its relevant part, parties to any process are entitled to decisions from judicial or administrative authorities, motivated by the application of the letter of the law. From a procedural due process point of view, the Panel notes that the Complainants do not raise any specific due process complaints regarding the initial or preliminary determinations. To the extent Complainants’ argument regarding the allegedly changing domestic industry definition is somehow meant to contain a due process violation argument, the Panel rejects that argument as groundless. The Panel finds that all interested parties were provided full procedural access and the opportunity to present and rebut evidence throughout the investigation and leading to the Final Determination. From the perspective of a substantive due process, the Panel finds that all decisions made by the IA were sufficiently motivated and therefore complied with the abovementioned constitutional principle.

198. Complainants do assert a due process claim regarding the Final Determination and the use of the SENASICA report. After reviewing the Administrative Record and the arguments of all parties, the Panel finds that there is no prejudice or error involving the IA’s utilization of the SENASICA report. The IA relied upon numerous independent sources of information and economic

²⁵ See *Guatemala – Cement II*, WT/DS156/R, ¶8.237

²⁶ See *EC-Fasteners (China)*, WT/DS39/R, ¶7.480.

indicators in the poultry sector. The IA did not rely exclusively upon any one source to determine the size and scope of the domestic industry. Moreover, as noted previously herein, the IA was under no obligation to disclose information to the interested parties absent a request.

199. 3.2 Inclusion of Bachoco and Exclusion of Pilgrim's Pride Mexico and Tyson Foods Mexico from the Domestic Industry

200. Complainants assert that the IA erroneously initiated the Antidumping Investigation because the Petitioners did not satisfy the standard of representation required by Mexican law.

201. Complainants challenge the IA's Final Determination that includes BACHOCO in the domestic industry. These parties contend that BACHOCO should have been excluded from the domestic industry definition due to its legal relationship with OK Foods, a US producer and exporter of the like product during the period of investigation. If BACHOCO had been excluded, the Complainants argue that the minimum domestic support requirement (percentage of representation) would not have been satisfied and the Antidumping Investigation would not have initiated under Mexican law.

202. The IA responds that BACHOCO was correctly included as a national producer because it appeared as such in the initial investigation, it did not import the like product during the period of investigation and it did not become legally related to OK Foods until over one year after the end of the period of investigation (See sections 1.7 and 1.8 of the IA Brief). These facts purportedly support the IA's contention that BACHOCO had no link to the exporters and was aligned with the domestic industry during the period of investigation.

203. In its Brief, the IA substantiates its exclusion of PILGRIM'S PRIDE MEXICO and TYSON MEXICO from the domestic industry on the ground that those entities appeared as exporters in the initial investigation, thus self-identifying themselves as having disparate interests from the domestic industry (see sections 1.7 and 1.8 of the IA Brief). Moreover, they both imported the like product during the period of investigation.

204. Article 4 of the Antidumping Agreement provides the foundational elements of what constitutes a domestic industry for purposes of antidumping proceedings. Specifically, article 4.1 provides the definition of domestic industry. Article 5 of the Antidumping Agreement contains the threshold WTO requirements for initiation and subsequent investigation of dumping allegations. Article 5.4 of the Antidumping Agreement provides the threshold amount (percentage) of domestic industry support necessary to initiate an antidumping investigation.

205. Mexican law implementing and adapting the Antidumping Agreement provisions relevant to the domestic industry definition and the domestic industry support requirement can be found in LCE Articles 40 and 50 and RLCE Articles

60, 61, and 62. LCE Article 40 defines domestic industry and allows for alterations to this definition in instances where certain producers are related to the exporter or importers, or are themselves importers of the product in question, and in instances where all of the producers are related to the exporters or importers, or are themselves importers of the product under investigation. RLCE Article 62 provides guidance on when certain related producers or importers may be considered representative of the domestic industry.

206. Article 50 governs the initiation of the investigation and allows an interested party to submit a request for initiation where that party is producing "...Goods identical or alike to those imported or that want to be imported under dumping conditions..." RLCE Article 60 references LCE Article 50 and provides that the parties requesting initiation under LCE Article 50 "shall demonstrate that they represent at least 25 per cent of the domestic production of the goods in question."

207. The Panel has reviewed the Complainants' arguments regarding BACHOCO, and after considering those arguments and the applicable legal provisions governing the domestic industry definition, concludes that the IA correctly included BACHOCO in the domestic industry definition. The Panel similarly concludes that the IA correctly excluded PIGRIM'S PRIDE MEXICO and TYSON MEXICO.

208. The concept of "domestic industry" in antidumping cases is dynamic and changes depending on the factual circumstances of each particular case. To a large degree the scope of what constitutes the domestic industry is defined by the parties initiating the investigation.

209. The IA is charged with ensuring that the domestic industry definition accurately reflects the domestic industry market situation during a particular period of time. The period of investigation is critical inasmuch as it lays the groundwork for an objective examination of dumping, injury and causation²⁷. While neither the Antidumping Agreement nor Mexican law contain any specific rules regarding the period of investigation to be utilized in antidumping cases, an investigating authority must nonetheless impose a common sense time limit that allows all parties to focus solely on the analysis of industry economic conditions during the particular analyzed period, rather than economic conditions existing *a priori* or *a posteriori*²⁸.

210. The Panel finds that the IA imposed a fair and reasonable period of investigation in this matter.²⁹ During that reasonable period of investigation, the facts demonstrate that BACHOCO's interests were aligned with the domestic industry, not the exporting industry. Bachoco appeared in the investigation as a domestic producer. BACHOCO had no legal connection to OK Foods during the period of investigation. In fact, BACHOCO did not become legally aligned with OK

²⁷ See *Mexico-Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, ¶ 7.224.

²⁸ *Id.* at ¶¶ 7.224-7.225.

²⁹ See Section XI. A., *supra*, for the Panel's analysis and conclusion regarding the period of investigation.

Foods until over one year after the period of investigation. BACHOCO did not import the investigated product during the period of investigation. As such, BACHOCO was properly included as part of the domestic industry under article 40 LCE and 60 RLCE. The Panel further finds that the second paragraph of Article 40 LCE and Article 62 of the RLCE do not apply to BACHOCO in this situation because it lacked of any link to the exporter during the period of investigation.

211. Unlike BACHOCO, the Panel asserts that the administrative record supports the IA's decision to exclude PILGRIM'S PRIDE MEXICO and TYSON MEXICO from the domestic industry. Both parties entered appearances in the investigation as importers and the economic behavior of both parties during the period of investigation establishes those links.³⁰ Moreover, neither party affirmatively established record evidence under RLCE Article 62, Section I proving that their economic activity did not have, and would not have, the effect of restricting competition or that their imports are not the cause of price distortion or alleged injury. The Panel finds that the burden is on the parties to provide factual information sufficient to satisfy this requirement and the record contains no information contradicting the reasonableness of the IA's conclusion to exclude these entities.

212. 3.3 Exclusion of Quarterers and Other Industry Participants from the Domestic Industry

213. Complainants contest the validity of the Final Determination insofar as the IA excluded from the domestic industry certain industry participants that conduct quartering and other butchering procedures to whole chickens. The Complainants assert that the IA impermissibly restricted the domestic industry to only those producers controlling 100% of the production process. These parties ask the Panel to consider these other industry participants as part of the domestic industry for initiation, investigation and if necessary injury purposes.

214. Complainants assert that if the IA had included quarterers and other excluded yet important parts of the domestic chicken production chain, the domestic support requirement (percentage of representation) would not have been satisfied and the Antidumping Investigation would not initiate under Mexican law. Complainants further contend that including these additional industry participants would have resulted in a different injury conclusion and antidumping duty calculation.³¹

215. The IA responds that quarterers were properly excluded from the domestic industry definition because their products are not similar to those under investigation. The IA relies upon the fact that whole chickens were not the investigated product. Moreover, chickens slaughtered or quartered *in situ* in public

³⁰ Counsel for Tyson Foods Mexico conceded during the public hearing that Tyson never intended to be part of the domestic industry.

³¹ This section makes no reference to injury claims. We refer to such claims in other section of this decision.

markets and similar establishments allegedly don't compete with imports of the investigated product due to significantly divergent sanitary standards.

216. Fundamental to any antidumping investigation is the characterization of what constitutes a “like product.” The “like product” concept allows for a fair and unbiased comparison of economic conditions between goods that are either identical or “like” those under investigation. Article 37 of the RLCE governs what constitutes “like product” for purposes of antidumping investigations. This concept “is a relative one that evokes the image of an accordion.”³² “The accordion of ‘likeness’ stretches and squeezes in different places as different parts of the WTO Agreement are applied.”³³ Article 2.6 of the Antidumping Agreement defines “like product” as “a product which is identical” or “has characteristics closely resembling the product under consideration.” This broad definition provides WTO Members with ample discretion to further delineate the meaning under domestic law. As such, WTO Members’ practice regarding what constitutes “like products” varies significantly.³⁴ Article 37 establishes “like goods” as “products which, although not alike in all respects, are similar in their characteristics and composition, thus allowing them to fulfill the same functions and making them commercially interchangeable with those with which they are being compared.” Article 37 further defines “identical goods” as those that are “alike in all respects to the product under investigation.”

217. Applying the definition of “like products” set forth in Mexican law, the IA must determine whether the antidumping investigation is properly initiated and whether there is injury to the domestic industry properly initiating the investigation. LCE article 50 sets forth that the parties requesting initiation “shall demonstrate that they represent at least 25 per cent of the domestic production of the goods in question.” The article also provides that an interested party may request initiation as long as it produces “goods identical or alike to those being imported or intended for import in circumstances involving unfair international trade practices.” RLCE article 60 re-affirms the minimum threshold support requirement of 25% of the domestic industry producing the investigated product in order to initiate a proceeding.

218. The IA excluded whole chickens, as well as butchered chickens emanating from quarterers not controlling 100% of the production process, from the “like product” analysis. The Panel agrees with the IA’s decision.

219. The Panel first notes that the investigation in this matter does not encompass the entire Mexican chicken industry, but rather a very particular segment of the Mexican industry. The domestic industry seeking relief from alleged unfair international trade practices under Article 40 includes those producers controlling 100% of the production process (leg and thighs produced in

³² See *Japan-Taxes on Alcoholic Beverages*, WT/DS8/AB/R, p. 21.

³³ *Id.*

³⁴ See Konstantinos Adamantopolous & Diego De Notaris, *The Future of the WTO and the Reform of the Anti-dumping Agreement: A Legal Perspective*, 24 *FORDHAM INT’L LJ* 30, 36-38 (2000).

TIF slaughterhouses). It is that particular segment of the broader chicken industry that produces the product either identical or alike those being imported and allegedly causing the market distortion. The mere fact that there are only 3 Mexican producers satisfying this criterion is not sufficient reason to broaden the domestic industry to include products outside the scope of this investigation. Moreover, the Panel understands that prior investigations and rulings can sometimes create industry expectations this Panel is not bounded to any prior NAFTA safeguard or other proceedings involving this or any other Mexican industry. Each case proceeds and is reviewed on its own merits.

220. The Panel finds that whole chickens are not “alike in all respects” to quartered legs and thighs under Article 37 RLCE. Moreover, whole chickens are not “like goods” under Article 37 because they do not share similar characteristics. While there may be some argument that they could serve “similar functions” as quartered legs and thighs, they most certainly do not fulfill the “same functions” and are not commercially interchangeable.

221. The Panel reaches the same result with respect to chickens butchered by quarterers that do not control 100% of the production process. Chicken legs and thighs produced by these entities are not “identical goods” or “like goods” under article 37. These goods are subject to vastly divergent sanitary standards, which prevent them from fulfilling the same function and being commercially interchangeable from chicken legs and thighs produced by entities that completely control 100% of the production process (see sections 1.5 and 1.6 of the IA Brief). The Panel finds that the additional or corollary production steps taken by quarterers and other intermediary channels of distribution outside of the main production process causes the goods to be commercially distinct products with different characteristics from the product under investigation.

222. 3.4 Division of the Domestic Industry into Regional Markets

223. USAPEEC asserts the IA improperly rejected arguments regarding the regional nature of the domestic chicken market in the Northern Mexican states. USAPEEC contends that the IA failed to properly consider the “border region” of Northern Mexico, which allegedly represents a separate and distinct domestic market (in terms of customer preferences) that competes with the remainder of the domestic Mexican market. USAPEEC argues that if the IA had properly segmented the domestic Mexican market it would have reached a different conclusion in its analysis regarding prices, costs, income, gains, and injury to the domestic industry.

224. USAPEEC contends that IA improperly diverted from prior practice where it acknowledged the existence of two separate and distinct markets. USAPEEC submitted record evidence including a prior IA final resolution referencing the importance of stocking the “northern market” to avoid shortages. USAPEEC also cites a prior decree implementing a specific and disparate chicken quota for companies selling their products in the border region.

225. The IA responds that this case does not present distinct regional markets industry (see section 1.10 of the IA Brief). The prior resolution simply established an import quota, and does not stand for the proposition that the IA recognizes a distinct northern border market different from the remainder of the country. The IA contends that to the extent the resolution has any relevance it is to suggest that demand for chicken legs is higher in the North than in other regions of the country.

226. Article 4.1 (ii) of the Antidumping Agreement provides a limited exception to the definition of what constitutes a domestic industry for purposes of an antidumping investigation. In this sense establishes:

“[I]n exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory.” In such an exceptional circumstance injury may be found despite the lack of injury to a major portion of the total domestic industry, as long as there is a concentration of dumped imports into the isolated market and the dumped imports are causing injury to all or almost of all of the production within the isolated market.

227. LCE article 44 implements the guidance provided by the Antidumping Agreement regarding the injury or threat of injury analysis, and states that injury or threat of injury may be considered in an isolated market “only if its producers sell a significant part of their production in that market and if demand is not to any substantial degree supplied by producers located elsewhere in the national territory.”

228. The Panel concludes that the IA properly maintained the integrity of the domestic Mexican market without regionalization or isolation of markets. The Antidumping Agreement establishes that domestic industry regionalization can only occur in exceptional circumstances, and then only where the producers within the alleged regional market sell all or most of their production within that market and where the demand in that market is not to any substantial degree supplied by producers located outside the alleged regional market.

229. The Panel finds no exceptional circumstances warranting consideration of regionalization. At best, the record evidence establishes different consumer preferences. Divergent consumer preferences are not sufficient exceptional circumstances to establish regionalization under the law. While the Panel acknowledges the prior resolution or decree issued by the IA in other matters, the Panel is not bound by those decisions and does not follow them in this case. For similar reasons as previously set forth the Panel lends no weight to any prior final resolution or decree issued by the IA in another matter. The record before the Panel does not establish exceptional circumstances sufficient to take the extraordinary step of dividing the Mexican domestic industry.

230. Moreover, even if exceptional circumstances existed, the Panel finds insufficient evidence that producers located within the requested regional market sell all or almost all of their production in that isolated regional market. There is also insufficient evidence that the demand in that isolated regional market is not satisfied to any substantial degree by producers outside the isolated regional market.

231. 3.5 Conclusion.

232. After reviewing all the arguments presented by the parties, both in writing and orally, as well as the Administrative Record and its links to the applicable law, this Panel confirms the assertions made by the IA in its Final Resolution. The Panel also affirms that the IA applied the relevant law correctly.

XIII. ISSUES RELATED TO THE DEFINITION OF THE DOMESTIC INDUSTRY AND THE ANALYSIS OF INJURY

233. 1. Introduction

234. USAPEEC requests Panel review of the IA's Antidumping Investigation and Final Determination since the Complainant asserts that the IA admitted a request for an investigation without the information necessary to define the domestic industry, on which the Petitioners active procedural standing and the analysis of injury to domestic production depended.

235. LARROC and OPERADORA request Panel review of the IA's Antidumping Investigation and Final Determination since the Complainants assert that the IA made a biased analysis to determine the existence of injury to the domestic industry, by not legally grounding or motivating its determination, by identifying the injury and causal link of all its economic and financial indicators, since the IA had to consider for analysis not only the leg and thigh but also the whole chicken.

236. CENTRAL DETALLISTA requests Panel review of the IA's Antidumping Investigation and Final Determination since the Complainant asserts that the IA fail to determine the existence of injury to the domestic industry by failing to take into account the effect caused on the indicators, inter alia, production and sale and market participation, since the financial information of the Petitioners reflects that the production of live or finalized chicken and the sales of whole chicken have increased during the analyzed period.

237. TYSON and TYSON MEXICO request Panel review of the IA's Antidumping Investigation and Final Determination since the Complainants assert that the IA fail to carry out the analysis of injury to the domestic industry in accordance with the provisions of the LCE and its Regulation and the ADA

238. The Panel notes the following legal authorities cited by the Complainants regarding the issues addressed in this section:

1. USAPEEC cites articles artículos 41 de la LCE; 75, sections IV and V; 82, section I and 163 of the RLCE; 5.1, 5.2 and 6.9 of the ADA, 1 of the CFPC and for the Panel's review, section II of article 51 of the LFPCA.
2. LARROC and OPERADORA cite article 80, section II of the RLCE and for the Panel's review, sections II and IV of article 51 of the LFPCA, and CENTRAL DETALLISTA cites articles 41 of the LCE and 64 of the RLCE.
3. TYSON and TYSON MEXICO cite articles 40 and 50 of the LCE; 60, 61, 62 and 63 of the RLCE; 4.1 and 5.4 of the ADA and for the Panel's review, sections II and IV of article 51 of the LFPCA.

239. 2. Issues for Review

240. All of the issues reviewed in this section regarding the analysis of injury are linked to the definition of domestic industry:

241. Did the IA err in admitting a request for an investigation without the information necessary to define the domestic industry, on which the Petitioners active procedural standing and the analysis of injury to domestic production depended, since the IA introduced the SENASICA report after the final hearing?

242. Did the IA err in the Final Determination, by making a biased analysis to determine the existence of injury to the domestic industry, by not legally grounding or motivating its determination, by identifying the injury and causal relationship of all its economic and financial indicators, since the IA had to consider for analysis not only the leg and thigh but the whole chicken?

243. Did the IA err to determine the existence of injury to the domestic industry by failing to take into account the effect caused on the indicators, inter alia, production and sale and market participation, since the financial information of the Petitioners reflects that the production of live chicken and the sales of whole chicken have increased during the analyzed period?

244. Did the IA err by failing to carry out the analysis of injury to the domestic industry in accordance with the provisions of the LCE and its Regulation and in the ADA?

245. 3. Law & Analysis

246. 3.1 Decision on whether the IA failed to admit a request for an investigation without the information necessary to define the domestic

industry and, therefore, the analysis of injury to domestic industry was issued in contravention of Articles 41 of the LCE and 5.2 of the ADA.

247. In relation to the definition of domestic production and the injury analysis, USAPEEC generally points out that a fundamental issue in the investigation was the definition of the domestic industry of the merchandise under investigation, since from such definition, the analysis of representativeness and injury to domestic production that sustain the determination of antidumping measures depended. According to the Complainant since there is a violation in the initial analysis of the determination of the domestic industry and consequently of the representation of the Petitioners, therefore, the analysis of injury was issued in violation of articles 41 of the LCE and 5.2 of the ADA.

248. The IA points out that USAPEEC claims that the FD is a violation of section II of article 51 of the LFPCA, because the IA action omitted the formal requirements required by the law affecting the individual's defenses when initiating the investigation without the information necessary to define the domestic industry, and subsequently not present it in the Administrative Record, giving the identification elements of the domestic producers up to the FD and therefore, the injury analysis was issued in contravention of articles 41 of the LCE and 5.2 of the ADA.

249. On the other hand, the IA indicates that the Complainant cites articles 41 of the LCE and 5.2 of the ADA without arguing why they apply to the specific case or in what sense they were violated.

250. USAPEEC's allegations concerning the definition of the domestic industry and the introduction to the Administrative Record of the SENASICA report were addressed by the Panel in *point 3, 3.1 of section XII. PANEL DECISION REGARDING THE DEFINITION OF THE DOMESTIC INDUSTRY, supra*, whereby the Panel states that it lacks competence to address issues related to initial or preliminary determinations made by the IA in this case. However, notwithstanding the Panel's review authority, the Panel finds no error in the IA's process of reaching the definition of domestic industry in this case. The Administrative Record demonstrates that the parties contested the like product under investigation throughout this case. The like product and domestic industry requirements are interrelated and the IA cannot make a domestic industry definition determination until the scope of the like product is finally decided. The like product issue was not finally resolved until the Final Determination, however, since the beginning of the investigation, the IA defined the domestic industry as those producers of chicken leg and thigh whose final product is commercially interchangeable with the product under investigation and that, during the investigation, it was informed of information that confirmed the presumptions established from the beginning, without substantial changes, hence the initial analysis on the determination of the domestic industry and consequently the representativeness of the Petitioners was made with the necessary information for this purpose, since Article 5.2 of the ADA is not sought to impose excessive charges to the Petitioners, contrary to what was

alleged by USAPEEC, the companies that make up the domestic industry and on which the injury analysis was based were basically the same since the beginning of the procedure.

251. On the other hand, *in point 3, 3.1 of Section XII abovementioned*, this Panel concluded that after reviewing the Administrative Record and the arguments of all parties, the Panel finds that there is no prejudice or error involving the IA's utilization of the SENASICA report. The IA relied upon numerous independent sources of information and economic indicators in the poultry sector. The IA did not rely exclusively upon any one source to determine the size and scope of the domestic industry.

252. Likewise, this Panel notes that USAPEEC's argument that the IA's injury analysis of the domestic industry was wrong, comes from the argument that the definition of the domestic industry from the start was misleading, situation that did not occur and in the other hand, the Complainant does not specify in what sense the analysis of injury to the domestic production that the IA carried out and that subsequently justified the imposition of the definitive measures in the Final Determination now challenged was mistaken, on the understanding that said proof of injury was done in relation to the domestic industry, as it was defined from the beginning, therefore this Panel cannot be in position to evaluate the substance of USAPEEC's argument nor can the Panel dismiss the determination on the analysis of injury since USAPEEC supports such analysis in wrong premises, nor does USAPEEC did not indicate how is that articles 41 of the LCE and 5.2 of the ADA were violated and how is it that section II of article 51 of the LFPCA is updated.

253. The following jurisprudence (court precedent) thesis is applicable by analogy:

"INEFFECTIVE (INOPERATIVE) GRIEVANCES. THEY ARE THOSE WHO ARE SUPPORTED IN FALSE PREMISES. The offenses whose construction starts from false premises are inoperative, since for no practical purpose would lead to their analysis and qualification, because starting from an assumption that was not true, its conclusion is ineffective to obtain the revocation of the judgment appealed."

Direct Amparo suit in review 63/2012. Calsonickansei Mexicana, S.A. de C.V. February 8, 2012. Five votes. Speaker: Sergio Salvador Aguirre Anguiano. Secretary: Juan José Ruiz Carreón.

Direct Amparo suit in review 2981/2011. Arrendadora y Comercializadora de Bienes Raíces, S.A. de C.V. May 9, 2012. Unanimity of four votes. Absent: José Fernando Franco González Salas. Speaker: Luis María Aguilar Morales. Secretary: Úrsula Hernández Maquívar.

Direct Amparo suit in review 1179/2012. Bombeo Equipment Engineering, S.A. de C.V. May 30, 2012. Five votes. Speaker: Sergio Salvador Aguirre Anguiano. Secretary: Juan José Ruiz Carreón.

Direct Amparo suit in review 2032/2012. Martha Aidé Sarquis Ávalos. August 22, 2012. Unanimity of four votes. Absent: José Fernando Franco González Salas. Speaker: Margarita Beatriz Luna Ramos. Secretary: Fausto Gorbea Ortiz.

Direct Amparo suit in review 2061/2012. Banco Nacional de México, S.A., Member of the Banamex Financial Group. August 22, 2012. Unanimity of four votes. Absent: José Fernando Franco González Salas. Speaker: Margarita Beatriz Luna Ramos. Secretary: Fausto Gorbea Ortiz.

Thesis of jurisprudence 108/2012 (10a.). Approved by the Second Chamber of the Supreme Court, in private session of the twenty-ninth of August of two thousand and twelve.

254. 3.1.1 Conclusion.

255. For all of the foregoing, this Panel considers that the arguments submitted by USAPEEC in this section for being assertions without support, in addition that they are based on wrong premises.

256. 3.2 Decision on whether the IA made a biased analysis of the injury to domestic production by not considering in its analysis the whole chicken or live or finalized chicken and by not taking into consideration the effect caused in the indicators.

257. 3.2.1 LARROC and OPERADORA

258. LARROC and OPERADORA point out that the FD is neither legally grounded nor motivated in the analysis of injury, because the IA incorrectly segmented the domestic industry and did not include the whole chicken as part of the identical or similar merchandise, therefore, all its injury analysis is biased and is wrong.

259. The Complainants allege that the Petitioners incorrectly segmented domestic industry. They sustain that the producers of whole chicken are necessarily those that produce the leg and thigh as indicated in the safeguard measure and add that by that segmentation, the Investigating Authority is not taking into account 100% of the chicken producers (as happened in the safeguard), contravening its own criteria used by the IA in the safeguard measure and violating article 37, section II of the RLCE. This segmentation has as consequence and consequent effects on the variables and indicators considered to accredit the alleged injury to the domestic industry of similar merchandise, since it implies a "bias" when estimating data that "supposedly" reflect injury to the domestic industry.

260. Regarding the determination of injury, the Complainants point out that the determination must be based on the production of chicken meat in Mexico, in that way it is not reflected a decrease in production, but on the contrary according to

the different sources of information reviewed between 2007 and 2010³⁵, chicken meat in Mexico has reflected an upward trend, and they point out that there can be no distinct trend between the behavior of the domestic production volume of whole chicken and the production volume of chicken legs and thighs.

261. The Complainants point out that another of the effects of estimating production volumes leads to the conclusion that, if the levels of employment or utilization of installed capacity are estimated from the biased data of production volumes, then a tendency similar to the results of production, ie negative data, will also have to be added - also biased. This can be seen in the contrasting data concerning the use of the installed capacity of BACHOCO and those used by the Petitioners.

262. Regarding the branch of national production and representativeness the Complainants argue that the IA did not consider whole chicken producers, when there are more than 29 companies identified by the Petitioners and BACHOCO in its annual report 2011³⁶, reports that there are approximately 179 Market segmentation (by failing to take into account the production of whole chicken in domestic chicken leg and thigh production), in addition to distorting the analysis, is in breach of WTO provisions as such. As stated in several precedents³⁷.

263. For all of the above, LARROC and OPERADORA consider that the IA did not act in accordance with the provisions of article 80, section II of the RLCE by not legally grounding or motivating all its determinations on the alleged injury to the domestic industry when identifying the affectation and its causal link of all its economic and financial indicators, updating the provisions in sections II and IV of article 51 of the LFPCA.

264. 3.2.2 CENTRAL DETALLISTA

265. CENTRAL DETALLISTA points out that it is clear from the analysis of Articles 41 of the LCE and 64 of the RLCE that for the Investigating Authority to determine the existence of injury to the domestic industry, it must take into account the effect caused in the indicators of, among others, production, sales, market participation among others.

266. The Complainant states that the IA determined in the Final Determination that the production and sales of chicken leg and thigh have decreased during the analyzed period. Specifically, it is mentioned that for the period analyzed from

³⁵ Various information reviewed by LARROC and OPERADORA, such as: the INEGI-BIE (Bank of Economic Information) source reflect an upward trend in chicken production volumes in Mexico, including UNA data with increases in the volume of Chicken from 2007 to 2010.

³⁶ Page 25 of the 2011 Annual Report of BACHOCO to the Mexican Stock Exchange.

³⁷ Final Report of the Special Group (GE) about the case of México-JMAF (DS 132), point 1.154; Final Report of the GE of in the case of Korea – safeguard measure regarding some dairy products (DS98), point 7.58; Reporto ver the dispute USA-Hot-Rolled Steel (DS184), points 204, 205, 206, 211 and 214; Final Reporto on the case EC-Salmon (DS337), points 7.121, 7.110, 7.115, 7.116 and 7.120.

2007 to 2010, domestic production shows a cumulative decrease of 15% and 4% in relation to 2008 and that sales to the domestic market of the domestic industry show a behavior similar to that of production, recording a fall of 11% from 2007 to 2010 (point 626 of the FD).

267. Notwithstanding the foregoing, the determination of the injury in relation to the production and sales of chicken leg and thigh was not correctly determined, since it is inconsistent with its reasoning regarding the integration of the domestic industry of the like product with the Investigated product.

268. Contrary to what was pointed out by the Petitioners, the production of leg and thigh of chicken has not decreased in the analyzed period, but instead, production has increased.

269. In fact, according to the document entitled "Monograph of the Poultry Industry" published by the UNA, the national poultry flock in Mexico grew by 2.2% in 2010 compared to 2009, a growth that is related to the growth of the Poultry industry in Mexico as well as domestic chicken production.

270. Also, according to this document, domestic chicken production has grown at an annual rate of 4.6% during the last 16 years (period 1994-2010), and the consumption of agricultural inputs in Mexico has grown at an annual rate of 3.2 % in the same period.

271. In addition, according to INEGI's Economic Information Bank, the national production of cuts of boneless and boneless chicken has remained stable when presenting a constant movement in the industry.

272. Thus, however, the Petitioners argued that they have suffered injury to chicken leg and thigh production from imports originating in the United States of America, chicken leg and thigh production has not been affected.

273. Thus, with the information mentioned above, it is shown that the sector to which the Petitioner's companies belong, that is to say the chicken production, has remained stable in the period under analysis presenting solidity and growth.

274. If we follow the line of argumentation established by the Investigating Authority, in the sense that the production of chicken leg and thigh starts with the live chicken or finalized, this leads us to the conclusion that, by increasing the production of live chickens, consequently the production of chicken legs and thighs is increased and this implies that during the analyzed period the production and sale of chicken leg and thigh has increased, therefore the injury alleged by the Petitioners does not exist.

275. As a result of the above, If the production and sale of whole chicken reflected an increase, it will be clear to the Panel that in the present case there is no injury to the domestic chicken leg and thigh industry, and therefore, precedes its remand

based on Article 1904.8 of the North American Free Trade Agreement, Rule 72 of the Rules of Procedure, and 50 and 51 of the LFPCA.

276. 3.2.3 Investigating Authority

277. Regarding the above arguments of LARROC and OPERADORA, the Investigating Authority in its Brief states the following:

278. The IA points out that it legally grounded and motivated each section of its analysis, as can be seen from the mere reading of points 445 to 712 of the FD, paragraphs in which the IA clearly explains its action to support and conclude the similarity of product between Imported and domestic production, definition of domestic industry, determination of injury and countervailing duty, which is why the Complainants' allegation is ineffective.

279. The IA states that there is no inconsistency between the determination of the IA in the Leg and Thigh Safeguard Decree with respect to the anti-dumping investigation as noted by the Complainants. As noted in points 509 and 515 of the FD, these procedures differ because of their different legal nature. In the first proceeding, within the domestic product to be considered, the directly competitive product was included as stated in Article 2.1 of the WTO Agreement on Safeguards and point 34 of the Decree imposing a definitive bilateral safeguard measure on imports of chicken leg and thighs published in the DOF on July 25, 2003, whereas in the antidumping investigation only the product identical or similar to the one investigated was referred to in articles 2.6 and 3.1 of the ADA and 40 of the LCE. Thus, it is not appropriate to include producers of non-imported goods within the domestic industry of an anti-dumping proceeding only because it is alleged that this was done in a substantially different proceeding.

280. The IA states that the fact that the chicken thigh and leg production process begins with live chicken does not in any way imply that the production process ends there. Nowhere in the FD does it mention that the leg and thigh production process begins and ends with live chicken. On the contrary, the FD specifies that leg and thigh production involves several stages after the production of live chicken. FD clearly mentions that the process ends with packaging and distribution. That is, the product investigated is not the leg and thigh of the live chicken, but the leg and thigh obtained after several stages of processing.

281. The IA notes that it cannot simply be assumed that the fluctuation in the volume of production of live chicken has a direct relation with the production of leg and thigh. There is a significant amount of live chicken that is not intended for the production of parts. Thus, point 477 of the FD indicates that, based on the Compendium of Economic Indicators of the Poultry Sector of UNA (document whose validity was not questioned during the investigation), during 2009, only 8% of annual production chicken is intended for pieces, including leg and thigh. Of course, this ratio can vary from 2% to 5%, so it cannot be assumed that an

increase in live chicken production corresponds to an increase in leg and thigh production, as investigated product.

282. In support of the above, it should be mentioned, that in the Compendium, the chicken pieces (including leg and thigh) have a specific market, independent of the one corresponding to the chicken, so it is even clearer that it is incorrect to point out that the behavior of chicken production corresponds to the production of leg and thigh. Hence, the indicators on chicken production are totally different from those related to the product under investigation.

283. However, as regards the domestic industry and representativeness, the IA did not discriminate against any producer of chicken legs and thighs. As described in points 477 to 527 of the FD, the information provided by interested parties was assessed and additional information relating to the domestic industry (points 478 and 482 of the FD) was obtained.

284. In particular, the IA counted on compendiums of economic indicators of the poultry sector of the National Union of Poultry Producers, surveys and census to producers, listing of 29 companies that are dedicated to the production of chicken, leg and thigh, egg and food, requirements of producing companies, lists of TIF slaughterhouses in operation of the National Service of Health, Safety and Agrifood Quality (SENASICA), dependent on SAGARPA.

285. The IA states that it is important to distinguish that the Securities Market Reports, indicated by LARROC and OPERADORA are based on the financial statements of INDUSTRIAS BACHOCO, S.A.B. DE C.V., which refer to the financial behavior of the "holding company" and in the antidumping investigation that concerns us, the IA analyzed the financial statements of the company BACHOCO, S.A. de C.V. and Subsidiaries, a production company, which states that it is not only engaged in the production of merchandise similar to the one investigated, but also has other lines of business, including chicken, egg and pork production; In turn the chicken line is subdivided into businesses (pre-cooked breasting, Kentucky, marinated portions and sausages, among others), among which is the chicken leg and thigh, as noted in point 643 of the FD.

286. As regards the Complainants' assertion that the domestic production of chicken leg and thigh in Mexico should be obtained from the production of chicken meat in Mexico, it should be noted that, once again, the Complainants do not point out why the methodology followed by the IA is incorrect, what are the legal provisions violated or why it causes them any affectation and therefore are mere statements without any legal grounding. They merely point out that it must have been calculated otherwise, so that the argument must be declared ineffective and it is reiterated that the whole chicken and chicken leg and thigh are not similar, the production of the former does not necessarily derive from the production of the second, so that the production behavior of one industry (whole chicken) is not equal to that of another (chicken leg and thigh). That is, not all the whole chicken

that is produced is destined as an input for the production of chicken leg and thigh, since as already indicated only a part is destined to the production of the latter.

287. As noted several times in the FD and in the IA's Brief, the whole chicken and the chicken leg and thigh correspond to two different industries. Even from the final determination of the leg and thigh safeguard investigation in paragraph 150, it was noted "... the UNA considers that the 49.4 percent duty on the American leg and thigh is a serious problem for the domestic leg and thigh industry, and the Mexican poultry industry in general."

288. It is therefore clear that both production volumes may behave differently because they are subject to different market conditions.

289. On the other hand, the Complainants alleged a different behavior between some economic and financial indicators analyzed by the IA and other sources of information. On several occasions, the IA explained that the differences are explained because its analysis refers exclusively to the product investigated - chicken leg and thigh - and not to the whole chicken as they suggest.

290. As for CENTRAL DETALLISTA's assertion that the increase in leg and thigh production (as a result of the increase in live chicken production) implies an increase in sales, the IA states that it should be mentioned that nowhere does the Complainant explain why it would have to be assumed that an increase in the production of leg and thigh (assuming *arguendo* that there is such increase), automatically translates into an increase in sales of that product.

291. The IA continues stating that the structural problem of this reasoning is that the proof of injury does not consist in analyzing the behavior of the total domestic producers, but only that of the domestic industry.

292. For this reason, it cannot be assumed, as CENTRAL DETALLISTA does, that the increase of an indicator of total national production corresponds to the increase of the indicator of the industry. The injury analysis (in terms of the production of investigated product) can start from the total production figures, but what is really sought is to determine whether the industry (and not the total production) suffered injury.

293. The IA states that it counted with the appropriate basis for its analysis of the existence of injury to the industry. With regard to that analysis, and as explained in points 620 to 660 of the FD, the economic and financial indicators of the domestic industry deteriorated.

294. Finally, even supposing that the indicators of production and sales of the domestic industry had not been granted, the claim of CENTRAL DETALLISTA would still be ineffective, since, as mentioned in articles 3.4 of the ADF And 64 of the LCE, the injury test involves analyzing many more factors than just production and sales, and also, as mentioned in articles 3.4 of the ADA and 41 of the LCE

"none of these factors alone or several of them together will necessarily suffice to obtain a decisive orientation ".

295. The IA considers that obtaining a determination of injury to the domestic industry is the consequence of a sum of results of the various factors analyzed whereby the IA determined that there are elements to consider that the increase in dumped imports caused injury to the domestic chicken leg and thigh industry because they were located at prices significantly lower and displaced domestic production, which lost market participation and the indicators related to production, sales, employment, wages and the utilization of installed capacity decreased in the analyzed period. Operating profits showed a decreasing behavior, which had an impact on the contribution of the return on investment, as explained in points 620 through 660 of the FD, from which it appears that the economic and financial indicators of the domestic industry deteriorated.

296. Derived from the comprehensive analysis of the information made in the FD, the IA determined that there are elements to consider that the increase in in dumped imports caused injury to the domestic chicken leg and thigh industry.

297. In addition to the above, the IA states that CENTRAL DETALLISTA did not mention which of the grounds provided for in Article 51 of the LFPCA was updated to its detriment. Consequently, this Panel cannot analyze its assertions and, therefore, the IA requests that it be determined that they are inoperative, since the final paragraph of article 51 of the LFPCA establishes that the Panel cannot analyze whether its claim would fit into any of the sections of this article, since that would imply analyzing *ex officio* the presence of these causes, for which the Panel has no authority.

298. In virtue of all the foregoing, the IA considers that there is no violation to article 80, section II of the RLCE cited by OPERADORA and LARROC, nor to the sections II and IV of article 51 of the LFPCA and there is no violation to articles 41 of the LCE and 64 of the RLCE cited by CENTRAL DETALLISTA.

299. 3.2.4 Analysis by the Panel

300. Regarding the allegations raised by the Complainants (LARROC and OPERADORA and CENTRAL DETALLISTA) about the definition of the domestic industry and the determination of what constitutes a "like commodity" were addressed by the Panel in *points 3, 3.1 and 3.3 of section XII. PANEL DECISION REGARDING THE DEFINITION OF THE DOMESTIC PRODUCTION supra*, whereby this Panel arrived to the conclusion that whole chickens are not "equal in all respects" to legs and thighs. On the other hand, whole chickens are not "like goods" in accordance with article 37 of the RLCE, since they do not "share the same functions" and are not "commercially interchangeable" with the legs and thighs, and the Panel also reached to the same conclusion with regard to chickens butchered by quarterers that do not control 100% of the production process. Chicken legs and thighs produced by these entities are not "identical goods" or

“like goods” under article 37. These goods are subject to vastly divergent sanitary standards, which prevent them from fulfilling the same function and being commercially interchangeable from chicken legs and thighs produced by entities that completely control 100% of the production process.

301. On the other hand, this Panel notes that the arguments of LARROC and OPERADORA and of CENTRAL DETALLISTA come from the wrong appreciation that "whole chicken" or "live chicken" should be considered as part of the domestic industry and that the determination of injury analysis should be done from the production of chicken meat in Mexico and not only of chicken leg and thigh. The Complainants do not specify in what sense the analysis of injury to domestic industry carried out by the IA and subsequently justified the imposition of the definitive measures in the Final Determination now challenged was misleading, on the understanding that said examination of injury was made in relation to the domestic industry, as defined from the beginning and that the determination of injury to the domestic industry is the consequence of a sum of results of the various factors analyzed, therefore this Panel cannot be in position to evaluate the substance of its arguments nor can it dismiss the determination on the analysis of injury since the Complainants supports such analysis in wrong premises, nor does LARROC and OPERADORA indicated how is that Article 80, Section II of the RLCE was violated and how is it that sections II and IV of article 51 of the LFPCA were updated, and regarding CENTRAL DETALLISTA how is it that articles 41 of the LCE and 64 of the RLCE were violated, in the understanding that CENTRAL DETALLISTA did not establish which of the sections of article 51 of the LFPCA were updated, therefore, the Panel cannot analyze *ex officio* the presence of such causes.

302. Likewise, it is applicable herein by analogy, the thesis of jurisprudence, whose item is **"INEFFECTIVE (INOPERATIVE) GRIEVANCES. THEY ARE THOSE WHO ARE SUPPORTED IN FALSE PREMISES"** and that was transcribed in point 253 of this Final Decision.

303. 3.2.5 Conclusion

304. For all of the foregoing, this Panel considers that the arguments submitted by LARROC and OPERADORA and CENTRAL DETALLISTA in this section are ineffective, for being assertions without support, in addition that they are based on wrong premises.

305. 3.3 The Investigating Authority erred in the Final Resolution by not carrying out the analysis of injury to the domestic industry in accordance with the provisions of articles 40 and 50 of the LCE; 60, 61, 62 and 63 of the RLCE; 4.1 and 5.4 of the ADA.

306. Allegations concerning the definition of the domestic industry, the determination of the exclusion of PILGRIM'S PRIDE MEXICO and TYSON MEXICO of the domestic industry and the merchandise similar to that investigated

were addressed by the Panel in *points 3, 3.1, 3.2 and 3.3 of section XII. PANEL DECISION REGARDING THE DEFINITION OF THE DOMESTIC INDUSTRY, supra.*

307. In relation to the exclusion of PILGRIM'S PRIDE MEXICO and TYSON MEXICO and the injury analysis, one of the arguments raised by TYSON and TYSON MEXICO in their Brief is that by excluding the IA, PILGRIM'S PRIDE MEXICO and TYSON MEXICO from the domestic chicken leg and thigh domestic industry, as a result, the IA performed the analysis of injury to the domestic industry, without considering the information of these companies as part of the domestic industry, although these companies accounted during the investigation period for 55% of the total domestic production of chicken leg and thigh (points 476 to 486 of the FD).

308. According to TYSON and TYSON MEXICO, the IA had to carry out the analysis of injury to the domestic industry from a different perspective and In compliance with the provisions of articles 4.1 and 5.4 of the ADA; 40 and 50 of the LCE and 60 and 63 of the ADA, ie TYSON points out that the provisions of article 40 of the LCE is clear in the sense of imposing a burden of proof to the Investigating Authority on the analysis of the existence of injury, this means that such analysis must be carried out considering the "total domestic producers" whose collective production constitutes a significant proportion of the total domestic production. This situation can be appreciated in the same way in Article 63 of the RLCE.

309. TYSON and TYSON MEXICO state that from the integral interpretation of articles 40 of the LCE and 63 of its Regulation, it is possible to conclude the following:

a) In order to arrive at a positive determination of injury to the domestic industry, it is a *sine qua non* requirement to analyze the impact of the investigated imports on the total domestic production.

b) If it is not possible to have the total domestic production, then such an analysis should relate to domestic producers whose joint production constitutes the major part of the total domestic production.

c) For this purpose, the SE must gather the necessary information from the non-applicant national producers and the latter must submit to the SE the information requested to them.

310. TYSON and TYSON MEXICO point out that the incorrect determination of the IA, from which its confusion derives, consisted in the fact of performing the injury analysis of the domestic industry by considering only 41% of the total domestic production not the main part of the total domestic production, without that percentage representing neither the total domestic production nor the main part of the total domestic production.

311. Likewise, the Complainants point out that the IA should have information of at least 51% of THE total domestic production and that this is impossible to meet if - as the IA did – if it is excluded 55% from the domestic industry represented by TYSON MEXICO and PILGRIM'S PRIDE MEXICO, and therefore, by considering only 41% of the total domestic production, the IA violated the provisions of articles 40 of the LCE and 63 of its Regulation and, consequently, the results presented in the points 572 to 712 of the FD are incorrect.

312. In relation to all of the above, the IA pointed out that nowhere in TYSON's allegation does TYSON state what the *causa petendi* is, since TYSON only mentions that Articles 50 of the LCE, 60, 61 and 62 of the RLCE, 4.2 and 5.4 of ADA were breached, without specifying why they are applicable to the specific case, or why TYSON considers that they were violated, hence its allegation consists of mere statements without support, in addition that TYSON did not indicate also what is the alleged affectation to its legal interests. This, together with the fact that the Complainant does not explain which of the grounds of illegality of article 51 of the LFPCA is the one that was updated to its detriment, so also for this reason the grievance must be declared inoperative. Given that there is no such explanation, the Panel cannot analyze whether its claim would fall within any of the sections of article 51 of the LFPCA, since that would imply analyzing *ex officio* the presence of the grounds contained therein, for which the Panel has no authority.

313. In relation with the allegations of TYSON and TYSON MEXICO, the IA indicated that it defined as domestic industry the chicken leg and thigh domestic producers as described in points 476 to 486 of the FD. That is to say, the IA first identified those companies producing the product similar to the one investigated, as described in point 479 of the FD, and later, assessed the provisions of Article 4.1 of the ADA, regarding the link between producers and exporters or importers.

314. Derived from such assessment, the IA decided to exclude from the domestic industry the companies PILGRIM'S PRIDE MEXICO and TYSON MÉXICO because such companies are in the case mentioned in Article 4.1 of the ADA (related companies). By excluding these companies and two smaller ones (which did not credit production in TIF slaughterhouses) from the domestic industry, the IA recalculated the production participation (without those companies) and it turned out that the Petitioners composed 96% of the domestic industry.

315. The IA continues stating that having defined the domestic industry as a major proportion of the domestic industry, the IA proceeded to examine the impact of the dumped imports on the domestic chicken leg and thigh industry, taking into account that established in Article 3.4 of the ADA on proof of injury: "the examination of the impact of the dumped imports on the domestic industry concerned shall include an assessment of all relevant economic factors and indices having a bearing on the status of that domestic industry".

316. Likewise, the IA points out that footnote 9 of the ADA, in a clarifying manner, states that "[i]njury shall be understood, unless otherwise indicated, a material injury caused to the *domestic industry*, a threat of material injury caused to the *domestic industry* or a material retardation in the establishment of this industry, and that term shall be interpreted in accordance with the provisions of this Article. "

317. On the other hand, the IA points out that, along the same line, Article 4.1 of the ADA states that "[t]he expression" domestic industry "shall be understood as encompassing all domestic producers of the similar products, or those among them whose collective production constitutes a major proportion of the total national production of these products. However, subparagraph (i) of that article states that "where producers are related to exporters or importers or are themselves importers of the product subject to the alleged dumping, the term "domestic industry" may be interpreted in the sense to be referred to the rest of the producers". In that sense, article 40 of the LCE establishes parallel provisions to what is established by article 4.1 of the ADA.

318. In other words, in accordance with the provisions of the ADA, the IA should define the domestic industry, by which it may exclude domestic producers related to importers or exporters. Once that determination is made, the injury analysis will focus on the domestic industry, as noted in Articles 3.4 and 3.5 and footnote 9 of the ADA, the provisions of which are consistent with Article 4.1 (i) of that Agreement.

319. Based on the above, it is clear that the IA was not required to include PILGRIM'S PRIDE MEXICO and TYSON MEXICO in the assessment of injury because they were excluded from the domestic leg and thigh industry, regardless of the interpretation that the Claimants Intend to give to what is established in Article 63 of the RLCE, because as explained, the determination of the existence of damage must fall on the domestic industry.

320. In view of the foregoing, it is particularly inappropriate for the Complainants to seek to construe Article 63 of the RLCE in a manner inconsistent with the provisions of the ADA and the LCE, in that it states that the injury analysis must relate to the totality of the domestic production in all cases, especially taking into account the principle of normative hierarchy existing between the RLCE on the one hand and the ADA and the LCE on the other.

321. Similarly, it follows that the IA acted in a manner consistent with Article 63 of the RLCE, which states: "[t]he Secretariat shall ensure that the corresponding injury determination is *representative* of the situation of the total domestic production", while it was credited that the SE defined the domestic industry in a manner consistent with the ADA and the LCE, and that the injury was effectively representative of the total domestic production, within the meaning of Article 63 of the RLCE.

322. Accordingly, the IA states that it is clear that the analysis of injury to domestic production was determined in a manner compatible with the ADA, as well as with the LCE and its RLCE and, therefore, the allegations of the Complainants to the effect that the IA violated these normative instruments with respect to the definition of the domestic industry and the analysis of injury are wrong, and therefore the IA requests the Panel to determine that the Complainants' allegations are inoperative and that none of the grounds of illegality provided for in Article 51 of the LFPCA have been updated.

323. 3.3.1 Analysis by the Panel

324. Regarding all the foregoing, this Panel considers that the analysis of injury to the domestic industry was made in a manner compatible with the ADA, as well as with the LCE and its RLCE, because the allegations of TYSON are wrong since Article 4.1 and Note 9 of the ADA are clear to allow the injury determination to be made by analyzing the total domestic producers or over a significant proportion of the total domestic industry, by which domestic producers linked to exporters or importers can be excluded, where in this case, the domestic industry will be composed by the rest of the producers. Therefore, the IA was not obliged to include PILGRIM'S PRIDE MEXICO and TYSON MEXICO in the assessment of the injury because they were excluded from the domestic chicken leg and thigh industry.

325. The Panel also concludes that the IA also acted in a manner consistent with Article 63 of the RLCE, since once the IA defined the domestic industry in a manner compatible with the ADA and the LCE, the IA make sure that the injury determination was in fact representative of the total domestic industry, therefore, the IA did not violate that set forth in articles 40 of the LCE and 60 and 63 of the RLCE.

326. This Panel has corroborated that in relation to articles 50 of the LCE; 61 and 62 of the RLCE and 4.2 and 5.4 of the ADA, TYSON and TYSON MÉXICO did not submit any arguments to support their claim that the IA violated the legal precepts cited, nor did TYSON establish which of the grounds of illegality provided for in Article 51 of the LFPCA was updated, so this Panel cannot analyze these causes *ex officio*.

327. 3.3.2 Conclusion

328. For all of the foregoing, this Panel considers that the arguments submitted by TYSON and TYSON MEXICO in this section are ineffective, for being assertions without support.

XIV. DECISION REGARDING THE ANALYSIS OF THE IA ON IMPORTS DESTINATED TO THE NORTHERN BORDERLINE AND TO THE BORDER REGION

329. 1. Introduction

330. USAPEEC requests Panel review of the IA's Antidumping Investigation and Final Determination with respect to the analysis on imports destined to the northern borderline and to the border region.

331. The Panel notes the following legal authorities cited by USAPEEC regarding the issues addressed in this section: Article 3.1 of the Antidumping Agreement, RLCE 64, and for purposes of the review before this Panel, the provisions on section IV and Article 51 of the LFPCA.

332. 2. Issues for Review

333. Did the IA err by assuming a position in favor of the Petitioners while analyzing imports destined to the northern borderline and to the border region?

334. Did the IA err in its analysis of the information offered by USAPEEC by not pointing out that the referred region only comprehends 20 kilometers of the borderline?

335. 3. Law & Analysis

336. 3.1 Analysis of the imports destined to the Northern Borderline and to the Border Region

337. USAPEEC claims that the IA did not comply with that set forth in article 3.1 of the ADA and section I of article 64 of the RLCE, since the IA's analysis of the imports destined to the market of the northern states of the Mexican Republic was wrong and inconsistent. The IA analyzed all imports classified under C1 regime (border) to identify its destiny and concluded that imports during 2007 to 2009 lost participation in that region³⁸, however, that analysis is weak or adopts a favorable position in favor of the Petitioners by not indicating that such type of imports make reference only to imports that have as destiny a distance of 20 kilometers from the USA borderline.

338. USAPEEC claims that the IA assessed the evidence the exporters submitted on the destination by federal entity of the USA imports in a wrongful manner by only taking a Northern Borderline³⁹ of 20 kilometers, without extending it to the

³⁸ Point 557 of the Final Determination.

³⁹ Northern Borderline

The territory between the international dividing line of the north of the country to a distance of 20 kilometers to the interior of the country between the boundary of the partial region of the state of Sonora and the Gulf of Mexico and the border town of Cananea, Sonora.

whole Border Region⁴⁰. Therefore, the conclusions on the north border market lack of analytical congruency and the facts that served as basis for the final determination were not carried out, since the IA should have considered the States comprehending not only the northern borderline, but also the Border Region.

339. The IA in response establishes that USAPEEC does not describe in what way the IA incorrectly assessed the facts nor how the IA's conclusions have a negative impact in USAPEEC's legal position, reason why, USAPEEC does not comply with its minimum procedural burden, therefore, its claim of illegality under section IV of Article 51 of the LFPCA, needs to be declared ineffective, in fact, the IA made the analysis of the imports intended to the Northern Borderline and those imports destined to the north Border Region in a correct and impartial manner as set forth in points 554 and 557 of the FD, as follows:

"554. The Secretariat considers that it isn't possible to determine or generalize neither place of destination nor the import's regime only by the corporate name and importer's address. The Secretariat obtained of the importer's addresses of the investigated product through General Department of Foreign Trade of the Secretariat and noted that there are importers who were not located in the northern border states, but in non-border states like Sinaloa, Zacatecas, Durango and Queretaro. Two of the main importers identified by USAPEEC were located in non-border states. Sinaloa and Queretaro"

"557. The Secretariat obtained the list of manifests of SIC-M, which contain specific information on the imports that were destined to the borderline and the rest of the country. According to the General Rules on Foreign Trade, the operations are done under concept A1 correspond to final importation to stay in the country for unlimited time (not restricted to an area or region); and C1 final import to the **north borderline and border region**". The Secretariat identified the imports made under the concept A1 and C1 for the analyzed period with the following results:

- a. The imports in the borderline C1 lost participation in total imports during the analyzed period and the investigated period. They went from 69% in 2007, to 45%, 27%, and 21% in 2008, 2009, and 2010, respectively. In the period from October 2009 to September 2010 they were 21%.
- b. On the contrary, the imports that were destined to the rest of the country A1 increased its participation to a portion equivalent to 31% in 2007, 79% in 2010 and in the investigated period.
- c. The C1 imports fell 41%, while the A1 imports increased 409%, this explains the growth of its participation."

(Emphasys added)

340. The IA states that the argument of the Complainant that the IA analyzed in a wrong manner USAPEEC's submitted information on the import transactions destined to the north region of the country has no grounds, due to the following reasons:

⁴⁰ Border Region

The states of Baja California, Baja California Sur, Quintana Roo and the partial region of Sonora; the southern border with Guatemala and neighboring municipalities of Caborca, Sonora, Comitán, Chiapas, and Salina Cruz, Oaxaca.

- a) USAPEEC submitted a map, import volumes by state and names of the principal importers to prove the greater presence of the investigated imports in the North States.
- b) The IA requested the support documentation for such information. In response, USAPEEC only mentioned that the information was obtained from its members, but did not submit the requested support documentation.
- c) USAPEEC offered as evidence the import documentation list. The IA analyzed it and came to the conclusion that it could not come to a determination or generalize the destination or the import regime taking into consideration only the corporate name and the address.
- d) The IA obtained the importers addresses of the investigated product and observed that there are importers that are not located on the north border States, but instead were from non-border states such as Sinaloa, Zacatecas, Durango and Queretaro. Two of the major importers mentioned by USAPEEC were in non-border states: Sinaloa and Queretaro.
- e) What is described in the preceding paragraphs shows that the IA made efforts to obtain the best information, and the IA made an objective assessment based on objective evidence.
- f) There is no congruence between what USAPEEC asserts and the evidence on which the Complainant pretends to base its assertions.

341. 3.1.1 Conclusion

342. This Panel finds that the arguments of USAPEEC are ambiguous and superficial because USAPEEC did not indicate or concrete some reasoning capable of being analyzed, being applicable the following thesis of jurisprudence:

"ASSIGNMENT OF ERRORS OR GRIEVANCES. ARE INOPERATIVE WHEN THE ARGUMENTS FILED BY THE COMPLAINANT OR THE PETITIONER ARE AMBIGUOUS OR SUPERFICIAL. Acts of authority and judgments are vested with a presumption of validity that must be destroyed. Therefore, when the complainant or the appellant's argument is ambiguous and superficial, while it does not indicate or specify any reasoning capable of being analyzed, such a claim of invalidity is unattainable, inasmuch as it **fails to construct and propose the cause of petition, to the extent that it evades referring to the basis, reasons or arguments or the reason for its claim. Thus, such deficiency reveals a lack of relevance between what is intended and the reasons given, which are therefore not suitable and justified to conclude and complete the request.** Consequently, the arguments or causa petendi that are to be expressed in the grievances in the amparo suit or in the grievances of the review must invariably be aimed at disqualifying and demonstrating the illegality of the considerations on which the claimed act is based, because if not, the manifestations that are poured cannot be

analyzed by the collegiate body and should be described as inoperative, since it is before *non sequitur* arguments to obtain a declaration of invalidity.

(Emphasis added)

FOURTH COLLEGIATE COURT IN ADMINISTRATIVE MATTER OF THE FIRST CIRCUIT.

Amparo suit in review 43/2006. Juan Silva Rodríguez and others. February 22, 2006. Unanimity of votes. Speaker: Jean Claude Tron Petit. Secretary: Claudia Patricia Peraza Espinoza.

Direct Amparo suit 443/2005. Services Corporativos Cosmos, S.A. de C.V. March 1, 2006. Unanimous votes. Speaker: Jean Claude Tron Petiti. Secretary: Alfredo A. Martínez Jiménez.

Direct amparo suit 125/2006. Víctor Hugo Reyes Monterrubio. May 31, 2006. Unanimity of votes. Speaker: Jean Claude Tron Petiti. Secretary: Alfredo A. Martínez Jiménez.

Incident of suspension (review) 247/2006. María del Rosario Ortiz Becerra. June 29, 2006. Unanimity of votes. Speaker: Alfredo A. Martínez Jiménez, clerk of the court authorized by the Judicial Career Commission of the Federal Judicial Council to perform the functions of Magistrate. Secretary: Alma Flores Rodríguez.

Incident of suspension (review) 380/2006. General Legal and Government Directorate at the Tlalpan Delegation. October 11, 2006. Unanimous votes. Speaker: Jesús Antonio Nazar Sevilla. Secretary: Indira Martínez Fernández.

343. Indeed, USAPEEC does not point out in what sense the IA's analysis of imports is wrong, inconsistent or deficient, in addition to claiming that the IA assumes a position in favor of the Petitioners, only stating that the IA should have indicated that the analysis of imports classified under the C1 regime (the border) covers only 20 kilometers of the border, nor does it indicate in what sense the IA valued the information provided by USAPEEC incorrectly. USAPEEC only pronounce general assertions, without specifying and locating the evidence the IA says was exhibited and which the IA presumably assessed incorrectly. On the other hand, USAPEEC also does not indicate how the IA violated the provisions of Articles 3.1 of the ADA and Section I of Article 64 of the RLCE.

344. In light of the foregoing, this Panel cannot review allegations or means of defense that have not been submitted, since the Panel does not have the authority to fill the deficiencies that the parties may incur.

345. In view of all of the foregoing, this Panel considers that the arguments submitted by USAPEEC in this section are ineffective in that they constitute generic statements that do not indicate or specify the reasons that support them, in addition that USAPEEC's allegations are ambiguous and superficial.

XV. DECISION REGARDING THE ANALYSIS OF THE IA OF THE EXISTING DIFFERENCES IN PACKAGING AND PRESENTATION OF THE INVESTIGATED MERCHANDISE

346. 1. Introduction

347. USAPEEC requests Panel review of the IA's Antidumping Investigation and Final Determination since the Complainant asserts that the IA did not take into consideration the differences existing in the packaging and presentation of the investigated merchandise which results in a difference in the marketing channels.

348. The Panel notes the following legal authorities cited by USAPEEC regarding the issues addressed in this section: Article 3.1 of the Antidumping Agreement, RLCE 64, section I and for purposes of the review before this Panel, the provisions on section IV of Article 51 of the LFPCA.

349. 2. Issues for Review

350. Did the IA err by not analyzing the differences existing in the packaging and presentation of the investigated merchandise?

351. Did the IA err by not analyzing the effect of packaging in costs, prices and profits?

352. 3. Law & Analysis

353. 3.1 Analysis by the Panel

354. From the different arguments and evidence established in point 533 of the Final Determination, USAPEEC argued that, in addition to the regional differences of the imports destinations (north of the country) and the sales of the Mexican Producers, there are also significant differences in the distribution channels, because the imports for the north region are sold in poultries and on the other hand, the domestic product that can get to this north region is distributed in retail stores as it was concluded by the IA in point 548⁴¹ of the FD.

355. USAPEEC claims that the arguments and evidence submitted during the investigation show the existence of the different distribution channels, which is congruent with the undercutting margins that the IA determined in paragraph 604 of the FD.

⁴¹ "548. The Secretariat noted that the sample of sales invoices that the Petitioners provided in the preliminary stage was to prove that they sell in the border region. These sales do not exhaust their total operations, but also shows that this sample was not intended to demonstrate that its sales in the region represent a major proportion of their total sales. This information is only intended to show that domestic production concurs and competes in the aforementioned areas. The Secretariat notes that this information shows that domestic producers supply their product effectively along the border to different customers (mainly self-service stores or retail stores) and similar products in presentation and color to imported goods."

356. Despite this, the IA did not proceed to investigate the differences in packaging and product presentation that are made in the poultries compared to the retail stores in which the Petitioner's products are sold or analyzed the impact on costs, prices, and profits that reports each distribution channel.

357. USAPEEC claims that according to section I of Article 64 of the RLCE and Article 3.1 of ADA, one of the elements of the presence of material injury is the existence of competing merchandise because of the identity of consumers and the presence of distribution channels.

358. According to USAPEEC, nowhere in the FD can be observed that the IA reviewed the indicated elements. Reason why, the IA made wrong conclusions and therefore breached that set forth in articles 3.1 of the ADA and 64 of the LCE.

359. Regarding the foregoing, the IA states that USAPEEC does not explain how the existing differences in the packaging and product presentation of the investigated merchandise become in a difference in marketing channels different to the marketing channels of domestic like products. It also does not explain in what way the sale of the investigated product in retail stores and grocery stores has an impact on costs, prices, incomes and profits. USAPEEC does not describe in what way the IA supposedly did not take into consideration the previous aspects in contravention to Article 3.1 of ADA and 64, section I of the RLCE. USAPEEC states superficially the relation between its assertions and the conclusion it intends to come to, therefore, it needs to be concluded that USAPEEC's claim is ineffective.⁴²

360. On the other hand, the IA points that assuming *arguendo* that USAPEEC allegation legally proceeds, it is incorrect that paragraph f. of point 533 of the FD proves as USAPEEC states in its Brief, that such company had "asserted" during the investigation, that in addition of the regional difference in the destiny of imports (north of the country) and the sale of the Mexican products, there also exists significant differences in the distribution channels between the investigated imported merchandise and the like domestic product, due to the fact that the imports that were meant for the north region are sold mainly in poultry shops. On the contrary, as described in paragraph 630⁴³ of the Final Determination, the IA identified coincidences between the customers of domestic producers and the leading import companies and proved that, independently of the packing, the investigated merchandise and the national similar merchandise do compete and concur in the same market.

⁴² The IA cites in response to USAPEEC's claims a court precedent whose item is the following: "ASSIGNMENT OF ERRORS OR GRIEVANCES, ARE INOPERATIVE WHEN THE ARGUMENTS FILED BY THE COMPLAINANT OR THE PETITIONER ARE AMBIGUOUS OR SUPERFICIAL".

⁴³ **630.** According to the sales by clients report submitted by the producer companies, which compose the domestic production industry, and the sales by clients report of the main importers which represent 27% of the investigated imports in 2010. The Secretariat observed that the import product purchases of this companies increased 153% in the period 2007 to 2010. On the other hand, the purchases of domestic product decreased 31%. The domestic product participation on the purchases of these 31 clients went from 87% in 2007 to 64% in 2010, while the import product increased from 13 to 36% in the same period.

361. As for USAPEEC's claim on the arguments and evidence submitted during the course of the investigation, it shows the existence of the different distribution channels, which is congruent with the undervalued margins that the IA determined in paragraph 604 of the FD. Again, USAPEEC does not reasonably expose what this argument consists in and in what way there is congruency between what it claims and what is set forth in paragraph 604⁴⁴ of the FD; therefore this claim must be classified as ineffective (inoperative) and not to be analyzed by the Panel.

362. Contrary to what USAPEEC asserts, the IA did analyze the impact of the packaging in costs, prices, incomes and profits, clarifying: first, operation costs are made up of selling costs plus operation expenses; and secondly, the packaging costs are included in operation expenses.

363. The IA made an analysis of the operation costs (including packaging costs) in the costs, incomes and profits during the analyzed period in items 645 to 648 of the FD.

364. Moreover, it took into consideration the information that PILGRIM'S PRIDE submitted in its exposition at the public hearing⁴⁵, regarding an exercise on the cost methodology based on market value and profits per chicken carcass pieces. It shows that the participation of the packaging cost in relation to the chicken cost cut in pieces (0.0009 USD/pound, equal to 0.12% in relation to the chicken cost cut in pieces), which confirms that such cost is not representative in relation to the total cost of the chicken cut into pieces; therefore, it does not have a relevant impact on the operative profits of chicken leg and thigh.

365. On the other hand, regarding prices, the IA noticed that practically chicken leg and thigh imports coming from the United States (approximately 99% of the export companies' prices) were lower from the average price of the domestic production industry during the investigated period. Regardless if the import company was a grocery store, a trading company or other. This demonstrates that the import prices do not modify according to who does the importation. On the contrary, the price difference is due to dumping and not because of the import company, as USAPEEC assumes. Finally, the information that the IA analyzed shows that both the import product and the domestic product have the same distribution channels.

⁴⁴ "604. The addition of the freight cost does not modify the existence of a substantial margin of undercutting that also is growing. According to the information in the appearing importers file, the Secretariat calculated an average freight cost. Thus, what is described in the two previous points of this Resolution and the information on interment freight of the merchandise, the Secretariat compared the prices of the imports with those selling prices of domestic market at the plant. This information confirmed that the import price of chicken leg and thigh from the United States was lower than the average selling price of the domestic product in levels lower than 24% to 38% in the analyzed period. During the analyzed period, the undercutting margin was of 37%. The Secretariat also obtained purchase price of domestic chicken leg and thighs and of the United States from companies that were members of the Asociación Nacional de Tiendas de Autoservicio y Departamentales, A.C. this information also confirmed the existence of undercutting margins in this case from 8 to 50%."

⁴⁵ The Public Hearing of the antidumping investigation on the chicken leg and thigh imports from the United States of America, May 15, 2012 in the First Participation of the Public Hearing AD Investigation against the imports of Chicken Leg and Thigh coming from the United States of America, page 10.

366. Due to all the above, the IA acted according to section I of Article 64 of RLCE, as well as Article 3.1 of ADA, on having concluded that the imported merchandise and the domestic merchandise concur in the same distribution channels and that the impact of packaging in costs, price, income and profit is insignificant.

367. Therefore, the IA considers that USAPEEC's claim stating that the impact of packaging costs were not taken into consideration in the marketing channels is not legally grounded.

368. 3.1.1 Conclusion.

369. This Panel notes that USAPEEC does not explain how the differences in the packaging and presentation of the merchandise investigated lead to a difference in marketing channels other than the marketing channels of similar domestic merchandise. Nor does it explain how the sale of the product under investigation in department stores and stores has an impact on costs, prices, revenues and profits. Lastly, USAPEEC also does not describe how the IA failed to consider the above aspects in violation of Articles 3.1 of the ADA and 64, section I of the RLCE and how the assumptions of section IV of article 51 of the LFPCA were updated.

370. In addition, USAPEEC does not indicate the arguments and evidence provided in the course of the investigation that demonstrate the existence of the different distribution channels.

371. In light of the foregoing, this Panel can not review allegations or means of defense that have not been presented, since it does not have the authority to fill the deficiencies that the parties may incur.

372. In view of all of the foregoing, this Panel considers that the arguments submitted by USAPEEC in this section are ineffective in that they constitute generic statements that do not indicate or specify the reasons that support them, in addition that such arguments are ambiguous and superficial⁴⁶.

XVI. ISSUES RELATING TO THE ESTABLISHMENT OF NORMAL VALUE

A. ALLOCATION OF COSTS AMONG CO-PRODUCTS

373. 1. Legal Framework

374. Article 2.1 of the WTO Antidumping Agreement defines the "normal value" of exported merchandise as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

⁴⁶ The IA cites in response to USAPEEC's claims a court precedent whose item is the following: "ASSIGNMENT OF ERRORS OR GRIEVANCES. ARE INOPERATIVE WHEN THE ARGUMENTS FILED BY THE COMPLAINANT OR THE PETITIONER ARE AMBIGUOUS OR SUPERFICIAL".

375. Article 2.2 of the same Agreement further provides, in its relevant part:

“When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation . . . of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison . . . with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.”

376. Article 2.2.1 of the same Agreement further provides that, in certain circumstances, domestic sales of the like product may be excluded from consideration in determining normal value, if they are made for less than the cost of production.

377. Thus, an investigating authority may disregard domestic sales of the like product and determine normal value based on a “constructed value” (the cost of production, plus administrative, selling and general costs and profit) rather than domestic prices if all such domestic sales are made for less than the cost of production, as defined in Article 2.2.1, or if a “particular market situation” in the exporting country otherwise prevents a “proper comparison” with export prices. Therefore, when the investigating authority is assessing whether some or all sales prices in the exporting country should be excluded from the calculation of normal value, and when establishing a “constructed value” when there are no available sales prices in the exporting country, the investigating authority must properly establish the cost of production.

378. Article 2.2.1.1 of the same Agreement further provides that, for purposes of Article 2.2,

“costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer.”

379. Therefore, when establishing the cost of production, if the records kept by the exporter or producer are in accordance with the exporting country’s GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration, the investigating authority shall “normally” use such records in establishing the cost of production. In any case, the investigating authority is required to “consider” the cost allocation methodologies historically used by the exporter or producer, although it may use a different cost allocation methodology if, after considering “all available evidence” including the allocation methodologies used historically by the exporter or producer, it determines an alternative methodology is appropriate.

380. 2. The Final Determination

381. The product under consideration in this case is the chicken leg and thigh. As explained by the IA at point 11, the main input "is used for the production of chicken leg and thigh is the finished or fattened chicken (live chicken)." In addition, in point 12, "Finalized Chickens are for traces of birds which are slaughtered and go through a process in which their main anatomical parts are obtained, including the leg and thigh. In general, the steps of process are download, sacrifice, evisceration, washing, cutting, storage and packaging."

382. Therefore, the IA found:

"**204.** In this research the chicken leg and thigh products correspond to the called sets of products or coproducts. Accounting texts define them as individual products, each with significant sales values, which are generated simultaneously from the same raw material and/or manufacturing process"

"**205.** In general, cost accounting texts indicate that to assign costs to co-products, must accumulate those costs incurred for the entire batch of products to the point of separation, and then distribute them between the units produced. ..."

383. Accordingly, many of the costs of producing chicken leg and thigh – including the costs of producing live chickens, bringing them to the processing facility, slaughtering them, up to the point of cutting them into the various parts, must be allocated among the various coproducts in order to determine the total cost of production of the specific coproducts, including the chicken leg and thigh.

384. The IA concluded "there is a special situation of the domestic market in the United States whenever consumers have a preference for white meat although the selling price has a higher premium in respect of the dark meat"⁴⁷ (point 196).

385. However, the IA clarified in point 220 of the Final Determination, the following:

"**220.** Although the presence of a private market situation prevents a proper comparison of prices and can opt for a reconstruction of the standard value or use export prices to a third country, the Secretariat determined convenient to analyze whether the sales made by the exporting Producers in the US market can be used for calculating the normal value."

386. In other words, notwithstanding the "particular market situation" it found to exist in the United States, the IA proceeded to determine whether the sales of the like product made in the United States were made in the ordinary course of trade and therefore useable for calculating normal value.

⁴⁷ Final Determination, point 196.

387. The IA found that, to establish the cost of production, it could not use an allocation methodology that assigned costs to coproducts based on their value in the U.S. market, precisely because of the particular market situation that it described in the following points of the Final Determination:

"**211.** A method of allocating joint costs incorporating market values to determine the specific product costs incorporates an element of circularity that when considering very low prices as those recorded in the United States due to the special market situation for the purposes of comparing prices and costs as provided in Article 2.2.1 of the Antidumping Agreement could result in that in general the prices shall cover the cost of production."

"**224.** Because the cost methodology of co-products that provided the exporting producers depends on the price at which they sell each and every time the price of each of the co-products is affected by a particular market situation in the United States, then, in this particular context, it is not possible to use co-product costs based on a methodology of value. "

"**225.** Under the above, the Secretariat determined that the calculation of cost of production based on market values does not reasonably reflect the costs associated with the production and sale of the product, besides that, for the reasons stated above, contravenes legislation on unfair trade practices under the last paragraph of Article 46 of RLCE. "

388. Accordingly, the IA did not accept the cost allocations in the records of the producer exporters that were based on the sales values of the various coproducts, even when such cost allocations were in accordance with GAAP in the United States and had been used historically by those producer exporters, because the IA determined that they did not "reasonably reflect the costs associated with the production and sale of the product under consideration" within the meaning of Article 2.2.1.1 of the Antidumping Agreement. Instead, the IA employed an allocation methodology based on weight:

"**230.** In a situation as described, the Secretariat believes that the results obtained from a cost allocation value may be unrealistic. Under Article 2.2.1.1 of the Antidumping Agreement, the Secretariat determines that the value costing methodology, not reasonably reflect the costs associated with the production and sale of the product concerned. Consequently, the costs obtained for co-products based on a methodology by weight are suitable as reasonably reflect the costs associated with the production and sale of the product under consideration, in the presence of a special market situation in the country of origin."

(Emphasys added)

389. 3. Arguments of the Participants

390. A number of the Complainants, including CERVANTES, DELATO, PECO, PILGRIM'S PRIDE, SANDERSON, SIMMONS, TYSON, TYSON MEXICO and USAPEEC, complain that the IA acted inconsistently with Article 2.2.1.1 of the Antidumping Agreement and other relevant legal provisions in not relying on the cost allocation methodologies used by the producer exporters. Although their arguments differ in their details, all contend that these cost allocation

methodologies are consistent with GAAP in the United States and reasonably reflect the cost of production of the product under consideration, and that the IA was therefore obliged to rely upon them under Article 2.2.1.1 of the Antidumping Agreement.

391. The IA rejects all of the arguments of the Complainants, contending that even if the cost allocation methodologies of the producer exporters were consistent with U.S. GAAP and historically used by the producers, such methodologies do not reasonably reflect the cost of production of the product under consideration for the reasons stated in the Final Determination, and therefore were properly rejected.

392. 4. Assessment by the Panel

393. The Panel recalls the opinion of the Chapter 19 panel in *Certain Softwood Lumber Products from Canada (Final Determination of Sales at Less Than Fair Value)*, which also addressed the issue of the allocation of costs to coproducts in the context of an antidumping investigation. In that case, the panel stated:

“Any cost allocation method applied to joint products has an element of arbitrariness. In the end, what are of economic substance in joint products (in making production decisions) are total costs. So long as total production costs are recovered (through the sale of the various joint products) it is arguable whether a finding of below cost sales (for dumping purposes) is warranted.”⁴⁸

394. The Panel is aware that no cost allocation methodology will be perfectly appropriate in all circumstances. We also recall that our task is not to determine what, in our opinion, is the best cost allocation methodology for the circumstances of this case, and that the IA retains a certain amount of discretion in its choice of methodology. At the same time, there is a certain economic logic to the principle articulated by the *Softwood Lumber* panel, in that production decisions for coproducts generally are based on an assessment of whether the total sales value of all the coproducts outweighs the total cost of producing all the coproducts. Indeed, the participants appear to agree that a value-based cost methodology is in accordance with U.S. generally accepted accounting principles and is standard accounting practice in the poultry industry, both in the United States and in Mexico.

395. However, the Panel also considers that the IA has identified an important potential problem with any cost allocation methodology that is based on the sales value of the coproducts in the home market of the producers, which the IA refers to as the problem of “circularity.” In essence, if the total sales value of all the coproducts is greater than the total cost of production of all of the coproducts, then allocating the production costs to the individual coproducts by the sales values of each will invariably show that all of the coproducts were sold at above cost. By contrast, if the total sales value of all the coproducts is less than the total cost of

⁴⁸ *Certain Softwood Lumber Products from Canada (Final Determination of Sales at Less Than Fair Value)*, No. USA-CDA-2002-1904-02, July 17, 2003, at 49.

production, then a pure allocation by value would show that all of the coproducts were sold below cost. In our opinion, the IA was justified to be concerned that allocating costs by the sales value of coproducts cannot detect the situation in which some of the coproducts, but not all of them, are sold outside the ordinary course of trade in the home market under consideration.

396. It is more difficult, however, to follow the IA's conclusion in its finding that the mere fact that the different parts of the chicken have different values in the U.S. market, in itself, constitutes a "particular market condition" that could justify setting aside all U.S. sales price data in this case under Article 2.2.1 of the Agreement to proceed with the reconstruction of the normal value. That consumers have different preferences for various coproducts and therefore that different coproducts have different prices will almost always be the case; there is nothing unusual or "particular" about that fact. This is even more true when, as with chicken, the different coproducts have different physical characteristics that could justify differences in consumer preferences or market values. The mere fact that differences exist in consumer preferences and market values for the various coproducts is not a "particular market condition," but a very ordinary market condition. The Panel also finds it difficult to follow AI's reasoning about the impact of the alleged "particular market condition" on the value-based method of cost allocation. It seems rather that the problem of circularity identified by the IA around the value method would be presented independently of the prices at which the different co-products, high or low, since the factor "price" or "value" is placed on both sides of the equation - is an inherent characteristic of cost-allocation methods by value. However, this is not what the IA has established in the FD. On the contrary, it established that the particular market condition made the method by allocation of costs by value particularly inappropriate and merely issued general assertions such as that the results obtained from a cost-of-value allocation "may not be realistic" without giving the Panel or the Complainants in question sufficient supporting information to determine whether in this particular case are not realistic values and the reasons for it. In the absence of such grounds, the Panel cannot support the choice of the IA based on the "particular market condition".

397. In addition, one would expect that the relative market values of each of the coproducts would ordinarily reflect accurately the relative shares of the joint production costs that should be included in the cost of production of each of the coproducts. The greater the variation in the market values of the coproducts, the more important it would seem to be to allocate costs in accordance with those values. Therefore, the mere fact *"that... consumers [United States] have a preference for white meat although the selling price has a higher premium with respect to the dark meat"*⁴⁹ cannot, in our view, by itself justify setting side a value-based methodology for allocating costs, nor serve as a basis for rebuilding normal value on the basis of Article 2.2 of the ADA. In fact, in the Panel's view, the IA did not establish that there was a "particular market condition" under Article 2.2 of the ADA, nor did it explain why the situation in question (ie, in the United States there

⁴⁹ Final Determination, point 192.

is a strong preference for white meat) qualifies as such under the applicable legal provisions.

398. This being said, the Panel recognizes, however, that circumstances may exist in which an alternative cost allocation methodology, such as the allocation of costs by weight or yield, could be justified.

399. Therefore, pursuant to Section IV of Article 51 of the LFPCA, the Panel finds that the IA's conclusion in point 196 of the Final Determination that *"there is a special situation of the domestic market in the United States whenever consumers have a preference for white meat although the selling price has a higher premium in respect of the dark meat,"* together with its conclusion in point 210 of the Final Determination that *this special situation of the domestic market* "prevents a proper comparison of prices" for purposes of Article 2.2.1 of the Antidumping Agreement, cannot be upheld under article 51, section IV of the LFPCA.

400. Likewise, the IA's finding in paragraph 230 of the Final Determination that, due to this alleged particular market condition, *"the costs for co-products are obtained based on a methodology by weight they are suitable as reasonably reflect the costs associated with the production and sale of the product"* for purposes of both determining whether sales were made in the ordinary course of trade and for determining constructed value, cannot be upheld under Article 51, Section IV of the LFPCA.

B. CALCULATION OF THE NORMAL VALUE FOR TRADING COMPANIES

401. 1. Factual Background

402. Several of the exporting companies, including participants LARROC, CERVANTES, ROBINSON & HARRISON, DELATO and NORTHERN BEEF, are primarily or exclusively trading companies (*empresas comercializadoras*) rather than actual producers of the subject merchandise. To the extent that these trading companies purchased their product from unrelated suppliers, these companies did not have knowledge of, and therefore were unable to provide to the IA, the actual cost of production of their products.

403. In the Final Determination⁵⁰ the IA concluded that, in the absence of actual information about the cost of production of the subject merchandise sold by the trading companies, it was unable to calculate normal value for these companies. Therefore, the IA determined that it could not calculate an individual margin of dumping for these companies.

404. Several of the trading companies requested that the IA use other information on the record, such as the cost of production reported by actual producers, to supplement their own information and allow for the calculation of a company-

⁵⁰ Final Determination paras. 425-442.

specific normal value using a combination of company-specific data provided by the individual trading company and cost data from other producing companies. The IA refused these requests.

405. 2. Arguments of the Parties

406. Participants USAPEEC⁵¹, CERVANTES, DELATO, PECO and LARROC⁵² allege that the IA erred in declining to calculate a normal value for the trading companies. They claim that Article 6.8 of the Antidumping Agreement permits the IA to make determinations “on the basis of the facts available,” in cases where an interested party “refuses access to, or otherwise does not provide, necessary information.”

407. These Participants note that Annex II of that agreement, which provides further guidance to the application of Article 6.8, allows (in paragraph 7) the IA, in cases where a party “does not cooperate,” to impose a result “which is less favorable to the party than if the party did cooperate.” However, these Participants argue that they fully cooperated to the best of their ability, and that any failure to provide information about their suppliers’ cost of production was due to the fact that these Participants did not possess, and could not obtain, this information. Since no one should be obliged to do the impossible, these Participants argue that the IA should not have effectively penalized them for not providing information that was not in their possession.

408. Further, these Participants point out that Article 47 of the RLCE sets forth detailed rules for the calculation of individual, company-specific normal value in the case of trading companies. Therefore, they argue, the IA had an obligation to calculate company-specific normal values for each of the trading companies in this investigation, even if the IA had to rely on the “facts available” in order to do so.

409. The IA argues that the Participants’ claims are ineffective (*inoperative*) and must be dismissed by the Panel. Article 6.8 and Annex II of the Antidumping Agreement may permit the IA to use facts available, including adverse inferences, in particular situations, but they do not require the IA to do so. Likewise, Article 47 of the RLCE provides the methodology by which the IA will calculate normal value when all the necessary information has been provided, but it does not address the situation present here, in which some necessary information is not available. Because the complaining Participants cannot establish that the IA acted inconsistently with any legal provision, the IA reasons that the Panel has no authority to disturb the IA’s action on this question.

410. 3. Assessment by the Panel

⁵¹ USAPEEC Brief at 162-178.

⁵² LARROC Brief at 40-57.

411. We agree with the IA that nothing in the Antidumping Agreement or Article 47 of the RLCE required the IA to calculate a company-specific normal value for the trading companies using the “facts available.” Even though it may have been beyond the ability of the trading companies to obtain and provide the necessary information about their suppliers’ cost of production in order for the IA to calculate a normal value for them, it was reasonable for the IA not to rely on other information about the costs of production to estimate the missing data. For example, the cost of production of other producers who did provide the necessary information to the IA may not have been representative of the trading companies’ suppliers, and would in any case be confidential to those producers.

412. Further, we do not consider that, by declining to calculate a normal value for the trading companies, the IA was making an adverse inference based on a supposed refusal of the trading companies to cooperate with the IA’s investigation. The IA did not calculate a normal value based on an adverse inference, but did not calculate a normal value at all. The IA merely observed that the legal provisions relied on by the complaining Participants do not require the IA to take any particular action when the record is incomplete. When the IA pointed out that the record is, in fact, incomplete with respect to the cost of production of the trading companies’ suppliers, it was merely stating a fact. We do not believe the IA was making a finding that the trading companies had failed to cooperate to the best of their ability, nor that the IA was making an adverse inference based on any such finding. Therefore, we do not believe that paragraph 7 of Annex II of the Antidumping Agreement applies in this matter.

413. The Panel therefore find that the Participants have failed to demonstrate that the IA acted inconsistently with any legal provision in its treatment of normal value for the trading companies, and dismisses their complaints on this point.

C. ALLEGED DOUBLE COUNTING OF PACKING COSTS FOR TYSON

414. 1. Arguments of the Participants

415. Participant TYSON alleges that the IA erred in calculating constructed value for TYSON, in that it included packing costs (*los gastos de empaque*) twice. According to Tyson Foods, Inc., it explained to the IA during the investigation that it reported packing costs in the cost of production, but the IA calculated constructed value as the cost of production, plus general and administrative costs, plus packing costs. This resulted in an incorrect calculation of constructed value. For Tyson Foods, Inc., this incorrect calculation is inconsistent with Article 2.4 of the Antidumping Agreement, Article 36 of the LCE, and Articles 53 and 54 of the RLCE.⁵³

416. The IA asserts that TYSON failed to explain why the alleged double counting of packing costs is inconsistent with any of the legal provisions cited or how any

⁵³ Brief of Tyson Foods, Inc. at 30-31.

such violation would be cognizable by the Panel under any particular provision of Article 51 of the LFPCA.⁵⁴ Further, the IA states that it expressly recognized that packing costs were included in the cost of production in paragraph 284 of the Final Determination, and therefore recalculated constructed value to ensure that no double counting occurred.⁵⁵ The IA asserts that the correct, final calculation was communicated to the representatives of Tyson Foods, Inc. in a *Technical Information Meeting held on August 17, 2012*.⁵⁶

417. In its reply brief, TYSON rebutted generally the IA's claims that the complaints of TYSON were insufficiently developed in its first brief. However, Tyson Foods, Inc. did not respond to the IA's assertion that the IA had removed any double counting of packing costs in the Final Determination.

418. 2. Assessment by the Panel

419. Although the legal argument contained in the brief of TYSON with respect to the issue of the alleged double counting of packing costs is indeed rather sparse, it is nonetheless clear to the Panel that if the IA had double-counted any element of the cost of production and sale of the subject merchandise, including packing costs, this would amount to a misapprehension of the relevant facts by the IA that could justify reversal by the Panel.

420. It seems clear that, at an early stage of the antidumping investigation, the IA did not fully appreciate that the cost of production reported by TYSON already included packing costs and that packing costs should not be added again in order to arrive at a constructed value for TYSON. However, the IA points to evidence that, by the time of the Final Determination, any double counting had been corrected, and therefore there is no longer any incorrect calculation that needs to be corrected. TYSON had an opportunity to point to contrary evidence on the record in its reply brief, but failed to do so. Therefore, the Panel considers that TYSON has not established that the IA in fact double counted packing costs in the Final Determination, and accordingly we dismiss its complaint in this regard.

XVII. SELECTION OF 2007 PRICES TO CALCULATE A LESSER DUTY UNDER THE MARGIN OF 25.7%

421. 1. Introduction

422. SANDERSON requests that the Panel review the Final Determination of the Antidumping Investigation, in order to determine if the AI properly reasoned or not its selection of prices of 2007 and if such Authority establishes where such prices were obtained, for the calculation of the residual duty of 25.7%.

⁵⁴ IA Brief paras. 1123-1133.

⁵⁵ IA Brief paras. 1134-1137.

⁵⁶ IA Brief para. 1136 n. 232.

423. The Panel notes that in this section, the Complainant cites for purposes of review by this Panel, the provisions of Article 51 of the LFPCA and Article 38, section IV of the CFF, as complementary provision.

424. 2. Issues to Review

425. Did the IA erre to motivate its selection of 2007 prices and if the IA indicated where those prices were obtained for the calculation of the residual duty of 25.7%?

426. 3. Law and Analysis

427. 3.3. Decision whether the IA reasoned or not its selection of 2007 prices and whether the IA pointed where such prices were obtained in order to calculate a lesser duty under the margin of 25.7%

428. SANDERSON argues that the Final Determination that is reviewed is illegal because it breaches Article 38, section IV of the CFF, applicable as complementary, since the IA did not reasoned the selection of domestic imports and prices of 2007 to make its determination of the residual duty, besides the IA did not explain where such domestic imports and prices were obtained, and being this a discretionary power, the IA necessarily have to give sufficient reasoning.

429. SANDERSON notes that according to paragraph 707 of the Final Determination, the IA determined to assess the relevance of a lesser duty than the alleged dumping margins found for the purpose of seeking the correction of distortions caused by unfair practice, in order not to impose excessively higher countervailing duties that could negatively impact the consumer, and that for this purpose, the IA determined to use as reference the import prices observed in 2007, arguing that during such year imports were subject to a quota and to a tariff (safeguard measure), which constitute elements for the establishment of prices in no harmful conditions for domestic production. The above, is not in itself an adequate reasoning for the specific selection of that year, since the safeguard measure was applied from 2004 to 2007.

430. Given the above statements, the IA notes that the Complainant does not explain how Article 51 of the LFPCA and section IV of article 38 of the CFF was breached, since SANDERSON only limited to point out certain actions of the IA and does not provide explanation as to why the Complainant considers that the performance of such acts of the IA breaches such provisions and how is that such actions causes SANDERSON an affectation in its legal interests, so the Complainant's argument should be declared inoperative.

431. The IA in its Brief, *ad cautelam*, answered in the following terms:

432. With regards to the merits of the case, the IA asserts that Article 9.1 of the ADA is the basis for its decision (and of the methodology used to) apply a residual duty, as set forth in point 708 of the FD.

433. With regard to the reasoning, the IA reasoned its decision and the methodology used to apply a residual duty in point 709 of the FD.

434. On the other hand, the IA notes that the Complainant argues incorrectly that the fact that in 2007 imports were subject to a quota and a tariff, is not in itself an adequate reason for the specific selection of that year, since the safeguard measure was applied from 2004 to 2007, and therefore any of the prices observed in such years – different from 2007- could be taken as reference.

435. In this regard, the IA states, first that, as is apparent from points 699 to 711 of the FD, the IA explained the logical-legal arguments as well as the elements that allowed the IA to determine the lower duty of price discrimination margin of 25.7%.

436. Therefore, the IA notes that it is inadmissible the allegation of the Complainant about the lack of reasoning to consider the year 2007 in the methodology for estimating the lower margin of dumping countervailing duty, in accordance with the following:

a. It is not illegal to have considered 2007 to estimate the lower margin of dumping countervailing duty, as the legislation does not prescribe any methodology for calculating an amount of lower duty to the dumping margin, as provided for in Article 9.1 the AAD.

b. 2007 is part of the analyzed period as described in paragraph 579 of the FD. That is, the information and evidence provided by the parties and that led the IA to determine the existence of an unfair practice also includes the year 2007. From the above, it appears that the selection of the prices for 2007 is properly reasoned, being such year within the analyzed period for which the IA had obtained information for such estimate. Thus, selecting 2007 for estimating a countervailing duty lower than the dumping margin in no way is considered arbitrary, as stated by the Complainant.

437. Moreover, the IA stated that is incorrect the allegation of the Complainant that the IA erred by failing to explain the source of both domestic prices and imports in which the IA relied to make its comparison prices for purposes of determining the countervailing duty of 25.7%. In this regard, reading points 584 and 585 of the FD is observed that the IA obtained import prices from the import lists of GESCOM.

"**584.** It is important to clarify that the inclusion of 2007 as part of the analyzed period does not breach the law, since it is not mandatory that the analysis is limited to information of 3 years. In addition, information concerning 2007 provides elements for analyzing the behavior of indicators; however, its exclusion does not change the result described."

"**585.** The Secretariat obtained the imports of chicken legs and thighs that entered from tariff items 0207.13.03 and 0207.14.04 of the GESCOM list of imports. Total imports show positive growth throughout the analyzed period, which is explained by

the behavior of US imports under investigation since they accounted for more than 99% in that period."

(Emphasys added)

438. Subsequently, in paragraphs 594 to 598 of the FD indicated in detail the assessment of the behavior of imports of chicken legs and thighs:

"**594.** According to point 585 of this Determination, the Secretariat obtained the prices of imports of chicken legs and thighs that entered from tariff items 0207.13.03 and 0207.14.04. According to the information provided by the appearing companies, the Secretariat identified eight importing companies related to exporters of the products under investigation. "

"**595.** Importing companies involved said their relationship has no effect on their purchase prices and do not have any agreement about their purchase prices. Exporters said their sales to Mexico were made at prices similar to its related and unrelated customers."

"**596.** For purposes of price analysis, the Secretariat considered the implied figures of the list of imports, in virtue that the prices of the related companies showed no defined pattern in favor of a related customer. "

"**597.** The average price of imports from countries other than the United States (Chile and Canada) increased 4% from 2007 to 2009, with a fall of 14 and 16% in 2010 and in the period of October 2009 to September 2010, however, volumes were insignificant."

"**598.** The average price of US imports decreased 17% in the analyzed period. In 2008 the average price increased 6%, while in 2009, 2010 and the period of October 2009 to September 2010 decreased 15, 8 and 10%, respectively."

(Emphasys added)

439. With respect to domestic prices, as is established in points 599 to 601, 604 to 607, such prices were obtained from the information provided by the Petitioners, so that the allegation of the Complainant that the IA did not describe the source from which the information on domestic prices was obtained, is not legally grounded.

440. In relation to all of the above, this Panel agrees with the IA that Article 9.1 of the ADA in effect does not establish any requirement to carry out a particular methodology to establish a lesser duty margin, with the limitation of course that for purposes of the Mexican legislation, any determination must be duly legally grounded and reasoned. The parties agree (as the Complainant concedes) that the legal grounding of the IA is not the matter in question, but only its reasoning, and in this item the Panel considers that the reasoning of the IA in the selection of prices of the year 2007, in order to find the percentage in which import prices were to increase in 2010, was logical and reasonably sufficient, taking one year within the analysis period (2007) where it could be observed, in the market behavior, in a circumstance in which the merchandise under investigation was subject to a

commercial barrier (even if of different nature) to find the corresponding price differential.

441. Further still, the legal grounding is found in Article 9.1 of the ADA and Article 62 of the LCE (point 708 of the RF) and the reasoning in paragraph 709 of the FD transcribed below:

"**708.** It is in this context that the recommendation of WTO members under Article 9.1 of the Anti-dumping Agreement that "it [i]s desirable that the imposition of the [anti-dumping] duty be permissive in the territory of all members and that the duty is lower than the margin if such lesser duty would be adequate to eliminate the injury to the domestic industry, principle that was inserted in the second paragraph of Article 62 of the LCE. "Countervailing duties may be lower than the margin of price discrimination or amount of the subsidy provided are sufficient even to discourage imports of goods under unfair international trade practices."

"**709.** To this end, the Secretariat proceeded to identify which reference of relative prices could be considered allowable for the operation and competence of the domestic industry. It was noted that in 2007, when still existed safeguard measures, import prices (with the use ad valorem for the safeguarding, DTA and customs expenses included) were 28% below the domestic prices. Such year was considered relevant due to the existence of the quota and the ad valorem duty as evidence to establish the behavior of prices in conditions not detrimental to national production. Also, in order to isolate the effects of price erosion and containment, the levels of domestic prices observed in that year (2007) were considered. Under these conditions, the percentage by which import prices in 2010 should be increased to restore the price differential mentioned and the observed relative prices to restore conditions to support the national industry should be 25.7%. Therefore, it is considered appropriate to apply an antidumping duty lower than the dumping Price margins calculated on that amount."

442. On the other hand, the decision of the IA for using 2007 prices and not those prices of 2004 to 2006, years where a safeguard measure on imports of chicken legs and thighs of the United States was established, it was precisely because 2007 is part of the analyzed period, as indicated in paragraph 579 of the FD, additioned to the fact that the information and evidence provided by the parties that led the IA to determine the existence of an unfair practice also includes 2007.

443. Finally, the Panel notices that in paragraphs 585, 594 and 596 of the FD, the IA established where the 2007 prices were obtained.

444. Now, as to whether the IA acted in accordance with the applicable law when determining the dumping margin of 25.7% to SANDERSON, the analysis is performed in another section of this Final Decision.⁵⁷

445. 4. Conclusion

446. Under the foregoing, this Panel considers that the arguments raised by SANDERSON in the sense that the IA did not reasoned the selection of national

⁵⁷ See section XVIII, B. ISSUES RELATED TO THE CLAIMS FILED BY SANDERSON. 4. THE IA ACTED IN ACCORDANCE WITH THE APPLICABLE LAW IN DETERMINING THE MARGIN OF DUMPING AT 25.7%, *infra*.

import prices for the year 2007 in order to carry out its determination of the lower margin duty and that the IA did not explain where it obtained the national and import prices on which it was based for such determination are unfounded and therefore section IV of article 38 of the CFF⁵⁸ nor any of the grounds set forth in Article 51 of the LFPCA were breached.

XVIII. DECISION ON THE DETERMINATION OF INDIVIDUAL AND RESIDUAL COUNTERVAILING DUTIES BY THE INVESTIGATING AUTHORITY

A. ISSUES RELATING TO THE CLAIMS EXPRESSED BY CERVANTES; DELATO AND JUAN MANUEL DE LA TORRE; PECO AND USAPEEC.

447. 1 THE IA ACTED PROPERLY IN DETERMINING THE RESIDUAL RATE FOR EXPORTERS

448. 1.1 Allegations

449. The Complainants argue that the IA violated Articles 6.8 and Annex II of the ADA; 57 and 64 of the LCE; and 47 and 79 of RLCE, by establishing a residual duty to traders due to the lack of cooperation in the investigation, and that this implies that the grounds of illegality under Article 51, section IV of the LFPCA is updated.

450. In particular, the claim of the Complainants is based on the following statements:

- A. Paragraph 7 of Annex II of the ADA does not allow the IA to adopt the less favorable outcome for the sole reason that an interested party does not provide the information requested, if in fact it has demonstrated its cooperation.
- B. The IA determination to dismiss the information of the exporters and take into account that provided by the Petitioners (even giving preference from the one provided by the producers/exporters), was the reason for the less favorable results for the exporters, which is contrary to the ADA.
- C. The IA gave the same treatment to companies that contributed to the extent possible (companies mentioned in point 443 of the FD) and those companies that decided not to submit any information on the procedure (referred to in point 99 of the FD). Therefore, the analysis of the IA is contradictory because if it decided to classify the "cooperation" in varying degrees, it is inexplicable to give the same treatment to non-cooperating in any way than those companies responding to the form and requirements of information.

⁵⁸ "Article 38.- The administrative acts that must be notified must have, at least, the following requirements: (...) IV. Be legally grounded, motivated and express the resolution, object or purpose in question. ... "

- D. In addition, the IA resolved for the company PILGRIM'S PRIDE to apply a margin of 127.5% which is the one calculated for companies that did not appear in the investigation. However, the IA decided in paragraph 710 of the FD to apply a duty lower than the margin.

451. For its part, the IA responds to the claims of the Complainants arguing that:

- A. The Complainants do not point in their arguments the cause of action nor injury that the challenged determinations is causing. Similarly, nowhere explain why the performance of the IA involves an alleged violation of Articles 6.8 and Annex II of the ADA; 57 and 64 of the LCE; and 47 and 79 of RLCE, nor explain why these violations, assuming *arguendo* that exist, make the grounds provided for in Article 51, section IV of the LFPCA.
- B. During the investigation, the Complainants showed no element that would allow the IA to assess the degree of difficulty that represented for them to gather the required information. Based on a simple statement and without having proved why they could not submit the information required, even when it was information that should have been presented as it was information related to its own normal value, the IA simply could not have considered that the Complainants had acted to the best extent possible.
- C. To determine the dumping margin of the exporters, the IA used as basis the dumping margin calculated to TYSON, a producer/exporter company. Therefore, since the determination of the IA does not correspond to what the Complainants note, their argument is irrelevant, because it is not clear what is the damage caused when the IA did not adopt the information that the Complainants argued that it was the right one.
- D. It is false that the IA granted an incongruous treatment to exporters since as stated in paragraph 99 of the FD, it is incorrect that the companies have not submitted any information.
- E. Regarding PILGRIM'S PRIDE, the Complainants nowhere indicate what was the damage caused. Therefore, the minimum requirements are not met for there to be a legal argument and, consequently, that statement is irrelevant. In addition, since the statement is not clear, the complainants' claim is ambiguous and superficial, which is consequently ineffective.

452. 1.2 Analysis by the Panel

453. Considering that stated by the Parties, the Panel will proceed to examine the allegations of the Complainants as to the determination of the IA to establish a residual dumping duty to exporters for allegedly not having cooperated in the investigation.

454. Article 6.8 and Annex II of the ADA provides that in cases where an interested party does not provide, within a reasonable period of time, the information necessary for the investigation, the IA may make definitive, positive or negative determinations on the basis of the facts it acknowledges.

455. In *US-Hot-Rolled Steel* (DS184), the US authorities had used "adverse" facts to calculate the dumping margins of an exporter who had not cooperated by failing to provide certain information requested. The Appellate Body confirmed the Panel's finding, resolved in the sense that cooperation is a process "in itself and is not determinative of the outcome of cooperation."⁵⁹

456. In addition, the Appellate Body in *US-Hot-Rolled Steel* (DS184), when analyzing the concept of cooperation under paragraph 7 of Annex II of the ADA, noted that this provision does not indicate the degree of cooperation expected from interested parties to avoid the possibility of investigating authorities to resort to a "less favorable" result.⁶⁰ The Appellate Body considered that, on the basis of the wording of paragraph 5 of Annex II, the degree of cooperation required is to cooperate in "the extent of its possibilities". The Appellate Body also based its reasoning on paragraph 2 of Annex II which highlights the principle of good faith which requires a balance by the investigating authorities between the effort that may be required to the interested parties to respond to the requirements and the practical ability of the interested parties to fully comply with all demands made by the investigating authorities.⁶¹

457. However, according to paragraph 244 of the FD, the IA did not have the information to calculate a margin of price discrimination to Complainants because such exporters did not submit the calculation of constructed normal value using the cost calculated in accordance with prorated by weight, as required.

458. The Panel finds that the IA did not have enough information to calculate a margin of price discrimination to the Complainants and there are no elements in the Administrative Record that allow the Panel to conclude that the Complainants proceeded "to the best of their possibilities" to provide the requested information or to prove the difficulty of providing the same. In this regard, the Panel considers that the provisions of Annex II make it clear that the primary responsibility for presenting the corresponding information lies with the Complainants and even gives the IA the right to request such information in certain particular forms, subject to the provisions of the Annex itself. This obligation cannot be transferred to the IA. It is natural, therefore, that the consequence from the IA of not having the requested information or the information that would allow the IA to understand the difficulty of providing it, was the determination of "non-cooperation" by the IA

⁵⁹ Appellate Body Report, *US - Hot-Rolled Steel*, para. 99.

⁶⁰ (footnote original) Appellate Body Report, *United States — Import Prohibition of Certain Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 158; Appellate Body Report, *United States — Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.

⁶¹ Appellate Body Report, *US — Hot-Rolled steel*, paras. 100–101.

with respect to that Complainants, as well as the consequent issuance of a resolution "less favorable" for them.

459. In addition, as noted by the Appellate Body in *US-Hot-Rolled Steel* (DS184), Annex II of the ADA does not refer to a degree of cooperation expected by exporters so that it is not permissible that Complainants argue that the determination of the IA to assign the same residual countervailing duty for Complainants and for companies that decided not to submit any information on the procedure is contradictory by having to classify the "cooperation" in various degrees, thereby determining, a (lesser) specific duty to the Complainants than to those companies that did not submit any information.

460. As for the claim of the Complainants that the company Pilgrim's Pride was determined a lower rate of 25.7%, this Panel considers that such claim is ungrounded under Article 8, Section I of the LFPCA, which establishes:

"Article 8.- It is ungrounded the trial before the Court in the cases, and for the causes and against the following acts:

I. That they do not affect the legal interests of the plaintiff, except in cases of legitimacy expressly recognized by the laws governing the contested act. ... "

461. As explained in this decision, this Article is part of the Panel's review criteria. In this particular point, the claim of the Complainants is that the Panel should decide whether the determination of the IA, with respect to the duty established to the Complainants, is legally held by virtue of the duty assigned to PILGRIM'S PRIDE; that is, the Complainants seek a Panel's ruling on the legal status of PILGRIM'S PRIDE but have not established in any way how the determination of the IA with respect to PILGRIM'S PRIDE affects their legal interests. The Panel appreciates that the Complainants seek to contrast the decision of the IA that relied on PILGRIM'S PRIDE to differentiate it from the treatment received by the Complainants, but based on the provisions indicated above, this Panel concludes that this claim is not applicable because the affectation in the legal interests of the Complainants is not proven, and that the Panel therefore has no jurisdiction to settle a claim of a Complainant concerning the duty assigned to a third party. Having said this, the determination of a countervailing duty of 127.5% to the Complainants, denying them the benefit of the lesser duty will be analyzed in the following section.

462. 2. THE AI ACTED INCORRECTLY BY NOT APPLYING THE LESSER DUTY TO ALL COMPANIES

463. 2.1 Allegations

464. The Complainants assert that by not applying a lesser duty than the dumping margin to the exporters, the IA violated Article 9.1 of the ADA in relation to the amount of the measure, because if lesser duty calculated by the IA is 25.7%, then

that is the amount necessary to remove the injury and, therefore, to apply a higher fee is excessive and in violation of that provision as it would have a punitive purpose. The Complainants also argue that the IA violated Article 79 of the CFPC by not carrying out the relevant assessment of the evidence to determine the most favorable countervailing duty on its imports.

465. Meanwhile, the IA argues that, first, the Complainants in their allegations do not indicate the cause of action or the damage that the challenged determinations caused, for which the allegations are ungrounded. Furthermore, assuming *arguendo* that the statements of the Complainants have grounds, the IA argues that there is nothing in the text of Article 9.1 of the ADA which can serve to support the claims of the Complainants.

466. According to the IA, the premise of the Complainants, namely, that if a lesser countervailing duty found is sufficient to neutralize the injury, the IA is automatically bound by Article 9.1 of the ADA to apply it, so it could not set a quota higher than necessary to neutralize the injury, although it does not exceed the margin of dumping found. On this point, the IA states that Article 9.1 of the ADA provides as the only limitation for the IA in terms of the amount of the duty, that it cannot impose such duty at a higher level than the dumping margin that was found. Also, Article 9.1 of the ADA is quite clear in stating that the IA has the discretion to set the amount of anti-dumping duty at a lower level of the dumping margin found.

467. 2.2 Analysis of the Panel

468. Having analyzed the arguments presented by the Parties, the Panel will proceed to examine the allegations of the Complainants as to the determination of the IA to establish a lesser duty to some of the exporters.

469. Article 9.1 of the ADA is quite clear in stating that the IA has the discretion to set the amount of anti-dumping duty at a lower rate of the dumping margin found always and when this amount does not exceed the margin of dumping found.

"Article 9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry."

[Emphasis added]

470. The Appellate Body in *EC-Fasteners (China)* (DS397) while making a comparison on the interpretation of the provisions contained in paragraph 2 of Article 9 of the ADA noted that unlike paragraph 2 of Article 9, which contains a prescriptive rule, the second sentence of Article 9.1 expresses a "preference for

the duties to be lesser than the dumping margin, if such lesser duty would be adequate to remove the injury to the domestic industry. The Appellate Body concludes by saying that such preference in paragraph 1 of Article 9 is expressed by the use of the term 'it is desirable'.⁶²

471. Following this interpretation of the literal meaning of Article 9.1 of the AAD, the Panel considers that the IA in this dispute had the authority to set duties below the dumping margin. The obligation provided for in Article 9 of the AAD is that the IA, in any case, may not impose higher duties in amount to the dumping margin found during the investigation. The IA therefore determined that it was appropriate to calculate a lower margin duty using the "lesser duty" figure to minimize the impact on the consumer, since it is a product with a high impact on the consumer, and noted the following:

"The Secretariat considered it justified to seek that the correction of distortions due to unfair practices should not lead to the imposition of excessively high compensatory measures that could have a negative impact on the consumer and the rest of the food production chain. Therefore, it was determined to assess the relevance of a quota below the margins of dumping. "

472. The IA carried out the above on the basis of Article 62 of the LCE, and based on Annex II, paragraph 7 of the ADA, the IA decided to grant such a lesser duty only to those who appeared and provided sufficient information.

473. This Panel considers that Annex II does not provide the authority for the IA to use the provision relating to cooperation as a tool for distinguishing between cooperating and non-cooperating Complainants, nor as a means of punishing those who did not appear or did not provide sufficient information.

474. The last sentence of paragraph 7 of Annex II of the ADA provides as follows:

"In any event, it is evident that if an interested party does not cooperate and consequently no longer communicate to the authorities relevant information, this could lead to a result less favorable to that party than if it had cooperated."

475. Based on the reading made by this Panel, such a rule simply states that non-cooperation could have a negative impact - adverse consequences for the Complainant in question, as a logical consequence of not participating or cooperating. The use of the word "evident" reinforces the Panel's interpretation in the sense that this provision refers only to a causal relationship, that is, cause and effect, between not cooperating in a procedure and obtaining a less favorable outcome in the same. The WTO Appellate Body has even pointed out that "in Annex II, paragraph 7, the lack of 'cooperation' by an interested party may, by reason of the use of the facts available, lead to a "less favorable" outcome for that interested party than if it had cooperated."⁶³

⁶² Appellate Body Report, EC — Fasteners (China), para. 336.

⁶³ Report of the Appellate Body in the United States — Hot Rolled Steel Plate (DS 184), paragraph 99.

476. Article 9.1 of the ADA effectively grants the right of the Investigating Authority to establish a duty below the margin. However, this Panel considers that such attribution must be exercised by the Investigating Authority subject to the grounds and motivation requirements established in Mexican law. And in that sense, the Panel finds no basis in either the ADA or other Mexican legal provisions that allow the IA to set a lower duty than the margin when the criterion that serves as the basis for that decision of the authority (ie, limiting the effect on the consumer) has no relation to the legal situation in which Complainants who did not receive such benefit (ie, lack of cooperation in the procedure) are located. This Panel considers that this decision of the IA is not legally upheld and that a determination to the contrary would mean that the Investigating Authority could arbitrarily designate the exporters or traders who the IA chooses to benefit without even having to follow the same criteria that the IA has used for this purpose. This Panel, therefore, does not agree with the IA statements that, in this case, based on Annex II, it may set lower duties than the margin to certain preferred exporters.

477. To a greater extent, this Panel considers that the IA may distinguish in the application of a smaller duty if the reasons that led to the determination of said smaller duty are not applicable to the circumstances or specific case of any of the companies to which the IA determined a margin of price discrimination. However, in the specific case, the IA determined the lower duty according to paragraph 707 of the FD, in which "the IA considered justified to seek that the correction of distortions by the unfair practice does not lead to the imposition of excessively high countervailing measures could have a negative impact on the consumer and on the rest of the food chain." In this sense, the reason that led the IA to determine the lower duty is equally applicable to all companies because the product exported from all of them can generate the distortions that seeks to prevent the IA with the lower duty.

478. Based on the above, the determination by the IA not to grant the lower duty to the Complainants is incorrect.

B. ISSUES RELATING TO THE CLAIMS EXPRESSED BY SANDERSON

479. 3. THE IA ACTED IN ACCORDANCE WITH THE APPLICABLE LAW IN DETERMINING THE MARGIN OF DUMPING AT 25.7%

480. 3.1 Allegations

481. The Complainant claims that the IA decided to apply a duty of 25.7%, despite its dumping margin corresponded to *de minimis*, contrary to the provisions of Articles 5.8 and 9.1 of the ADA and Article 62 of the LCE. Moreover, the Complainant claims that the IA acted contrary to Article 2.2.1.1 of the ADA and 46 of RLCE by determining a margin of price discrimination of 85.61% for imports of the Complainant, by comparing the export price and constructed normal value using the cost allocation methodology based on weight.

482. For its part, the IA argues that the allegation of the Complainant is irrelevant because it does not indicate what the affectation or damage suffered is and it has not demonstrated that the IA based its findings on the information submitted by the Complainant. In regard to the latter, the IA alleges that the Complainant reached a false conclusion that the dumping margin that corresponded was of 1.4% based on false premises that has been not demonstrated: (i) that the applied methodology was the cost allocation by value; and (ii) that its domestic sales should have been considered when calculating normal value.

483.3.2 Analysis of the Panel

484. The allegations of the parties related to the methodology used by the IA to determine the normal value was analyzed by the Panel in the section **XV. ISSUES RELATED WITH THE ESTABLISHMENT OF THE NORMAL VALUE. A. ALLOCATION OF COSTS AMONG CO-PRODUCTS** of this decision. The Panel confirms that this decision is applicable to the Complainant's arguments as to those product codes for which the Complainant was assessed by the IA a duty on the basis of the normal value reconstruction pursuant to the FD, and that, therefore, said determination of the IA updates the assumption of Article 51, Section IV of the LFPCA.

C. ISSUES RELATED TO THE CLAIMS EXPRESSED BY NORTHERN BEEF AND ROBINSON & HARRISON

485. 4. THE IA ERR BY DETERMINING THE RESIDUAL DUTY FOR THE COMPLAINANTS

486. 4.1 ALLEGATIONS OF ROBINSON & HARRISON AND NORTHERN BEEF.

487. In accordance with what was stated in this Chapter XIX procedure by ROBINSON & HARRISON and NORTHERN BEEF (hereinafter, the Complainants), the following arguments of the Complainants are extracted, without intending to reproduce *verbatim* what was said in their Briefs, Public Hearing or Administrative Record:

1. According to Articles 2 of the ADA and 47 of the RLCE, trading companies are entitled to have the IA calculate an individual margin of price discrimination.
2. The Complainants submitted information on the export price and various options for the calculation of normal value, so that the IA had correct and complete information to calculate individual margins of price discrimination.
3. The IA failed to set out the reasons why the information submitted by NORTHERN BEEF and ROBINSON & HARRISON to demonstrate that the cost of production for the calculation of normal value corresponds to the

purchase price, determined in the ordinary course of trade, was not sufficient and was only mentioned in the FD in an enunciative manner.

4. The Secretariat erred in the FD when determining a residual countervailing duty of 127.52% for NORTHERN BEEF and ROBINSON & HARRISON exports in contravention of articles 59 and 64 of the LCE, 47 of the RLCE and 6.8 and Annex II of the ADA.

488. 4.2 The Investigating Authority

489. For purposes of analysis, the Panel summarizes the main arguments of the IA below, without intending to repeat verbatim, as has already been mentioned, what was said in its Brief, the Public Hearing or the Administrative Record:

1. The Complainants' argument does not comply with their minimal procedural burden, since they do not state the reason why they consider is applicable to the case or how the IA breached Article 51 of the LFPCA.
2. The Complainants have not complied with their minimal procedural burden in relation to their arguments under Article 51 of the LFPCA, 59 and 64 of the LCE, as well as 2, 6.8 and Annex II of the ADA, since they do not indicate what their affectation is or what is the *causa petendi*.
3. The IA determined the margin of price discrimination for Complainants on the basis of the facts it became aware of, because they didn't provide relevant information that its acquisition costs had been determined in the ordinary course of trade as requested by Article 47 of the RLCE.
4. The IA legally grounded and reasoned its decision to reject the information submitted by the Complainants on their normal value on paragraphs 429, 438, 439 and 441 of the FD, which show that the IA had no evidence to believe that, as is required by Article 47 of the RLCE, the Complainants' transaction costs would have been determined in the ordinary course of trade. Similarly, in paragraphs 425 to 443 of the FD, the IA justified its determination to reject the alternatives for the calculation of normal value proposed by the Complainants.
5. The Complainants do not comply with their minimal procedural burden with regard to their allegation that the IA improperly imposed the residual countervailing duty of 127.52% on their imports, so their argument is ineffective.
6. The Complainants did not present evidence demonstrating the degree of difficulty in obtaining the information that was required of them.

490. Based on the above arguments, this Panel proceeds to determine whether the IA erred in not calculating individual price discrimination margins for the Complainants in accordance with the relevant legal provisions.

491. 4.3. Analysis by the Panel

492. In accordance with paragraph 425 of the FD, at the preliminary stage, trading companies were requested, based on Article 47 of the RLCE, to demonstrate that the cost of production of each of the product codes they used for the calculation of normal value corresponds to the purchase price determined in the ordinary course of trade. In point 426 of the FD, the IA indicated that in order to comply with Article 47, it had to corroborate that the purchases made by the trading companies appearing did not imply losses for the supplier companies, that is, that the purchases were made at prices higher than the cost of production plus the general expenses of the supplier companies.

493. In accordance with point 427 of the FD, the Complainants did not submit information to support the conclusion that the transactions used for the calculation of normal value were in the ordinary course of trade, so the IA has not the sufficient information available to calculate a margin of individual price discrimination for the Complainants. Accordingly, in point 443 of the FD, the IA determined, based on articles 2.1, 6.8 and Annex II of the ADA, 30, 36, 54 and 64 of the LCE and 38, 39 and 47 of the RLCE, to establish the margin of discrimination of prices for the Complainants according to the facts that the IA acknowledged, thus imposing the margin of discrimination of prices calculated by the IA for TYSON of 127.5% with information submitted by this company.

494. In this regard, the Complainants stated that Article 2 of the ADA, and in particular Article 47 of the RLCE, establishes the right of traders to have the IA to calculate individual margins of price discrimination. Likewise, they stated that they were unable to present information that is not of their own, being the costs of production highly confidential information of each company and that is not shared with their customers. However, they consider that they submitted the information correctly, fully and in accordance with the required questionnaire, and also cooperated at all times with the IA by providing various options for the calculation of normal value, based on information reasonably available to them, in terms of article 54 of the LCE. They also noted that on the basis of the information and evidence provided in its response to the official export research form and its response to the additional information requirement of August 2011, the IA had sufficient information on export price and normal value, for the purpose of determining individual margins of price discrimination, which the IA did not do.

495. In this sense, the Complainants point out that the IA's request to the trading companies, in terms of Article 47 of the RLCE, to show that the cost of production of each of the product codes they used for the calculation of normal value, corresponds to the purchase price determined in the ordinary course of trade, in itself, gives rise to excessive use of investigatory powers of the IA, since it cannot

compel the parties to submit information that is not their own and that by their nature belongs to economic agents different from the appearing company. According to the Complainants, they stated, since their response to the August 2011 requirement, the material impossibility to access this information and they presented options available to them to demonstrate that the purchase price was determined in the ordinary course of trade.

496. In addition, the Complainants state that they presented the names and purchase volumes of the producers during the investigation period and stated that the costs of production of the merchandise investigated were integrated into the Administrative Record of the case, in the confidential responses of the appearing producers, so the information was indeed available for the IA to review. In this regard, they refer to the principle of acquisition of evidence, on the basis of which they argue that the IA should have used the information available in the Administrative Record within its reach, since that principle states that the evidentiary activity does not belong to the participant who does it, but is considered to be part of the process, so it must be taken into account to determine the existence or non-existence of the fact to which it refers, regardless of whether it benefits or damages the interests of the party that offered it. Therefore, in the specific case, the specific information on production costs of chicken leg and thigh submitted by the attending producers was of particular relevance. The Complainants argue that the omission and decision of the IA not to analyze the information submitted transcended the meaning of the determination and affected their legal interests. They indicate that the IA had to point out the reasons why none of the alternatives presented were viable or to explain the reasons why it was unable to access the cost information of the producers appearing in the investigation. They also stated that the IA had to explain the reasons why the information submitted by the Complainants to show that the cost of production for the calculation of normal value corresponds to the purchase price, determined in the ordinary course of trade, was not sufficient, since the IA only enlisted the above information in its Final Determination.

497. In view of the above, they request that the IA be instructed to determine, based on the information submitted and the information in the record, determine the cost of production of each of the product codes used for the calculation of normal value that corresponds to the purchase price determined in the ordinary course of trade and, therefore, calculate individual margins of price discrimination.

498. The IA pointed out that Articles 47 of the RLCE and 2 of the ADA do not impose an obligation on the IA to calculate individual margins of dumping, since these provisions only contain, respectively, guidelines for the calculation of the costs of production of trading companies and the rules to be applied for the calculation of dumping margin.

499. With respect to the foregoing, this Panel notices that Article 6.10 of the ADA generally establishes the obligation of the investigating authorities to calculate

individual price discrimination margins, both for exporters and for producers, in accordance with the following:

“6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated. [...]”

500. Article 64 of the LCE provides an obligation to the same effect for the IA, however, it refers only to foreign producing companies:

“Article 64. The Secretariat shall calculate individual margins of price discrimination or subsidies for those foreign producers that provide sufficient information for this; these individual margins will serve as a basis for the determination of specific countervailing duties. [...]”

501. Notwithstanding the foregoing, Article 47 of the RLCE establishes the criteria for determining the production costs of the trading companies, which are necessary for the calculation of the normal value of the product under investigation. Pursuant to Articles 2 of the ADA and 30 of the LCE, the normal value of the exported goods is used, together with the export price, to determine the margin of price discrimination. It would therefore be nonsense if Article 47 of the RLCE provided criteria for the calculation of the normal value for trading companies if those criteria were not intended to calculate the margin of price discrimination that correspond to them. Moreover, there is no valid reason why an authority can distinguish itself from its obligation to calculate individual margins of price discrimination between exporting producer companies and trading companies, since the subject of its investigation focuses on imports of the merchandise under investigation and does not have a direct relationship with respect to that obligation on the type of company that exports it or takes it to the domestic market. Thus, the Panel considers that the obligation to calculate individual margins of discrimination provided for in Article 6.10 of the ADA and 64 of the LCE is extended to the trading companies, so the IA was effectively obliged to determine such margins, if the IA had enough information for such purpose. This interpretation is consistent with the administrative practice of the IA, where it has, on several occasions, calculated individual margins of dumping for trading companies.⁶⁴

⁶⁴ See as example: Review of the Final Determination of the Antidumping Investigation on the Imports of Rolled Steel Plate coming from Canada, MEX-CDA-1996-1904-02, paragraphs 47 to 50 and Review of the Final Determination of the Antidumping Investigations on Imports of Bovine Carcasses and Half Carcasses, Fresh or Chilled, MEX-USA-00-1904-02, paragraphs 10.66 and 13.3.

502. However, In the present case, the parties allege in respect of the information submitted by the Complainants for the calculation of normal value, specifically, that they complied with Article 47 of the RLCE, which provides as follows:

"Article 47. **In the case of trading companies, the cost of acquisition will be taken as cost of production.** Under the terms of the first paragraph of Article 44 of these Regulations, **the cost of acquisition must be determined in the ordinary course of trade.** Such purchases will be considered as such by the trading companies that do not involve losses for the supplying companies, that is, purchases with higher prices than the cost of production, plus the general expenses of the supplier companies. The Secretariat shall verify the production costs and overheads of the supplier companies before making this comparison.

When the purchases of the trading companies generate representative profits to the supplier companies, the cost of production for the first companies will be calculated according to the cost of acquisition registered during the period of investigation. In the opposite case, the cost of production will be estimated by means of the reconstructed value determined by the Secretariat for the supplier companies. In order to calculate the overhead and the profit margin, the proportions derived at company level will be applied to the acquisition costs effectively observed.

When the trading company is located in a country other than the country of origin of the merchandise, the cost of production will be the one incurred in the country of the merchandise of origin, increased by all costs and expenses involved in moving and interning the merchandise from the country of origin to the country of procedence. In this case, the overhead and the profit will be those of the country of procedence."

(Emphasis added)

503. In this regard, the Complainants point out that, through a request for additional information the IA requested them to demonstrate, in terms of Article 47 of the RLCE, that the cost of production for each of the product codes used by the Complainants in the calculation of normal value, corresponded to the purchase price determined in the ordinary course of trade. The Complainants state that they provided all the information that was reasonably available to them in order for the IA to calculate an individual margin of price discrimination. As mentioned, regarding the production costs information of their suppliers, they indicated that this information is highly confidential and that the supplier companies do not share this information with their clients, making them unable to present information that is not of their own; therefore, they proposed the IA three alternatives of analysis to determine whether their acquisition costs occurred in the ordinary course of trade.

504. On the other hand, for the IA, it was precisely the failure to comply with the requirement of Article 47 of the RLCE to determine that acquisition costs were determined in the ordinary course of trade, which led to the determination of the margin of discrimination prices based on the facts it had knowledge of.

505. Based on the foregoing, the relevant issue for this Panel is whether the information submitted by the Complainants was sufficient to comply with the information request formulated by the IA, in other words, whether the Complainants demonstrated that the cost of production for each of the product

codes used in the calculation of normal value corresponds to the purchase price determined in the ordinary course of trade, as required by the IA.

506. First, this Panel notes that the Complainants indicate that the IA did not request them to provide the actual cost of production for each of their suppliers, but, in accordance with Article 47 of the RLCE, as traders, they had to demonstrate that their purchases were made with prices higher than the production costs plus overhead of their suppliers, that is, in the ordinary course of trade.

507. Specifically, the IA framed the following question:

"In terms of Article 47 of the RLCE, show that the cost of production for each of the product codes used in the calculation of normal value corresponds to the purchase price determined in the ordinary course of trade."

508. The Complainants stated that despite not having access to information from their suppliers, they provided sufficient information and evidence on export price and normal value that allowed the IA to determine individual margins of price discrimination. In this sense, the Complainants pointed out that the Administrative Record of the case contains the necessary information for the calculation of the individual margin of price discrimination of the trading companies and proposed the following alternatives of analysis:

- a) That the SE compare the Complainants' purchase prices with the costs of production plus the expenses of their suppliers in the period of investigation and who appeared in the proceeding;
- b) That the SE compare the Complainants' purchase prices with the production costs of the participating exporting companies which are representative in the United States of America market and which appeared in the proceeding, and
- c) That the SE compare the purchase prices of the Complainants with the costs in accordance with the model of linear regression of costs suggested by the Petitioners, with some modifications.

509. In addition, the Complainants note that although they were materially unable to access their suppliers' cost information, they did present the name and purchase volumes of chicken thigh and leg producers during the investigation period and noted that in the confidential responses of the producers appearing were the production costs of the products, which are part of the Administrative Record of the case.

510. Furthermore, in their response to the IA's brief, the Complainants stated that they submitted the information in a way that the IA could determine which company sold to the Complainants during the investigating period. Specifically,

they indicate that they presented in their Annexes Response - Question 14, 15 and 17 of the August 2011 requirement - examples of their sales databases in the United States of America and Mexico where it can be observed that they provided the selling relationship, including the name of their supplier for each sale. They also note that in addition to identifying the producer of each sale, NORTHERN BEEF presented the product codes, both of the producer and its own codes, in the sales database for each transaction. The Complainants noted that they also presented their acquisition costs on the basis of specific transactions. As a result, the Secretariat knew the identity of the producer and the purchase price of the specific transactions based on the responses to the official form. In addition, the Complainants indicate that they held a meeting with IA's staff to orally outline the content and scope of the databases. The Complainants note that after the request for additional information, the IA questioned them regarding the product codes, however, it did not request ROBINSON & HARRISON to add the producer product codes nor did it request any of the Complainants to provide the real production cost for each of their suppliers. They also state that what the IA requested them to demonstrate is that the cost of production for each of the product codes used in the normal value calculation corresponds to the purchase price determined in the ordinary course of trade, for which the Complainants presented the three alternatives of analysis. The Complainants note that the Administrative Record shows that the IA clearly had the product codes of its suppliers for each sale made during the investigation period, and therefore it may have linked the Complainants' databases to the databases of their suppliers' costs.

511. Finally, the Complainants point out that even if there had been some difficulty on part of the IA in determining which company sold the Complainants, what would have been legal would be to require clarification or additional information from the Complainants to achieve the intended objective, which did not happen. The Complainants refer to the final report of the WTO Appellate Body in US - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, in which it was noted that the authorities responsible for carrying out an investigation should actively seek relevant information, which implies the obligation not to remain passive before possible deficiencies in the evidence presented.

512. The Complainants state that, in view of the foregoing, the IA was silent because it failed to explain or motivate in detail the reasons why none of the alternatives they submitted were viable and did not indicate why it was unable to access the information costs of the producers appearing in the investigation.

513. For its part, the IA notes that points 425 and 427 of the Final Determination indicates that the Complainants did not submit information that could corroborate the transactions used to calculate their normal value were made in the ordinary course of trade, consequently sufficient information was not available to calculate individual price discrimination margins for these companies and the IA proceeded to calculate them in light of the facts available.

514. The IA also notes that the Complainants make a mistake in interpreting that presenting alternatives on how to fill the lack of information was equivalent to having submitted the information required by the IA. It points out that calculating the individual margin of price discrimination for the Complainants based on information not submitted by the companies is contrary to the spirit of Article 47 of the RLCE. The IA supports its argument by indicating that the term "verify", in that provision indicates the need for the Complainants to submit the information required for the purposes of calculating the individual price discrimination margin. The IA in points 438, 439 and 441 of the FD based and explained the reasons why it was not in a position to use the information contained in the Administrative Record, and also states that Article 6.8 of the ADA should not serve to supplement information that is not provided by the Parties and that, from the perspective of the Complainants, the IA should provide the information that an applicant cannot at a given moment be able to obtain because such information is not of their own.

515. Subsequently, in point 441 of the FD, the IA noted the following:

" [...] the information contained in the record is exclusive of the producing companies, who classify their product code information according to their accounting information systems, which does not mean that they all use the same classification for their products; that with the information that has been contributed, a trace of which company sold to a seller and this to another seller can not be made; that there is a link between them; that it does not have information to establish a level of fair comparison, therefore, the Secretariat cannot determine normal value applicable to the sellers who sold to Mexico. "

516. In its Brief, the IA cites arguments of the Complainants set out in point 52 of the FD, where it is noted that the Complainants stated that during the technical meeting of information the IA argued that it did not apply any of the alternatives proposed because it cannot extend production cost information from one interested party to another, each one of them should submit its own information.

517. Finally, it points out that, in accordance with paragraph 3 of Annex II of the ADA, for the information to be considered by the IA it should be able to be used without undue difficulty.

518. In this context, the Panel notes that the IA made two arguments in its Final Determination that support its determination that the information submitted by the Complainants did not allow the IA to corroborate that the acquisition costs occurred in the ordinary course of trade. The first is that the information that had to be presented by the trading companies could not be substituted by the alternatives submitted nor by the information of other parts of the procedure that are contained in the Administrative Record. The second, related to the practical or de facto impossibility of using the information contained in the record for the reasons referred in point 441 of the aforementioned Determination.

519. With regard to the first point, it is important to note first that the IA did not specifically and directly requested that the production costs of the traders'

suppliers be provided to verify that the purchase price responded to ordinary trade transactions, but only broadly required to show that the cost of production used in the calculation of the normal value corresponded to the purchase price determined in the ordinary course of trade, giving the option to submit it in the manner deemed appropriate to demonstrate the quality of that information. In that case, this was what the Complainants did when they submitted different alternatives that, in their view, show that production costs correspond to the current purchase price in the ordinary course of trade.

520. However, the relevant issue for this Panel is whether Article 47 of the RLCE requires that information to determine that acquisition costs of trading companies were in ordinary course of trade should be presented by said Companies for the calculation of individual margins of price discrimination or the IA could or should have recourse to the information contained in the Administrative Record if appropriate. In this regard, this Panel observes that, as the Complainants stated, that provision does not provide that the acquisition cost should be provided directly by the trading companies. In effect, the information to be verified by the Secretariat should not necessarily have been produced by the trading company seeking the determination of an individual margin of price discrimination.

521. In this case, the information was requested by the IA through a request for information, to that end, Article 54 of the LCE provides as follows:

"Article 54. The Secretariat may require interested parties to provide evidence, information and data that it deems appropriate, for this purpose it will use forms established by it.

If the requirement referred to in the previous paragraph is not satisfied, the Secretariat shall decide on the basis of the information available."

522. Based on this provision, this Panel considers that the Complainants should effectively disclose the information request made by the Secretariat to determine that their acquisition costs occurred in the ordinary course of trade. However, even if the IA considered that the Complainants did not satisfactorily resolve the request, this did not mean that the Secretariat could no longer calculate the individual margins of price discrimination. Nor did it mean that the automatic consequence of the lack of relief of a request made by the Secretariat allows it to act without considering the information that is available, as provided in Article 54. The IA mentions that calculating the margin of individual price discrimination for Complainants based on information not submitted by companies is contrary to the spirit of Article 47 of the RLCE. This interpretation by the IA is contrary to the provisions of Article 54 of the LCE, which allows the IA to calculate individual margins of discrimination if information is available, even if the trading companies did not provide the information. This makes more sense when the nature of the information used to determine that the acquisition costs incurred by the trading companies were in the ordinary course of trade is observed, that is, information on costs of a supplier, which is not proper to the trader and in any business is usually highly confidential information. Even though the Complainants were required by

the Secretariat to demonstrate that the cost of production of each of the product codes they used for the calculation of normal value corresponds to the purchase price, determined in the ordinary course of trade, that did not exempt the IA from resolving on the basis of the best available information, including the one presented by other parties to the proceeding, and acting on the Administrative Record or providing the due process opportunity to the Complainants. This Panel agrees with the Complainants that the principle of the acquisition of the evidence is applicable, since, once admitted, the evidence belongs to the proceeding and not to the party that offered it, which is why the IA was in legal possibility of occupying the information of the Administrative Record for its determinations.

523. In this regard, the WTO Appellate Body has ruled on the principle of good faith which informs the provisions of the ADA and which prevents investigating authorities from imposing on exporters a charge which, under the circumstances, is unreasonable.⁶⁵ Specifically, the Appellate Body noted the following in its final report of the United States - Hot Rolled Steel:

"101. We note, however, that paragraph 2 of Annex II authorizes investigating authorities to request that responses to questionnaires be provided in a given form (e.g. on computer tape) but at the same time state that they should not "maintain" that request if the fact of satisfying it would give rise to an "extra charge out of proportion" for the interested party "such as a disproportionate increase in costs and inconvenience" (emphasis added). This provision obliges the investigating authorities to strike a balance between the efforts that may be required of interested parties to respond to the questionnaires and the practical capacity of those interested parties to fully satisfy all the demands made by the investigating authorities. We consider this provision to be another detailed expression of the principle of good faith, which is at the same time a general principle of law and a principle of common international law which informs the provisions of the Anti-Dumping Agreement and the other covered agreements. This organic principle of good faith, in this particular context, prevents investigating authorities from imposing on the exporters a charge which, under the circumstances, is unreasonable."

"102. Accordingly, we consider that paragraphs 2 and 5 of Annex II of the Anti-Dumping Agreement reflect a delicate balance between the interests of investigating authorities and exporters. In order to complete their investigations, investigating authorities have the right to require the investigated exporters to have a very high degree of cooperation ("to the best of their ability"). At the same time, however, the investigating authorities cannot insist on absolute standards or impose an unreasonable burden on those exporters."

"103. We further note that Article 6.13 of the Anti-Dumping Agreement provides as follows:

The authorities shall take due account of the difficulties encountered by interested parties, in particular small enterprises, in providing the requested information and providing them with all feasible assistance." (emphasis added).

"104. Thus, Article 6.13 underlines that "cooperation" is, in fact, a two-way process, involving a common effort. This provision obliges the investigating authorities to take

⁶⁵ Report of the Appellate Body in the United States – Hot Rolled Steel (DS184), paragraph 101.

into account certain elements or to take measures to assist the interested parties so that they can provide the information. If the investigating authorities do not "take due account" of the actual "difficulties" encountered by the interested parties and which they have brought to their attention, they cannot, in our view, blame the interested parties for their lack of cooperation."

"**105.** Keeping in mind our interpretation of the "cooperation" obligations, we recall the approach taken by USDOC, which is reflected in the record of this case. There is no disagreement as to the fact that the information requested by the USDOC: was not known to the KSC and was not in its possession; It referred to ITUC prices and costs; Was derived from operations of the ITUC and not from the KSC; And was only known by the ITUC and was exclusively in its possession. We further note that, as discussed above, KSC attempted several times to obtain the requested information from the ITUC.⁶⁸ In fact, USDOC itself acknowledged that KSC had "provided a large amount of information and [had] cooperated Substantially in relation to other matters "and that, with regard to the information not provided" attempted to obtain the data and [...] the management of the ITUC rejected those attempts."

"**106.** The KSC also repeatedly informed USDOC of the difficulties encountered in obtaining information from the ITUC.⁷⁰ However, the USDOC did not take any action to assist KSC in overcoming those difficulties or in order to overcome the resulting deficiencies of the information provided. The USDOC refused to allow KSC to attend a meeting with the applicants' legal counsel to discuss the matter. Although the USDOC met with KSC to analyze it, it does not appear to have provided any guidance or concrete assistance to KSC: it merely reiterated that KSC was required to obtain the requested information from the CSI. USDOC did not take any action to obtain the necessary information by requesting it directly to the ITUC. There is, in our view, no provision in the Anti-Dumping Agreement that would prevent USDOC from requesting information directly from the ITUC; On the contrary, Article 6 (1) and (11) of the Agreement provides that possibility.⁶⁶ [Footnote corresponds to quotation] "

524. Based on the foregoing, this Panel determines that, in accordance with Article 54 of the LCE, the IA should have resorted to the best available information for the purposes of calculating the individual discrimination margins of the Complainants, including information that was available in the Administrative Record, and make a determination, based on precisely that information, regarding the calculation of the specific margin for the Complainants in question.

525. In addition to this, it is appropriate to analyze the second argument put forward by the IA regarding the factual impossibility of using the information available in the Administrative Record to determine individual margins of price discrimination for the Complainants. In this regard, it is noted that the IA motivated its determination in paragraph 441 of the Resolution, stating the following reasons why it considered that there was a practical impossibility to use the information referred to:

- The information contained in the record is exclusive to the producing companies, who classify their information on product codes according to their

⁶⁶ We recall that, in its investigation, the investigating authorities relate to all interested parties, which, according to the definition of Article 6.11 of the Anti-Dumping Agreement, include, inter alia, exporters, domestic producers of the like product and trade associations or entrepreneurs representing these national producers. In addition, we note that Article 6.1 requires investigating authorities to advise "all interested parties" of the information they require.

accounting information systems, which does not mean that all use the same classification for their products;

- With the information that has been contributed, a trace of which company sold to a trader and this to another trader cannot be made;
- That there is a link between them, which does not have information to establish a fair level of comparison.

526. From the analysis of the arguments presented by the IA, this Panel considers that the determination not to use the information available in the Administrative Record for the calculation of the individual margins of price discrimination of the Complainants is not sufficiently reasoned. This is because the Complainants state in a timely manner the way in which it was possible to demonstrate, with the information in the Administrative Record and the information submitted by them during the investigation, that the acquisition costs they incurred in their normal value calculations were given in the course of normal commercial operations. The generic explanation by the IA of the reasons that prevent the use of the above information is not enough to stop considering it. In particular, where the Complainants indicate that they specifically submitted information that allows the identification of the purchases made to each exporting producer that appeared in this proceeding without a particular response by the Secretariat to the specific difficulties.

527. Although this Panel considers that the burden of generating the relevant information is with the Complainants and that, in general, the complainants in a proceeding are those who are in a better position to obtain and provide such information, and taking due account that this Panel is not concluding that giving the IA the burden of generating information that corresponds to producing the Complainants is permissible, this Panel considers that, in this case, the IA should have made reasonable efforts to comply with its obligation to verify the production costs of the trading companies, as established in Article 47 of the RLCE, even requiring additional information from other companies appearing in the procedure, as long as it did not involve excessive difficulties for the IA, in accordance with Annex II paragraph 3 of the ADA, and that the corresponding traders or companies fulfilled their respective cooperation burden. In opinion of this Panel, the IA should have duly justified and motivated in its resolution the reasons why the information available in the Administrative Record could not be used, based on the information and requests reasonably presented by the Complainants.

D. ISSUES RAISED BY PILGRIM'S PRIDE

528. 5. THE COMPLAINANT'S CLAIM IS INVALID GIVEN THAT THE DETERMINATION DOES NOT CAUSE ANY AFFECTATION TO ITS LEGAL INTERESTS

529. 5.1 Allegations

530. The Complainant alleges that the FD derives from the refusal by the IA of the normal value information of PILGRIM'S PRIDE and therefore the IA didn't assign an individual duty in violation of Articles 54 and 64 of the LCE.

531. PILGRIM'S PRIDE bases its statement on the factual relationship as provided in Part II of its Brief, stating that it submitted in due time and form both its response to the Official Form, its response to the opening of the second probationary period of the investigation, and each one of the additional information requirements formulated by the IA. By submitting this information, the Complainant alleges that it made available to the IA all information related to the calculation of normal value, both the cost methodology proposed by PILGRIM's PRIDE and the methodology proposed by the Mexican requesting companies.

532. The Complainant points out that none of the three assumptions under Article 64 of the LCE operate in the present case and therefore, the IA had sufficient elements to determine an individual margin of price discrimination according to its methodology of costs, since this is the best information available, and failing that based on export price information.

533. The IA maintains that, in the first instance, the Complainant's argument does not comply with the minimum procedural burden required under Article 51 of the LFPCA, so it must be declared ineffective. This is because the Complainant only cites the aforementioned provision without explaining why it applies to the particular case or in what sense it was violated by the IA. In addition that the Complainant does not indicate what is the affectation to its legal interests at or what the *cause petendi* is.

534. In relation to the two elements mentioned above, the first involves expressing why it considers that what it claims damages its legal sphere; and the second involves explaining what are the fundamentals, reasons and facts on which it is based to ask for what is asked. Regarding the first element, the AI argues that the Complainant in any part of its plea indicates what the alleged damage was caused and as for the *cause petendi*, the Complainant in any part of its brief notes on what basis it asserts why it considers that it made available to the IA all information relating to the calculation of normal value.

535. Assuming *arguendo* that the Complainant has complied with the requirements of Article 51 of the LFPCA, the IA argues that PILGRIM'S PRIDE did not provide the information necessary for the calculation of an individual margin of dumping, in accordance with Articles 6.10 of the ADA and 64 of the LCE. The IA maintains that the Complainant's claim has no merits, since in the PD it was informed that it had not submitted the information required and that these inconsistencies had prevented the IA from calculating an individual margin of price discrimination. In addition, the IA argues that the Complainant has not been harmed because the duty that was established to it was the lower margin duty, so that the determination of the margin is irrelevant. Finally, the IA also pointed out

that the Complainant's argument about the dumping margin is accessory to that relating to the methodology by value.

536. 5.2 Panel Analysis

537. This panel has analyzed the allegations of the Complainant and the various defenses of the IA, and by procedural economy, makes the following two pronouncements: first, the Panel agrees with the IA that the Complainant's argument depends on the Determination of the Panel on the methodology used by the IA. In this regard, the Panel refers to its decision in paragraphs 399 and 400 hereto on the methodology and determines that the determination of the margin by the IA will now be subject to the revisions made by the IA in Compliance with this order, and therefore, the Complainant's claim has been left without matter. Secondly, this Panel agrees with the IA that the arguments presented by the Complainant in this case do not establish that the determination of the dumping margin affects the legal interests of the Complainant, based in article 8, section I of the LFPCA, which states:

"Article 8.- The trial before the court in cases, for the grounds and against the following acts, is unreasonable:

I. Do not affect the legal interests of the plaintiff, except in cases of legitimization or specifically recognized by the laws governing the contested measure. ... "

538. As explained in this decision on several occasions, this article is part of the review criteria of this Panel. In this particular point, the Complainant's claim is that the Panel decides whether the determination of the IA with respect to the dumping margin established to PILGRIM'S PRIDE is in accordance with Articles 54 and 64 of the LCE without explaining how is it that the determination of the margin of dumping, per se, would not entail any injury to it as long as it did not result in a countervailing duty equal to the margin.

539. In this particular case, during the investigation, the IA determined to the Complainant the dumping margin calculated for TYSON, corresponding to 127.5%. However, the countervailing duty applied to PILGRIMS PRIDE does not correspond to that dumping margin. Indeed, as it appears in point 715 of the FD, the IA applied to PILGRIM'S PRIDE a smaller duty than the margin of price discrimination.

"**715.** The present investigation procedure concerning unfair international trade practices in the form of price discrimination is hereby terminated and the following definitive countervailing duties are hereby imposed on imports of chicken leg and thigh which are entered under tariff fractions 0207.13 .03 and 0207.14.04 of the TIGIE, or any other, originating in the United States, regardless of the country of origin:

a. For imports from Simmons, Sanderson, Tyson Foods and Pilgrim 's Pride Corporation 25.7%

b. For imports from the rest of the export of 127.5% "

540. It follows that even though the IA determined the Complainant a margin of price discrimination of 127.5%, the contravening duty allocated to it is less than the margin of price discrimination of 25.7% and as the Panel has pointed out, the Complainant merely stated that "if an individual margin had been determined, it would have been lower, so that the countervailing duty would have been lower, perhaps even to that determined by the Investigating Authority in the FD (Emphasis added), without offering in its writings the elements or reasonings that would allow the Panel, with certainty and free of speculations, to conclude that indeed that determination would have resulted in a lower duty. The Panel reiterates that it does not make a general ruling on whether the application of a lesser duty is sufficient to dismiss the relevance of the determination of the dumping margin but, in this particular case, the Complainant has not provided the arguments that allow the Panel to resolve its claim based on what can be deduced from its arguments. The Complainant seeks a Panel's ruling on the legal situation without pointing out in any way how the IA's determination affects its legal interests.

541. Based on the aforementioned provisions, this Panel concludes that this claim does not proceed because it has been deprived of its subject matter and because there is no evidence of an injury to the Complainant's legal interests.

E. ISSUES SUBMITTED BY LARROC AND OPERADORA.

542. 6. THE IA ACTED PROPERLY TO DETERMINE THE RESIDUAL DUTY FOR THE COMPLAINANTS

543. 6.1 Allegations

544. The COMPLAINANT asserts that the IA violated articles 6.8 and Annex II of the ADA; 57 and 64 of the LCE; 47 and 79 of the RLCE, for establishing a residual duty to the exporting traders, for not cooperating in the investigation, and that this implies that the cause of illegality provided for in article 51 section IV of the LFPCA is updated.

545. In particular, LARROC points out that the information that the IA required for the COMPLAINANT to demonstrate that the acquisition costs of the chicken leg and thigh were determined in the course of normal commercial operations (i.e. that for its supplier companies' sales operations had been made with profits), it was not proper to the company and therefore had no legal or material possibility to prove the fact mentioned. This caused the IA to charge the higher margin of price discrimination calculated in the course of the proceeding.

546. The IA responds to the claims of the COMPLAINANT arguing that, in principle, the claim is irrelevant because the COMPLAINANT does not indicate what the *petendi cause* of its argument, or what the alleged damage was caused.

547. In addition, the IA argues that under Article 47 of the RLCE, the cost of acquisition of the traders, which is its cost of production, must be determined in the ordinary course of trade, which means that the price of purchases to the traders, in this case LARROC, generate profits to its supplier. According to the IA, LARROC had to show or at least explain why LARROC considered that the purchases from his suppliers were made under those conditions.

548. 6.2 Analysis by the Panel

549. Considering what the parties have stated, the Panel will proceed to analyze the COMPLAINANT's allegations regarding the determination of the IA to establish a residual duty for allegedly not cooperating in the investigation.

550. As mentioned in previous sections, Article 6.8 and Annex II of the ADA provides that in cases where an interested party fails to provide the necessary information for the investigation within a reasonable period of time, the IA may make definitive determinations, positive or negative, on the basis of the facts available.

551. In US - Hot Rolled Steel (DS184), US authorities had used "adverse" facts to calculate the dumping margins of an exporter that had not cooperated by not providing certain requested data. The Appellate Body, upholding the Panel's finding, ruled that cooperation is not the only determinant of the final outcome.

552. In addition, the Appellate Body in US-Hot Rolled Steel (DS184), in analyzing the concept of cooperation under ADA Annex II, paragraph 7, noted that this provision does not indicate the degree of cooperation expected to avoid the possibility for the investigating authorities to resort to a "less favorable" outcome.

553. Indeed, the Appellate Body considered that, on the basis of the wording of paragraph 5 of Annex II, the degree of cooperation required is to cooperate "to the best of its ability". The Appellate Body also relies on paragraph 2 of Annex II which highlights the principle of good faith which requires a balance on the part of the investigating authorities between the effort the parties concerned may require to respond to the requirements and the practical capacity of the parties concerned to fully comply with all the demands made by the investigating authorities.

554. However, according to paragraph 427 of the FD, the IA did not have the information to calculate a specific price discrimination margin for the COMPLAINANT because the information submitted did not confirm that the operations used to calculate its value have been made in the ordinary course of trade.

555. The Panel notes that, in fact, the IA did not have sufficient information to calculate a margin of price discrimination specific to the COMPLAINANT and there are no elements in the Administrative Record that would allow the Panel to

conclude that the COMPLAINANT proceeded within "all its possibilities" to provide the information requested or to prove the difficulty of providing the same. In this regard, the Panel considers that the provisions of Annex II make it clear that the primary responsibility for submitting the corresponding information lies with the COMPLAINANT.

556. With regard to the COMPLAINANT's assertion that the IA should investigate until finding the producing company that has incurred in production costs and general expenses and that it has the obligation to find the cost of production and the general expenses of the company producer supplying the traders, the IA maintains and this Panel affirms that there is no legal provision that confers such obligation, reason why the argument of the COMPLAINANT is considered as improper.

557. Thus, this Panel finds that the IA is only required to calculate margins of price discrimination to companies that provide sufficient information for this, which, in the case of traders, is the information established in Article 47 of the RLCE. In addition, the Panel contends that Article 54 of the LCE only confers on the IA the power to request information and data that it deems relevant to clarify or complete certain information, but that power is not intended to make up for the deficiencies or omissions of the parties, since doing so would constitute proceedings in substitution of the parties, and it is to these to whom the burden of proof corresponds and not to the IA.

558. This obligation cannot be transferred to the IA. It is therefore natural that the consequence that the IA did not have the information requested or the information that would allow it to understand the difficulty of providing it was the determination of "non-cooperation" by the IA with respect to said COMPLAINANTS, as well as the consequent issuance of a resolution "less favorable" for them.

559. Therefore, this Panel determines that the COMPLAINANT 's allegation is inoperative and that section II of Article 51 of the LFPCA has not been updated.

560. 7. THE IA INCORRECTLY ACT WHEN NOT APPLYING THE LESSER DUTY TO ALL COMPANIES

561. 7.1 Allegations

562. The Complainant asserts that, by not applying a lesser duty to the traders' dumping margin, the IA violates Article 9.1 of the ADA in relation to the amount of the measure, because if the duty lower than the margin calculated by the IA is 25.7 %, then that is the amount necessary to eliminate the injury and, therefore, to apply a superior duty is excessive and violating said article, since it would have a punitive purpose. The Complainant also contends that the IA contravened Article 79 of the RLCE by failing to make the relevant assessment of the evidence to determine the most favorable countervailing duty on its imports.

563. For its part, the IA maintains that, firstly, the Complainant did not indicate in its pleadings the cause of asking nor the damage caused by the determinations that it tries to impugn, reason why the allegations are inoperative. In addition, assuming that the claim of the Complainant did not grant an explanation for the injury suffered by the IA calculating a smaller duty on the margin to other exporters, the IA argues that there is nothing in the text of Article 9.1 of the ADA which may serve to support for the Complainant's allegations.

564. According to the IA, the Complainant's premise that if a compensatory duty less than the margin found is sufficient to neutralize the injury, the IA would automatically be required by Article 9.1 of the ADA to apply it, so it could not establish a higher duty than that necessary to neutralize the injury, even if it does not exceed the dumping margin found. On this point, says the IA, Article 9.1 of the ADA establishes as the only limitation for an IA in terms of the amount of the quota, which cannot impose it at a level higher than the margin of dumping found. And, furthermore, Article 9.1 of the ADA is quite clear in establishing that the IA has the discretion to set the amount of the anti-dumping duty at a level below the dumping margin found.

565. 7.2 Analysis by the Panel

566. The Panel having analyzed what has been said by the Parties, will proceed to analyze the COMPLAINANT's allegations as to the determination of the IA to establish a lower quota for some of the exporters.

567. Article 9.1 of the ADA is quite clear in stating that the IA has the discretion to set the amount of the anti-dumping duty at a level below the dumping margin found provided that this amount does not exceed the dumping margin found.

568. The Appellate Body in EC-Fasteners (China) (DS397), in making a comparison between the interpretation of the provisions contained in paragraph 2 of Article 9 of the ADA, noted that unlike Article 9.2 containing a standard, the second sentence of Article 9.1 expresses a "preference for duties to be less than the margin of dumping", if that lower duty suffices to eliminate injury to the domestic industry. The Appellate Body concludes that, in order to express in Article 9, paragraph 1, the expression 'is desirable', is used.

569. Following this interpretation of the literal sense of Article 9.1 of the ADA, this Panel considers that the IA in the present dispute had the power to establish lower duties than the margin of dumping. The obligation under Article 9 of the ADA is that the IA, in any case, may not impose higher duties in amount to the margin of dumping found during the corresponding investigation. The IA therefore determined that it was appropriate to calculate a lower margin duty using the "lesser duty" figure to minimize the impact on the consumer, since it is a product with a high impact on the consumer, and Noted the following:

"The Secretariat considered it justified to seek that the correction of distortions by unfair practice should not lead to the imposition of excessively high compensatory measures that could have a negative impact on the consumer and the rest of the food production chain. Therefore, it was determined to assess the relevance of a quota below the margins of dumping."

570. The IA carried out this on the basis of Article 62 of the LCE, and based on Annex II, paragraph 7 of the ADA, the IA decided to grant such a smaller quota only to those who appeared and provided sufficient information.

571. The last sentence of paragraph 7 of Annex II of the ADA provides as follows:

"In any case, it is clear that if an interested party does not cooperate and consequently fail to communicate relevant information to the authorities, this could lead to a less favorable outcome for that party than if it had cooperated."

572. The Panel considers that such a rule simply states that non-cooperation could have a negative impact - adverse consequences for the complainant in question - as a logical consequence of not participating or cooperating. The use of the word "evident" reinforces the Panel's interpretation that this provision refers only to a causal relationship, that is, cause and effect, between not cooperating in a proceeding and obtaining a less favorable outcome in the same. The WTO Appellate Body has even pointed out that "in Annex II, paragraph 7, it follows that the lack of 'cooperation' by an interested party may, by reason of the use of the facts available, lead to a "less favorable" outcome for that interested party than if it had cooperated."

573. Article 9.1 of the ADA effectively grants the right to the IA to establish a duty below the margin. However, this Panel considers that such attribution must be exercised by the IA subject to the requirements of justification and motivation established in Mexican laws, and in that sense, the Panel finds no basis in either the ADA or other legal provisions that allows the IA to set a lower duty margin when the criterion that serves as the basis for such decision of the authority (ie, limiting the effect on the consumer) is not related to the legal situation in which the Complainants who did not receive such benefit (ie, lack of cooperation in the procedure). This Panel considers that such a decision by the authority is not legally upheld and that a determination to the contrary would mean that the IA could arbitrarily designate the exporters or traders whom it chooses to benefit without even having to follow the very criteria used by the authority for this purpose. This Panel, therefore, does not agree with the IA statements that, in this case, based on Annex II, it may set lower duties to certain preferred exporters.

574. To a greater extent, this Panel considers that the IA may distinguish in the application of a lesser duty if the reasons that led to the determination of said lesser duty are not applicable to the circumstances or specific case of any of the companies to which it determined a margin of price discrimination. However, in the specific case, the IA determined the lower duty in accordance with paragraph 707 of the Final Resolution, in which "it considered justified to seek that the correction

of distortions by unfair practice does not lead to the imposition of excessively high compensatory measures which could negatively impact the consumer and the rest of the food production chain." In this sense, the reason that led the IA to determine the lower duty is equally applicable to all companies because the product exported from all of them can generate the distortions that seek to prevent the IA with the lower duty.

575. Based on the above, the determination by the IA not to grant the lower duty to the Complainant is incorrect.

576. 8. THE IA ACTED PROPERLY IN FOUNDING AND MOTIVATING ITS DECISION

577. 8.1 Allegations

578. LARROC contends that the IA did not act in accordance with the provisions of article 82, section II of the RLCE, by not substantiating or motivating the application of dumping margins to LARROC's export operations that corresponds to TYSON and therefore, section II of article 51 of the LFPCA is updated.

579. LARROC points out that while it is true that in paragraph 442 of the Final Determination the IA explained that, in accordance with Articles 54, 64 and 6.8 and Annex II, paragraph 7 of the Anti-Dumping Agreement, it determined the margin of price discrimination for the trading company LARROC, among others, based on the facts of which it was aware and that these facts refer to the margin of price discrimination calculated for the company TYSON of 127.52%, this does not imply that the IA substantiate and motivated its determination .

580. In particular, LARROC argues that the IA does not explain in detail in which of the three assumptions contained in Article 6.8 of the ADA that give rise to the possibility for the IA to make determinations based on the facts that it has knowledge, the IA relied upon to make such decision, i.e.: (i) where an interested party denies access to the necessary information, (ii) fails to provide it within a reasonable period of time, or (iii) when it significantly impedes the investigation.

581. For its part, the IA contends that the grievance identified by the Complainant is ineffective for the following reasons: (a) the Complainant does not explain the reasons for which it considers that the IA violated Article 82, section II of the RLCE; (b) Article 82, section II of the RLCE is not applicable to the FD, but to the PD of an investigation; and (c) in paragraphs 414 to 443 of the FD, the IA founds and motivates the application of the dumping margins to the Complainant.

582. Regarding the last point on the alleged lack of motivation and of legal grounds, the IA argues that there must be a complete omission in order to express the applicable legal provisions and the reasons for which this legal ground is applicable. In this regard, the IA points out that paragraph 443 of the FD mentions

the basis on which it was based, while paragraphs 414 to 442 of the FD detail the reasons why those provisions are applicable.

583. Analysis by the Panel

584. This Panel takes into account the jurisprudence cited by the IA in paragraph 1408 of its Brief entitled "LEGAL FOUNDINGS AND REASONING. THE DIFFERENCE BETWEEN LACK AND IMPROPER SATISFACTION OF BOTH CONSTITUTIONAL REQUIREMENTS TRANSCENDS TO THE ORDER IN WHICH THE STATEMENT OF ERRORS OR GRIEVANCES AND THE EFFECTS OF THE PROTECTIVE FAILURE SHOULD BE STUDIED "which states that in order for an allegation of lack of reasoning and motivation to be effective, this absence must be a complete omission in expressing the applicable legal provision and the reasons for which said legal ground is applicable.

585. In this regard, the Panel notes that in several paragraphs of the FD, the IA referred to both the legal basis on which the IA made its decision and the reasons for its decision. Paragraph 443 of the FD sets out the legal grounds on which the IA was based, while paragraphs 414 to 442 of the FD sets out the reasons why those provisions are applicable.

586. It is apparent from points 414 and 443 of the FD that the IA based its decision on Article 6.8 and Annex II of the ADA; where it argued that it was not possible for the IA to calculate an individual dumping margin for LARROC, and proceeded in accordance with the facts of which the IA was aware. In addition, points 418 to 423 of the FD set out the reasons why the IA determined that the export prices submitted by the Complainants should be rejected. Likewise, with respect to the determination of normal value, points 425 to 443 of the FD detail the reasons why the IA determined that the data presented by LARROC could not be used to calculate such normal value. Finally, point 443 of the FD explains how the margin of price discrimination for LARROC and the applicable legal bases were calculated.

587. For these reasons, the Panel determines that the IA complied in motivating and setting the legal grounds of its determination, so the Complainant's allegation is ineffective.

XIX. DECISION REGARDING THE EFFECT THAT THE ESTABLISHED RESTRICTIONS OF SOUTH AFRICA HAVE ON THE IMPORTS OF THE INVESTIGATED PRODUCT AND ITS RELATION WITH THE INCREASE OF EXPORTS TO MEXICO

588. 1. Introduction

589. USAPEEC states that the IA determined that the restrictions of South Africa to the imports of the investigated merchandise results in the increase, by deviation, of the exports from the USA to Mexico.

590. The Panel notes the following legal authorities cited by USAPEEC regarding the issues addressed in this section: Articles 3.1 and 3.5 of the Antidumping Agreement and for purposes of the review before this Panel, the provisions on section II of Article 51 of the LFPCA.

591. Issues for Review

592. Did the IA err by considering that the restrictions established by South Africa to the imports of the investigated merchandise affects the increase, by deviation of the exports of the USA to Mexico?

593. 3. Law & Analysis

594. 3.1 Decision regarding the effect that the restrictions of South Africa have on the imports of the investigated merchandise

595. USAPEEC states that Section II of Article 51 of LFPCA is breached since in the analysis of the international market that the IA carried out, the Authority included injury elements without explanation in what form they will rebound in the increase, by deviation, of United States of America to Mexico, noting only in point 570 of the FD that Mexico became the principal destiny to the chicken surplus of the USA, after the fall of the exports of that country due to the different commercial remedies imposed by South Africa, China and Russia of chicken legs and thighs from USA.

596. The Complainant argues that the IA breached Articles 3.1 and 3.5 of ADA, by not making the examination of the measure imposed by South Africa, on how these measures would injure the domestic production industry, as well as the attribution of such factor to the imports of the investigated dumped product. Therefore USAPEEC stated that the absence of the analysis implied and omission of the formal requirements established by the ADA, which affects the Complainant's defenses and therefore, the IA acted illegally and breached Section II of Article 51 of the LFPCA.

597. The Investigating Authority states in its Brief that the Complainant's claim is ineffective because it only submits assertions with no support, and it does not describe in what way affects its defenses and impact the result of the challenged determination. As a consequence, the IA concluded that USAPEEC did not comply with the minimum procedural burden; therefore, USAPEEC'S argument is ineffective and requests this Panel to consider it as such.

598. However, the IA answered *Ad Cautelam* that there is nothing in paragraph 570 that allows to arrive to the conclusion that the IA considered or determined that the commercial remedies imposed by South Africa against the investigated product had an impact on the increase of exports of the product to Mexico. On the contrary, the only intention of paragraph 570 of the Final Resolution, and of the

entire section on “International Market” was to describe the international context of the chicken leg and thigh market, as well as to describe a fact that the Petitioners mentioned during the investigation. The IA highlighted that it never made any consideration or determination in such sense in that paragraph; and consequently, Articles 3.1 or 3.5 of ADA are not breached; therefore, there is no illegality.

599. Concerning the statements of USAPEEC and of the Investigating Authority, this Panel considers that USAPEEC starts from the false premise that the IA in the analysis of the international market included elements of injury without explaining how the restrictions established by South Africa to imports of the merchandise investigated would affect the increase, by deviation, of exports from the United States of America to Mexico, however, the Panel found that point 570 of the FD does not have any determination of such Authority, in the sense that the commercial remedies imposed to South Africa against the investigated merchandise had as effect the exports increase of such product to Mexico, and therefore the Panel considers that the allegation of USAPEEC is inoperative for the reasons given by the IA.

600. Point 570 of the FD states the following:

“570. The Petitioners mentioned that since 2002, South Africa applies countervailing duties to chicken legs and thighs of the United States, which were ratified in 2006. They stated that China established anti-dumping duties that go from 50 to 150% to chicken parts; it also determined that the United States subsidizes the production cost of chicken. These added to the sanitary restriction from Russia in 2010, this factors caused the fall of the exports of the United States and caused that Mexico became the principal destination for the surplus of the USA.”

601. 3.1.1 Conclusion

602. In virtue of the foregoing, this Panel considers that the arguments of USAPEEC in this section are inoperative.

XX. ISSUES RELATED TO EVIDENCE

603. 1. DECISION OF NOT CONSIDERING THE IA THE EVIDENCE SUBMITTED ON THE RELATION ON THE FLUCTUATIONS EFFECT OF THE PRICES OF CORN IN THE NATIONAL AND INTERNATIONAL MARKETS

604. 1.1 Introduction

605. USAPEEC states that the IA did not consider the evidence submitted in relation on the fluctuations effect of the prices of corn in the national and international markets.

606. The Panel notes the following legal authorities cited by USAPEEC regarding the issues addressed in this section: Article 3.5 of the Antidumping Agreement;

Article 39 of the LCE; Article 79 of the CFPC and for purposes of the review before this Panel, the provisions on section IV of Article 51 of the LFPCA.

607. 1.2 Issues for Review

608. Did the IA err by supposedly not considering the evidence submitted in relation on the fluctuations effect of the prices of corn in the national and international markets?

609. 1.3 Law & Analysis

610. 1.3.1 Decision whether the IA took into consideration in its analysis the evidence regarding the fluctuations effect of the prices of corn in the national and international markets

611. USAPEEC states that the IA did not take into consideration the evidence submitted by the importers and exporters in relation to the increase of the price of corn in the domestic and international markets. It came to the conclusion that the short-term fluctuations were dismissed due to annual average price, without there being evidence in the administrative record that such prices could explain the significant levels of underestimation between the investigated merchandise and the like one. The Complainant considers such issue relevant since it would help to explain the losses registered by the domestic producers at the end of the safeguard measure since it is a source of injury that impacts: operation costs, price increase of 2009, income decrease, as well as in the operation margin. USAPEEC claims that the IA did not take into consideration the above to explain the underestimate and also the IA did not explain the relation that occurred with the increase of such costs.

612. USAPEEC pointed out that the increase in the corn price was a domestic and international concern since it was a source of injury that affected the operation costs, the increase of the prices reported in 2009, the income and operation margin decrease. Concerning this, the Complainant submitted evidence to explain the losses registered in the domestic industry from the end of the safeguard measure implemented on the chicken leg and thigh imports from the USA, due to the increase in corn prices, which were not assessed in a correct manner, as being considered as a “short-term fluctuation” by the IA. Therefore, it did not make an in-depth analysis of its impact as it can be appreciated in item 618 of the FD.

“**618.** The Secretariat considers that the short term fluctuations in a year (for high, low and middle cycles, atypical exchange variations, etc.) are dismissed when considering annual average prices. Likewise, the price behavior of non-investigated products is not relevant for this procedure; furthermore, there is no evidence in the administrative record that this could explain the significant levels of under-valuation between the dumped import product and the domestic.”

613. USAPEEC claims that the IA was obligated to examine all the relevant evidence and the factors it had knowledge of, different from the dumped imports

that injured the national production, to analyze if whether there was a causal link between the dumped imports and the injury to the domestic industry. The previous in accordance with Articles 3.5 of ADA and 39 of the LCE; and pointed out that such factors should not be attributed to the dumped imports. Likewise, it highlighted that the IA had knowledge of such situation since it corresponds to its competition; moreover, in agreement with Article 79 of the CFPC, the IA had the power to gather information.

614. For the reasons above mentioned, USAPEEC came to the conclusion that the IA acted illegally and breached section IV of Article 51 of the LFPCA.

615. In response, the Investigating Authority requested this Panel to determine as inoperative USAPEEC's argument since it did not meet the minimum procedural burden (point out the *Causa Petendi* and the damage caused to USAPEEC). Also, it could not be considered a legal argument, because the IA stated that the Complainant had limited itself to only transcribe legal basis without establishing a concrete relation of the facts, not allowing the Panel to study them. Likewise, the IA stated that the Complainant failed to explain why section IV of Article 51 was breached.

616. The IA pointed out that the Complainant did not submit "any arguments that explains in what form or manner the Investigating Authority has breached Articles 3.5 of ADA, 39 of LCE and 79 of CFPC and section IV of article 51 of the LFPCA, that they are only mere groundless statements, and therefore, for not stating the affectation or damage caused to USAPEEC, the alleged grievances are inoperative.

617. The IA answered that assuming *arguendo* that the claim was not inoperative due to the previous causes. The argument would still be inoperative since it does not have support because the IA did carry out an analysis of the referred situation and it was made according to Articles 3.5 of ADA, 39 of LCE and 79 of CFPC by analyzing the corn price increase in the domestic and international markets, considering in an integral manner all the information available in the Administrative Record.

618. The IA considers that USAPEEC fall in contradictions, by one side, points USAPEEC that the IA "did not consider the evidence given by the importers and exporters" and in the other side, USAPEEC notes that the proofs given by the interested parties "were not assessed in a correct manner" and as the grievances are ambiguous and superficial,⁶⁷ those assertions are inoperative.

619. The IA states that contrary to what USAPEEC said, the analysis on the increasing of corn prices in the national and international markets was done based on Articles 41, fraction III of LCE, 64, section III, paragraph c of RLCE and 3.4 of

⁶⁷ The IA cites the court precedent whose item is as follows: "ASSIGNMENT OF ERRORS OR GRIEVANCES. ARE INOPERATIVE WHEN THE ARGUMENTS GIVEN BY THE CLAIMANT OR THE COMPLAINANT ARE AMBIGUOUS AND SUPERFICIAL".

ADA and analyzed the behavior of the costs of raw material for the analyzed period as set forth in points 612 to 618 of the FD.

620. The IA concluded its Brief noting that, it did consider the evidence presented by the parties, and about the fact that the Complainant did not explain why it considered that the assessment of the evidence had been incorrect, the AI was found impaired to give a timely response, since USAPEEC in any part of its Brief explains why it considered that the assessment of the evidence on the price increase is incorrect, only USAPEEC asserts that it was a very important issue and that the IA did not make a thorough analysis, but it does not indicate why it considers so.

621. Nevertheless, the IA noted that its analysis was correct for the next reasons:

- i) The IA assessed the impacts of the corn price fluctuation in a complete and correct way, concluding that they are congruent with the applicable law.
- ii) The IA made an “exhaustive analysis” of the dumped imports and the injury to the domestic industry.
- iii) Likewise the IA analyzed any factors of which it had knowledge, as possible causes of the injury different to the imports.
- iv) The IA analyzed all the available information in the administrative record so as to make a causal analysis, as it can be seen in items W and X of point 63 of the FD. The arguments given by USAPEEC concerning this issue and the analysis of the evidence submitted by USAPEEC and other interested parties, may be quoted in points 583 to 589 of the Final Determination. The particular analysis of the information from SAGARPA on the issue discussed in points 613 to 618 of the FD.
- v) The IA did not limit itself to the information submitted by the parties, but also gathered relevant data (of the FEDEAGRO), of the World Bank and the United Nations Organization for Food and Agricultural (FAO). The IA examined all the evidence relevant to the case, contrary to what USAPEEC states.

622. Due to all the above, the IA acted in accordance with Articles 3.5 of ADA and 39 of LCE and 79 of CFPC by determining the effect on the corn price fluctuations in the domestic and international markets; therefore, Article 51 of the LFPCA is not breached.

623. Regarding the arguments of the parties, the Panel has noted that the IA performed behavioral analysis of the costs of the raw material (corn prices) in the subject merchandise taking into consideration the evidence submitted by the interested parties and that contained in the Administrative Record, serving both

USAPEEC's arguments⁶⁸ as other interested parties, performing the analysis in points 612-618 of the Final Determination, as transcribed below:

"612. The Secretariat observed the behavior of the raw material costs for the reporting period that provided the Petitioners. These figures confirm a significant increase in the cost of 2008, as in the case of international price, but for the years 2009 and 2010 show an opposite behavior. However, it is important to mention that domestic sales prices did not compensate the significant increase in costs for the period."

"613. Based on the document "Situation Analysis. The International outlook for corn, wheat and Soya "of SAGARPA, the USAPEEC said it is not true the statement of the Secretariat on price stability, as prices of white corn increased in the first quarter of 2010, which cannot be considered stable. It also kept in agreement with the document "Agricultural Tribune of UNA", it was expected increases on food for poultry April 2010 to September 2011. It noted that while Bachoco can rely on imports of corn and soybeans from the United States, this does not allow competition from Mexico regarding supplies and creating a disadvantage against imports from that country."

"614. In the final phase, Pilgrim's Pride Mexico and Pilgrim's Pride Corporation claim that one of the principle reasons for which the Chicken is more expensive in Mexico is that sweet corn is imported primarily from the United States. Regarding this, it submitted the study case "Factors affecting trade in Mexican Imports of Poultry Meat from the United States" of ITC 2003; and published "Corn Situation and Perspective in Mexico 1996-2012" of SIAP. Also, they indicated that since it is about the same import supply, the domestic producers also have additional expenses as transport cost, storage, costumes, etc., that makes it impossible to compete with the United States producers."

"615. The Secretariat noted that the submitted documents by Pilgrim's Pride Mexico and Pilgrim's Pride Corporation were out of the analyzed period. The document of ITC is previous of the duty deduction (2003) when the imports of corn that came from the United States had a duty of 91%. In the case of the SIAP document, the price projections only cover up to 2007. On the magnitude of the impact on the transportation costs and other expenses, Pilgrim's Pride Mexico and Pilgrim's Pride Corporation did not give information. In any case, the Secretariat considers that the corn price increase and soy have to impact, in general, all the producers and not only the Mexicans. **The available price indicators on food supply indicate a recovery during the investigated period. In contrast, the import prices continued to deteriorate. Therefore, the price gap on domestic products continued to grow. This indicates that the differential price behavior can't be explained by the differential cost behavior of the food supply and that it was not correctly proven.**"

⁶⁸ Item 63 of the FD, concerning USAPEEC."

"63. On March 7, 2010, appeared to submit the arguments and the evidence corresponding to the second probatory period, it declared..."

"W. It is false item 510 of the Preliminary Determination. USAPEEC exhibit SAGARPA'S study on Current and Perspective of Chicken Meat Production in Mexico 2009 situation, which was not analyzed and which proves that the injury suffered in the domestic industry does not obey to the imports but rather to the increase in prices of raw material in the chicken production which impacts the price of chicken leg and thighs.

X. The Secretariat did not assess correctly the properly prices of supplies in the manufacture of chicken that affects the price of the leg and thigh, regarding Article 3.5 of the AD Agreement. And even when it ruled on the effect of prices of corn and soybeans on the production of the chicken leg and thighs, its conclusion is technically incorrect because it based its analysis on the price level and its trend in the international market."

(Emphasis added)

“616. Operadora de Ciudad Juarez, Operadora Reynosa y Larroc stated that in the Preliminary Determination the Secretariat omitted to clear out if the impact on the undervaluation of the import prices have to do with contingency or downturn domestic prices, as it is determined by the Antidumping Agreement. The Secretariat pointed out that during the analyzed period significant and increasing levels of undervaluation were registered, whereas national prices registered negative growth rates in the order of -8, -0.3 and -6% in 2009, 2010 and the investigated period.”

“617. Concerning items 510, 515, and 518 of the Preliminary Determination and Pilgrim's Pride Mexico and Pilgrim's Pride Corporation, USAPEEC and INMAQ accusations on the impact of the seasonal cycles of the market through the year, the exchange rate, and other poultry products on domestic prices, and the lagging or the monthly or trimester behavior between the import prices and the domestic prices, the Applicants stated that monthly periods cannot be considered; but instead, longer periods that mitigate the annual distortions. In the final phase, the appearing parties did not submit additional information.”

“618. The Secretariat considers that short-term fluctuations during the year (high cycles, low and medium, untypical exchange rates, etcetera) are annulled when average annual prices are considered; in addition, it is considered that **the price behavior of the non-investigated products is not relevant for this procedure, moreover, that there is no evidence in the administrative record that could explain the significant undervaluation levels between the imported product in dumping conditions and the domestic.**”

(Emphasis added)

624. From the preceding paragraphs, it follows that USAPEEC's claim that the IA did not consider the evidence provided by such Complainant, is erroneous.

625. Concerning the analysis of SAGARPA document “Situation Analysis. The International outlook for corn, wheat and Soya” submitted by USAPEEC, it can be quoted points 583 to 589 of the FD where the IA made an analysis of the document and the specific analysis of the information from SAGARPA on the issue under discussion in points 613 to 618 of the Final Determination.

626. On the other hand, this Panel analyzed point 612 of the FD correlated with points 645 to 648 of the FD, from which it can be shown that the raw material cost and the international price were increased in 2008, while in 2009 and 2010 decreased. In the same manner, the operational profits have a decreased tendency from 2007 to 2010, contrary to what USAPEEC states, the price behavior of the supplies does not explain the operational profit behavior of the domestic products, reason why the IA considered that the corn price has not been the cause of the injury suffered by the domestic industry since in 2009 and 2010, the price of supplies decreased and the operational profits also decreased. Due to the above, it is implied that USAPEEC statements have no grounds.

627. On the other hand, the IA made an exhaustive analysis of the casual link between the imports subject of dumping and the injury to the domestic industry, as it can be seen in points 620 to 661 of the FD.

628. Likewise, the IA made the analysis of other factors that it acknowledged, as possible causes of injury other than the imports, was made in points 662 to 698 of the FD, assessing the arguments of all parties, including USAPEEC's.

629. Concerning the information regarding the fluctuations in the price of corn, the IA was not limited solely to information provided by the interested parties but the IA rather obtained the information on international prices of corn and soybeans from the National Confederation of Associations of Agricultural Producers (FEDEAGRO), the World Bank and the Food and Agriculture Organization (FAO), examining all relevant evidence.

630. 1.3.2 Conclusion

631. By virtue of the above, this Panel considers that the IA acted in agreement with the provisions of Article 3.5⁶⁹ of the ADA, 39⁷⁰ of the LCE AND 79⁷¹ of the CFPC on making its analysis on the corn Price increase in the domestic and interational markets, considering in an inclusive way, all the information contained in the administrative record, reason why the provision of section IV of article 51 of the LFPCA was not breached.

⁶⁹ Article 3.5 of the Antidumping Agreement states:

"3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as outlined in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal link between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also **examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.** Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry." (Emphasis added)

⁷⁰ Article 39 of the Foreign Trade Law:

"Article 39. For the purposes of this Act shall mean injury, unless the concept of serious injury for safeguard measures:

I. material injury to a domestic industry;
II. a threat of injury to a domestic industry; or
III. A delay in the establishment of a domestic industry

In the administrative investigation must prove that imports under conditions of price discrimination or subsidization, causing injury to the domestic industry under the terms of this law.

The Secretariat will consider **other factors known to it**, other than imports under conditions of price discrimination or subsidies, **which could affect the domestic industry.** The effect caused by these factors not be attributed to imports under conditions of price discrimination or subsidies."(Emphasis added).

⁷¹ Article 79 of the Federal Code of Civil Procedure provides:

"Article 79. To know the truth, the judge can rely on any person, whether a party or third party and anything or document, whether belonging to the parties or a third party without restrictions other than those that testing is recognized by law and have immediate relation to the facts.

The courts have no time limits to order the production of evidence they deem necessary to form their conviction regarding the content of the lawsuit, and apply to them the limitations and prohibitions of evidence, established in relation to the parties. "

632. 2. ANALYSIS OF THE IA OF THE INFORMATION FILED BY USAPEEC AND CERVANTES

633. 2.1 Introduction

634. USAPEEC states that the IA did not consider in its analysis the information that the Complainant submitted.

635. CENTRAL DETALLISTA points out that the IA, omitted the analysis of the arguments put forward and evidence presented by the Complainant in the course of the investigation, and therefore violates the hearing guarantee contained in articles 14 and 16 of the Political Constitution of the United Mexican States, article 38, Fraction IV of the CFF and 80, fraction II of the RLCE.

636. The Panel notes the following legal authorities cited by USAPEEC regarding the issues addressed in this section: Articles 6.6 of paragraph 7 of Annex II of the Antidumping Agreement; Articles 41, 42, 82 of the LCE; 59 and 162 of the RLCE and 79 of the CFPC and for purposes of the review before this Panel, the provisions on section II of Article 51 of the LFPCA.

637. The Panel notes the following legal authorities cited by CENTRAL DETALLISTA regarding the issues addressed in this section: Articles 14 and 16 of the Political Constitution of the United Mexican States, Article 38, Section IV of the CFF and 80, Section II of the RLCE.

638. 2.2 Issues for Review

639. Did the IA err by supposedly not considering in its analysis the evidence submitted by USAPEEC?

640. Did the IA err by supposedly not considering in its analysis the arguments and evidence submitted by CENTRAL DETALLISTA?

641. 2.3 Law & Analysis

642. 2.3.1 Decision of the IA not to consider in its analysis the information submitted by USAPEEC

643. USAPEEC states that the IA did not act in accordance with Articles 41, 42, 82 of the LCE, 59, 162, of RLCE, 6.6 paragraph 7 of Annex II of ADA and 79 of CFPC when the IA did not consider in its analysis the information submitted by the Complainant for no reason at all. An action which is illegal due to the facts that served as the basis for the FD were wrongfully appreciated, issued in breach of the applicable provisions and omitted to apply the correct provisions regarding the merits of the case, and alleged the illegalities set forth in Sections IV and V of Article 51 of LFPCA.

644. USAPEEC continues stating that to determine the domestic production size, the IA should have taken into consideration Articles 41 and 41 (sic) of the LCE that state what has to be taken into consideration to come to its determination of injury or threat of injury and to make sure, as it is established in Article 59 of the RLCE, through the corresponding investigation procedure, that the injury or threat of injury derives from the minimum analysis of all the elements that Articles 41 and 42 of LCE referred to.

645. For this, the parties offered evidence allowed by the law as set forth in Article 6.6 and paragraph 7 of annex II of ADA and 162 of RLCE. However the IA, to “determine a larger size of the domestic production” it analyzed the information out of the analyzed period⁷², such as the association census and the surveys applied to producers during the safeguard measure on chicken legs and thighs on 2001, and decided in point 485 of the FD, that the data used in the PD was “the best available information”⁷³.

646. USAPEEC states that the determination of the IA is not based on the best available information since it overlooked important information. For example, the INEGI’s web page which contains the information on volume and domestic production value of chicken carcasses from 2005 to 2010, this is all the information from the analyzed period, that the IA did not gather and therefore did not consider it for its use.

647. Likewise, the Complainant establishes that the IA dismissed evidentiary documents offered by Pilgrim’s Pride because they were out of the analyzed period; in addition, the IA dismissed the data from the study “Situation Analysis. The International outlook for corn, wheat and soybeans” done by SAGARPA and PROFECO that had information on the analyzed period⁷⁴.

⁷² “**478.** In the Preliminary Determination, the Secretariat decided to further specify the size of the domestic production. It used information from UNA publications, Association census, and surveys to producers during the safeguard procedure on chicken leg quarters, egg and food, that was submitted by the Petitioners. Starting with this information and the answers to the requirements from the Secretariat, all of this information was used to adjust the initial estimation of the total domestic production referred to in the previous point.”

⁷³ “**485** According to what has been previously described, the Secretariat confirmed that the data used for the Preliminary Determination was the best information available and by excluding from the domestic production industry, Pilgrim’s Pride Mexico and Tyson de Mexico, as well as the other 2 small companies that did not credit for the TIF butcheries, as shown in Table 2, it ratifies that the current investigation is supported by domestic producers that represent more than 50% of the total production of similar products produced by the domestic production industry. In fact, the Petitioners represent 42% of the domestic production and constitute a significant proportion (96%) of the domestic production industry of chicken leg and thighs.”

⁷⁴ “**613.** Based on the Document “Situation Analysis. International outlook for corn, wheat and soybeans” of SAGARPA, USAPEEC indicated that it wasn’t true the statement from the Secretariat on the price stability, since the price of white corn increased in the first trimester of 2010, which cannot be considered as stable. Likewise, according to the document “Tribuna Agrícola” of the UNA, the increase of food for poultry was expected from April 2010 to September 2011. It pointed out that Bachoco may depend on the imports of corn and a soybean from the United States, this fact does not allow a competition of Mexico in terms of supplies creating a disadvantage against the imports coming from that country.”

“**694.** USAPEEC stated that the investigated imports decreased while the prices increased; therefore, it should be determined a change of circumstances which shows the lack of injury to the domestic production. It indicated that the prices from PROFECO show that since the Initial Determination, the prices of chicken leg and thighs in bulk show an increase; therefore, explains Bachoco’s increase price policy”.

648. The arbitrariness of the IA to consider or not consider information is reflected in the fact that the IA decided not to apply countervailing duties for the contingency of avian influenza virus, based on information out of the analyzed period.

649. Regarding all the foregoing, the IA sustains that this grievance must be declared inoperative since the Complainant does not point out which are the breaches that the IA did to either Articles 41, 42 and 82 of LCE and 162 of RLCE, 6.6 and paragraph 7 of Annex II of ADA and 79 of CFPC or the damage caused to such Complainant by the illegal actions of the IA. Without explaining in what way the IA breaches Article 51, sections IV and V of LFPCA. Therefore, the Complainant did not meet the minimum procedural burden; therefore, its claim should be declared inoperative. In fact, by not having an individualized argument, the Panel has no obligation on declaring if the invoked Articles apply to the case or not.

650. In the event that the Panel considers that the arguments of the Complainant legally proceed, the IA answers “*Ad Cautelam*”, paragraph i. the size of the domestic industry, using information out of the analyzed period, as the census of producers associates and surveys made during the safeguard measure of the chicken legs and thighs on 2001”, must not be considered a claim, as it is a simple narration without explaining any breach or tort, and it does not indicate if the size of the domestic industry was calculated or not with information out of the analyzed period, nor Complainant states which the alleged breach is.

651. Assuming *arguendo* that it is a claim and that the Panel consider that it proceeds, the IA sustains that the argument does not proceed because the Complainant did not argue during the investigation, that the census was out of the analyzed period, therefore, the IA had no opportunity to assess the argument nor to respond to it, therefore, it must be declared inadmissible.

652. The IA acted in conformity of all the applicable legal provisions by basing its conclusions on all the information and evidence submitted by the parties and assessed the exactness of all the information and evidence on the Administrative Record.

653. The IA confirmed the information submitted by the Petitioners with other sources, as the National Union of Poultry Farmers, a list of 29 companies engaged in the production of chicken legs and thighs, egg and food, responses to requests for production companies and listings TIF slaughterhouses under operation of the Health Service, Food Safety and Quality as it noted in points 477-527 of the FD. Therefore the referred census didn’t serve as basis to determine the size of the domestic industry.

654. The IA complied with Article 41 of the LCE among others since the IA analyzed all the elements that such provision establishes for the injury analysis, as it was mentioned in points 577, 580, 592 and 620 of the Final Determination.

655. On the other hand, the Complainant did not clarify to which law Article 42 belongs to. If it is from LCE or RLCE, if it is from LCE it is important to make it clear that the current investigation consisted on analyzing the injury to the domestic industry, and not a threat of injury; therefore, the IA did not have to act or analyze such Article, it also isn't applicable since this Article indicates how to act when the IA is calculating the normal value of the investigated product and it needs to consider if the sales to the domestic market or to a third market of exportation are representative.

656. Referring to Articles 82 of LCE, 59 and 162 of RLCE and 6.6 and paragraph 7 of Annex II of ADA, in the absence of legal arguments, such allegations are to be considered inoperative, however, "*ad cautelam*," the IA explains how the authority acted in conformity with these Articles.

657. Throughout the investigation, the interested parties had several procedural opportunities to submit information and evidence. They had the legal right to do so, situation that the same Complainant confirms when it states that "the interested parties offered evidence allowed by law as set forth in Articles 6.1 and paragraph 7 of Annex II of the Antidumping Agreement and 162 of the RLCE. Among these opportunities it can be mentioned two periods for submitting evidence, the public hearing, opportunity to answer questions of the public hearing, the presentation of allegations, etc. Likewise, the IA requested several companies according to Article 82 of the LCE to complete or explain the submitted information, and it was assessed by the formal procedure (points 23 to 99, 117 and 123 of the FD). In consequence, the IA guaranteed the right to due process and the guarantee of hearing by allowing the parties, on several occasions, to introduce evidence as it was convenient to their rights, as it was accepted by the Complainant.

658. The IA did not reject any evidence by the sole reason that it was not an evidentiary means approved by Article 162 of RLCE, and as set forth in point 123 of the FD, the IA accepted and assessed such evidence subject to the essential formalities of the administrative procedure, taking into consideration the arguments, exceptions and defenses, and the evidence that the parties introduced during the investigation, grounded in law and in fact which of such proofs were accepted and which were not (for example, because such evidence was untimely introduced) and what was the assessment given by the IA to such evidence, in consequence, the IA acted in accordance with that Article.

659. Article 59 of RLCE establishes that the verification on injury should be done through the investigating procedure and during its proceedings, the elements referred to in articles 41 and 42 of LCE are to be analyzed. It is evident that the FD that is challenged put an end to the investigating procedure.

660. According to Article 6.6, as stated in the FD, the IA resolved each controversial item and the investigation with the information and evidence that the parties submitted during its procedure; this means, the IA assessed the evidence

and decided which ones were more accurate on the facts that on each case they pretended to prove. As it can be seen in points 491 to 493 of the Final Determination, are explained the reasons why the information submitted by USAPEEC was not used to determine the domestic chicken industry. Therefore, the Complainant's grievance does not proceed since the IA did assess the information provided by the Complainant in the investigation and compared it with other sources.

661. The IA based its determination on the best available information, in an equal manner and according with all the legal applicable provisions. The conclusion the IA reached in point 485 of FD is supported with the analysis referring points 476 to 484 of the same Determination.

662. The IA analyzed in point 489 of the FD that by not having the official data in particular on the production of chicken legs and thighs, the best available information is the data from UNA. Regarding INEGI's data referred to by USAPEEC, it corresponds to the estimates of the production of chicken and not of chicken legs and thighs that is the investigated product.

663. The IA analyzed and assessed the data in the study "Situation Analysis. The International outlook for corn, wheat, and soybeans" which was presented to demonstrate that there was no price stability of the raw material, as it was mentioned in point 613 of the FD, so, the IA did not omit to assess the data of SAGARPA'S study, as in points 611 and 615 on the FD solved the impact of the costs of the raw material assessing the information of the study that USAPEEC exhibited with the one presented by other interested parties. On the other hand, the IA did assessed the information from PROFECO submitted by USAPEEC and explained its answer in items 694 and 698 of the FD, where the IA considers that the elements given as circumstantial changes, do not distort the existence of unfair practice during the analyzed period; therefore, the claim should be dismissed. It also is required as stated in point 713 of the FD, that the decision of not applying the countervailing duties was because the IA did not want to over-dimension the impact of such duties in the market due to the presence of the avian flu virus.

664. The information used to determine dumping existence, injury, and the causal link need to be based on the investigated and analyzed periods. This happened in the current case; but not the decision on applying and enforcing the countervailing duties. This decision needs to be taken at the end of the investigation; therefore, the moment in which is decided to enforce a countervailing duty is always outside the investigated period that was from October 1, 2009, to September 30, 2010, and the final determination was issued until August 2012. Therefore, it cannot be accepted that the IA used information arbitrarily out of the analyzed period while deciding to apply such duties. Therefore, the claim is inadmissible.

665. This Panel coincides with the IA that the assertion of USAPEEC pointed out on page 212 of its Brief that: "i) the size of domestic production, using information outside the analyzed period, as the census on producers associations and surveys

conducted during the process of safeguard on chicken leg quarters in 2001” cannot be considered a claim, as it is a simple narration without explaining any breach or tort. However, on the other hand, in relation to this statement, the Panel concludes, after reviewing the Administrative Record and the arguments of all the parties, that the IA did not harm or make an error in using such information. The IA was based on numerous independent sources of information, including responses to Secretariat requirements and was not based solely on the census referred to, and based on all that information, data were obtained that allowed The IA Adjust the initial estimate of the total production, as indicated in point 478 of the FD that is transcribed below:

“**478.** In the Preliminary Determination, the Secretariat decided to precise even more the size of the domestic industry. It used information published by UNA, the census to associations and surveys of the producers carried out during the safeguard procedure of chicken legs and thighs on 2001, as well as 29 companies’ producers of chicken, legs and thighs, egg and foods, submitted by the Petitioners. From this information and the responses to the requests of information from the Secretariat, the data was obtained which allowed adjusting the initial estimates of the total production referred to, in the above paragraph.”

666. Referring to point 478 of the FD on the information used by the IA in order to specify the size of the domestic production, this Panel was able to prove that points 491 to 493 of the FD explain the reasons why the information submitted by USAPEEC and other participants were not used to determine the domestic industry of chicken as follows:

“**491.** In the same direction, Central Detallista, Smart & Final del Noroeste and USAPEEC submitted as an alternative source of domestic production, the data of the total poultry production of the sector converted to chicken legs and thighs concerning to the chicken meat as a whole.”

“**492.** Regarding this issue, the Petitioners outlined that in this procedure it has not been proven the likeness of the investigated product with the live chicken, and with the whole chicken. Petitioners argued that in this context, the applicable laws does not allow the inclusion of products whose likeness has not been established, and as a consequence, it is not allowed, the incorporation within the domestic industry, of those who produce such products that are not alike.”

“**493.** The Secretariat notes that, in effect, the live chicken and the whole chicken are not identical products, nor alike to the investigated product which is chicken legs and thighs. Therefore, there is no justification to include in the domestic industry the producers of products that aren’t alike to the investigated one. As a consequence, it is not acceptable the alternative proposal of the definition of domestic industry that is proposed by the mentioned importers. In the same direction, it is noted that the statistics that report all the domestic industry of chicken, include that sector that is produced and traded as live poultry or whole chicken and; therefore, are not relevant to this investigation. Finally, in the previous paragraph it is described, the procedure to determine the companies that specifically produce products alike to the imported ones and the sources used to do so, which include, review of census and survey data, specific requests, direct consultation to the companies and associations involved, as well as the cross-referring of information with the sector authorities. Therefore, the information concerning the domestic industry of chicken legs and thighs was not

based on indirect inferences. Therefore, the Secretariat considers the referred claims as inadmissible.”

667. On the other hand, the Panel also noted that the Complainant did not submit any argument or objection during the investigation process that the census on the producers of associations and surveys made during the safeguard measure on chicken leg and thighs on 2001 were out of the analyzed period, on the other hand, the claim from the Complainant does not proceed since the IA assessed the information given by the Complainant in the investigation and compared it to other sources.

668. This Panel agrees with the Investigating Authority that the IA based its determinations on the best available information, according to all the applicable legal provisions. The conclusion to which the Investigating Authority reached in point 485 of the FD is based on the analysis referred to in points 476 to 484 of the same Determination, as stated below:

“**476.** In accordance with Articles 4.1 and 5.4 of the ADA; 40 and 50 of the LCE, and 60, 61 and 62 of the RLCE, the Secretariat should identify the domestic industry as a whole production of the like product manufacturers under investigation, whose aggregate output constitutes all or at least a significant proportion of the total production. When justified, these systems give the Secretariat the authority to discard those producers that are linked to importers or exporters of the domestic producers, or are themselves, importers. Furthermore, the provisions mentioned indicate that the Petitioners of the investigation represent at least 25% of the industry, and its application must have the support of 50% or more of producers expressing their support or rejection to the application.”

“**477.** In this Regard, in the Initial Determination, the Secretariat considered it reasonable the approaches that the Petitioners made to calculate the total domestic industry of chicken legs and thighs. Indeed, the lack of specific indicators for these products, the petitioners used the information published by the UNA in the Compendium of the Poultry Sector Economic Indicators 2010. According to this source, in 2009, 8% of which live chicken it was produced in Mexico is sold in parts or cutting. A chicken in Mexico weighs 2,945 kilograms and the average performance of the chicken legs and thighs of the dominant race of chickens (Ross) is 31.76%. Thus, the total initially estimated chicken legs and thighs volume resulted from multiplying the total volume of live chickens in tons by the aforementioned performance factor. When comparing the production of the Petitioners and other production companies, on this estimate, the Secretariat concluded that the standards mentioned in the previous point of this determination were met. It was noted that this determination was consistent with the data of the companies that responded to the requests of information made by the Secretariat to corroborate the estimate and the prevention response made by the Petitioners. ”

“**478.** In the Preliminary Determination, the Secretariat decided to precise even more the size of the domestic industry. It used information published by UNA, the census to associations and surveys of the producers carried out during the safeguard procedure of chicken legs and thighs on 2001, as well as 29 companies’ producers of chicken, legs and thighs, egg and foods, submitted by the Petitioners. From this information and the responses to the requests of information from the Secretariat, the data was obtained which allowed adjusting the initial estimates of the total production referred to, in the above paragraph.”

“479. In fact, eleven companies were identified as chicken leg and thighs producers on the following terms: one of them stop producing; two (Pilgrim’s Pride Mexico and Tyson Mexico) are importers linked to exporters; three (Bachoco, Buenaventura and Patsa) are the petitioners; four (Pollo de Queretaro, Productora Pecuaria Alpera, Agroindustrias Quesada y Agropecuaria el Avion) support the investigation; and one more (Interpec San Marcos) declared itself indifferent. In summary, it was noted that there are ten companies in operation that produce alike merchandise to the investigated product, whose joint output was considered as the best available information on the total production for the Preliminary Determination.”

“480. During the preliminary stage of this investigation, the Secretariat decided to exclude from the domestic industry, Pilgrim’s Pride Mexico and Tyson Mexico. This determination was based on the fact that these two companies made direct and through third party imports of chicken legs and thighs from the United States, and the existence of a corporate link with the exporters Pilgrim’s Pride Corporation and Tyson Foods. “

“481. By proceeding in the manner described, the Secretariat observed that the Petitioners represent a major proportion of the total domestic industry of chicken legs and thighs (41%) and, considering the domestic industry as all the the producers without the companies linked mentioned in the previous point, it was preliminarily concluded that the Petitioners represent more than 90% of this industry and have the support of virtually all of the remainder.”

“482. For the final determination, the Secretariat verified the information obtained in the preliminary stage, with gathered information related to the operation of slaughterhouses of Federal Inspection Type (TIF), according to official sources from the agricultural sector, namely, the National Health Service, Food Safety and Quality (SENASICA) dependent of SAGARPA.”

“483. Indeed, the already-mentioned Compendium of Economic Indicators of UNA states that the TIF process plants are those that have facilities, equipment, and production process that allows obtaining chicken meat in conditions that meet animal sanitary official regulations, and any appropriate manufacturing practices, which makes the product obtained alike to that imported. According to this source, there are 23 TIF plants in the country for slaughter and poultry processing; the Secretariat noted that the owners are, among others, the petitioners or those who supported them. In order to corroborate that information, and to identify which of these slaughter plants result in traces alike to the imported product, the Secretariat gathered the register SENASICA of all TIF establishments for cattle, pigs, horses, sheep, rabbits, goats and birds. According to this standard, the Secretariat proceeded to identify the TIF slaughterhouses processing poultry, as well as those belonging to the Petitioners or their supporters.”

“484. When analyzing and debugging the registry of TIF slaughterhouses, the Secretariat noted that official information SENASICA confirms the numbers of UNA, in the sense that there are indeed 23 TIF establishments with the capacity for slaughtering and processing of birds. It was noted that according to the official census, the absolute majority of the butchers (70%) belong to companies already identified as producers of chicken legs and thighs and 30% to companies not known to have chicken meat in pieces. Two of the companies support the investigation, with a marginal participation of the total, they noted that the chicken not processed in TIF slaughterhouses but in private slaughterhouses registered with the SAGARPA, therefore, the Secretariat decided to exclude them from the domestic industry.”

669. In addition to the above, the IA specified in point 489 that by not having official data on the particular production of chicken legs and thighs, the best available information are the data from UNA. Regarding INEGI data referred to by USAPEEC, are estimates of production of chicken, and not that of chicken legs and thighs, which is the product under investigation.

670. As this Panel has stated, contrary to what was pointed out by USAPEEC, the IA did analyze and assessed the data in the study "Situation Analysis. International outlook for corn, wheat and soybeans", which was submitted to prove that there was no stability in the raw material prices, as it was mentioned in point 613, this is, the IA did not omit to assess the data from the study of SAGARPA, since in points 611 to 615 of the FD it resolved the issue on the impact of raw material costs by assessing the information of USAPEEC study which it exhibits together with that information submitted by other interested appearing parties.

671. On the other hand, the IA did assess the PROFECO'S information submitted by USAPEEC and explained its answer to points 694 and 698 of the FD, in which it considers that the elements raised by the change of circumstances, did not distort the existence of the unfair practice in the analyzed period.

672. The following paragraphs 694 to 698 of the FD state the following:

"**694.** USAPEEC pointed out that the investigated imports decreased while its prices increased; therefore, a change of circumstances shall determine which show that there is no injury to the domestic industry. It stated that PROFECO prices show that since the Initial Determination, the prices of chicken legs and thighs in bulk show an increase, which it explained by Bachoco's increase pricing policy."

"**695.** Pilgrim's Pride Mexico and Pilgrim's Pride Corporation indicated that since 2010 and in 2011 the domestic and international markets have experienced a change in circumstances that reverses the trends of the investigation period: i) the opening of the Russian market and Ukrainian exports of States United; ii) stabilization of the crisis of 2008, senior US domestic demand for white meat chicken and high surplus chicken legs and thighs that are used to an increasing demand for export; iii) the increase in the price of the subject imports and decrease in volume eliminates price discrimination and normalizes international competition, and iv) depreciation of the peso against the dollar raises the cost of imports."

"**696.** Operadora de Reynosa, Operadora de Ciudad Juarez and Larroc indicated that there are also favorable growth prospects for the domestic industry. They noted that the situation leaves no doubt of the alleged injury due to the financial capacity of one of the main petitioners to acquire even to another company. "

"**697.** The Petitioners indicated that the arguments that should be dismissed of the counterparties on the absence of injury, since they are based on the performance of products that are not under investigation; since the beginning of the investigation there has been a change in circumstances; imports in 2011 have not diminished nor increased their prices, and that the assertion of the parties is inaccurate since it rely only on the information of one quarter and in the data PROFECO which relate mainly to supermarket chains where the selling price is not controlled by the producers and marketing margins are absorbed by the distributor. "

698. The Secretariat considered that in the administrative record is the information that proves the injury caused to the domestic industry of chicken legs and thighs by the imports in dumping conditions. It considers that the elements raised as “change of circumstances” does not distort the existence of the unfair practice in the analyzed period, or they are not aspects that modify the discriminatory behavior of the exporters and the adverse effects on the domestic market.”

673. The information that is used to determine the existence of dumping, the injury, and the casual link need to be based on the investigated and analyzed periods as it happened in the present case, but not the decision to impose an apply the countervailing duties; since, this decision must be taken at the end of the investigation, and therefore, the moment in which is decided to impose the countervailing duty is always outside the investigated period.

674. 2.3.2 Conclusion

675. Finally, this Panel considers that the IA analyzed the information provided by the Complainant and motivated the reasons why it did not consider it suitable and that in relation to Articles 41, 42, 82 of the LCE, 59, 162 RLCE, 6.6, paragraph 7 of Annex II of the ADA and 79 of the FCCP, USAPEEC did not submit any argument to explain in what way or how the Investigating Authority has violated or breached the above legal provisions reason why sections IV and V of Article 51 of the LFPCA are not breached.

676. 2.3.3 Decision of the IA not to consider in its analysis the arguments and evidence submitted by CENTRAL DETALLISTA

677. The Final Determination is illegal and should be left without effect, because the Investigating Authority failed to analyze and answer the arguments raised by CENTRAL DETALLISTA in his letter of reply to the Preliminary Determination of this antidumping investigation that is, violating the provisions of Constitutional articles 14 and 16, setion IV of article 38 of the CFF and section II of article 80 of the RLCE.

678. It should be noted that the aforementioned hearing guarantee enshrined in Constitutional Article 14, can be seen reflected in or provided for in article 164 of the RLCE, which states the following:

"Article 164.- In the case of proceedings against unfair practices in international trade, and safeguard measures, the initiation of the administrative investigation and acceptance of the request, importers and exporters and, where appropriate, representatives of foreign governments that have been notified or that appear in their own right before the Secretariat, will have a period of 30 days to formulate their defense and to present the required information.

After the deadline referred to in the preceding paragraph, the Secretariat shall give the applicants and, as the case may be, their interveners, eight days to submit their counterarguments and replies.

As from the publication in the Official Journal of the Federation of the preliminary determination referred to in Article 57 of the Law, the Secretariat will grant a period of twenty days, so that the interested parties present the arguments and additional evidence that they consider pertinent ."⁷⁵

679. Accordingly, the fact that the IA failed to take into account the evidence and arguments put forward within the deadline set forth in article 164 of the RLCE would mean to leave without effect the provisions of the constitutional provision in question, since the possibility of defense to the affected individual would be denied.

680. According to the Complainant, it is imperative for the authorities that carry out all the necessary acts so that there is no doubt that the individual has been genuinely heard in the procedure in question, which means that the person affected by the act has the opportunity to defend, the opportunity to plead, and the right that the determination resolves the question actually raised in the light of the defense arguments.

681. However, in this case, through a letter dated March 7, 2012 registered under folio number 00390, CENTRAL DETALLISTA stated first that the determination of the injury in relation to the production and sales of leg and chicken thigh was not correctly determined by the Investigating Authority, since it is contradictory to its reasoning regarding the integration of the domestic industry of the product similar to that investigated.

682. In fact, according to the aforementioned document, according to data from the National Union of Poultry Producers, the national poultry flock in Mexico grew by 2.2% in 2010 compared to 2009, growth that is related to the growth of the poultry industry in Mexico as well as with domestic chicken production, also showing that the growth of national chicken production had grown at an annual rate of 4.6% in the period 1994-2010.

683. In these terms, since the IA noted that the production of chicken leg and thigh began with live or finished chicken it was logical to infer that if the production of whole chicken had increased, consequently the production of leg and chicken thigh would have Increased in the same way.

684. In this regard, my representative argued that if it is not accepted that the increase in live chicken has the necessary increase in leg and chicken thigh, then the Investigating Authority should have considered chicken leg and thigh producers to the rest of the Economic agents who perform the cutting of poultry in order to determine the representativeness of the petitioners, in accordance with footnote 13 of the Anti-Dumping Agreement, eliminating the unjustified discrimination that has so far been manifested in the anti-dumping investigation concerned.

⁷⁵ Note this article has been reformed by DOF of May 22, 2014 and currently contains another text.

685. However, despite all of the above, in issuing the Final Determination of the antidumping investigation in question, the IA failed to analyze and respond to the aforementioned indications.

686. In fact, in the Final Determination the Investigating Authority noted the following:

"C. Effects on domestic production. ...

"626. Based on the information of the companies that make up the relevant domestic industry, production decreased 11 and 12% in 2008 and 2009. In 2010 it increased 8%, while in the period from October 2009 to September 2010 increased by 12%. However, the growth registered mainly in 2010, for the period analyzed as a whole, from 2007 to 2010, the national production recorded a cumulative decrease of 15%, and in relation to 2008 of 4%. Due to the fact that there were no exports of the domestic industry, production to the domestic market shows the same behavior. "

"627. The participation of the domestic industry in the CNA decreased from 20% in 2007 to 16.13% and 11% in 2008, 2009, and 2010, respectively. This represented a drop of 8 percentage points in 2007 to 2010 and 5 percentage points compared to 2008. In the period from October 2009 to September 2010 decreased by 1%. It should be noted that the domestic production of all the companies that identified themselves as producers of leg and chicken thigh also registered a decreasing trend in the analyzed period and a decrease of their participation in the CNA from 45% in 2007, to 37, 30, 26 and 27% from 2008 to (sic).

"628. Sales to the domestic market of the domestic industry show a behavior similar to that of production, falling by 11% from 2007 to 2010. In 2008 and 2009, it decreased by 10% and 12%, while in 2010 and even if in the period from October 2009 to September 2010 a recovery of 13% was observed, did not reach the volumes that were registered in 2007 and 2008."

687. According to the previous transcript, the Investigating Authority never made a statement regarding the arguments raised by CENTRAL DETALLISTA regarding the incorrect determination of injury to the domestic leg and chicken thigh industry.

688. In this regard, it is clear that the Final Determination of the anti-dumping investigation in question was issued in contravention of Articles 14 and 16 of the Constitution, so that it is appropriate for the Panel to return it so that the Hearing guarantee of CENTRAL DETALLISTA is respected and this investigation complies with the principles of due process, based on NAFTA Article 1904.8, Rule 72 of the Rules of Procedure, and 50 and 51 of the LFPCA.

689. In relation to the foregoing, the IA asserts that it complied with all the provisions relating to the procedure in respect of unfair international trade practices and granted full opportunity for defense to all parties concerned in that proceeding because it not only admitted the evidence offered by CENTRAL DETALLISTA, but valued them in their integrity, as well as each of the arguments that were raised.

690. The IA reiterates that all the arguments and evidence offered by the interested parties in the investigation were duly analyzed in the FD. The fact that the Complainant disagrees with the determination of the IA does not mean that the IA has omitted such analysis. In points 490 to 493 and 637 of the FD, the IA addressed, assessed and analyzed and concluded the arguments of all Parties involved in the issue that the Complainant claims was not met.

691. Now, with regard to the claim that the IA did not include in its analysis the behavior of the national flock including live, finished or whole chicken, it is important to note that, as mentioned in paragraph 493 of the FD, the product investigated is "chicken leg and thigh" and not everything else, so it is wrong that the IA has stopped considering that point.

692. The generalization about the behavior of the poultry sector or of the "national flock" does not have to coincide with the domestic production of chicken leg and thigh. In this regard, the IA clarified in point 637 of the FD that "the difference between the behavior of the indicators provided by the Petitioners and the sources indicated by their counterparts are explained by the fact that the latter do not refer to the investigated similar product that is chicken leg and n thigh. The market behavior of a product other than the chicken leg and thigh did not influence the IA injury determination. Again, it can be seen that the point was properly analyzed in the FD.

693. The IA responded to the arguments of CENTRAL DETALLISTA and determined that the information provided by the Petitioners at the start stage corresponds to the information reasonably available to them, pursuant to Articles 5.2 (iii) of the ADA and section XI, of article 75 of the RLCE.

694. In that regard, the IA considered that these arguments were unfounded. Public market poultry, tianguis, boarding houses and other establishments that distribute whole chicken meat are intermediaries who buy the chicken in a canal and perform a simple on-site cutting operation to meet the particular needs of their final customers, but they are not producers of chicken leg and thigh.

695. The IA responded opportunely to the argument of CENTRAL DETALLISTA and determined that the leg and thigh imported from the United States and those of domestic production use the same channels, serve the same geographic markets and consumers, without being limited to what is indicated in the FD.

696. The IA analyzed these arguments and did not rule out tariff elimination or the elimination of a safeguard measure as an element that may influence the increase in imports. However, the IA considered that in this case not only an increase in imports of chicken leg and thigh was observed, but also that dumping took place at prices with significant margins of undercutting with respect to the price of similar domestic product.

697. The IA considered that in the present case not only an increase in imports of chicken leg and thigh was observed but also that dumping occurred at prices at significant margins of undercutting relative to the price of similar domestic product. It was also observed that the increase in volume imported in the year in which the safeguard measures were eliminated was followed by subsequent increases resulting from an increasing deterioration in import prices. For this reason, the IA considered that the increase in imports cannot be classified as "natural" but as a result of dumping.

698. The IA considered that the characterization of the leg and thigh as a by-product of CENTRAL DETALLISTA and Smart & Final del Noroeste is inconsistent with the generalized consensus of all parties that they are co-products. However, if by-products are considered, that would in any case explain that the product was not sold at normal market prices, but under conditions of dumping.

699. The IA considered that dumped imports replaced domestic leg and thigh production in the period under analysis at prices with significant understatement margins.

700. The IA observed that the estimates of the parties appearing essentially relate to the effects of a compensatory quota on demand, and considered it justified to seek that the correction of distortions by unfair practice does not lead to the imposition of measures excessively high compensatory costs that could negatively impact the consumer and the rest of the food production chain. It was therefore decided to assess the relevance of a lower quota than the dumping margins.

701. 2.3.4 Conclusion

702. This Panel considers that the IA analyzed the arguments and information provided by CENTRAL DETALLISTA and motivated the reasons why the IA did not consider it suitable and that, regarding articles 38, section IV of the CFF and 80, fraction II of the RLCE, CENTRAL DETALLISTA did not present sufficient arguments to support its claim that the IA violated the legal precepts cited, together with the fact that CENTRAL DETALLISTA did not indicate which of the grounds of illegality foreseen in article 51 of the LFPCA was updated.

703. 3. DECISION REGARDING THE DISMISSAL OF THE EVIDENCE OFFERED BY CERVANTES ON THE RECONSTRUCTION OF EXPORT PRICE

704. 3.1 Introduction

705. CERVANTES states that the IA dismissed the evidence offered on the reconstruction of export price.

706. The Panel notes the following legal authorities cited by CERVANTES regarding the issues addressed in this section: Articles 2.1, 2.3, 6.1, 6.8 and paragraphs 5 and 6 of Annex II of the Antidumping Agreement; Articles 35 and 55 LCE and 38 of the RLCE.

707. 3.2 Issues for Review

708. Did the IA err by supposedly dismissing in its analysis the evidence submitted by CERVANTES on the reconstruction of export price?

709. 3.3 Law & Analysis

710. 3.3.1 Decision whether the IA dismissed the evidence on the reconstruction of the export price submitted by CERVANTES

711. CERVANTES claimed in its Brief that the Investigating Authority did not act in accordance to Articles 35, 55 of LCE, 38 of RLCE, 2.1, 2.3, 6.1, 6.8, and paragraph 5 and 6 of Annex II of ADA. The IA dismissed the information submitted by CERVANTES on the reconstruction of the export price, without letting CERVANTES know about the inconsistencies detected between the sales volume and the imports reported by COMERCIAL DE CARNES FRÍAS, therefore the IA breached section III of Article 51 of LFPCA.

712. CERVANTES claims that in the Final Determination, the IA decided to dismiss the information of the export price presented by CERVANTES due to the fact that when comparing the volume of the product code submitted by CERVANTES with the import volume of its link importer COMERCIAL DE CARNES FRIAS identified that the volume of imports was lower, meaning they did not coincide, which did not allow the reconstructions of the export price for CERVANTES, and the IA determine for CERVANTES the highest residual countervailing duty. The above taking into consideration that the IA inform CERVANTES of this situation, having elapsed 16 months from the response to the official questionnaire, that the sales volumes of CERVANTES and the reported imports by COMERCIAL DE CARNES FRIAS showed differences.

713. CERVANTES continues stating that the IA, in accordance to paragraph 6 of Annex II of ADA, has the obligation to inform immediately the reasons why the IA is not taking into consideration the submitted information, to give CERVANTES the opportunity to submit new explanations.

714. CERVANTES notes that in the course of the investigation, the IA made three requests for information and that in none of the three the IA requested clarification regarding the sales transactions made during the investigation period. Therefore, it was not made knowledgeable of faults or errors in the presentation of its information. The only act, it acknowledged was the rejection of its export price until the time the Final Determination was issued.

715. Due to the above, and given the defects in the procedure, the Complainant requests this Panel to accept the claim submitted and to remand the determination to the IA to correct the irregularity and to issue a new one, according to the Panel's instructions.

716. Given these statements, the IA noted that, excluding the allegation that CERVANTES developed based on paragraph 6 of Annex II of the ADA, the Complainant did not present "any argument to explain in what way or how the Investigating Authority has violated Articles 35, 55 of the LCE; 38 RLCE; 2.1, 2.3, 6.1, 6.8, and paragraph 5 of Annex 2 to the ADA, which is mere assertions unsupported, and CERVANTES did not point the affectation in its legal interest, therefore, the grievances are ineffective. This, together with the fact that CERVANTES did not argue why Sections IV and V of Article 51 of the LFPCA were breached.

717. The IA clarified that it did not rejected the information filed by CERVANTES, reason why paragraph 6 of Annex II of the ADA is not applicable, and that in any moment the IA acted in an incompatible way with such provision, since the IA did not give to the interested party a second opportunity to submit information, because if the information submitted by the interested party had an error and had the right to offer new information, the investigation could delay indefinitely.

718. The IA stated that taking into consideration what is established by GE in Korea; *Certain paper*, what paragraph 6 demands is that the Investigating Authority gives to the interested party whose information was rejected, the opportunity to explain to the Investigating Authority the reasons why the Authority must take into account such information, and at the same time, would give the Investigating Authority a second chance to review its decision of rejecting certain information; but not a second chance to the interested parties to submit new information, by interpreting the contrary, the investigation could go on and on indefinitely.⁷⁶ GE equally emphasized that paragraph 6 of Annex II of ADA "does not establish the procedure by which the interested party has to be notified about (the) rejection".⁷⁷

719. On the other hand, the IA affirms that CERVANTES did not submit information on its export prices when it responded the questionnaire at the beginning of the investigation; it gave the information through a letter written on March 7, 2012 (folio 0398). Afterward, March 26, 2012 the Secretariat requested CERVANTES, by official letter UPCI.416.12.0787 to clarify some information related to the export prices, which CERVANTES answered on April 12, 2012. After analyzing CERVANTES' submitted information, and the answer given by this company to the requested information UPCI.416.12.0787, the Secretariat assessed in the FD that the requested information necessary to calculate an individual export price was not submitted.

720. As previously exposed, the IA requests this Panel: i) to determine CERVANTES' claim as groundless concerning the IA's action in an incompatible manner with paragraph 6 of Annex II of ADA; and ii) dismiss the statements that

⁷⁶ GE inform, Korea- Determined paper, paragraph 7.85

⁷⁷ GE inform, Korea- Determined paper, paragraph 7.75

CERVANTES was not required to correct and clarify its information on the export price.

721. First, this Panel transcribes the contents of paragraph 6, Annex II of the ADA, with the purpose to analyze as argued by the IA, if CERVANTES' argument is not legally grounded because paragraph 6 of Annex II of ADA is not applicable to the situation:

"ANNEX II: BEST INFORMATION AVAILABLE REGARDING PARAGRAPH 8 OF ARTICLE 6

...

6. If evidence or information is not accepted, the supplying party should be informed immediately of the reasons why it was not accepted, and should have an opportunity to provide further explanations within a reasonable period, taking into account the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determination."

722. From the analysis of paragraph 6 of Annex II of ADA, this Panel comes to the conclusion that such paragraph is only applicable to evidence and information that the IA has not accepted or has rejected during the investigation, and it does not refer to the evidence or information that has decided not to take into consideration as the result of its assessment. In this case, the party is informed of which are the reasons of the rejection of the evidence or proof, in order for the party to have the opportunity to submit new explanations within a reasonable time.

723. In view of the abovementioned, this Panel considered that the violation claimed by CERVANTES to paragraph 6 of Annex II of ADA does not exist, because in the present case, the problem was not that the IA had not accepted or rejected the information, since the IA have as exhibited the evidence of CERVANTES, but when assessing the export price information presented by CERVANTES, when comparing the volume of product code submitted by CERVANTES with the import volume of its related importer COMERCIAL DE CARNES FRIAS, the IA identified that the import volume was lower, i.e., there was no correspondence between them, making it impossible to make the reconstruction of the export price of CERVANTES, and therefore, the IA determined what is appropriate based on the facts that it was aware of, ie, the highest residual countervailing duty.

724. Indeed, in paragraphs 416 and 417 of the Final Resolution, the IA determine the following:

"**416.** Cervantes Distributors submitted in this phase, the database with the total export operations that were made by its related importer Comercial de Carnes Frias del Norte. For reconstruction purposes on export prices, it reported the import operations of its related importer, as well as the sales to its first unrelated client, during the period of investigation, for the product code it exported.

417. The Secretariat identified the volume of the product code that it exported to Mexico, and it compared it to the import volume. As a result, it noted that the import volume was lower; therefore, there is no link between both volumes. Due to this situation, it is not possible to make the reconstruction of the export Price for Cervantes Distributors, according to articles 2.3 of the Antidumping Agreement, 35 of LCE, and 50 of RLCE."

725. On the other hand, as evidenced in the Administrative Record, the IA required CERVANTES to submit additional information on their export prices and clarification on some points of CERVANTES' replies to the official questionnaire and also clarified that CERVANTES did not submit information on their export prices when responding the questionnaire at the beginning of the investigation, it did through a writ dated March 7, 2012 (folio 0398). Subsequently, on March 26, 2012, the Secretariat requested CERVANTES, through official letter UPCI.416.12.0787 to clarify certain information on export prices, which CERVANTES replied on April 12, 2012. After analyzing the information submitted by CERVANTES, as well as the response that the company gave for the request for information UPCI.416.12.0787, the IA assessed in the FD that it had not submitted the information needed to calculate a personalized export price.

726. The Panel considers that the above does not breach any provision since it is clear that the obligation in an investigation on submitting evidence, elements, information and data is a burden of the participating companies and not that of the IA.

727. Annex 1904.15 11 (f) of NAFTA provides that participants in an antidumping proceeding should have the opportunity to "present facts and arguments in support of their positions before any final determination, in so far as time will allow ... " Although this provision applies to the preliminary stage of an antidumping proceeding, it evokes the principle of transparency and fairness that should be present throughout the entire procedure.

728. On the other hand, Article 6.1 of the ADA provides that each participant will enjoy ample opportunity to submit in writing all useful evidence.

729. In fact, the law recognizes that the dumping margins should be based on adequate information and to this end, provides some safeguard measures to ensure that the information submitted is accurate and complete; and that the parties had the opportunity to correct information deficiencies that were already submitted.

730. Despite the existence of these safeguards, there is no legal obligation for the IA to ensure that each participant has exhausted its options or each party has delivered its complete information. The existence of an obligation as the former would be a difficult task, if not impossible, in charge of the IA, especially in the final stage of the investigation. The parties in an antidumping proceeding have the responsibility to deliver all the information they consider necessary to protect their interests and to ensure that the information provided is appropriate. The IA should

facilitate the submission of information and should take into consideration all information submitted promptly, but it is not the responsibility of the IA to decide for a participant what information should be presented. The law does not require the IA to take by the hand each participant during each stage of the procedure and in the case of study, the rights of evidence and procedural burden to comply the IA's requirements are of the Complainant.

731. 3.3.2 Conclusion

732. This Panel has corroborated that in relation to articles Articles 35, 55 of the LCE, 38 RLCE, 2.1, 2.3, 6.1, 6.8, and paragraph 5 of Annex II of the ADA, CERVANTES did not submit any argument to explain in what form or how the Investigating Authority has breached such legal provisions.

733. In virtue of the above, this Panel considers that paragraph 6 of Annex II of the ADA was not violated, and therefore section III of Article 51 of the LFPCA was not breached.

734. 4. DECISION ABOUT THE PRELIMINARY STUDY OF THE INFORMATION SUBMITTED BY CERVANTES

735. 4.1 Introduction

736. CERVANTES states that the IA did not make a preliminary study of the information it submitted.

737. The Panel notes the following legal authorities cited by CERVANTES regarding the issues addressed in this section: Articles 6.1, 12.2 and 12.2.1 of the Antidumping Agreement; Articles 82, section I of the RLCE and sections II, III and and for purposes of the review before this Panel, the provisions on Section IV of Article 51 of the LFPCA.

738. 4.2 Issues for Review

739. Did the IA err by supposedly not studying in a preliminary manner the information submitted by CERVANTES?

740. 4.3 Law & Analysis

741. 4.3.1 Decision whether the IA made a preliminary study of the information submitted by CERVANTES

742. CERVANTES claims that the IA breached Articles 57 of LCE, section 1 of Article 82 of RLCE, 6.1, 12.2 and 12.2.1 of ADA. The IA did not carry out a preliminary study on the information submitted by CERVANTES, in the official questionnaire so as to the answers given in the information requirements, as a consequence, eliminate its right to a broad opportunity to offer complementary

evidence in the second probationary period that CERVANTES would have considered pertinent. Likewise, CERVANTES claims it has received an unequal and discriminatory treatment, regarding the opportunity of defense given to the rest of the interested parties. The alleged violation impacts the result of the challenged Final Determination if the IA had made a preliminary study to the given information in the probationary period CERVANTES would have had a minor adverse result, therefore, the IA omitted the formal requirements and breached Sections II, III and IV of Article 51 of the LFPCA.

743. CERVANTES explains that the IA did not make a preliminary determination of the given information, that this affects its possibility of defense since CERVANTES was not aware of the inconsistencies detected by the IA in the information, and therefore, CERVANTES did not have the possibility to give further elements of evidence as set forth in Article 164 of the RLCE. Likewise, CERVANTES claims that the rest of the interested parties did have the opportunity of finding out what they required to correct or improve their information, which left CERVANTES in a total state of disadvantage and defense.

744. In conclusion, CERVANTES points out that the foregoing means there is an omission of the formal requirements of the procedure, which affects its defenses and the alleged violation impacts the result of the challenged resolution. If the Complainant had known from the beginning the IA's determination, CERVANTES would have been able to use its right of defense as established in Article 6 of ADA.

745. In response, the IA pointed out that this Panel is impaired to enter to the study of CERVANTES's claim, since CERVANTES did not comply with the minimum procedural burden regarding its claim under Sections II, III, and IV of Article 51 of the LFPCA. CERVANTES did not reasonably detail which was the section of the referred Article that was supposedly breached. Additionally, and regarding the breach of Articles 57 of LCE; Section I of Article 82 of RLCE and Articles 6.1, 12.2 and 12.2.1 of ADA, the IA highlights that CERVANTES failed in stating its cause of action. Also what damage was caused to CERVANTES, and therefore, CERVANTES did not complied with its minimum procedural burden; therefore, the IA requested this Panel to determine that CERVANTES's claims are inoperative.

746. The IA pointed out that the claims, even if they were operative, they are not valid since they ran out of matter, since such claims deal of an act that already had stopped from producing legal effects since the Preliminary Determination stops being valid when the FD is issued. If a challenged act stops producing effects, the claim that is based in such act ran out of matter; and therefore, needs to be dismissed as stated in the thesis: XXI. 2°. P.A. 28.

747. The Investigating Authority highlighted that Articles 6.1, 12.2, 12.2.1 of ADA did not enforce an obligation on analyzing in a preliminary manner the information that the interested parties submit during the first probationary period. Article 52 of LCE refers to the terms in which the IA must issue the Preliminary Determination

of an investigation; meanwhile articles 6.1, 12.2 and 12.21 of ADA only refer to the obligation of giving information to the public of all the determinations that are given in an antidumping investigation. The sole provision that has relation with its allegation is section I of article 82 of RLCE, that establishes the content that have to have the preliminary determinations, but inclusively in the case of section I of article 82 of RLCE, it only would impose a obligation to the IA to analyze the information filed by the interested parties during the first probationary period, as it is necessary to fulfill with the minimum content in section I of the said Article of the RLCE.

748. The IA arguendo that the allegations of CERVANTES are applicable, the IA state that it fulfilled a preliminary analysis of the information submitted by CERVANTES in the first probationary period, however, as a result of this analysis, the IA concluded that it did not have sufficient information to calculate a specific dumping margin, so the Complainant allegation is not legally grounded. This can be seen in point 173 of the Preliminary Determination.

749. In fact, regarding the price discrimination information, in the questionnaire responses filed by CERVANTES on April 11, 2011, CERVANTES did not include enough information that may allow the IA to fulfill the analysis to determine a specific margin of price discrimination specific to the company. In the section of export price and adjustments to the export price, CERVANTES's answer was "N/A" (not applicable), and meanwhile, in the parts of reconstruction of export price and the prices referred to the internal market of the country of origin, reconstructed value and adjustments to normal value, CERVANTES did not gave any answer.

750. By means of a writ of July 29, 2011, CERVANTES pretended to mend the lack of information by the inclusion of annexes 8A and 8B referring to the total costs of production, normal value and export prices to Mexico, on "II Aspects of Injury", as part of its answer to question 7. Such information was included by CERVANTES without being requested by the IA in the information requirement of July 12, 2011, nevertheless the Secretariat took it into consideration.

751. As a result of the analysis of all the information filed by CERVANTES in the first probationary period, as is demonstrated in paragraph 416 of the PD, the IA found that it does not count with the sufficient information given by CERVANTES to calculate a specific dumping margin for the mentioned company.

752. Likewise, the treatment given by the IA to the information that CERVANTES filed during the first probationary period related to injury, was correct. By official letter UPCI.416.1260 of July 12, 2011, the IA requested CERVANTES to file more information regarding injury. CERVANTES, answered the following:

- a) Regarding the section of general aspects, the requirement consisted that CERVANTES has to file the original document and a copy of the general power of attorney for lawsuits and collections of its legal representative,

so as in the reclassification of some information catalogued as confidential. CERVANTES filed this document.

- b) About injury aspects, CERVANTES clarified that by a mistake CERVANTES was mentioned as a producer of the investigated merchandise, nevertheless, CERVANTES answered as a trader and not as a producer. According to this explanation, the Secretariat gave CERVANTES the treatment of trader in the Preliminary Determination.
- c) With respect to the application to file the indicators of the exporter company pointed in Annex A.3 of the questionnaire for the exporters, CERVANTES marked that “it was unable to finish to compile the required information for this point, nevertheless, will offer it in a later moment of the administrative investigation. The secretariat took notice of such answer.

753. Last, the IA once more the information given by CERVANTES and decided to require – by official letter UPCI.416.11.2284 of October 21st, 2011 – to such company, to present an explanation and more information regarding the strictly legal part of the investigation. In response, CERVANTES: reclassified certain information that was previously submitted; gave a public summary of some information previously submitted; gave an explanation why CERVANTES can resume the contained information in the public summaries of its confidential information; submitted the Spanish translations of some documents and a defense why some information was classified as confidential. Such information was duly admitted by the Secretariat, as is evident in the decree of October 31st, 2011, as response of folio 2033 of October 28, 2011.

754. As it is set forth in point 173 of the Preliminary Determination, the IA considered all CERVANTES answers previously described, therefore the IA request the Binational Panel to determine that CERVANTES’ allegation that the IA acted in an incompatible manner with Article 57 of LCE; Section I of Article 82 of RLCE and Articles 6.1, 12.2 and 12.2.1 of ADA, is groundless.

755. 4.3.2 Conclusion

756. In relation to the foregoing, this Panel cannot study the arguments made by the Complainant, since it does not have the power to review whether the IA made a preliminary determination of the information presented by the Panel through its response to the official form as well as to the Responses to information requirements, since its power is limited to reviewing the final resolutions and not the Preliminary Determination, as established in Article 1904.1 of NAFTA, which states that each Party will replace the Judicial review of final determinations on antidumping and countervailing duties with the review carried out before a Panel.

757. 5. ADMINISTRATIVE INSPECTION EVIDENCE

758. 5.1 OPERADORA AND LARROC

759. 5.1.1 The AI failed to rule on the evidence of administrative inspection (acceptance or rejection), promptly offered by LARROC

1. LARROC alleges that since the administrative inspection test offered in response to the April 10, 2011 form was not accepted and assessed, the IA affected its defenses and the alleged violation impacts the result of the challenged resolution given that the IA did not calculate individual margins of dumping, pursuant to Article 64 of the LCE, which constitutes a violation of Article 51, Section III of the LFPCA. According to LARROC, its test would have shown that the sales of its suppliers occurred in the ordinary course of trade, ie under market conditions and not at loss.

2. For its part, the IA points out that Article 162 of the RLCE establishes that the IA will accept as means of proof the recognition or administrative verification, and that LARROC offered an administrative inspection in order that the IA verified, at the domicile of its supplier companies, that the sales made to LARROC were made in ordinary course of trade. In this regard, the IA pointed out that, in paragraphs 440 and 441 of the FD, it examined the evidence and reasoning in which LARROC supported its offer and effectively resolved the question raised that it is the obligation of the parties concerned to verify that the acquisition costs are given in ordinary course of trade.

3. In addition, the IA states that it ruled on the verification visit offered by the Complainants in points 140 and 141 of the FD. In this regard, the IA argued that the verification visits should be carried out to verify the information and evidence presented during the course of the investigation which is contained in the Administrative Record. As a result, since the information was not submitted, the IA was not in a position to verify it, as indicated in point 427 of the FD. Since it was not possible to verify anything, the test was never relieved.

4. On the other hand, the IA points out that according to article 83 of the LCE, the decision to carry out the verification visits is a discretionary power of the IA, and therefore the IA decided not to exercise said power, as stated in points 140 and 141 of the FD.

760. First, this Panel observes that the administrative recognition or inspection referred to in Article 162 of the RLCE is a different legal figure or circumstance than the verification visit provided for in Articles 83 of the LCE and 175 of the RLCE. The former, since the first constitutes a means of proof that aims to clarify or fix facts relating to the administrative procedure that do not require special technical knowledge. The verification visit constitutes a discretionary power of the administrative authority used to verify the information and evidence presented during the course of the investigation, which is contained in the Administrative Record. As noted by the IA, Articles 83 of the LCE and 175 of the RLCE do not impose on the IA the obligation to perform the administrative inspection test, but

establish the faculty of the IA to verify, through an administrative verification visit, the information contained in the Administrative Record in order to verify that such information and evidence is correct, complete and comes from their accounting records, as well as collate the documents they have in the Administrative Record or make any necessary verification.

761. In this regard, the IA should rule on the admission or dismissal of the evidence offered under Article 162 of the RLCE, but not on a request to exercise its power to carry out administrative verification visits under Article 83 of the LCE, which as mentioned is optional and does not follow the same formalities for admission and relief as the means of proof.

762. In this context, the IA states that LARROC offered an administrative inspection in order for the IA to verify, at the domicile of its supplier companies, that the sales made to LARROC were made in the ordinary course of trade. In spite of the foregoing, this Panel observes that in paragraphs 440 and 441 of the FD, in which, according to the IA, the evidence offered was examined, there is no statement regarding the admission or rejection of the recognition or verification test provided by LARROC. This Panel considers that the IA's failure of not pronouncing on the acceptance or rejection of the evidence offered by LARROC constitutes a violation of Article 162 of the RLCE, which establishes the obligation of the administrative authority to rule on the evidence offered by the parties, including administrative verification.

763. Notwithstanding the foregoing, this Panel considers that such procedural defect does not impact the result of the challenged resolution, since the evidence offered was not adequate to fulfill its purpose, that is, it was not adequate to clarify a fact or facts concerning the administrative procedure which do not require special knowledge; this because LARROC offered the test in order to verify that the sales of its seven suppliers were in the ordinary course of trade, which in the opinion of this Panel does not clearly state the fact or facts that they try to demonstrate and it only shift the burden of proof that the sales of LARROC's suppliers occurred in the ordinary course of trade.

764. If specific information related to LARROC sales had been submitted by LARROC or formed part of the Administrative Record, the IA could possibly have been in a position to relieve the evidence, provided that the purpose of the test was to establish or clarify even more specific facts regarding that information which do not generate the burden of producing or presenting the information to the Investigating Authority, which should be assessed, if appropriate, by the same IA. LARROC has indicated that this information did not belong to LARROC and that the IA imposed the burden of proving other parties' fact. Although this Panel appreciates LARROC's difficulty in producing such information, this circumstance is not sufficient to transfer the burden of proof to the IA. That is to say, administrative verification, as a means of proof, was not constituted to make up for the deficiencies or difficulties faced by the parties in order to obtain the information required and, instead, to transfer the burden of proof to the Investigating Authority.

765. Thus, this Panel considers that the offer of the recognition or administrative verification test under Article 162 of the RLCE does not fulfill its purpose when it transfers the obligation to the Investigating Authority to gather information that in principle corresponds other parties to provide to the procedure. The purpose of such test should only be to clarify or fix a fact, for which the administrative authority should not require special knowledge. In this case, LARROC did not submit any information in this regard, but merely offered the administrative verification test for the Investigating Authority to verify that the sales of its suppliers occurred in the ordinary course of trade. As it is not a fact that is requested to be clarified, this Panel considers that the test was not suitable to fulfill its purpose, reason why the omission by the IA of pronouncing regarding the admission or rejection of the test does not impact the result of the challenged resolution. In addition, the means of prove serve to prove facts, in this case it is questionable that the fact that was tried to prove was clearly identified, since the specific information that would be the object of the test is not manifested and a generic manifestation, as indicated by LARROC in this case, cannot be considered as a fact for this Panel.

766. 5.1.2 The IA must verify production costs and overheads of the suppliers, in situ or desktop or cabinet

767. As stated in the previous section, it also applies to on-site visits as these are but a variant of the administrative inspection test referred to by the Complainant. As noted, so that the test had a purpose or be suitable, the Complainant should have submitted information on production costs or overheads of the suppliers, not just acquisition costs of the Complainant. The Panel appreciates that the presentation of such documentation, held by a third party (ie, the provider), could be complex for the Complainant, but as mentioned in the previous section, the difficulty related to the presentation of information of a third party is not a fact attributable to the IA or one that can validly operate to transfer the burden of proof to that authority.

768. 5.1.3 The IA did not act in accordance with Articles 2.3 of the ADA and 50 of the RLCE by not considering LARROC exports with respect to the related importing companies for the calculation of the adjusted export price.

769. LARROC argues that the Investigating Authority did not act in accordance with the provisions of Articles 2.3 of the ADA and 50 of the RLCE by not considering the exports of LARROC with respect to the related import companies for the calculation of the adjusted export price, proceeding directly to consider the export operations between related companies as unreliable. There is no reason to consider that the export price, even when derived from commercial transactions between related companies, is not reliable, which refers to have credited with various information, arguments and evidence that LARROC presented.

770. The IA also overlooked the analysis and evaluation of this situation as mandated by the applicable legislation, resorting to the rebuilding of the export price. Likewise, it did not establish or motivate the decision to consider export prices of LARROC. The IA acted illegally because the formal requirements required by the articles invoked were omitted.

771. According to LARROC, this situation affected its defense and that of its related companies by not considering the real options offered by the company to consider that its related operations do not distort market prices, which transcended the meaning of the FD because the IA disqualified those transactions in order to calculate the imputed margins of discrimination, a situation of illegality provided for in section II of article 51 of the LFPCA.

772. For its part, the IA points out that the Complainants' argument is inoperative because they did not establish the cause of the claim or the damage caused to it, and they did not explain the reasons why they consider the IA had violated Articles 2.3 of the ADA and 50 of the RLCE. The IA also states that the Complainant did not explain in any part of its Brief what formal requirements are required in Articles 2.3 of the ADA and 50 of the RLCE or which of them were allegedly violated by the IA, nor by which it maintains that the causation provided in article 51, section II, of the LFPCA was updated.

773. Lastly, the IA states *ad cautelam* that by rejecting the prices of LARROC's exports to the importers with which it is linked, the IA did not violate Articles 2.3 of the ADA and 50 of the RLCE, since they allow it to determine as not reliable the export price when there is an association or arrangement between the exporter and the importer or a third party, and the IA has the discretion to rebuild it on the basis of the price at which the imported products are first resold to an independent buyer.

774. Following the analysis of the arguments presented by the parties, this Panel considers that LARROC's argument is inoperative, since they constitute generic manifestations that do not allow this Panel to enter into the study of the claim. The previous, since it makes a series of indications of which it does not mention the reasons that sustain them.

775. In fact, it is noted that LARROC points out that there is no reason to consider that the export price is unreliable, and that it presented various information, arguments and evidence to prove it. However, this Panel observes that LARROC does not specify or refer in a timely manner, according to its allegation, what information, arguments and evidence credit it. This point is particularly important for the operability of the allegation because the fact that the Complainant's sales were to its related companies is not in dispute and, in view of the provisions of Article 2.3 of the ADA (which expressly refers to the IA judgment to discredit prices related to related companies), it was fundamental, in the opinion of this Panel, that LARROC articulate the allegation in a complete and comprehensive manner. Otherwise, this Panel cannot be in position to evaluate the substance of its

argument nor can it dismiss a determination of the IA that is based in the text of the referred Article 2.3 of the ADA. Additionally, noting that the IA overlooked the analysis and assessment of the reliability of the export price when it arises from operations between commercial enterprises, by going directly to the rebuilding of the export price, does not prove how the IA omitted this analysis or went directly to the rebuilding of the export price. Finally, it does not indicate what formal requirements are required by Articles 2.3 of the ADA and 50 of the RLCE, which states were violated by the IA.

776. Conclusion of this Section

777. Therefore, this Panel considers that the arguments presented by LARROC in this section are inoperative since they constitute generic manifestations that do not indicate the reasons that sustain them.

C. ORDER OF THE PANEL

778. For all the above, and taking into consideration the provisions of Article 1904.8 of the NAFTA, the Panel unanimously resolved and orders the following:

779. Final Order issued by the Ministry of Economy published in the Official Gazette of August 6, 2012, at all points is confirmed, except as expressly required to be remanded as stated below:

780. With regard to the concepts of challenge related to the allocation of costs between co-products, the Panel finds that the IA's conclusion in point 196 of the Final Determination that *"there is a special situation of the domestic market in the United States whenever consumers have a preference for white meat although the selling price has a higher premium in respect of the dark meat,"* together with its conclusion in point 210 of the Final Determination that *this special situation of the domestic market* "prevents a proper comparison of prices" for purposes of Article 2.2.1 of the Antidumping Agreement, cannot be upheld under article 51, section IV of the LFPCA. Likewise, the Panel considers that the IA's finding in paragraph 230 of the Final Determination that, due to this alleged particular market condition, *"the costs for co-products are obtained based on a methodology by weight they are suitable as reasonably reflect the costs associated with the production and sale of the product"* for purposes of both determining whether sales were made in the ordinary course of trade and for determining constructed value, cannot be upheld under Article 51, Section IV of the LFPCA and therefore, orders the remand of the Final Determination to the Investigating Authority so that such Authority:

(a) calculate normal value by allocating joint costs of production:

(i) in accordance with a methodology that reasonably reflects the costs associated with the production and sale of the product under consideration, or

(ii) on the basis of the records kept by the exporters and producers, provided that they reasonably reflect the costs associated with the production and sale of the product under consideration, and

(b) in either case, provide an explanation of why the methodology chosen is reasonable, based on appropriate evidence.

781. In relation to the concepts of challenge related to the application of a lesser duty, this Panel considers that the IA may distinguish in the application of a lesser duty if the reasons that led it to the determination of said lesser quota are not applicable to the circumstances or specific case of one of the companies that were given a margin of price discrimination. However, in the specific case, the IA determined the lesser duty under paragraph 707 of the Final Determination. in which "it considered justified to seek that the correction of distortions by unfair practice does not lead to the imposition of excessive compensatory measures that could negatively impact in the consumers and the rest of the food production chain. " In this sense, the reason that led the IA to determine the lesser duty is equally applicable to all companies because the product exported from all of them can generate the distortions that seeks the IA to prevent with the lesser duty. Based on the above, the determination by the IA not to grant the lesser duty to the Complainants is incorrect and therefore, the Panel orders its remand to the Investigating Authority so that such Authority:

a) Determine the lesser duties to the margin that correspond to all the companies that are in the same legal situation stated by the IA with its due legal justification and motivation.

782. With regard to the concepts of challenge relating to the matters at issue raised by SANDERSON respect to the determination of the corresponding dumping margin of 25.7%, this Panel finds that the arguments of the parties are related to the methodology used by the IA to determine the normal value. This allegation has already been analyzed by the Panel in the section **XVII. THEMES RELATED TO THE ESTABLISHMENT OF THE NORMAL VALUE. A. ASSIGNMENT OF COSTS BETWEEN THE CO-PRODUCTS OF THIS DECISION.** The Panel confirms that this decision is applicable to the Complainant's arguments as to those product codes in respect of which the Complainant was assessed on the basis of the normal value reconstructed by the IA pursuant to the FD, and that, therefore, said determination of the IA breaches Section IV of Article 51 of the LFPCA, and therefore this Panel orders the remand of the Final Determination to the Investigating Authority so that such Authority:

(a) calculate normal value by allocating joint costs of production:

(i) in accordance with a methodology that reasonably reflects the costs associated with the production and sale of the product under consideration, or

(ii) on the basis of the records kept by the exporters and producers, provided that they reasonably reflect the costs associated with the production and sale of the product under consideration, and

(b) in either case, provide an explanation of why the methodology chosen is reasonable, based on appropriate evidence.

783. With regard to the concepts of challenge relating to the matters at issue concerning the determination of the residual duty claimed by NORTHERN BEEF and ROBINSON & HARRISON, this Panel considers that the determination not to use the information available in the Administrative Record for the calculation of the individual margins of price discrimination of the Complainants is not sufficiently reasoned. In opinion of this Panel, the IA should have duly justified and motivated in its resolution the reasons why the information available in the Administrative Record could not be used, based on the information and requests reasonably presented by the Complainants and therefore, orders the remand of the Final Determination to the Investigating Authority so that such Authority:

a) to legally ground and motivate the determination of the residual duty imposed to the Complainants, stating the reasons why the information available in the Administrative Record could not be used.

b) In case of not finding sufficient grounds and motivation, modify the determination of the residual duty imposed on the Complainants taking into account the information submitted by the Complainants and that is contained in the Administrative Record.

D. TERM FOR REMAND

784. Pursuant to NAFTA Article 1904.8, the Panel remands the case to the Investigating Authority and orders it to comply with this order within sixty days counted from the day following that in which the IA is notified of this Final Decision, in order for the IA to submit to the responsible Secretariat the Remand Report referred to in Rule 73 (1) of NAFTA Article 1904 Rules of Procedure and inform the Panel of its compliance.

Firmada en original por:

Expedida el 05 de abril de 2017.

Edward Hayes

David Yocis

Mark Sandstrom

Mariano Gomezperalta

Lucia Reina
Presidente
