

**DECISION AND ORDER OF THE PANEL
REGARDING THE DETERMINATION ON REMAND
OF THE SECRETARIAT OF ECONOMY OF THE REVIEW OF THE FINAL
DETERMINATION OF THE ANTI-DUMPING INVESTIGATION ON IMPORTS OF
CHICKEN LEGS AND THIGHS, ORIGINATING
IN THE UNITED STATES OF AMERICA**

CASE: MEX-USA-2012-1904-01

December 20, 2017

PANEL MEMBERS:

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DECISION OF THE BINATIONAL PANEL ON THE DETERMINATION ON REMAND OF THE INVESTIGATING AUTHORITY REGARDING THE REVIEW OF THE FINAL DETERMINATION OF THE ANTIDUMPING INVESTIGATION ON IMPORTS OF CHICKEN LEGS AND THIGHS, ORIGINATING IN THE UNITED STATES OF AMERICA

Case: MEX-USA-2012-1904.01.

I. BACKGROUND

On April 5, 2017, this Panel issued its Final Decision in the proceeding cited above. In this decision, the Panel returned the case to the Secretariat of the Economy (hereinafter “Investigating Authority” or “IA”) and ordered the IA to comply with various requirements indicated in the Panel order.

By means of the pleadings filed to the Mexican Section of the North American Free Trade Agreement (“Mexican Secretariat”), on June 2, 2017, the IA filed a motion requesting a deadline extensión of sixty (60) days to comply with the Order contained in the Final Decision of April 5, 2017 and issue its Determination on Remand.

On June 16, 2017, this Panel issued an order by which it granted the IA the requested extension for the filing of the Determination on Remand.

On July 25, 2017, the IA filed the Determination on Remand, which the IA claims complied with the Final Decision of the Panel.

The Determination on Remand, mentioned in the previous paragraph, was published in the Official Gazette of the Federation (“DOF”) on August 9, 2017.

On August 14, 2017, Robinson & Harrison Poultry, Co. Inc. (“ROBINSON & HARRISON”), Sanderson Farms, Inc. (“SANDERSON”) and USA Poultry and Eggs Exporter Council (“USAPEEC”), jointly the complainants (the “Complainants”) filed their respective challenges to the IA’s Determination on Remand. On August 15, 2017, USAPEEC filed a document in addition to the challenge to the IA’s Determination on Remand filed on August 14, 2017 clarifying the name of the company.

On September 4, 2017, Bachoco, S.A. de C.V. (“BACHOCO”) filed a response to the challenges to the IA’s Determination on Remand raised by USAPEEC, TYSON and SANDERSON.

On September 4, 2017, the Investigating Authority filed a response to the challenges filed by ROBINSON & HARRISON, SANDERSON, TYSON and USAPEEC to the IA’s Determination on Remand dated July 25, 2017, whereby the IA claims it complied with the Final Decision dated April 5, 2017.

On September 4, 2017, Pilgrim’s Pride Corporation (“PILGRIM’S”) filed a response to the Determination on Remand in support of the challenge filed by USAPEEC.

In a written submission filed on October 5, 2017, before the Mexican Secretariat, the IA filed a motion (“Motion”) requesting the Panel to dismiss the brief filed by PILGRIM’S on September 4, 2017, since in accordance with Rule 73 (3) of the Rules of Procedure was submitted outside the period indicated in said Rule.

On November 6, 2017, this Panel issued an Order by which the Panel dismissed the brief filed by PILGRIM’S dated September 4, 2017, considering that the Motion filed by the Investigating Authority legally proceeds.

II. ISSUES RAISED BY THE COMPLAINANTS

A. Application of the Principle of Full Jurisdiction

USAPEEC's allegation is based on the following statements:

a) The principle of deference is a figure alien to national law and implies granting the IA the expertise that its investiture has, which implies putting, above procedural balance, the capabilities or technical experience of the Authority, which is a part in the trial, giving a greater weight to the evidence provided by that Authority. That is, if the Panel does not indicate the applicable methodology and leaves this decision to the IA, it would be applying the principle of deference.

(b) No national court has placed procedural balance above the experience or technical capabilities of the authority. This is more evident in the case of the administrative court whose revision replaces this Panel, since that court has the power not only to annul the act, but also to establish the plaintiff's rights and to order the IA to reinstate it's right (principle of full jurisdiction).

(c) The IA is an additional part of the proceedings and should therefore be granted the same rights and should be heard as the other parties, without altering the procedural balance, that is, without being granted a greater capacity and knowledge than its counterparts.

d) The Panel granted discretion to choose between two methodologies. However, only one of these methods maintains the procedural balance, because if the IA uses its own methodology (the methodology by weight), the relevant legislation and the evidence that the Complainant submitted are not taken into account.

e) The IA, in fact, rejected in an irregular and unlawful manner the evidence duly submitted by the producers, by not selecting the methodology that they proposed, in violation of the principle of due process (without their evidence being analyzed, they were not heard at trial).

f) In conclusion, by using a method other than that proposed by USAPEEC, the IA violated the applicable substantive legislation, contravened procedural balance and due process. In addition, by presumably applying the principle of deference, the Panel allows the IA to repeat its unlawful conduct.

In relation to what was indicated by USAPEEC, this Panel notes the following:

The Standard of Review applicable in this proceeding is determined by NAFTA. This Panel must apply the standard or review contained in Articles 1904.3 and

Annex 1911 of the NAFTA, as well as the rules of procedure derived from said provision, as stated in the Panel's Final Decision.¹

The Final Decision of the Panel falls within the parameters established by Article 51 of the LFPCA, paragraphs 2, 3 and 8 of NAFTA Article 1904 and Rule 2 of the Rules of Procedure and at no time does the Panel apply principles of law outside the national legal order of the importing party.

Pursuant to Article 1904.2, the panel review will focus on determining whether the resolution was in accordance with the anti-dumping and countervailing duty legal provisions of the importing party, "including laws, legislative precedents, regulations, administrative practice, and precedents and general principles of law that would otherwise be applied by a court of the importing Party to review a decision of the competent investigating authority, so that its purpose is to control the legality of the act.

Article 1904, paragraph 3, of NAFTA also authorizes the Panels to apply the standard or review set out in Annex 1911, and that in the case of Mexico, it is effectively established in Article 238² of the Federal Tax Code. the Federation, or any law replacing it, based solely on the administrative record³, as well as the general principles of law that would otherwise be applied by a court of the importing party to review a decision of the competent investigating authority.

It should be noted that the standard of review should be considered referring exclusively to the grounds of illegality provided for in article 238 of the Fiscal Code of the Federation, or by any other law that replaces it, the Panel considers that there is no doubt about it, since to hold something different construction would mean misinterpreting a provision contained in an international treaty, especially when the Vienna Convention on the Law of Treaties, in its article 31, paragraph 1, provides that: "A treaty shall be interpreted in good faith as to the ordinary meaning to be given to the terms of the treaty in the context of the treaty and in the light of its object and purpose"; of which it is considered that to pretend to include within the standard of review other legal provisions not expressly foreseen in the norm of the treaty in question, would be to depart completely from the ordinary meaning attributable to the terms in which NAFTA is drafted.

Regarding articles 50⁴ and 52⁵ of the LFPCA, its invocation becomes inapplicable, since Article 1904 of NAFTA itself states in paragraph 8, what could be understood as "standard of review", or, the possible meanings in that a final decision can be made, namely: confirmation of the final determination (when it is not established as

¹ Final Decision, paragraphs 67-83.

² Actually, article 51 of the LFPCA.

³ Administrative record that is essential for the Panel to review the performance of the Investigating Authority, likewise, the Panel uses to issue its final decision a record that could be called "jurisdictional" and that is formed by virtue of the review procedure itself before the Panel, which contains the claims, responses, memorials, motions and orders issued to them, as well as all the evidence and annexes provided by the parties, including the transcript of the Public Hearing.

⁴ Priory article 237 of the Federal Fiscal Code.

⁵ Priory article 239 of the Federal Fiscal Code.

a cause of illegality) or the referral of the decision to the administrative authority to adopt measures that are not incompatible with the final determination cause of illegality); prescriptions that interpreted according to the ordinary meaning of the literal terms in which they were conceived, exclude the possibility that the Panel expressly declares the absolute nullity of the contested administrative resolution, since in the case of proving the illegality of the respective resolution, the decision to return or remand implies that the authority has the discretion to determine how it will comply with the decision of the Panel, provided that the measures it adopts are not incompatible with it, since it can happen, the affected person has the right to request the Panel to review the measures taken by the Investigating Authority as a result of the remand and, consequently, to issue a decision thereon.

The Panel acted in a manner consistent with its authority in granting discretion to the IA to select the methodology most appropriate for the specific case and not to pronounce on the methodology it considered most appropriate, since Article 1904.2 of NAFTA clearly states that the Binational Panels' role is limited to reviewing, on the basis of the record, whether the final anti-dumping determination was in accordance with the relevant legal provisions and, based thereon, confirm or return the decision for the IA to take measures not inconsistent with its decision (NAFTA Article 1904.8).

The Panel did not alter the procedural balance between the IA and the parties within the Panel's procedure because it has always given all the appearing parties full opportunity to defend their interests under the Rules of Procedure. The IA has the discretion to decide accordingly to Article 2.2.1.1 of the Anti-dumping Agreement ("ADA") what is the applicable cost methodology, using the broadest freedom to evaluate the evidence in the Administrative Record in accordance with applicable the law, provided that no other party is an investigating authority, nor count with the authority of the investigating authority to correct its act. As the Complainant in question may appreciate, there is no doubt that the ADA (including its Article 2.2.1.1) is part of the national legislation. If the panel's decision reflects the elements of discretion granted by Article 2.2.1.1 of the ADA and such an agreement, pursuant to NAFTA Article 1904.2, is a legal provision on antidumping and countervailing duties of the importing party, there is no room then to the Complainant's argument that the Panel has resolved on the basis of a figure that is foreign to national law.

The Panel did not "grant" either a benefit to the IA over and above the other parts of the present proceeding, since the Panel only determined that it was precisely to return the challenged resolution to the IA so that it would correct the decision that the Panel found not to be in accordance with section IV of article 51 of the LFPCA, in the understanding that the Panel did not grant the Investigating Authority the principle of deference referred to by USAPEEC in its plea, since it is clear that the authority has the discretion to determine how it will comply with the judgment, provided that the measures it adopts are not inconsistent with it.

B. Compliance with the Panel Decision with respect to the challenge related to the methodology of allocation of costs among co-products

SANDERSON, TYSON, and USAPEEC allege that the IA failed to comply with the Panel's decision with regard to the methodology for the allocation of joint costs to co-products.

1) Arguments of the participants

SANDERSON complains that the IA's original Final Resolution used a methodology of allocation by weight based on its finding of a particular market situation, and now continues to use that methodology even without finding a particular market situation. SANDERSON also argues that the IA does not explain why an allocation by weight is more reasonable than an allocation by value. Rather, the IA points to the problem of circularity created by an allocation methodology based on value, without acknowledging the distortions caused by an allocation methodology based on weight. Therefore, SANDERSON argues that the IA should have simply used the allocation methodology that SANDERSON uses in its books and records, which is a methodology based on value.

TYSON also points to the record evidence establishing that the allocation methodology based on value is used in its normal books and records, is consistent with generally accepted accounting principles in the United States, and is a reasonable methodology for allocating costs to the various parts of a chicken. The allocation of costs by weight, according to TYSON, is not reasonable, as the panel in *Softwood Lumber from Canada* explained. Therefore, TYSON concludes that the IA should have used a methodology based on value.

USAPEEC makes similar arguments to those of SANDERSON and TYSON, stressing that the IA originally linked the methodology of allocation by weight to its finding regarding a particular market situation in the United States, and that the methodology of allocation by value is reasonable. For USAPEEC, the IA's explanation of the reasonableness of the allocation by weight lacks clarity. Specifically, the allocation by weight cannot be sustained under Article 51 of the LFPCA, because it "is contrary to applicable legal provisions" or "is based on facts that were not correct or were misunderstood," in that producers do not base their production decisions on such a methodology.

The IA and Bachoco disagree with these allegations. According to the IA, "it is impossible to determine the exact and real proportion of the total costs that correspond to each coproduct as if it were a product that was produced separately." Thus, any allocation methodology is an approximation. In this case, only two methodologies have been proposed – an allocation by sales value (i.e., the value of each coproduct when sold in the United States) or an allocation by weight. Allocation by value creates a problem of circularity, in which it is impossible to detect a situation in which some of the coproducts, but not all of them, are sold outside the ordinary course of trade. Because the product under

consideration in this case is only a subset of the coproducts, an allocation by value is not acceptable. An allocation by weight at least has the advantage of avoiding this problem.

2) Evaluation by the Panel

In paragraph 395⁶ of our original decision, we stated:

“However, the Panel also considers that the AI has identified an important potential problem with any cost allocation methodology that is based on the sales value of the coproducts in the producers’ home market, which the AI calls the problem of “circularity.” That is, if the total sales value of all the coproducts is greater than the total cost of production of all the coproducts, then the allocation of the costs of production to the individual coproducts according to the sales value of each one will necessarily show that all the coproducts were sold above cost. On the other hand, if the total sales value of all the coproducts is less than the total cost of production, likewise, a pure allocation by value will show that all the coproducts are sold below cost. In our opinion, the AI was justified to be concerned that the allocation of costs by the sales values of the coproducts is unable to detect a 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.”

We consider that the issue of “circularity” is independent of the issue as to whether the differences in the values of the various parts of the chicken in the U.S. market constitutes a “particular market situation,” as that term is used in Article 2.2 of the Antidumping Agreement. Under Article 2.2, an investigating authority may find that there are no sales in the ordinary course of trade in the home market because of a “particular market situation” in that country. In addition, under Article 2.2.1.1, an investigating authority may calculate costs differently from how they are recorded in the books and records of an individual producer if they do not reasonably reflect the costs associated with the production and sale of the product under consideration. The investigating authority’s decision whether to adopt a different cost allocation methodology therefore does not depend on the existence of a “particular market situation.” Therefore, nothing in the Panel’s assessment of the IA’s findings regarding the particular market situation would preclude the IA, on remand, from selecting an alternative cost methodology, provided that its selection conforms to the requirements of Article 2.2.1.1.

Moreover, we cannot disagree with the IA’s conclusion that the problem of “circularity” is sufficient to justify the determination that an allocation by value does not reasonably reflect the costs associated with the production and sale of the product under consideration, namely, chicken thighs and legs, even if a value-based methodology is contained in the books and records of producers and in accordance with generally accepted accounting principles. For the reasons given in paragraph 395 of our original decision, a value-based methodology cannot detect a situation in which some coproducts, including the product under consideration, but not other coproducts, are sold outside the normal course of

⁶ Final Decision, paragraph 395.

trade in the home market. The complainants have not demonstrated that the IA's conclusion "is contrary to applicable legal provisions," such as Article 2.2.1.1 of the Antidumping Agreement, or that it "is based on facts that were not correct or were misunderstood."

Our reasoning is consistent with the report of the panel in *Softwood Lumber from Canada*. Although that panel stated that an allocation of costs by value was the most reasonable methodology in that case, the *Softwood Lumber* case differs from this investigation in that all of the coproducts in the *Softwood Lumber* case were part of the product under consideration. Thus, in *Softwood Lumber*, the only question was how to allocate costs among the product codes within the product under consideration. Here, the IA must allocate costs between the product under consideration and other coproducts not subject to the investigation. Therefore, the problem of "circularity" arises in this case in a way that it did not arise in the *Softwood Lumber* case.

The complainants also err when they argue that the IA must employ a methodology of allocating costs by value because the producers' production decisions are based solely on value. However, Article 2.2.1 and Article 2.2.1.1 of the Antidumping Agreement focus on whether the *sales* of the product under consideration in the home market are in the "ordinary course of trade." Therefore, the question is not whether the *production* of the product under consideration is in the "ordinary course of trade," but whether the home market sales of the product under consideration are made at prices that fully cover the cost of production of the product under consideration. As the IA correctly observes in paragraph 98 of its response brief, a methodology that considers only whether the sales prices of all the coproducts cover the costs of producing all the coproducts can "artificially transmit part of the profit obtained by the sale of the coproducts with high demand to the coproducts with lower demand," because it assigns the same profit margin to all the coproducts, "regardless of which coproduct is considered or the price at which it is sold."

The only methodology for allocating costs proposed by the participants in this case that does not suffer from the problem of "circularity" is allocation by weight, regardless of whether said methodology by weight may or may not have its own deficiencies. If the IA had been presented with another methodology that avoided both the problem of "circularity" and the deficiencies of allocation by weight, such an alternative might have been preferable to allocation by weight. However, no such alternative appears to have been suggested by any of the participants.

In particular, none of the complainants has suggested that there is some other methodology that is both free of the problem of "circularity" and more reasonable than an allocation by weight that the IA could have used. Rather, all of the complainants have argued that the IA was wrong to treat the problem of "circularity" as seriously as it did. But, for the reasons we have stated above, we cannot agree that the IA acted improperly in rejecting all methodologies that

present the problem of circularity. Therefore, we cannot say that the IA acted unlawfully in selecting the only remaining methodology that was presented to it.

For these reasons, we sustain the IA's determination on remand with respect to the methodology for allocating costs.

C. The Panel exceeded its authority by issuing its Final Decision.

The Investigating Authority notes that the Panel exceeded its authority by issuing its Final Decision in two particular cases: (1) in relation to the order concerning the application of the lower duty to the dumping margin; and (2) in relation to the issues relating to the use of information contained in the administrative record to determine the residual duty raised by Northern Beef and ROBINSON & HARRISON.

In both cases, the IA points out that the Panel exceeded its authority due to the following reasons:

a) The Binational Panel resolved according to a point not alleged by the Complainants and, therefore, unrelated to the litis.

b) The review before a Panel is limited to the allegations included in the Claims. Rule 7 (a) of the Rules of Procedure of Chapter XIX of the NAFTA states that the review shall be limited to the allegations of error of fact or law contained in the claims submitted to the Panel.

c) As provided in Annex 1911 of NAFTA, Article 51 of the LFPCA contains the applicable review criteria and should therefore be observed at all times during the procedure. The last paragraph of that article expressly prohibits the Panel from ex officio reviewing any of the grounds of illegality outlined therein.

d) Articles 1904.2 and 1904.3 of the NAFTA establish that the purpose of the Binational Panel is to review whether the final determination was made in accordance with the antidumping or countervailing duty legislation of the importing Party, for which the Panel may go, inter alia, to other sources, laws, judicial precedents, and general principles of law (including the due process principle), to the extent that the domestic tribunal could rely on the review.

(e) Thus, the Panel's determination violates the essential procedural requirements, since: (a) it decided on the basis of a plea that was never raised and therefore that its decision does not address the issues discussed (but an additional one); and b) the foregoing deprived the IA of the possibility of arguing in this regard and defend its position, leaving it in a state of defenselessness.

f) Not only did the Panel review ex officio the presence of a cause of illegality, but, in issuing a determination on points outside the litigation, it did so on the basis of that illegal revision, which implies that the Panel's determination violates the

essential procedural requirements and the principle of congruence of resolutions to the detriment of the IA.

For the Investigating Authority, this implies a particularly serious circumstance, which is corroborated by the high level of importance granted to it by Chapter XIX of NAFTA. In fact, in order to illustrate the importance that the XIX Chapter of NAFTA attaches to the obligation of the Binational Panels to act in accordance with the criteria of review and resolution, and to respect the applicable rules (including those related to due process), Article 1904.13 establishes that if the Panel acts in a manner contrary to the fundamental procedural rules or exceeds its powers, authority or jurisdiction established in Article 1904, this constitutes a conduct that can be challenged through the procedure contained in that provision.

1. Regarding the order relative to the application of the lesser duty.

The IA notes that the Complainants never claimed the Panel's reason for determining that the application of the lower margin duty was inadequate, then the Panel was prevented from ruling on that basis, since that point was outside the limits of the review procedure, according to Rule 7 of the Rules of Procedure.

With respect to the application of the lesser duty, the Final Decision of the Panel establishes the following:

“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.”

The IA indicates that it decided not to apply the lesser duty to several Complainants, on the grounds that they did not cooperate in the proceeding. Its basis for this was Article 62 of the LCE and Annex II, paragraph 7 of the ADA.

The Panel ordered the IA to determine the lesser duty that correspond to all the companies that are in the same legal situation stated by the IA (limit the effect on the consumer). This is, the Panel ordered the IA to apply lesser duties to all

companies in the same legal situation, regardless of whether or not those companies challenged the differentiated application of the lesser margin duty.

The IA considers that these aspects are inconsistent with the authority, powers and jurisdiction that the NAFTA and other provisions grant to the Binational Panels and argues that none of the Complainants mentioned in their Claims, Memorials or Rebuttal Memorials that the IA would have incurred a violation of the applicable law, for applying the less-than-margin duty based on an assumption that was not related to the approach that the IA had taken to apply it.

The IA states that in this regard, the Complainants alleged the following:

Allegations related to the lesser duty.

Cervantes, Delato, Peco, USAPEEC

- 1.- An anti-dumping duty cannot be applied higher than the lower margin duty, because this would be punitive.
2. There is no basis for applying a duty lower to the differential margin.

Larroc

- 1.- There is no basis for applying the duty lower to the margin in a differential manner, based on the behavior of the parties.
- 2.- The countervailing duty is a measure whose purpose is to eliminate the distortions caused by an unfair practice and not a measure of punishment.
- 3.- The IA did not legally ground nor reasoned why it imposed a duty lower to the differential margin.

Northern Beef and Robinson & Harrison

- 1.- The IA had to apply to these companies the lower margin duty, because they cooperated at the same level as other companies to which they were applied.

Based on the Complainants' allegations and the defenses raised by the IA, in the original proceeding the Panel concluded that Article 9.1 of the ADA "effectively grants the [IA] right to establish a quota below the [dumping margin]".⁷ However, the Panel noted that the exercise of this power has to be done in accordance with the applicable regulations. Likewise, the Panel noted that the IA may also "distinguish in the application of a "lesser duty", provided that the reasons behind the differentiated application of said lesser duty "[do] not apply to the

⁷ Final Decision, paragraph 476.

circumstances or specific case of any of the companies", which were imposed a higher duty.⁸

The Panel also reviewed the allegations made by the Complainants regarding the *non-punitive* function of paragraph 7 of Annex II to the ADA. In this regard, the Panel pointed out that Annex II of the ADA does not empower the IA "to distinguish between cooperating and non-cooperating Complainants"⁹ and therefore, that provision cannot be used "as a means of sanctioning or denying a benefit to those who did not appear or did not provide the corresponding information".¹⁰ Based on prior interpretations of the WTO Appellate Body¹¹, the Panel noted that, based on its reading of ADA Annex II, paragraph 7, this standard "merely points out that non-cooperation could have a negative impact - adverse consequences for the Complainant in question - as a logical consequence of not having participated or cooperated."¹² The Panel was therefore "not in agreement with the IA's assertions that, in this case, on the basis of Annex II [the IA] may set lesser duties on the margin of certain preferred exporters."¹³

The Panel emphasized that the IA justified the application of a lesser duty only to certain companies in order to avoid "negatively impacting the consumer [of the product under investigation] and in the rest of the food production chain".¹⁴ However, in the Panel's view, "the reason that led the IA to determine the lesser duty [was] equally applicable for all companies", because the price of the product exported by all could generate the same negative effects on the consumer that the IA sought to prevent.¹⁵

Based on these reasons, the Panel concluded that the determination of the IA not to grant a lesser duty also to the Complainants was not legally justified.¹⁶

The Panel acknowledges that the IA chose in its Compliance Determination to maintain the consumer impact criterion referred to in paragraph 707 of the Final Determination and that the IA has complied with the Panel's Final Decision on applying the "lesser duty" to all companies in the same legal situation. However, in order to alleviate the claim raised by the IA in its Determination on Remand regarding the alleged excessive exercise of the Panel's powers in deciding on the legality of the differentiated application of duties among the investigated companies, the Panel makes the following considerations:

The Panel recalls that as noted in the above paragraphs, several Complainants, i.e. Cervantes, Delato, Peco, USAPEEC and Larroc, argued before the Panel that there is no legal basis for the differentiated application of a lesser duty. In

⁸ Final Decision, paragraph 477.

⁹ Final Decision, paragraph 473.

¹⁰ *Id.*

¹¹ Report of the Appellate Body in US - Hot Rolled Steel (DS184), paragraph 99.

¹² Report of the Appellate Body in US - Hot Rolled Steel (DS184), paragraph 475.

¹³ Final Decision, paragraph 477.

¹⁴ *Id.*, citing point 707 of the Final Determination.

¹⁵ *Id.*

¹⁶ Final Decision, paragraph 478.

particular, the Complainants argued that paragraph 7 of Annex II to the ADA cannot be used for punitive purposes, ie that it cannot be used to penalize those companies that did not cooperate sufficiently during the investigation.

The Panel also recalls that the IA argued in its defense that the reason why the IA decided to apply a duty below the margin of dumping to certain companies was its intention to avoid a negative impact on consumers of the product under investigation and on the rest of the food production chain and that IA itself introduced the consideration of the impact of the duties on the consumer in paragraph 707 of the Final Determination.

The Panel recalls that the IA also maintained that the application of such a lesser duty was not extended to the Complainants because they did not cooperate sufficiently during the investigation. Therefore, according to the IA, paragraph 7 of Annex II of the ADA empowered the IA not to apply such benefit to the Complainants.

Based on the above, it is important to establish the following:

First. The Panel determined that the application of a lesser duty to the dumping margin is permitted and even "desirable" under Article 9.1 of the ADA. However, the Panel noted that the differentiated application of a lower quota to the dumping margin should be duly justified in accordance with the applicable rules. The Panel therefore proceeded to determine whether, as supported by the IA, paragraph 7 of Annex II to the ADA empowered the IA not to extend to the Complainants the benefit of a lower duty than the dumping margin. In other words, the Panel assessed whether the alleged non-cooperation of the Complainants justified the IA's decision not to apply the lower duty to the dumping margin in a uniform manner.

The Panel concluded that paragraph 7 of Annex II to the ADA does not allow for the non-cooperation of the investigated companies to be penalized by imposing a less favorable outcome for such companies. Therefore, in the Panel's view, this provision did not empower the IA to impose lower duties on the margin in a differentiated manner.

Second. This single conclusion, however, would not have satisfied the Panel's duty to resolve the dispute as to whether the imposition of differentiated duties by the IA was justified under the applicable law in this case. If paragraph 7 of Annex II of the ADA cannot be used as a punitive mechanism, what then is the rationale for the IA to apply a lower duty margin to certain companies only? As the IA will be able to appreciate, the way in which the IA structured the lesser duty margin or 'lesser duty' did not leave an alternative to the Panel, rather than review whether in the administrative record some other justification could validly be used by the IA to adopt a lower duty margin in a differentiated manner. Had it not sought such other justification, the Panel's decision would have been incomplete, would not have

resolved the litigation and would have limited the analysis of the defense of the IA to a single provision, i.e. paragraph 7 of Annex II of the ADA.

Third. Consequently, the Panel proceeded to assess whether there was any other *de jure* or *de facto* reason, which could justify the application of duties to the companies involved. The Panel noted that the only other reason cited by the IA as a justification for the differentiated application of a duty lower than the margin of dumping to certain companies was to avoid negative impacts on consumers and the rest of the food production chain. It is important to emphasize that this element, that of consumer impact, was introduced by the IA, not by the Panel, and in this respect, the Panel did not consider that this reason was undue as a basis for the application of a lower overall duty. However, in the specific case, the Panel had to decide whether such a lower margin duty could be applied legally by the IA in a differentiated manner based on the only other justification that was in the administrative record i.e. the impact on the consumer. The Panel proceeded to determine whether such a criterion justified a decision not to extend the same benefit to all Complainants.

Fourth. Following this analysis, the Panel concluded that the desire to avoid negative impacts on consumers and the rest of the production chain was also applicable to the rest of the companies subject to investigation, including the Complainants. As mentioned, the Panel determined that the negative effects on consumers that the IA wished to avoid through a reduction in duties could be caused by the rise in prices of products imported by both the Complainants and those companies that did receive the benefit of a lower duty than the dumping margin. The Panel therefore concluded that the intention to protect consumers did not justify the differentiated application of lesser duties.

Fifth. Based on the above, the Panel considers that the revision of the consumer protection criterion was an indispensable step in the analysis of the legality of the IA's decision to apply a lesser duty only to certain companies. Otherwise, as noted above, the Panel could not have resolved the issue raised by the Complainants or the *litis* in a complete and final manner.

The Panel does not, therefore, share the view of the IA that, in ruling on this issue, the Panel exceeded its review powers in contravention of paragraph 7 of the Rules of Procedure.

D. In relation to the issues concerning the use of information contained in the administrative record to determine the residual duty raised by Northern Beef and ROBINSON & HARRISON.

The IA points out that the lack of reasoning of the Final Determination that the Panel points out in its Final Decision in relation to the determination not to use the information in the Administrative Record for the calculation of the individual price discrimination margins of Northern Beef and ROBINSON & HARRISON, has no record in the Claim, the Memorial, or the Claimants Rebutal Memorial.

According to the IA, the Complainants argued that the SE did not substantiate or motivate (reasoned) its decision to reject the information, arguments and evidence submitted by these companies to calculate normal value, contrary to that argument, the IA in paragraph 429¹⁷ of the Final Determination summarized the arguments of the traders, as well as in paragraphs 438¹⁸, 439¹⁹ and 441²⁰, the IA did legally ground and explained the reasons why it was not in a position to use the information of the Administrative Record.

In this regard, the IA observes that in points 526 and 527 of the Final Decision, the Panel simply resolves on allegations that the Complainants never submitted, which implies an excess in the Panel's authority, since an order is issued based on aspects that are not part of the *litis*, with all the consequences that this entails, in the following terms:

“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

¹⁷ "429. They added that the Secretariat determined to reject the normal value information submitted by the trading companies on the grounds that they should not involve losses for the producing companies. In the view of the companies, Article 6.8 of the Anti-Dumping Agreement does not provide the authority to the Secretariat to reject all information of one of the facts of the dumping on the grounds that it has not been filed in all its aspects. In addition, the facts known to the Secretariat, because they are in the administrative record, should serve to remedy the deficiencies of that provided by the traders. Finally, they considered that the Secretariat concluded, without motivation or exhaustive justification, to apply the information of normal value that is most adverse to the trading companies, as is the one provided in the request for research, since the Secretariat is in a position to use the normal value of exporting producers."

¹⁸ "438. In relation to the statement made by the companies in point 429 of this Determination, the Secretariat does not share it. The provisions of Article 6.8 of the Anti-Dumping Agreement should in no way serve to supplement information that is not provided by the parties. The dumping margin is derived from the comparison of two prices: normal value and export price. Some traders have provided information on export price and on normal value. However, in the case of export price it was not possible to rebuild the export price in accordance with Articles 2.3 of the Anti-Dumping Agreement; 35 of the LCE, and 50 of the RLCE. In the case of normal value, the Secretariat determined that they do not comply with the requirements established in Article 47 of the RLCE."

¹⁹ "439. From the point of view of such companies, it would mean, for example, that the Secretariat should provide the information that at a given point in time an applicant for an investigation procedure could not obtain because of information that does not correspond to it, such as that indicated in Articles 5.2 (iii) of the Anti-Dumping Agreement and 75 section XI of the RLCE."

²⁰ "441. In any case, the information in the record is exclusive to the producing companies, who classify their information on product codes according to their accounting information systems, which does not mean that all use the same classification for their products; that with the information that has been provided it cannot carry out a trace of which company sold to a trader and this in turn to another trader; that there is a link between them; which has no information to establish a fair level of comparison, the Secretariat cannot determine normal value applicable to the traders who sold to Mexico."

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."

(Emphasys added)

Contrary to what was said by the Investigating Authority, the Panel did not exceed its authority since both Northern Beef²¹ and ROBINSON & HARRISON requested the IA, in their Memorials stated the following:

"Robinson & Harrison Poultry Co. Inc. has submitted information on its sales as well as its acquisition costs in the official questionnaire formats. Likewise, R&H filed specific answers to all the requirements of the authority. There are no elements in the record that question the validity of this information. In relation to the costs of its suppliers, my principal has also filed three (sic) production cost options. The Secretariat has not pointed out that all of this information did not seem to be "sufficient" and has been dismissed in its entirety."²²

"Specifically, Robinson & Harrison Poultry Co. Inc. submitted four alternatives to the Secretariat to properly determine production costs:

...

The Secretariat simply ignored all of this information and erroneously concluded that Robinson & Harrison Poultry Co. Inc. did not submit cost information.

After analyzing the information, arguments and evidence submitted in this section, my representative considers that this Panel should instruct the Secretariat to calculate individual margins of price discrimination for chicken leg and thigh exports. Robinson & Harrison Poultry Co. Inc., based on the information and evidence that my principal submitted in the course of the anti-dumping investigation. All the information necessary to carry out these calculations is done in the administrative record, identified under No. 13/10 and filed in the International Trade Practices Unit of the Ministry of Economy."²³

"In the Final Determination of the investigation, without presenting an explanation of the inadmissibility of the information and evidence submitted by my principal, the investigating authority decided that it did not have the necessary information to calculate the traders a margin of individual price discrimination, as stated in Article 47 of the RLCE. ... "²⁴

"Subsequently, in its statement of arguments and additional evidence to the preliminary determination, my principal provided the" update "and complement of the three (sic)

²¹ Memorial of Northern Beef, pages 4, 7, 12, 15, 16, 17, 18 and 19. This Panel notes that the claims raised by Northern Beef are almost the same than those of Robinson & Harrison.

²² Memorial of Robinson & Harrison, page 4.

²³ Op. Cit., page 7.

²⁴ Op. Cit., page 12.

methodologies originally submitted to the investigating authority, in order to demonstrate that the cost of production of each of the product codes used for the calculation of the normal value corresponds to the purchase price, determined in the ordinary course of trade.

In addition, my principal submitted the name and purchase volumes of chicken thigh and leg producers during the investigation period and noted that the production costs of the merchandise investigated were included in the administrative record of the case, in the confidential responses of the appearing producers. That is to say, although my principal did not have direct access to this information, it was available in the administrative record of the case and of course, available to the investigating authority.

This omission of the Secretariat transcends the meaning of the resolution and affects the legal interest of my principal. ...

In addition, the investigating authority points out in paragraph 427 of the contested final determination that the traders Robinson & Harrison and Northern Beef "did not submit any information which would corroborate that the transactions used to calculate their normal value were carried out in the course of normal trade transactions". This means that the investigating authority did not review the response of my principal of August 2011 nor did it review the written arguments and additional evidence to the preliminary determination. The authority merely stated in points 435 to 437 of the contested final determination what information was presented by my principal, without stating in any place of the determination of the analysis and the reasons such information was not appropriate.

In other words, in strict compliance with the hearing guarantee of my principal in the anti-dumping proceeding, the authority had to explain and motivate in detail, the reasons why none of the three alternative proposals of my principal was viable or, state the reasons why it was unable to access the cost information of the producers appearing in the investigation; in the specific case, none of these two options occurred.

In particular, the authority had to explain the specific reasons why, despite the fact that in the administrative record of the case there is information on the costs of production of chicken leg and thigh suppliers of my principal during the investigation period, the IA determined not to consider such information."²⁵

"In this sense, my principal considers of particular relevance, the fact that in the administrative record of the case is contained the specific information on costs of production of chicken leg and thigh, which was submitted by the American producers appearing. That is, in the present case, the authority was not faced with a scenario of "absence" or "insufficiency" of information, since it is included in the record; in any case, was faced with a scenario of "availability" of information. Thus, although it is true that for my principal the direct information of costs of production of chicken leg and thigh under investigation is not within its reach, this information is available to the investigating authority.

Notwithstanding the foregoing, the investigating authority did not use it and did not explain the reasons why it was unable to use it. This determination affected the legal interest and defense of my principal, transcending the sense of the final determination to the extent of not calculating a specific dumping margin for its export operations to Mexico.

²⁵ Op. Cit., pages 15, 16 and 17.

It is clear that it is not sufficient to mention in detail (points 435 to 437 of the final determination) the information which my principal provided to show that the cost of production of each of the product codes used for the calculation of normal value corresponds to the price of acquisition, determined in the ordinary course of trade; in addition, the investigating authority should have set forth the reasons why such information was not sufficient. This situation never occurred in the contested determination.

As this Panel may observe, notwithstanding the arguments set forth by my principal in its pleadings and supplementary evidence, the Secretariat determined, in the final analysis, not to calculate a specific margin of discrimination for the exports of my principal. The situation that my principal considers illegal and in violation of the standard of review in this Panel, is that the investigating authority did not analyze any of the proposals of my principal to calculate the normal value and also, did not reasoned in its final determination, which were the specific circumstances that led the IA to reject the information, arguments and evidence that my principal submitted.

In conclusion, my principal requests this Panel to instruct the Secretariat, based on the information provided by my principal in the course of the investigation, as well as using that information in the administrative record of the case, determine that the cost of production of each of the product codes used for the calculation of the normal value corresponds to the purchase price determined in the ordinary course of trade and therefore calculates an individual price discrimination margin chicken leg and thigh exports of Robinson & Harrison Poultry Co. Inc., pursuant to Articles 2 of the Anti-Dumping Agreement and 47 of the RLCE."²⁶

(Emphasys added)

In light of the foregoing, the Panel considered 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 was not sufficiently reasoned and, therefore, returned the Final Determination to the IA, in accordance with Article 1904.8 of the NAFTA, to adopt measures not inconsistent with its Decision, in the following terms:

“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.

²⁶ Op. Cit., pages 17, 18 and 19.

- 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.”

Regarding the foregoing, the Panel resolved on allegations that the Complainants (Northern Beef and ROBINSON & HARRISON) submitted in their Memorials, which is why it did not act in excess of its authority.

E. Compliance with the decision of the Panel regarding the objection concerning the use of the methodologies proposed by the Traders.

The controversial facts at this point of discussion are whether the Investigating Authority complied with the Panel's Decision in its Determination on Remand in relation to the use of the methodologies proposed by the Traders.

In tis final resolution, the Panel ordered that:

“**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 resoutions the reasons why the information available in the Administrative Record could not be used, base don 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.”

For its part, and in compliance with what the Panel ordered, the Investigating Authority claims to have carried out the corresponding analysis regarding the concepts of objection related to the proper legal grounds and the reasons why it was not possible to use the information filed by Northern Beef and ROBINSON & HARRISON as alternatives to calculate them a normal value, that is available in the Administrative Record. For this reason, the Investigating Authority amended paragraph 441 and added paragraphs 441 A, 441 B, 441 C, 441 D, 441 E, 441 F, 441 G and 441 H of the Final Determination.

Thus, the Determination on Remand states the following:

"(2) Excessive difficulties

441 D. In addition to not having met their corresponding burden for cooperation, the Secretariat notes that the alternatives proposed by Northern Beef and Robinson & Harrison so that the IA calculate them a margin of price discrimination were not usable because they represented an undue hardship within the meaning of paragraph 3 of Annex II of the ADA. Although they provided information on their export price, in order to be able to calculate their normal value, the Secretariat first needed to ensure that their specific sales were given at a price higher than their production costs plus expenses. Being trading companies, in accordance with Articles 32 of the LCE, 47 RLCE and 2.2.1 of the ADA, it was necessary to compare the selling price in the United States of the transactions examined individually, by product code, carried out by Northern Beef and Robinson & Harrison, with the respective acquisition cost. In order to make the respective comparisons, the Secretariat had to ensure that items identified by the same product code were being compared, since, in the case of goods identified by different codes, there would be a great risk that the result of the comparison would be distorted, since there would be comparing non-comparable items."

Argument of the Parties

ROBINSON & HARRISON claims that the Investigating Authority had to properly justify in its Final Determination the reasons why the information available in the Administrative Record could not be used and, if it did not do so, it had to modify the residual duty based on the information submitted by the Complainants. The Investigating Authority, says the Complainant, did neither.

The Complainant further asserts that, while it is true that the burden of generating the information initially corresponds to the trading companies, in any part of the legislation provides that the parties shall certify that the information could not be obtained and further, demonstrate the reasons why it could not be obtained. In addition, the Complainant states that it did submit to the Secretariat the factual and legal impossibility it had to file the production costs of the manufacturers from which it purchased the merchandise under investigation. Showing at all times a cooperative attitude in the procedure.

The Complainant also alleges that, in its Determination on Remand, the Investigating Authority does not state what the reasons, motives and circumstances for which it was not possible to use the information cotss that is contained in the Administrative Record of the case; on the contrary, the Investigating Authority merely filed a series of circular and illogical arguments without complying with the Panel Order. The Secretariat said the Complainant sought to justify its compliance with the Panel's Order claiming alleged "undue hardship" as provided in paragraph 3 of Annex II of the ADA, which is incorrect.

According to the Complainant, paragraph 3 of Annex II to the Anti-Dumping Agreement refers to excessive difficulties in the handling of time and manner of presentation of information, ie, it does not refer to difficulties in the content of the information itself; in this sense, the Complainant maintains that it presented and documented exhaustively three different alternatives of use of its information, as follows:

1. That the authority compare the Complainant's purchase prices versus the costs of production plus the expenses of its suppliers who have appeared in the proceeding.
2. That the authority compare the Complainant's purchase prices versus the costs of production of the exporting companies that are representative in the United States market and have appeared in the proceeding.
3. The authority compare purchase prices versus the Complainants' costs according to the linear regression model cost suggested by the Petitioners themselves, but properly corrected in the method of allocating the total cost of the chicken to its parts.

Likewise, the Complainant argues that in addition to the fact that the Investigating Authority had the information duly presented in a timely manner, the IA had sufficient space during the investigation so that, in the exercise of its investigative powers, it requested the Complainant to clarify the course of the administrative investigation.

The Investigating Authority contends that it explained extensively why it was unable to use the information that ROBINSON & HARRISON provided and the methodologies it proposed. Thus, the principle of acquisition of evidence cannot be considered as obliging the Investigating Authority to act as the Complainant points out. It should be noted, the Investigating Authority claims, that as can be seen in the Determination on Remand, the Investigating Authority carried out an analysis and explained over approximately 36 pages the reasons why neither the information contained in the Administrative Record nor the alternatives the calculation proposed by ROBINSON & HARRISON proved adequate to obtain an estimate of an individual margin of dumping for the Complainant, all of which is also reflected in paragraphs 441-441 H of the Compliance Resolution.

In addition, the Investigating Authority points out that it enjoys the presumption of validity and, in order to destroy that presumption, it is not enough for the Complainant to believe that the authority failed to comply with what was ordered, on the contrary, to destroy that presumption, such interested party has the burden of proving that such presumption is invalid. Since the Complainant has not brought effective challenges, the administrative acts of the Investigating Authority must prevail.

Regarding the discussion of the term "excessive difficulties" in paragraph 3 of Annex II of the Anti-Dumping Agreement, the Investigating Authority states that in the Decision is never established in reference to the timing of the investigation or to the manner in which the Complainant shall submit such information. Further alleges the Investigating Authority that the interpretation of ROBINSON & HARRISON that the excessive difficulties relate to managing time and manner of presentation of the information is wrong. It is pointed out that the use of information "without undue hardship" is not confined exclusively to situations of time and manner of presenting data, but may involve any circumstance involving excessive obstacles in order to use it.

Also, the Investigating Authority alleges that ROBINSON & HARRISON does not give a reason why the problem of traceability is not a valid reason to stop considering the proposed methodologies. The Investigating Authority also notes that it comprehensively explained in its Determination on Remand how the problema of traceability made it virtually imposible to use the methodologies that ROBINSON & HARRISON proposed.

Finally, the Investigating Authority argues that it is unclear how the fact that a possible inequity is a problem of ROBINSON & HARRISON that could affect the validity of compliance of the Investigating Authority with the Final Decision of the Panel, so this allegation of the Complainant is also ineffective (inoperative).

Determination of the Panel

Having analyzed the arguments of both parties, the Panel determines the following:

According to paragraph 3 of Annex II of the ADA, in making determinations must be taken into account all verifiable information appropriately submitted so it can be used in the investigation without undue difficulties, supplied in a timely and appropriate, in a medium or computer language requested by the authorities.

As the Investigating Authority points out in its Response to the challenges raised by the Complainants, paragraph 68, the use of information without undue hardship is not confined exclusively to situations of time and manner of presenting data, but may involve any circumstances that imply excessive obstacles to use it. The Panel recognizes the reference of cases made by the Investigating Authority to support its argument, ie, *Guatemala - Cement II* (DS156) (8.252 point) and *US - Steel Plate* (DS206) (item 7.59). In both cases, the Special Groups describe situations different to the times and manner of reporting, involving "undue hardship".

This Panel also recognizes that the Investigating Authority extensively explained why it was unable to use the information that ROBINSON & HARRISON proposed and the methodologies as stated in paragraphs 441 through 441 H of its Compliance Determination.

In addition, the Panel considers that the Investigating Authority is correct when it argues that it enjoys the presumption of validity and that in order to reverse that presumption it is not enough for the Complainant to believe that the Investigating Authority failed to comply with the Panel's orders, in the Complainant there is a burden to prove that such presumption is not valid. Following this principle, the Panel considers that the Complainant did not comply with the burden of proving how the explanation provided by the Investigating Authority in the Compliance Determination does not comply with what is ordered by this Panel.

Finally, the Panel also considers that the Complainant did not present sufficient arguments for the determination that the Investigating Authority erred in its statement regarding the problem of traceability and alleged inequity in determining the Complainant's duty.

It is for this that the Panel decides that the claims of Robinson & Harrison are ineffective (inoperative).

F. PANEL ORDER

Based on the above, the Panel decides and orders the following:

FIRST. This Panel considers that the IA complied with the orders issued in the Final Decision of the Panel.

SECOND. Due to the above, and based on Rule 73(6) of the Rules of Procedure of Article 1904 of Chapter XIX of the NAFTA, this Panel confirms the Determination on Remand of the Investigating Authority.

THIRD. Pursuant to Rule 77 (1) (b) and (c) of the Rules of Procedure of Article 1904 of Chapter XIX of NAFTA, and because this decision is the last act in the review procedure, this Panel directs the responsible Secretariat to issue a Notice of Final Panel Action on the eleventh day thereafter.

Signed in original by:

EDWARD HAYES
Panelist

Signature and date

DAVID YOCIS
Panelist

Signature and date

MARK SANDSTROM
Panelist

Signature and date

MARIANO GOMEZPERALTA
Panelist

Signature and date

LUCIA REINA
Panelist

Signature and date