REVIEW BEFORE A BINATIONAL PANEL
PURSUANT TO ARTICLE 1904
OF THE NORTH AMERICAN FREE TRADE AGREEMENT

REMAND DECISION

IN THE MATTER OF THE REVIEW OF THE FINAL DETERMINATION OF THE ANTIDUMPING DUTY INVESTIGATION ON IMPORTS OF CERTAIN RED DELICIOUS APPLES AND GOLDEN DELICIOUS APPLES FROM THE UNITED STATES OF AMERICA

CASE: MEX-USA-2006-1904-02

PANEL

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I. DEFINITIONS

For purposes of this decision, unless otherwise specified:

AA means The WTO Antidumping Agreement.

Court Rulings means the rulings issued, on October 28, 2003, by the First Administrative Circuit Court and the ruling issued, on February 14, 2005 by the Ninth Mexican District Court ordered to declared legally null ("dejar sin efecto") the final determination.

Federal Fiscal Code means "*Código Fiscal de la Federación*".

Federal Law of Litigious and Administrative Procedure means "*Ley Federal del Procedimiento Contencioso Administrativo"*.

Final Determination or Final Determination of the Antidumping Duty Investigation on Imports of Apples from the United States means the Final Determination of the Antidumping Duty Investigation on Red Delicious apples and its variations apples and golden delicious apples, merchandise classified under tariff item, originating from the United States of America, investigation carried out to comply with the First Administrative Circuits Court (File number 1183/2002), published in the Official Gazette on November 2, 2006.

FTL means the Mexican Foreign Trade Law ("*Ley de Comercio Exterior"*).

FTLR means the Mexican Foreign Trade Law Regulations ("*Reglamento de la Ley de Comercio Exterior*")

IA means the Mexican Investigating Authority, the Secretary of Economy ("*Secretaría de Economía*"), in particular the Unit of Commercial International Practices ("*Unidad de Prácticas Comerciales Internacionales*").

Initiation Determination means the Initiation Determination of the Antidumping Duty Investigation on Red Delicious apples and its variations and golden delicious apples, merchandise classified under tariff item, originating from the United States of America, investigation carried out to comply with the First Administrative Circuits Court (File number 1183/2002), published in the Official Gazette on May 26, 2005.

NAFTA means The North American Free Trade Agreement.

NFE means the Northwest Fruit Exporters. persiguen el mismo fin, esto es, la conclusión de la investigación sin la imposición de cuotas compensatorias **Official Gazette** means The Mexican Official Gazette ("*Diario Oficial de la Federación*").

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Panel means the panel established in accordance with Article 1904 of the NAFTA to review the Final Determination of the Antidumping Duty Investigation on imports of Apples from the United States.

POR means the period of review chosen by the IA in a given determination.

Preliminary Determination means the Preliminary Determination of the Antidumping Duty Investigation on Red Delicious apples and its variations apples and golden delicious apples, merchandise classified under tariff item, originating from the United States of America, investigation carried out to comply with the First Administrative Circuits Court (File number 1183/2002), published in the Official Gazette on September 29, 2005.

Rule means the Rules of Procedure for Article 1904 Binational Panel Reviews**.**

SE means the Mexican Secretary of Economy ("*Secretaria de Economía*").

UNCIEPA means National Union of Importers and Exporters of Agricultural Products ("*Unión Nacional de Comerciantes Importadores y Exportadores de Productos Agrícolas*").

UNIFRUT means the Regional Union of Fruit Producers of the State of Chihuahua ("*Unión Agrícola Regional del Estado de Chihuahua , A.C.*").

WTO means the World Trade Organization.

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II. INTRODUCTION

1. This binational Panel was established in accordance with Article 1904 of the NAFTA to review the Final Determination of the Antidumping Duty Investigation on imports of Apples from the United States. The Panel was originally established on July 20, 2007. Three of the original panelists resigned and the Panel was finally established with its current members on August 6, 2008.

III. JURISDICTION

2. The Panel has jurisdiction to review the Final Determination of the Antidumping Duty Investigation on imports of Apples from the United States since such determination was issued by a competent investigating authority and qualifies as a Final Determination, in accordance with Article 1904 and Annex 1911 of the NAFTA.

IV. STANDARD OF REVIEW

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

4. The term "standard of review" is defined in Annex 1911, which refers to separate statutory review standards for each of the three NAFTA Parties. In the case of Mexico, Annex 1911 states that the applicable standard of review is "the standard set out in Article 238 of the Federal Fiscal Code, or any successor statutes, based solely on the administrative record."

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5. It should be noted that Article 238 of the Federal Fiscal Code has been replaced by Article 51 Federal Law of Administrative Contentious Procedure, published in the Official Gazette on December, 1 of December, 2005 and entered into force on the January, 1, 2006.[1]

6. In sum, this Panel is required to examine and apply the Mexican standard of review set out in the NAFTA and confine its review strictly to the facts and information contained in the administrative record.

V. FACTUAL ASPECTS

7. On December 4, 1996, UNIFRUT requested the initiation of an antidumping investigation on imports of red and golden delicious apples.

8. On March, 6, 1997, the IA initiated the investigation.

9. On September 1, 1997, the IA issued the preliminary determination in which a preliminary antidumping duty of 101.1% was imposed.

10. On March 25, 1998, producers and exporters from the United States of America agreed on a price undertaking. Accordingly, the proceeding was suspended.

11. On August 9, 2002, the IA published the determination whereby the price undertaking was terminated.

12. On August 12, 2002, the IA issued its final determination imposing an antidumping duty of 46.58% on imports from any exporter other than Price Cold Storage & Packing Company Inc and Washington Fruit and Produce Co. For such exporters the applicable antidumping duty was 0%.

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[1] Article 51 - An administrative determination will be declared illegal if:

I. The Official who ordered, or handled the procedure from which such resolution derives has no jurisdiction.

II. There is an omission of the formal requirements demanded by the laws that affect the defenses of the private party and such omission affected the challenged resolution;

III. There are errors in the proceeding that affect the defenses of the private party and such errors affected the challenged resolution.

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13. On January 3, 2003, Ninth Mexican District Court upheld the IA's determination.

14. On September 3, 2003 NFE challenged such determination through an amparo proceeding.

15. On October 28, 2003, the First Administrative Circuit Court revoked the determination made by the lower court and granted the amparo to NFE.

16. On February 14, 2005 Ninth Mexican District Court declared legally null ("dejar sin efecto") the Final Determination.

17. On May 26, 2005, the IA published the Initiation Determination which complied with the Court's order and declared the original determination null with respect to NFE and its members. In the same determination the IA initiated an antidumping investigation with respect to NFE.

18. On September 29, 2005, the IA issued its Preliminary Determination imposing the following preliminary antidumping duties:

- A 10.53% duty for imports made by Allan Bros Inc.
- A 0% duty for imports made by Price Cold Storage and Packing Co Inc.
- A 2.01% duty for imports made by Zirkle Fruit Co.
- A 44.67% duty for imports made by the rest of NFE's affiliates.

19. On November 2, 2006, the IA issued its Final Determination imposing the following final duties:

- A 6.40% duty for imports made by Price Cold Storage and Packing Company, Inc.
- An 8.04% duty for imports made by Ralph Broetje.
- A 30.79% duty for imports made by Stadelman Fruit L.L.C.
- A 31.19% for imports made by Dovex Fruit Co.
- A 47.05% for Northern Fruit Co. Inc and the rest of NFE's affiliates.

IV. The facts that gave rise to the cause of action did not occur, were different from or evaluated wrongly, or if an order was made in breach of the rules applied or there was a failure to apply

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VI. FINDINGS

A. PROCEDURAL CLAIM: LEGAL REPRESENTATION OF THE MEXICAN PRODUCERS

Claim

20. NFE raises an objection based on the lack of legal authority of UNIFRUT's representative. NFE argues that the power of attorney through which Mexican apple growers representative appear before the IA was not valid. Thus, according to NFE, the determination was illegal because, by admitting a power of attorney which contained "two deficiencies"[2], the IA "applied incorrectly Article 75 paragraph II of the FTLR.[3]

21. Conversely, the IA and UNIFRUT argue that UNIFRUT complied with the applicable law. Moreover, IA and UNIFRUT argue that they duly corrected any deficiencies which the power of attorney may have had by submitting a complementary power of attorney[4]. Finally, the IA argues that it did not have the required faculties to determine whether a power of attorney is valid. According to the IA, "notary instruments submitted by the apples domestic industry constitute complete evidence ('*prueba plena*')"[5].

22. NFE representative replies that the deficiencies in the power of attorney could not be corrected after the investigation was initiated.

Panel analysis

23. We begin our analysis with paragraph II of Article 75 of the FTLR:

> The request by an interested party to initiate an administrative investigation of an unfair international trade practice, in addition to being submitted in writing and satisfying the requirements prescribed in Article 50 of the Act, shall be submitted using the questionnaire issued by the Ministry, which shall contain the following

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the rules that should have been applied.

[2] According to NFE Brief the two deficiencies were: i) not including Article 2453 of the State of Chihuahua Civil Code and ii) not including the list of the attendees to UNIFRUT General Assembly. NFE Memorial, paragraph 39-41.

[3] NFE answers to the Panel Questions, page 53.

[4] Preliminary Determination, paragraphs 63- B and 111- B.

[5] IA Brief, paragraph. 82.

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> II. Name or business name and domicile of the requesting party and, if applicable, *his representative, accompanied by accrediting documents*;

24. In accordance with that Article, the legal authority of the domestic producers representative has to be duly credited when requesting the initiation of an investigation. Participants disagree as to whether this power of attorney was duly granted by UNIFRUT to his representative or whether this type of deficiency could be corrected at a later stage of an antidumping proceeding.

25. In light of this, the question for this Panel is whether the original power of attorney was "deficient" and, if that is the case, which are the consequences that flow from that, taking into account that UNIFRUT submitted a complementary power of attorney which apparently corrected them. The Panel requested any relevant precedent by the Fiscal Court regarding this issue. No relevant precedent was provided to the Panel by any participant on this issue.

26. Notwithstanding, the Panel observes that the legal authority of UNIFRUT's representative has been already been upheld by the Court which ordered the initiation of the present investigation. In that proceeding, NFE raised this claim which was rejected by the Mexican Court based on the fact that the claim wasn't raised before the IA during the original proceeding.

27. According to the First Administrative Circuit Court Tribunal:

> [T]he investigating authority accredited the legal existence of the association which submitted the request of initiation of an antidumping investigation, as well as the personality of Enrique Bautista Parada, as president of the executive board and representative of the growers which belong to this association, based on the documentation provided in the request, which was not challenged by any participant, but until this amparo proceeding was initiated, using arguments which were not part of the matter, in light the fact that the complainant never challenged the personality of UNIFRUT. Prove of that is that in the original investigation the investigating authority did not issued any finding in this regard…[6]

[6] *Court Ruling of the First Administrative Circuit Court*, RA-431/2003-5523. October 28, 2003. Page 50.

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28. Based on this decision, the Panel considers that this claim has already been addressed by the Mexican Court which reviewed the underlying investigation. Accordingly, we uphold the IA's determination with respect to this claim.

B. THE PERIOD OF REVIEW USED BY THE IA

29. The Panel considers that a core issue in this review that needs to be addressed first in order to analyze several of the claims raised by NFE and UNCIEPA relates to the POR used by the IA. Thus, the Panel will address this issue as follows:

- First, the Panel will analyze each of the periods of review used by the IA in this investigation.
- Second, the Panel will address what, if any, would be the applicable standard to review information and data.
- Third, the Panel will address whether it was possible for the AI to update the information and data.
- Fourth, the Panel will address whether there was any attempt to update the data and information.
- Fifth, conclusion.

1. The periods of review used during the investigation.

30. As stated in the factual section, the investigation under review was initiated on May 26, 2005. The Preliminary Determination was issued on September 29, 2005 and the Final Determination on November 2, 2005. Now, we turn to the analysis of the POR used in each of these determinations.

Initial Determination

31. The Initiation Determination had two purposes:

- To comply with a Mexican Court by declaring legally null, all proceedings applicable to NFE and its affiliates **after the initiation of the original investigation**; and

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- To carry out a new antidumping investigation with respect to NFE and its affiliates.

32. Although this determination did not state which POR was used, the AI confirmed that the POR used was from January 1 to June 30 of 1996[7]. None of the other participants contested this issue.

Preliminary Determination

33. In accordance with paragraph 18 of this determination, the POR used was the original POR, that is, for the dumping analysis from January 1 to June 30 of 1996 and for the injury analysis from January 1, 1994 to June 30, 1996. The AI confirmed this in response to a question by the Panel[8].

34. However, at paragraph 386 of this determination, the AI modified the POR for the dumping analysis from January 1, 2004 to June 30, 2005 and for the injury analysis from January, 1, 2002 to June, 30, 2005.

Final Determination

35. In the Final Determination, the IA incorporated the information submitted by the parties on the new POR. The IA explained:

> In light of this, the Ministry considered that it was correct, to the extent possible, to support its dumping, injury and causal link analysis on information from January to December 1996 and from January 2004 to June 2005, in order to use the most recent information, without affecting the evaluation of relevant economic factors in the assessment of injury within the context of the economic cycle and the specific conditions of competition of the specific industry, as set forth in Article 65 of the Foreign Trade Law Regulations, and taking into account the particular circumstances of the present proceeding, which is to redo the antidumping investigation requested in 1996.[9]

36. In sum, the IA:

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[7] IA Brief, paragraph 115.
[8] Response to Question 11 of the prehearing Panel questions.
[9] Final Determination, paragraph 216.

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- Used data and information provided during the original investigation, that is, January - June, 1996 for the dumping analysis and January - June of 1994, 1995 and 1996 for the injury analysis, for issuing the Initiation and Preliminary Determinations of the new investigation.
- Requested participants to update information and data for the Final Determination and, accordingly, allowed participants to submit information for a new POR, January 1, 2004 to June 30, 2005 for the dumping analysis and January 2004 to June 2006, for the injury analysis.

2. The applicable standard in cases where the information and data is not contemporary.

37. Many of the claims raised by NFE and UNCIEPA regarding the illegality of the determination with respect to the dumping, injury and causal link analysis are based or closely related to the data or information used by the IA in its determinations. Many of those claims expressly raised the fact that most of the information and data is not contemporary because, in many instances, the information and data was at least 8 years old.

38. We begin our analysis as to what, if any, would be the standard for this Panel to analyze the information and data used by the IA in its determinations. In this regard, we are facing a "*sui generis*" type of investigation in light of the fact that it was the result of a judicial ruling which ordered the authority to "redo" the investigation. The validity of information and data used by the IA in this "redoing" exercise is the core issue before us.

39. We find useful guidance in the following report by the WTO Appellate Body which addressed precisely the issue of the assessment of the POR with respect to an antidumping investigation conducted in Mexico[10].

> We agree with Mexico that using a remote investigation period is not per se a violation of Article 3.1. In our view, however, the Panel did not set out such a principle, as its findings relate to the specific circumstances of this case. The Panel was satisfied that, in this specific case, a prima facie case was established that the information used by Economía did not provide reliable indications of current injury and, therefore, did not meet

[10] *Appellate Body Report. Mexico – definitive anti-dumping measures on beef and rice*, WT/DS295/AB/R, November 29, 2005.

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> the criterion of positive evidence in Article 3.1 of the Anti-Dumping Agreement. The Panel arrived at this conclusion on the basis of several factors. *The Panel attached importance to the existence of a 15-month gap between the end of the period of investigation and the initiation of the investigation, and a gap of almost three years between the end of the period of investigation and the imposition of final anti-dumping duties.* However, these temporal gaps were not the only circumstances that the Panel took into account. The Panel, as trier of the facts, gave weight to other factors: (i) the period of investigation chosen by Economía was that proposed by the petitioner; (ii) Mexico did not establish that practical problems necessitated this particular period of investigation; (iii) it was not established that updating the information was not possible; (iv) no attempt was made to update the information; and (v) Mexico did not provide any reason—apart from the allegation that it is Mexico's general practice to accept the period of investigation submitted by the petitioner—why more recent information was not sought. Thus, it is not only the remoteness of the period of investigation, but also these other circumstances that formed the basis for the Panel to conclude that a prima facie case was established. *In the light of the general assessment of these other circumstances carried out by the Panel as trier of the facts, we accept that a gap of 15 months between the end of the period of investigation and the initiation of the investigation, and another gap of almost three years between the end of the period of investigation and the imposition of the final anti-dumping duties, may raise real doubts about the existence of a sufficiently relevant nexus between the data relating to the period of investigation and current injury.* Therefore, we have no reason to disturb the Panel's assessment that a prima facie case of violation of Article 3.1 was made out.[11]

40. This report fleshes out the importance to this Panel of assessing the particular circumstances in which the IA decided to chose the applicable POR, in particular:

- Whether it was possible for the IA to update the information or whether the Court ruling ordered the IA to used a particular POR ; and
- Whether there was any attempt to update the information.

[11] *Appellate Body Report. Mexico – definitive anti-dumping measures on beef and rice*, WT/DS295/AB/R, November 29, 2005, paragraph 167.

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3. Whether it was possible for the IA to update the information

41. We agree that, in accordance with Article 65 and the second paragraph of Article 76 the FTLR[12], the IA has the discretion to establish and modify the POR. However, that discretion is not boundless.

a) The IA recognized the need to update the information and data.

42. The IA considered that it was necessary to modify the POR in order to update the information. In response to a question by the Panel, the IA stated:

> In strict compliance with Articles 65 and 75 of the FTLR, the authority had to update the information for the determination of dumping, injury and causal link…[13]
>
> Due to the atypical circumstances of this case, it was necessary to analyze what happened in the original period of investigation, as well as the period that occurred up to when the court ruling was issued. Thus, it was necessary to carry out the analysis in light of the specific conditions of competition, in accordance with Article 65 of the FTLR. [14]

43. Moreover at paragraph 213 of the Final Determination, in their brief[15] and in response to a question by the Panel[16], the IA cites as a basis for modification of the POR, the WTO

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12 ARTICLE 65. The Ministry shall evaluate the economic factors described in the preceding Article in the context of the economic cycle and conditions of competition specific to the industry affected. For that purpose, the requesting parties shall submit information on the relevant factors and indicators and characteristics of the industry covering at least the three years preceding the submission of the request, including the period under investigation, unless the enterprise concerned had not been established for the whole of this period. In addition, domestic producers making a request or the organizations representing them shall submit economic studies, case studies, technical literature and national and international statistics on the performance of the market concerned, or any other documentation permitting identification of economic cycles and conditions of competition specific to the industry affected.

ARTICLE 76. The investigation of unfair international trade practices shall address the existence of price discrimination or subsidy and the injury caused or which may be caused to the domestic industry. It shall include a period which covers imports of goods identical or alike to those produced by the domestic industry which may be affected, entered over a period of at least six months prior to the commencement of the investigation.

The period of investigation to which the foregoing paragraph refers may be modified at the discretion of the Ministry to cover a period which includes imports made subsequent to the commencement of the investigation. In that case, decisions to impose provisional or final countervailing duties shall refer both to the original period and to the extended period. (adding emphasis)

13 Response to the Panel's first set of questions at page 36.
14 Response to the Panel's first set of questions at page 39.
15 Paragraph 277.
16 Response to the first set of question at page 41.

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Antidumping Committee (G/ADP/6) recommendation regarding period of reviews, adopted on May 5, 2000.

44. Thus, the IA recognized the need to update the information and data for its determination.

b) The Court Rulings regarding the POR.

45. Since this investigation was originated on the basis of the Court Rulings, the Panel analyzed whether such Court rulings mandated or ordered the IA in any way with respect to the POR.

46. After analyzing the Court rulings the Panel can conclude that such rulings did not impose any obligation on IA with respect to the POR. In response to a question by the Panel in this regard, all participants agreed with this conclusion.

47. Thus, it could have been the case that the IA could have modified the POR at any time after the initiation of the investigation and it also could have ended the investigation by issuing a negative preliminary determination if it did not found sufficient data or information that would support an affirmative dumping and/or injury determination or causal link among them.

4. Whether there was any attempt to update the information

48. Notwithstanding the clear attempt to update information and data[17], the Panel is puzzled by the approach taken by the IA. From a review of the Final Determination, the Panel concludes that the IA used data and information from three different periods of time.

49. In some instances, the IA used information from periods of approximately 8 years. For example, at paragraph 542, in the productivity analysis, the IA used data and information from 1997 to 2005. Similar approaches could be found, for example, at paragraphs 531, 539, 540, 542, 556, 557 and 559.

50. In other instances, the IA used data from the original period. For example, at paragraphs 532, 536 and 544.

[17] Preliminary Determination, September 29, 2005. Paragraph 386.

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51. Finally, the authority used the "new" POR in other parts of its analysis, for example, with respect to wages at paragraph 541.

52. To add to this confusion, the determination states at paragraph 471:

> … After giving the participants, including members of NFE and UNIFRUT, the opportunity to submit evidence and arguments, no new economic data was submitted which could modify the information used in the preliminary determination. Thus, it should be pointed out that the arguments and data related to injury, threat thereof and causation mentioned in paragraphs 284 to 378 of the preliminary determination would be applicable *mutatis mutandi* to this determination…

53. The Panel notes that the preliminary determination used only data and information from the original POR. Thus, based on this statement, it seems that whenever there was no updated data or information available, the IA "filled the gap" by using information from the original investigation, that is, information and data that was at least years 8 years old[18].

5. Conclusion

54. In light of this, the Panel considers that notwithstanding that the IA recognized the need to update the information and made efforts to that effect, the information and data used was, in many instances, at least 8 years old. In this regard, the Panel believes that, by any standard, "a gap" of 8 years would not provide "sufficiently relevant nexus" between data relating to the period of investigation and current dumping, injury and causal link.

55. Based on the foregoing, the Panel could not undertake a proper assessment of the Final Determination until **all information and data is updated using the new POR set forth by the IA in paragraph 386 of its preliminary determination**. Thus, the Panel will issue a remand to this effect and defer until such information and data is updated to issue a ruling concerning those claims related to the determination of dumping, injury or causal link.

C. INITIATION DETERMINATION.

Claims

[18] The Panel posed various questions to the IA regarding this issue. No clear response from the IA was provided. Responses to questions by the Panel 15, 16, 17, 18 and 19.

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56. NFE raised two claims with respect to the Initiation Determination. NFE argues that the Final Determination **violates** Articles 40 of the FTL, 62 of the FTLR and 5.3 of the AA because the IA did not analyze, before issuing its Initiation Determination, that there were importers that were also domestic producers of the subject merchandise[19]. The NFE also claims that IA initiated without enough positive evidence of injury, because it used incomplete information due to the fact that the injury analysis only included 6 months of 1994, 1995 and 1996[20].

Analysis

57. We begin our analysis with the initiation determination issued on May 26, 2005. As already stated, the origin of this investigation is a determination by a Mexican Circuit Court in which it ordered the authority to nullify ("*dejar sin efecto*") the final determination and all other acts with respect to Members of the NFE from the date that the violation to Mexican law occurred. We understand that this ruling is based on a determination by the Court that there was a violation of Mexican law because of lack of authority of the government official who issued the notification to NFE's Members of the initial determination.

58. In order to comply with this ruling, the IA had to carry out again all acts from the date that the violation occurred, that is, **after the initiation determination was issued**.

59. Thus, the Panel considers that compliance with the Court Rulings did not include the initiation determination. However, it is our view that all acts after the initiation of the investigation had to be consistent with Mexican antidumping law.

60. Based on the foregoing, we uphold the Initiation Determination.

D. PRELIMINARY DETERMINATION

Claims

61. NFE states three claims with respect to the information and data in which the preliminary determination was based[21].

[19] NFE Brief, pages 42-47.
[20] NFE Brief, pages 53-56.
[21] NFE Brief, pages 68-79.

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- The first claim is that the IA violated Articles VI(2) of the GATT, 3 of the AA, and 76 of the FTLR by issuing a determination with information that was, at least, 8 years old.
- The second claim is that the IA violated Article 3 of the AA in making its preliminary determination which only used 6 months of 1994, 1995 and 1996.
- The third claim is that the IA violated Article VI of the GATT, 3 of the AA and 76 of the FTLR when it used the new period of investigation together with the POR from the original investigation.

62. The IA justification is basically that information was updated when in paragraph 386 of the preliminary determination it modified the POR.

Analysis

63. All participants agreed that the information and data used by the IA in issuing its injury preliminary determination was that of the original investigation. Thus, as already analyzed, we failed to see how information or data that was 8 years old could justify, by any reasonable standard, a positive injury determination. We are also mindful of the fact that the court ruling did not order the IA to use a particular POR.

64. For this reasons, we determine that the Preliminary Determination violated Articles VI(2) of the GATT, 3 of the AA and 76 of the FTLR.

65. Finally, with respect to the third claim that the IA violated Articles VI of the GATT, 3 of the AA and 76 of the FTLR when it used the new period of investigation **together** with the POR from the original investigation. We already discussed this issue in the introductory part of our findings and will address it accordingly in our general remand.

E. CLAIMS RELATED TO THE FINAL DETERMINATION

1. Timing for issuing the Final Determination

Claim

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66. NFE argues that the Final Determination is illegal because the IA exceeded the period provided under the FTL (260 days) to issue its Final Determination[22]. UNCIEPA states the same claim[23].

67. Even though they accept that they exceeded the period provided by Mexican law, the IA argues that the claimants must demonstrate that such delay affected them. Moreover, the IA argues that the AA provides a longer period.

Analysis

68. We begin our analysis with Article 59 of the FTL:

> Within a period of 210 days from the day following the publication in the *Diario Oficial de la Federación* of the resolution initiating the investigation, the Ministry shall issue a final resolution by which it shall:
>
> I. Impose a final antidumping duty;
>
> II. Revoke the provisional antidumping duty; or
>
> III. Pronounce the termination of the investigation without imposing an antidumping duty.
>
> The final resolution shall be published in the *Diario Oficial de la Federación* and subsequently notified to known interested parties.

69. In this case, the initiation determination was published on May 18, 2005 and the Final Determination was published on November 2, 2006. Clearly, the time frame established by the FTL was exceeded. We are also mindful that under the AA, which is part of Mexican antidumping regulations, the period provided by Article 5.10 for conducting an investigation is one year and "and in no case more than 18 months".

70. The Panel is also aware of a recent jurisprudence by the Mexican Supreme Court in which it established that the IA can exceed the period set forth by the FTL[24].

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[22] NFE Brief, pages 47-53.

[23] UNCIEPA Brief, pages 20-31.

[24] *Judicial weekly review of the Federation and his Gazette XXV*, Ninth Epoch, Jurisprudence Thesis 2a./J. 39/2007, March, 2007, page. 300. "ANTIDUMPING DUTIES. THE VALIDITY TO ISSUED A THE FINAL DETERMINATION, DOES NOT EXPIRE WHEN IT IS ISSUED BEYOND THE 220 DAYS PERIOD ESTABLISHED UNDER ARTICLE 89 F, PARAGRAPH IV, OF THE FOREIGN TRADE LAW."

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71. It is important to note that this ruling is related to a sunset proceeding in which the FTL provided a period of 220 days to issue a determination.

72. In response to a question by this Panel asking the participants views on this jurisprudence, NFE's main argument was that the jurisprudence refers to a different proceeding.

73. The court's reasoning is not based on the particularities of a sunset review (as opposed to an original investigation), but rather on the nature of unfair trade practices proceedings in general. Thus, the fact that both proceedings are different could not provide sufficient basis for this Panel to distinguish them with respect to this particular claim.

74. Paragraph 2 of Article 1904 of the NAFTA provides that the Panel's task is to review whether a Final Determination is in accordance with "the antidumping law of the importing Party", and that such law includes "judicial precedents to the extent that a court of the importing Party would rely on such precedents in reviewing a Final Determination of the competent investigating authority".

75. Thus, we are bound by the jurisprudence set forth by the Mexican Supreme Court and, uphold, accordingly, the determination with respect to this claim.

2. Substantive claims

Claims

76. NFE raises various claims regarding the merits of the Final Determination:

- The IA violated Articles 39, 41, 42 of the FTL, 59, 64, 65, 68, 69 of the FTLR and 3 and 4 of the AA in its threat of injury analysis[25].
- The IA violated Article 3 of the AA and 39 of the FTL because the Final Determination was not based on positive evidence[26].
- The IA violated Articles 3.5 of the AA and 69 of the FTLR when it failed to analyze other factors different from the dumped imports which could cause injury[27].

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25 NFE Memorial pages 98-144.
26 NFE Brief, pages 145-156.

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- The IA violated Articles VI of the GATT, 32 of the FTL and 43 of the FTLR when it calculated dumping margins based on information from two periods of review[28].
- The IA violated Article 6 of the AA because it failed to take into account information submitted by many exporters[29].

Analysis

77. As we discuss in the introductory part of our finding, at the core of this dispute is the information and data used by the IA to issue these determinations. Accordingly, this Panel could not issue a finding with respect to these claims until all the information and data is updated. Accordingly, we refer our determination on these allegations until the IA responds to our general remand in this matter.

F. OTHER CLAIMS

1. Request of cost of production from exporters.

Claim

78. NFE argues that the determination violated Articles 32 of the FTL and 43 of the FTLR because the IA should not have requested production costs data from exporters, since costs data could only be requested to exporters when domestic producers specifically assert that such data is necessary[30].

79. IA argues that it has a general authority to request relevant information and data to exporters in accordance with Articles 54 and 82 of the FTL.

80. We begin our analysis with Article 32 of the FTL and 43 of the FTLR. Article 32 of the FTL provides:

> The term "in the ordinary course of trade" shall mean commercial transactions which reflect market conditions in the country of origin and which are concluded customarily, or within a representative period, between independent buyers and sellers.

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27 NFE Brief, pages 158-161.
28 NFE Brief, pages 166-172.
29 NFE Brief, pages 177-181.
30 NFE Brief, pages 57-62 and 166-172.

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> Sales in the country of origin or export to a third country may be disregarded in calculating the normal value if the Ministry finds that such sales reflect sustained losses. Such sales shall be deemed to include transactions whose prices are insufficient to cover the costs of production and general costs incurred in the ordinary course of trade within a reasonable period of time, which may be more extensive than the period of investigation.
>
> When the transactions in the country of origin or of export to a third country which generate profits are insufficient to be described as representative, the normal value shall be established on the basis of the computed value.

81. Article 43 of the FTLR states that:

> For the purposes of paragraph 2 of Article 32 of the FTL, the requesting party must submit the information justifying the exclusion of the sales in question. In such cases, the Ministry may take into account the fact that, during the period of investigation, selling prices were exceptionally low or costs and expenses exceptionally high, due to factors of a transitory nature or the economic situation.

82. The Panel fails to see that, based on the provisions cited by NFE, the IA does not have the authority to request costs data from exporters. Moreover, we agree with the IA that Articles 54[31] and 82[32] provide a general authority for the IA to request information which it considers relevant.

83. With respect to the request of costs data, in response to a question by the Panel during the hearing, the IA stated that it requests costs data from exporters in every case[33]. Thus, we failed to see that such request in this particular case should be illegal.

84. Based on the foregoing, we uphold the Final Determination with respect to this claim.

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[31] ARTICLE 54 - The Ministry may request the interested parties to produce evidence, information and data which it considers relevant, for which purpose the Ministry's questionnaires shall be used.
If the above request is not satisfied, the Ministry shall decide on the basis of the information available.

[32] ARTICLE 82 - The interested parties may adduce evidence of all types except statements by the authorities or material considered contrary to public order or offensive to morals or decency.
The Ministry may agree at any time to the institution, repetition or extension of any proceedings considered necessary and conducive to the discovery of the truth regarding the matters under dispute. Furthermore, the Ministry may institute such proceedings as it considers appropriate in order to obtain better information.

[33] Panel Hearing transcript at page 63.

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2. Access to Confidential Information

Claim

85. NFE claims that the IA violated Articles 6.2 of the AA or and 80 of the FTL because it denied access to NFE to part of the record of this investigation[34]. In particular, the IA did not allow NFE to have access to confidential information submitted by other members of NFE. As a basis for denying such access, the IA stated that it did not considered it necessary for NFE to have access to information of other NFE members participating in the investigation in light of the fact that such information was from companies that were "pursing the same objective, that is, the conclusion of the investigation without the imposition of duties"[35].

86. The IA argues that access was denied because NFE did not justify properly why it needed access to this information.

Analysis

87. We begin our analysis with Articles 6.2 of the AA and 80 of the FTL. Article 6.2 of the AA agreements provides that:

> Throughout the antidumping investigation all interested parties shall have a full opportunity for the defense of their interests.

88. Article 80 FTL states that:

> The Ministry shall provide timely opportunities for interested parties to examine all information contained in the administrative dossier for the presentation of their cases. Confidential information shall be made available only to the accredited legal representatives of interested parties and to natural or legal persons having access to such information under the international treaties or conventions to which Mexico is a party. No interested party shall have access to restricted commercial or confidential government information.
>
> Persons with authorized access to confidential information may not use such information for their personal benefit and shall be under the obligation to take all measures necessary to prevent any disclosure thereof. Infringement of this requirement shall be punishable under the

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34 NFE Brief, pages 63-68.

35 Oficio UPCI.310.05.4642/2, contained in volumes 013-13 (non-confidential version) and 020-20 (confidential version) of the record (560 of the record index).

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> provisions of this Act, independently of such civil and criminal penalties as may be applicable.
>
> During the investigation proceedings referred to in this section the Ministry shall provide timely access, at the request of the interested parties or their representatives, to any non-confidential information forming part of the administrative dossier of any other investigation after a period of 60 days following the publication of the relevant final resolution.

89. Both provisions, deal with a basic due process right of a party in a proceeding to have access to the arguments and data submitted in the investigation by other parties in order to properly defend its interests. All this with due care of confidentiality considerations.

90. In this case, NFE complied with all the FTL and FLTR requirements to gain access to all information contained in the record. During the hearing the IA stated that it deny access because it "considered that there was not enough justification to grant access to this information to NFE. Another element that was taken into consideration was that in theory, if they are exporters, they should have access to the information contributed by the members and their associates"[36].

91. NFE did justify to the IA that it needed access "in order to review the methodology and information used by the IA in its dumping margin determination based on Best Information Available"[37].

92. In light of this, it can be concluded that the only justification for the IA to deny access relates to the fact that NFE was "pursuing the same objective" because as exporters "they should have access to the information contributed by the members and their associates".

93. The Panel fails to see why this could be a reasonable and proper justification for denying access to the record.

94. It is regular practice that parties pursuing the same objective in an antidumping investigation are represented by different counsels and, therefore, not all information is share among the parties. Thus, it is not rare that parties "pursing the same objective" do not share

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[36] Hearing transcript at 39.

[37] NFE, brief dated November 22 of 2005, contained in volumes 013-13 (non-confidential version) and 020-20 (confidential version) of the record (568 of the record index).

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information because of, for example, competition concerns. That is why there is a strict mechanism in place to grant access to the confidential record.

95. In this case, NFE justified its reason for having access on the basis that it needed to understand the basis for the margin of dumping determination, basically because such margin was established based on best information available. Such justification seems to be reasonable and the IA did not put forward in the record any justification, other than the one we already discussed, for denying access to NFE.

96. Therefore, we determine that the IA violated Articles 6.2 and 80 of the FTL by not allowing access to NFE to all information contained in the confidential record of this investigation.

3. Verification Visit

Claim

97. NFE claims that the IA violated Article 6.6 of the AA because it did not perform a verification visit to review the accuracy of the information submitted by the domestic industry[38].

98. The AI argues, in accordance with Article 175 of the FTLR[39], that it has the discretion to determine whether to perform verification visits[40].

Analysis

99. We begin our analysis with Article 6.6 of the AA:

> Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

[38] NFE Brief, pages 157-158.

[39] ARTICLE 175. The Ministry **may request a**ccounting and any other information, data and documents from the interested parties, in order to verify the truth of their submissions and statements at the official domicile of the Ministry.

The person subject to the search shall have the right to indicate whether the information or data supplied or to be supplied to the visiting officials is of a confidential or restricted commercial character, provided that he satisfies the provisions of these Regulations. (adding emphasis)

[40] IA Brief, paragraphs 415-429.

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100. As we review this provision, we failed to see an obligation of the IA to conduct, in all cases, verification visits. Moreover, NFE did not raise before this Panel any particular basis as to why the information submitted by the domestic industry had to be verified.

101. In light of this, the Panel upholds the Final Determination with respect to this claim.

4. Margin of dumping

Claim

102. NFE claims that the IA violated Articles 9.1 of the AA, 62 of the FTL and 90 of the FTLR because the margin of dumping should have been less than the determined by the IA. NFE claims rests on the fact that the IA failed to performed the analysis provided for article 7.4 of the AA.

103. IA argues that it correctly determined the amount of antidumping duties[41].

Analysis

104. We begin our analysis with Article 7.4 of the AA:

> The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

105. Notwithstanding, that the Final Determination states at paragraph 210 that the IA "examined whether a duty lower than the margin of dumping would be sufficient to remove injury", in response to a question by the Panel requesting to be directed to the place in the record were such analysis was made, the IA failed to respond. Thus, the Panel considers that the IA maintained preliminary duties for more than a year without justifying such extension in accordance with Article 7.4 of the AA.

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41 IA Brief, paragraphs 448-469.

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106. However, the claim brought before this Panel by NFE is not that the AI maintained preliminary dumping duties for more than the period in violation of Article 7.4. Rather, NFE claims that, based on such delay, the AI should have determined a lower margin of dumping.

107. In this regard, we fail to see the legal connection between failing to comply with the obligation provided in Article 7.4 of the AA and an automatic determination of a lower margin of dumping.

108. Based on the foregoing, the Panel upholds the Final Determination with respect to this claim.

5. Previous administrative practice

Claim

109. UNCIEPA argues that the IA failed to comply with Article 1902.1 of the NAFTA because it did not follow certain administrative precedents[42].

110. The IA argues that the precedents cited by UNCIEPA are not applicable to this case[43].

Analysis

111. We begin our analysis with the text of Article 1902.1 of the NAFTA:

> Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Parties. Antidumping law and countervailing duty include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents.

112. The Panel fails to see or draw from this Article an obligation for the IA to follow previous administrative practice. It refers only to the authority of each of the NAFTA Parties to apply their antidumping laws.

113. Based on the foregoing, the Panel will not issue a decision with respect to this claim. The Panel would like to clarify that this decision should not be interpreted to establish any precedent

[42] UNCIEPA Brief, pages 35-50.
[43] IA Brief, paragraphs 557-570.

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with respect to claims related to administrative practice or whether authorities should follow or be bound by such practice in a particular case.

6. Calculation and Payment of Dumping Duties

Claims

114. UNCIEPA claims that the IA violated Article 9.3 of the AA because the amount of duty paid by importers exceeded the duty calculated by the IA. UNCIEPA argues that under Mexican Customs Law, the amount of dumping duties payable is calculated based upon the custom value of the merchandise which includes costs (for example, freight expenses) derived from the importation of the products as opposed to the amount of duty calculated under Article 2 of the AA[44].

115. The IA argues that the determination of the dumping margin is consistent with the AA and the FTL[45].

Panel Analysis

116. In our view, there needs to be a distinction drawn between the calculation of the margin and the determination of the duties to be paid at the border. UNCIEPA is not challenging the calculation of the dumping margin performed by the IA. UNCIEPA is challenging the method through which Mexican customs calculate the antidumping duties owed. In response to a question by the Panel during the hearing, UNCIEPA representative confirmed that this was an issue of custom valuation regulated by Mexican Customs Law and not by the FTL[46].

117. The Panel considers that this is not a claim in which it can make a ruling. The provisions of Mexican Customs Law related to the determination of duties owed are no part of the scope of a binational panel's review. Such laws are not "relevant statutes in which a court of the importing Party would rely…in reviewing a final determination", is accordance with paragraph 2 of Article 1904 of the NAFTA. Thus, this Panel does not have jurisdiction to rule on this particular claim.

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[44] UNCIEPA Brief, pages 57-65.
[45] IA Brief, paragraphs 582-605.
[46] Hearing Transcript at page 15.

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7. Participation of UNCIEPA in the proceeding.

Claims

118. UNCIEPA argues that the IA violated Articles 51, 53 and 64 of the FTL and 6.1 AA because it did not allow it to participate in the proceeding.

119. IA argues that since UNCIEPA members did not participate in the underlying judicial proceeding, they were not entitled to participate in this "special" proceeding related to complying with a ruling which was only applicable to NFE members[47].

120. In response to the argument that the IA did let domestic producers participate in the proceeding, the IA stated that this was because they participated in the judicial proceeding as a third party ('*tercero perjudicado'*).

Analysis

121. We begin our analysis with the text of Articles 51 and 53 of the FTL, 164 of the FTLR and 6.1 of the AA.

122. Article 53 of the FTL provides that:

> As of the day following the publication in the Diario Oficial de la Federación of the resolution initiating the investigation, the Ministry shall notify the interested parties known to it, so that they may appear in order to exercise their right to make representations.

123. Article 51 of the FTL establishes the definition of an interested party:

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

124. Article 164 of the FTLR provides that:

> In the case of proceedings in respect of unfair international trade practices and safeguard measures, following publication of the initiation of the administrative investigation and acceptance of the request, importers,

47 IA Brief, paragraphs 729-746.

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> exporters and, if applicable, representatives of foreign governments who have been notified or who appear of their own right before the Ministry, shall have a time-limit of thirty days to formulate their defence and present the required information.

125. Article 6.1 of the AA

> All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question."

126. As this Panel reviews the cited provisions, it could not identify nor has it been directed to any other provision which expressly authorizes the IA to exclude importers from participating in antidumping proceedings when a Court ruling is involved. Thus, the Panel considers that the fact that this proceeding derived from a Court ruling in which only NFE and domestic producers participated, does not authorize the IA, under the FTL, FTLR or the AA, to exclude other "interested parties" from participating in antidumping proceedings.

127. Therefore, the Panel considers that the IA violated Articles 51 and 53 of the FTL, 164 of the FTLR and 6.1 of the AA when it excluded UNCIEPA from participating in the underlying proceeding.

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VII. ORDER OF THE PANEL

For the reasons set forth above, the Panel hereby remands this matter to the IA for further proceedings consistent with this opinion, in accordance with paragraph 8 of Article 1904 of the NAFTA. Specifically, the Panel remands this matter with instructions for IA to issue a new dumping, injury and causal link Final Determination based **exclusively** on information and data from the period of review established by the IA in paragraph 386 of its preliminary determination.

In rendering such determination the IA:

- Shall base its determination only on information and data contained on the record.
- Provide a justification in case it chooses to exclude information or data of certain months of the period established in paragraph 386 of the preliminary determination.
- Provide a justification in case it chooses to include producers that are also importers of the subject merchandise.
- Provide the percentage of the domestic industry of the subject merchandise that was considered in its analysis, in case the IA reaches an affirmative injury finding.

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The IA is directed to report its Determination on Remand within sixty (60) days from the date of this decision. Any participant thereafter wishing to challenge the Determination on Remand shall file such challenge with the time prescribed in Rule 73 of the Rules of Procedure of Article 1904 Binational Panel Reviews.

SIGNED IN THE ORIGINAL BY:

Gabriela Aldana Ugarte

Gabriela Aldana Ugarte — October 15, 2009

Christian Raúl Natera Niño de Rivera

Christian Raúl Natera Niño de Rivera — October 15, 2009

Morton Pomeranz — October 15, 2009

Morton Pomeranz

Mark R. Sandstrom — October 15, 2009

Mark R. Sandstrom

Ricardo Ramírez Hernández — October 15, 2009

Ricardo Ramírez Hernández
Chairman

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