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

IN THE MATTER OF:

SECRETARIAT FILE:

Review of the Final Determination of the Antidumping Duty Investigation on imports of ethyleneglycolmonobutyl ether from the United States of America, regardless the country of origin.

MEX-USA-2012-1904-02

PANEL MEMBERS:

- Lawrence Bogard
- Gabriel Cavazos Villanueva
- Cynthia Lichtenstein
- Carlos Humberto Reyes Díaz
- Juan Manuel Saldaña Pérez, Chair

PARTICIPANTS:

A. PETITIONERS

- Eastman Chemical Company
- The Dow Chemical Company, Union Carbide Corporation and Dow Agrosociencias de México, S.A. de C.V.

B. INVESTIGATING AUTHORITY

- Unit of International Trade Practices of the Secretary of Economy

C. IN OPPOSITION TO EASTMAN CHEMICAL COMPANY AND IN SUPPORT OF THE DOW CHEMICAL COMPANY, UNION CARBIDE CORPORATION AND DOW AGROSCIENCIAS DE MÉXICO, S.A. DE C.V.

- Valspar Aries Coatings S. de R.L. de C.V.

D. NATIONAL PRODUCER

- Polioles S.A. de C.V.

I. DEFINITIONS

For the purposes of this Decision, unless otherwise indicated, it shall be understood that:

AA means the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994, or Antidumping Agreement.

AB means the Appellate Body of the World Trade Organization

CFF means the Federal Fiscal Code (*Código Fiscal de la Federación*), which is the Mexican fiscal statute

DOF means the Official Journal of the Federation (*Diario Oficial de la Federación*), which is the main official government publication in Mexico

Dow means The Dow Chemical Company, Union Carbide Corporation and Dow Agrosiences de México, S.A. de C.V.

Eastman means Eastman Chemical Company

EB means ethylene glycol monobutyl ether

FR or Final Resolution means the Final Resolution of the antidumping investigation on imports of ethylene glycol monobutyl ether from the United States of America, regardless the country of origin

IA or UPCI means the Investigating Authority, which is the Unit of International Trade Practices of the Secretary of Economy (*Unidad de Prácticas Comerciales Internacionales de la Secretaría de Economía*)

IR or Initial Resolution means the Resolution accepting the request of an interested party to start the antidumping investigation on imports of ethylene glycol monobutyl ether from the United States of America, regardless the country of origin

LCE means the Foreign Trade Law (*Ley de Comercio Exterior*)

LFPCA means the Federal Contentious Administrative Procedure Act (*Ley Federal de Procedimiento Contencioso Administrativo*)

Panel or Binational Panel means this Panel appointed pursuant to Article 1904(2) of the North American Free Trade Agreement to review the Final Determination on the Antidumping Duty Investigation on imports of ethylene glycol monobutyl ether from the United States of America, regardless the country of origin

Polioles means Polioles S.A. de C.V.

PR or Preliminary Resolution means the Preliminary Resolution of the antidumping investigation on imports of ethylene glycol monobutyl ether from the United States of America, regardless the country of origin

RLCE means the Regulation of the Foreign Trade Act (*Reglamento de la Ley de Comercio Exterior*)

Rules or Rules of Procedure means the Rules of Procedures for Article 1904 Binational Panel Reviews

Tecnon Prices means the ethylene glycol monobutyl ether prices in the United States market published by the international consultant TecnonOrbiChem

TFJFA means the Federal Court of Fiscal and Administrative Justice (*Tribunal Federal de Justicia Fiscal y Administrativa*)

USA means the United States of America

Valspar means Valspar Aries Coatings S. de R.L. de C.V.

WTO means the World Trade Organization

II. INTRODUCTION

This Binational Panel was appointed pursuant to NAFTA Article 1904.2 in order to review the Final Resolution published in the DOF on September 9, 2012, which imposed antidumping duties of 14.81% to imports made by Eastman, 16.28% to imports made by Dow and 36.64% to imports made by the rest of importers.

The Panel issues its Final Decision pursuant to NAFTA Article 1904.8 and Part VII of the Rules of Procedure.

III. PROCEDURAL BACKGROUND

A. Administrative proceeding

On March 11, 2011, the Initial Resolution was published in the DOF.

On April 9, 2012, the Preliminary Resolution was published in the DOF, whereby the IA imposed provisional antidumping duties of 37.91% on imports made by Dow and the rest of exports from the USA, except for Eastman.

On September 11, 2012, the Final Resolution was published in the DOF, whereby the IA imposed a final antidumping duty of 14.81% on imports made by Eastman, 16.28% on imports made by Dow and 36.64% on imports made by the rest of exporters.

B. Proceeding before the Panel

On October 9, 2012, Eastman filed a Request for Panel Review of the Final Determination, in accordance with Rule 34 of the Rules of Procedure.

On November 8, 2012, Eastman and Dow filed their Complaints respectively, in accordance with Rule 39 of the Rules of Procedure.

On November 21, 2012, Polioles filed a Notice of Appearance, in accordance with Rule 40 of the Rules of Procedure.

On November 23, 2012, the IA filed a Notice of Appearance, in accordance with Rule 40(1)(a)(b)(c)(d)(ii) of the Rules of Procedure.

On November 23, 2012, Dow filed a Notice of Appearance in opposition to all allegations made by Eastman, in accordance with Rule 40(2) of the Rules of Procedure.

On November 23, 2012, Valspar filed a Notice of Appearance in support of all allegations set out by Dow and in opposition to allegations set out in parts 12.IV and 12.VII of Eastman's Complaint, in accordance with Rule 40(1)(d)(i)(ii) of the Rules of Procedure.

On November 23, 2012, Eastman filed a Notice of Appearance in support of allegations I to XI set out in Dow's Complaint, in accordance with Rule 40(1)(d)(i) of the Rules of Procedure.

On December 7, 2012, the AI filed the administrative record, in accordance with Rule 41 of the Rules of Procedure.

On February 5, 2013, Dow and Eastman respectively filed a brief in accordance with Rule 57(1) of the Rules of Procedure.

On February 6, 2013, Eastman filed a Notice of Motion to dismiss Polioles' Notice of Appearance, in accordance with Rule 61 of the Rules of Procedure.

On February 15, 2013, Polioles filed a response to the Notice of Motion filed by Eastman, in accordance with Rule 61 of the Rules of Procedure.

On April 5, 2013, Polioles filed a brief to oppose allegations of the Complaints, in accordance with Rule 57(2) of the Rules of Procedure.

On April 8, 2013, Dow filed a brief opposing allegations set forth in Eastman's Complaint, in accordance with Rule 57(2) of the Rules of Procedure.

On April 8, 2013, Valspar filed a brief to support to all allegations set out by Dow and in opposition to allegations set out in parts 12.IV and 12.VII of Eastman's Complaint.

On April 9, 2013, the IA filed a brief opposing allegations set out by the Petitioners, in accordance with Rule 57(2) of the Rules of Procedure.

On April 24, 2013, Eastman filed a brief replying to the grounds and arguments set forth in the IA, Dow, Polioles and Valpar briefs, in accordance with Rule 57(3) of the Rules of Procedure.

On April 24, 2013, Dow filed a brief replying to the grounds and arguments set forth in the IA, Eastman, Polioles and Valpar briefs, in accordance with Rule 57(3) of the Rules of Procedure.

On September 29, 2014, the Panel issued an Order dismissing Eastman's Motion to dismiss Polioles' Notice of Appearance.

On February 13, 2015, the Panel issued an Order to inform all parties that the Public Hearing of oral argument would take place on March 10, 2015.

On March 6, 2015, Dow filed a Notice of Motion requesting that the appearance of the speakers at the Public Hearing would be in accordance with the Order issued on February 13, 2015.

On March 9, 2015, Eastman filed a Notice of Motion requesting that the appearance of the speakers at the Public Hearing would be in accordance with the Order issued on February 13, 2015.

The Public Hearing was held on March 10, 2015.

On March 13, 2015, the Panel issued an Order requesting the IA to present information that was orally requested during the Public Hearing.

On March 17, 2015, the IA filed a response to the Panel's Order, presenting the requested information.

On March 24, 2015, Polioles filed arguments in support of the IA's response to the Panel's Order.

On March 24, 2015, Dow filed a Notice of Motion to dismiss the information presented by the IA on March 17, 2015, in response to the Panel's Order.

On March 24, 2015, Eastman filed a Notice of Motion to dismiss the information presented by the IA on March 17, 2015, in response to the Panel's Order.

On March 24, 2015, Valspar filed a response in opposition to the IA's response to the Panel's Order.

On March 27, 2015, Dow filed a Notice of Motion to dismiss the response filed by Polioles on March 24, 2015.

On April 1, 2015, the IA filed a response to the Notices of Motion filed by Dow and Eastman and to Valspar's response.

On April 6, 2015, Polioles filed a response to the Notices of Motion filed by Eastman and Dow.

On May 15, 2015, the IA filed a Notice of Motion to dismiss Valspar's arguments filed on March 24, 2015.

On May 27, 2015, Dow filed a response to the IA's Notice of Motion to dismiss Valspar's arguments filed on March 24, 2015.

On May 28, 2015, Valspar filed a response to the IA's Notice of Motion to dismiss their arguments.

On July 28, 2015, the Panel issued an Order addressing the information presented by the IA on March 17, 2015 and the subsequent Notices of Motion.

On July 30, 2015, Dow filed a Notice of Motion to consider a subsequent authority.

On August 10, 2015, the IA filed a response to Dow's Notice of Motion to consider a subsequent authority and a response to the Panel's Order from July 28, 2015.

On August 21, 2015, Dow filed a Notice of Motion to consider only certain paragraphs from the IA's response to their Notice of Motion filed on August 10, 2015.

On August 27, 2015, the Panel issued an Order to respond to Dow's Notices of Motion filed on July 30 and August 21, 2015.

IV. STANDARD OF REVIEW

Pursuant to NAFTA Articles 1904.1, 1904.2, 1904.3 and Annex 1911, in the case of Mexico, the Panel must apply the standard of review set out in Annex 1911 of Chapter 19, which is Article 238 of the CFF or any successor statutes.

Thus, it should be noted that CFF Article 238 has been replaced by Article 51 of the LFPCA, which was published in the DOF on December 1, 2005, entering into force on January 1, 2006. LFPCA Article 51 says:

ARTICLE 51.- An administrative decision shall be declared illegal if any of the following cases is demonstrated:

- I. Incompetence of the official who made the decision, or ordered or conducted the proceeding from which the decision raised.
- II. Omission of the formal requirements of the law provided that it affects an individual's defense and transcends the sense of the challenged decision, including the lack of justification or motivation, if any.
- III. Errors in the proceeding provided that it affects an individual's defense and transcends the sense of the challenged decision.
- IV. The facts that gave rise to the cause of action did not occur, if they were different or if they were evaluated wrongly, or if the challenged decision was issued contravening the provisions applied or if it failed to apply the proper provisions, as to the merits of the case.
- V. The administrative decision was made in the exercise of discretionary faculties and it does not correspond to the purposes for which the law confers such faculty.

For the purposes of cases II and III, it shall be considered that neither an individual's defense nor the sense of the challenged decision are affected if:

- a. When a subpoena does not mention that it is made to receive an order of domiciliary visit, as long as the domiciliary visit starts with the recipient of the order.
- b. When a subpoena does not record the details of how the official making the notification made sure he was in the right address provided the notification was made in the address indicated in the subpoena.
- c. When there are errors in the delivery of the subpoena provided the notification was made directly to the interested party or their counsel.
- d. When there are irregularities in the subpoena, in the notifications of information requirements, or in the requirements themselves, provided the individual answers the requirements, presenting the requested information or documents.
- e. When the individual isn't informed of the result of a certification to third parties, provided the challenged decision is not based on those results.
- f. When evidence is not valued to establish the facts stated in the observations sheet or in the last partial sheet, provided such evidence is not suitable for those purposes.

Given the fact it is a matter of public interest, the Court may enforce by its own initiative the incompetence of the authority to issue the challenged decision or order to conduct the proceeding again.

When the incompetence of the authority is proven and there are errors affecting the merits, the Court must analyze those errors and if any of them is proven, the Court shall proceed to resolve the merits of the cause raised by the claimant.

Arbitration bodies or others arising from alternative dispute settlement mechanisms concerning unfair practices may not revise the grounds previously listed in this article by their own initiative.

It must be noted that the standard of review is based solely on the administrative record and the general legal principles that the TFJFA would apply.

V. COMPLAINTS RAISED BY PETITIONERS

This Panel has reviewed all complaints raised by Eastman and Dow. Such complaints will be presented in the order that they have been raised in the briefs filed according to Rule 57.

VI. PANEL ANALYSIS

A. Preliminary issues

I. Eastman's consent

Regarding Eastman's claims I, II and III, Polioles argues in its brief that Eastman has no right to appear and make claims before this Panel because: a) the IA granted Eastman full opportunity of defense during the administrative procedure; b) Eastman didn't raise a claim against the dismissal of part of their information within the given deadline, so now they have no right to challenge it; c) accordingly, such action means consent.

In its brief, Eastman argues that there was no consent towards the dismissal because: a) when they filed corrections and arguments on May 22, 2012, they explained the reasons and legal grounds for the IA to accept their information, additionally, during the public hearing and during the phase of allegations of the administrative procedure they argued against the dismissal; b) the IA granted a deadline to "provide new arguments" and not to challenge the decision, because such action can only be made after the final resolution is issued.

During the administrative procedure, through document UPCI.416.12.0893 the IA announced the opening of a second period to present evidence, from April 9, 2012, to May 22, 2012, so that the parties presented supplementary arguments and evidence, in accordance to last paragraph of RLCE Article 64.

Within the second period to present evidence, from May 7 to 11, 2012, there was a verification visit to Eastman where the IA didn't accept some of the information presented by Eastman. Eastman explained the reason for the differences found in the information and asked to correct the information about the basis for normal value submitted in response to the official questionnaire (column 17 of Annex 3.B).

On May 22, 2012, Eastman presented the information again with a correction to the information that was not accepted during the verification visit, for purposes of taking into consideration the corrected information in the Final Resolution.

The public hearing of the administrative procedure was held on June 5, 2012, during which Eastman again explained the reasons for the differences in the information that was not accepted by the IA and requested that the corrections would be taken into consideration in the Final Resolution.

On July 3, 2012, Eastman filed pleadings in which they stated again the reasons why the IA should take into account the information that wasn't accepted during the verification visit.

On July 12, 2012, through document UPCI.416.12.1422, the IA notified the dismissal of the information that wasn't accepted during the verification visit and in accordance with AA paragraph 6 of Annex II they gave Eastman a deadline of July 17, 2012, to file what they deemed convenient respecting the dismissal.

On September 11, 2012, the IA issued the Final Resolution, stating the following on paragraphs 62 and 63:

62. The Secretary [of Economy] granted Eastman a time period to file what they deemed convenient respecting the decision referred in last paragraph. Eastman failed to make any statement.

63. Therefore, the Secretary [of Economy] confirmed its determination to dismiss such information and resolved the issue based on the best information available in accordance with AA Article 6.8 and paragraph 6 of Annex II and LCE Articles 54 and last paragraph of 64.

The Panel considers that the narration of the administrative procedure should be analyzed according to the judicial criteria that define consent:

CONSENT. WHEN ACTS ARE NOT CONTESTED THROUGH THE PROPER REMEDY.
There is consent when acts are not challenged by the proper legal means, because if there is only a simple manifestation of dissatisfaction, such action does not produce any legal effect tending to revoke, confirm or modify the act, which means consent given the lack of effective challenge. Judicial Gazette, Ninth Period, Circuit Courts, Volume XXII, December 2005, Thesis VI.3o.C.J./60, page 2365.

This criterion shows that the remedy and the appropriate procedural timing to challenge an act must be clear in the legal statute, because any other demonstration of dissatisfaction has no legal effect. In this case, LCE Article 94 establishes the proper remedy, which is the appeal for reversal:

Article 94. The administrative appeal for reversal may be raised against determinations:

(...)

V. That establish definite antidumping duties or the actions to implement them;

(...)

On the other hand, LCE Article 95 states the following:

Article 95. The remedy referred in this chapter aims to revoke, modify or confirm the challenged resolution and the ruling on them must include the determination of the challenged act, the legal grounds and the resolutions. The appeal for reversal shall be processed and settled in accordance with the provisions of the Fiscal Code of the Federation. The exhaustion of the merits is needed before proceeding with a trial before the Federal Court of Fiscal and Administrative Justice.

From the preceding articles it is understood that actions in an antidumping investigation procedure that culminates in the issuance of a final resolution may only be challenged by the proper remedy, which in the local forum is the appeal for reversal.

Regarding the international forum, LCE Article 97 states the following:

Article 97. Regarding resolutions and acts referred to in sections IV, V, VI and VIII of Article 94, any interested party may choose alternative dispute settlement mechanisms concerning unfair trade practices contained in international treaties. To opt for such mechanisms:

I. There shall not be appeal for reversal under Article 94 nor trial before the Federal Court of Fiscal and Administrative Justice against the referred resolutions and acts, nor against the resolution issued as a result of the alternative mechanisms. It shall be understood that the party who chose the alternative mechanism will accept the issued determination.

The mechanism chosen in this review functions as an appeal for reversal and as a trial before the TFJFA in Mexico, therefore, it is the proper remedy to challenge the FR.

Even if during the administrative procedure Eastman failed to make any statement during the period granted by the IA after receiving notice of dismissal, such action was not the proper remedy to challenge the decision to dismiss part of the information; furthermore, Eastman had already made several manifestations. Even if Eastman had manifested their dissatisfaction only once, they would not be prevented from raising the issue after the FR was issued, as the only way to have legal effect is possible under the provisions already identified in the LCE.

Given the above the Panel dismisses the national producer's arguments respecting consent.

Similarly, Polioles states that under the principle of procedural default Eastman is prevented from raising a complaint before the Panel since they failed to make any statement within the period granted by the IA.

Since the appropriate procedural time for Eastman to challenge the acts of the administrative procedure was only after the final determination was issued, as it has been demonstrated, this Panel does not consider that the right to raise the issue has precluded.

II. *Causa pretendi accreditation*

The IA states that “in order for an allegation to be considered as a legal argument and thus allowing this Panel to analyze it, and given the case, take it into consideration, it is necessary that, at a minimum, such allegation indicate what are the proper elements to rationally demonstrate the alleged infraction”¹. Therefore, the AI affirms that:²

- A. The Petitioner only mentions articles or precedents without explaining why they apply to the case or how they were violated.
- B. The Petitioner argues lack of foundation and motivation, but does not show how the omission of formal requirements affected their defense or the sense of the contested decision.
- C. The Petitioner does not point out the grounds of illegality under LFPCA Article 51 allegedly violated.
- D. The Petitioner’s claim is ambiguous or contradictory.

With this, the AI asks the Panel to determine that the Petitioner didn’t prove its claim properly, that is, the *causa pretendi* and therefore not to take their arguments into account.

Regarding this issue, Eastman states that the rules cited by the IA to discredit its arguments “are concepts that in Mexican domestic law are meant for disputes before the courts of the Judicial Power of the Federation”³ but in this case, according to NAFTA Article 1904, the Panel replaces the review that the TFJFA would conduct in other circumstances. In addition, it notes that “the third paragraph [of LFPCA Article 50] does not intend so strict a review as the IA aims to have this Panel to conduct because the court is allowed to correct the errors they find in the citation of provisions that are deemed to have been violated and examine grievances and causes of illegality as a whole, as well as the rest of the arguments raised by the parties, to

¹Investigating Authority brief, April 9, 2013, p. 29.

²Investigating Authority brief, April 9, 2013, pp. 34-45 and 47-51.

³Eastman’s brief, April 24, 2013, p. 17.

effectively resolve the issue raised without changing the facts presented in the complaint and response”⁴.

On the other hand, Dow argues that the IA failed to make generic references to “the Petitioner” without specifying which of them they meant. They also note that “the Secretary wrongly based its grounds for ineffectiveness on legal rules and precedents that do not apply to this review”⁵.

Among other issues, Dow also points out that the IA pretends to transgress the “good faith” principle that applies to this dispute resolution mechanism, as well as the *pro actione, iuranovit curia* and efficiency principles, that the TFJFA would apply and therefore this Panel as well.

After analyzing all parties’ positions, the Panel determines that Petitioners Dow and Eastman properly credited the *causa pretendi*. We consider that in terms of legality, it is enough that complainants express the reasons for their petition or the origin of their claims for the Panel to study their questions.

In addition, the Panel considers that the Petitioners exposed valid legal syllogisms about the alleged illegalities in their briefs and they also point out the alleged illegalities violated legal concepts as well as the wrongs such violations caused them. Therefore the Panel should conduct a deep analysis to determine if the IA committed any illegality when issuing the Final Resolution⁶.

B. Analysis of claims

With support of various judicial precedents⁷ and asserting the principle of judicial economy, the Panel has decided to conduct a joint study of those claims that refer essentially to challenge the same act, which does not affect either party.

a. Complaints filed by Eastman

- I. The IA acted illegally and in violation of LCE Articles 82 and 83, RLCE Articles 162 and 163, AA Articles 6.1, 6.2, 6.6, 6.8, 6.9, Annex I and Annex II when it notified and then determined the dismissal of the information regarding the incentives and credit notes

⁴Eastman’s brief, April 24, 2013, p. 19.

⁵Dow’s brief, April 24, 2013, p. 13.

⁶ In support of the above, see the following judicial precedents: Judicial Gazette, January 2009, p. 2390 and February 2003, p. 944.

⁷ “GROUNDS OF ILLEGALITY. THE ANALYSIS CAN BE DONE AS A WHOLE IF THE JUDGE ADDRESSES ALL ARGUMENTS RAISED”, Judicial Gazette, August 2003, p. 1710; “TORTS ON APPEAL. THE ANALYSIS AS A WHOLE IS NOT A VIOLATION TO THE RIGHT OF PETITION (LEGISLATION OF THE STATE OF QUINTANA ROO)”, Judicial Gazette, October 2014, p. 583.

adjustments (Annex 3.B, columns 17 and 17-A of the official questionnaire) based on the assumption that such information was complementary. The IA was also remiss with respect to the information clarifications that were made during the verification visit, the public hearing and in the written pleadings;

- II. The IA acted illegally and in violation of LCE Articles 82 and 83; RLCE Articles 162 and 163; AA Articles 6.1, 6.2, 6.6, 6.8, paragraph 7 of Annex I and paragraph 7 of Annex II because during the verification visit it determined not to accept corrections to the column of adjustments from the database that Eastman had presented in the official questionnaire since the verification visit is not meant to present new information but to validate the previously filed. The IA determined that the methodology and figures of incentives were incorrect, denying Eastman the opportunity to correct the number, resulting in a substantial distortion of normal value; and,
- III. The IA acted illegally and in violation of LCE Articles 82 and 83; RLCE Articles 162 and 163; AA Articles 6.8 and paragraph 7 of Annex II when it dismissed without a valid argument the information filed by Eastman, it was not a “new normal value database” but a corrected version that was filed within the period to present evidence and supplementary arguments.

Eastman states that during the verification visit held from May 7 to 11, 2012, they presented information regarding adjustments for rebates and bonuses (incentives and credit notes) and the verification team of the IA noticed a difference in the list required to be submitted by Eastman before the visit, with respect to the total of incentives presented on the normal value database from the official questionnaire (column 17 of Annex 3.B), so Eastman suggested disaggregating the amounts and separating the adjustments for volume incentives and credit notes.

Eastman continued by stating that the verification team refused to accept the disaggregation and did not admit the corrections that would properly report the information, “stating that the objective of the verification visit is just to confirm that the previously filed information is correct, complete and comes from their accounting records, but not to accept new information”, although the information concerning both adjustments had already been filed and was in the administrative record⁸.

In addition, Eastman also points out that on May 9, 2012, within the verification visit, the verification team did not accept the disaggregated information, so Eastman stated that they would file it during the second period to present evidence, which happened on May 22, 2012.

Concerning this issue, the Final Resolution states:

⁸Eastman's brief, February 5, 2013, p. 26.

60. On May 22, 2012, Eastman presented supplementary arguments and evidence as well as a new normal value database in order to present new information regarding adjustments for volume incentives and credit notes.

61. On July 12, 2012, the Secretary notified Eastman the decision to dismiss part of the information referred in the last paragraph, particularly the information from Annex 1, column 12 "Volume incentives adjustments. Dollars" and 17-A "Credit note adjustments. Dollars", because such information was not previously filed, so it could not be considered as supplementary.

62. The Secretary granted Eastman a period to file what they deemed convenient respecting the decision referred in last paragraph. Eastman failed to make any statement.

63. Therefore, the Secretary confirmed its determination to dismiss such information and the figures accepted for the Final Determination were based on the best information available in accordance with AA Article 6.8 and paragraph 6 of Annex II and LCE Articles 54 and last paragraph of 64.

On the other hand, the IA affirms they acted lawfully by determining to dismiss the information presented by Eastman during the verification visit, "since the Secretary found that the information was neither correct nor complete and consequently it was dismissed by legal mandate"⁹.

The IA continues by pointing out that said information can't be considered as "further details" according to AA Annex I, nor as supplementary evidence, because it was incorrect and incomplete information so it was dismissed, also information provided by Eastman acquired the quality of unreliable. Because of this, the IA points out that in order for information to be dismissed first it has to be admitted but in this case, it is information that never was accepted since it was dismissed when the verification team noted the discrepancy between the information previously reported and the one in the records of the company.

Also, the IA affirms that their determination to use figures based on the best available information, namely dismissing the aforementioned adjustments, was in accordance with AA Article 6.8 and LCE Article 54 and last paragraph of 64, that say:

6.8. In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or

⁹Investigating Authority brief, April 9, 2013, p. 77 and 78.

negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

Article 54. The Secretary may require of the interested parties the evidence and information they consider appropriate, for which they will use the established forms.

If the requirement is not answered, the Secretary shall resolve based on the best available information.

Article 64. (...)

By known facts it shall be understood those substantiated by evidence and data provided in a timely manner by the parties or their auxiliaries, as well as the information obtained by the investigating authority.

Also, the IA also supports its decision on LCE Articles 82 and paragraphs two and four of Article 83, which state that:

Article 82. The interested parties may offer all kind of evidence except authority confession, or those considered as contrary to public order, moral and good manners.

The Secretary may determine, at any time, the practice, repetition or extension of any procedure to obtain evidence when it considers it necessary for the knowledge of the truth on the disputed facts. Also, the Secretary may conduct the necessary procedures to obtain the best information.

The Secretary will declare a period to receive allegations after the period to present evidence.

The Secretary's orders by which any evidence is admitted shall not be subject to challenge during the procedure.

Article 83. (...)

The Secretary shall conduct the procedures they consider appropriate in order to confirm that the information and evidence is correct, complete and comes from the company's records; the Secretary may also utilize documents from the administrative record to compare information.

(...)

If as a result of the verification visit the Secretary finds that the filed information does not correspond with the records, they shall proceed to dismiss it in accordance with Article 64.

Regarding this issue, Polioles states that “the IA proceed lawfully by dismissing part of the information presented by Eastman on the document from May 22, 2012 and that the IA did not remiss the allegations made by Eastman”¹⁰.

On the other hand, Valspar also states that “the IA acted within its faculties when dismissing certain information filed by Eastman because such information was not supplementary but new and it was not timely filed. Also, the verification visits are not meant to receive new information but to verify the one previously filed by the parties”¹¹.

In its response brief, Eastman points out that “the IA states they were the ones to detect the error and that the corrections could not be considered as further details and that it was not supplementary evidence because it was not correct and complete information because the data was considered unreliable”¹² nonetheless, the Petitioner continues setting out that “Eastman explained why the information about corrections that they provided to the verification team was not new information but supplementary information”¹³.

After a deep analysis of arguments presented by all parties, this Panel **confirms the IA decision** because as exposed in the IAs brief, if the verification team found a discrepancy between the information previously filed by Eastman and the one they found during the visit, the IA has the faculty to dismiss it “by legal mandate”, understanding by that the LCE Article 83 paragraph four provision:

If as a result of the verification visit the Secretary finds that the filed information does not correspond with the records, they shall proceed to dismiss it in accordance with Article 64.

Referred LCE Article 64 says:

Article 64. (...)

The Secretary will determine an antidumping duty based on the margin of price discrimination or subsidization obtained based on the best information available from the known facts, in the following cases:

(...)

When producers don't file the required information on time, when they significantly obstruct the investigation or when they present information or evidence that is incomplete, incorrect or not corresponding to their accounting

¹⁰Poliolesbrief, April 5, 2013, p. 4.

¹¹Valsparbrief, April 8, 2013, p. 14.

¹²Eastman brief, April 24, 2013, p. 24.

¹³Eastman brief, April 24, 2013, p. 24.

records, which does not allow for the determination of an individual dumping margin; or (...)

Although during the Public Hearing of this Panel review the IA's counsel did not explain this issue with full clarity, this Panel must rule based on the administrative record and use the criteria that the TFJFA would apply, therefore the Panel confirms the IA determination to dismiss the disaggregated information of column 17 of Annex 3.B from the official questionnaire, concerning adjustments for incentives and credit notes, given the fact that during the verification visit it was confirmed that the previously filed information did not correspond to their accounting records.

IV. The IA was inconsistent with articles 82 and 83 of the FTA, articles 162 and 163 of the FTAR, article 6.8, and paragraph 7 of Annex II of the ADA because Eastman's treatment was unequal and discriminatory compared with other parties who were given several opportunities to submit corrections to reviewed information.

Moreover Eastman states in claim IV of its Brief that the causes for nullity established in sections III, IV and V of article 51 of the FLACP are implicated due to the unequal and discriminatory treatment received by Eastman compared to the other interested parties in submitting their information.

In this regard, the most relevant paragraphs of Eastman's Brief are translated:

"Notwithstanding the *de iure* and *de facto* elements listed above, the point of view of the IA, in determining not to accept the corrections presented only once by Eastman and within the evidentiary period, was that in the visit verification, the information can be confirmed or dismissed for purposes of the analysis. That information was being verified and according to the paragraph 3 of Annex II of the ADA, the information subject to verification must be considered in the Investigating Authority analysis.

The above circumstances was not just an isolated case of Eastman, the other interested parties had the necessity to correct more than once the information; notwithstanding, the point of view of the IA regarding the unfeasibility of accept corrections after the filling of the official questionnaire within the so called "first evidentiary period", and instead dismiss it, was only applied to Eastman. The abovementioned will be demonstrated by listing the several opportunities granted by the Investigating Authority to another company for correcting the information submitted in the official questionnaire following the first evidentiary period. Thus, to prove the procedural inequity in Eastman's treatment we will describe the

several opportunities granted to another company to correct the information submitted in the official questionnaire in following stages to the first evidentiary period. Proving the procedural inequity in the Eastman's treatment and without any legal basis and the lack of excessive difficulties for analyzing the correction proposed by Eastman to its normal value adjustments. "¹⁴

(...)

The IA unlawful acting is classified in the causes of nullity stated in sections III and IV of article 51 of the FLACP, because the unequal Eastman's treatment produces a procedural defect. The foregoing because of the false factual support in the IA's administrative act, by omitting to analyze the corrections proposed by Eastman and to analyze the submitted by other interested party. It did not apply the same criteria to the parties.

On the other hand, if it is true that the Investigating Authority has discretion to request or not to request information, the cause of nullity established in section V of article 51 of the FLACP does not allow it nor authorizes it to decide which errors in the information must be clarified through an information requirement. Therefore, the IA's discretion became arbitrary under the same circumstances (identification of errors in the information) by acting differently with different parties.¹⁵

With regard the previous arguments, in its Brief the IA concludes the following:

"Eastman reaffirms its argument on the unequal treatment because the IA accepted and analyzed the corrections made by the other interested party under the same circumstances. However, as is clarified, Dow's situation was never similar to Eastman's.

(...)

Eastman states that the factual basis of the IA's determination was wrong, thus it was false, causing a procedural defect (unequal treatment), and thus, the causes of nullity in sections III and IV of article 51 of the FLACP were produced.

(...)

...it is incorrect that the IA produces the causes of nullity established in sections III, IV and V of article 51 of the FLACP because as is asserted in this Brief, the IA did not cause a procedural defect which affected the rights of the company, it

¹⁴Pages 55 and 56 of Eastman's Brief.

¹⁵Pages 65 and 66 of Eastman's Brief

appreciated correctly the facts and complied with the applicable provisions regarding international trade, besides it applied correctly its discretionary faculties.

According to Eastman, the Panel must remand the Final Resolution because the IA's determination was not grounded and reasoned. In this regard, it has been clarified that in the official letter UPCI.416.12.1433 as dated July 12th, 2012, the IA duly argued its determination.¹⁶

Due to the arguments stated by the participants, this Panel considers that the omission of the IA to admit the information submitted by Eastman in the verification visit, contrary to the alleged treatment of other parties during the investigation, does not produce the causes of nullity established in sections II, IV and V of article 51 of the FLACP.

First, according to article 82 of the Foreign Trade Act the Ministry has the faculty to agree the practice, repetition or extension of any evidentiary proceeding considered necessary. In this way, the argument regarding that "the cause of nullity established in section V of article 51 of the Federal Law on Administrative Contentious Proceedings does not allow to authorize nor to decide which mistakes in the information must be corrected." The aforementioned is applicable because the Foreign Trade Act is the special provision, which rules this administrative proceeding; especially because the Federal Law on Administrative Contentious Proceedings, in the article 51, does not provide faculties to the administrative bodies, but establishes the administrative acts' causes of nullity.

Now, this Panel has to analyze if the Investigating Authority's refusal to accept the corrections submitted by Eastman, contrary to those opportunities granted to other parties, produces the causes of nullity established in sections II and III of the article 51 of the Federal Law on Administrative Contentious Proceedings.

It is important to note that both section II and III of article 51 of the FLACP as causes of nullity (omission of formal requisites and procedural defects) are subject to the affected claimant's rights and the effect of the sense of the appealed decision. Thus, this Panel is obliged to analyze if the grievance submitted by Eastman comply with this conditions.

On this regard, it is convenient to quote the following case law issued by the Supreme Court of Justice of the Nation, the Tribunal on Civil Matters and the Federal Court of Fiscal and Administrative Justice:

¹⁶Paragraphs 363, 364, 365 and 369 of the Investigating Authority's Brief.

PERSONALITY. AGAINST THE RESOLUTION THAT DISMISSES THE OBJECTION OF LACK OF PERSONALITY, WITHOUT APPEAL, IT IS INAPPROPRIATE UNDER THE INDIRECT , RESULTING INAPPLICABLE THE CASE LAW P. / J . 4/2001 (UNDER LAW APPLICABLE FROM 3 APRIL 2013)¹⁷.

(...) for acts to be qualified as irreparable, they need to cause a negative effect on substantive rights, namely, the consequences should be so serious that they prevent the exercise of a right and not only to cause a formal or adjective effect that would not necessarily transcend in the resolution (...)

PROCEDURAL VIOLATIONS. ITS ANALYSIS IS NOT APPLICABLE ON AN APPEAL WHEN THEY DO NOT AFFECT THE COMPLAINANT'S DEFENSES NOR AFFECT THE RESOLUTION¹⁸.

(...) if the contested procedural violation involves the admission of evidence from the complainant's counterparty and the resolution did not consider that evidence, it is obvious that such violation did not affect the complainant's defenses nor transcended in the resolution and therefore its analysis is inappropriate (...)

NOT SEVERE VIOLATIONS. ILLEGALITIES THAT DO NOT AFFECT THE LEGAL RIGHTS OF AN INDIVIDUAL AND DO NOT TRANSCEND TO THE RESOLUTION SHOULD BE CONSIDERED AS SUCH¹⁹.

(...) [the complainant] had to prove how the alleged violation affected their legal rights and how they transcended to the resolution, and since it was not proven, the illegality should be considered as not severe (...)

Thus, the violations of the procedural rights or of the administrative procedure do not themselves affect the individual when they arise. It is necessary that these violations affect the result of the determination.

In this manner, the burden of proof is imposed on the party who claims such violation to demonstrate that its procedural rights were breached and influenced the authority's decision. Otherwise, those administrative acts shall be considered as valid.

¹⁷ [J]; 10a. Época; Pleno; Gaceta S.J.F.; Libro 7, Junio de 2014, Tomo I; Pág. 39. P./J. 37/2014 (10a.).

¹⁸ [J]; 9a. Época; T.C.C.; S.J.F. y su Gaceta; Tomo XXVIII, Noviembre de 2008; Pág. 1283. I.11o.C. J/14.

¹⁹ R.T.F.J.F.A. VII-P-1aS-772. Séptima Época. Año III. No. 29. Diciembre 2013. p. 293

Thus, the refusal of the IA to accept the additional information is not enough to invalidate the challenged administrative act. The claimant has to prove that the violation influenced the result of the determination.

In this case, in its brief as during the public hearing Eastman did not prove why the IA's refusal to accept the additional information made a difference in its decision. That is to say, the claimant did not submit nor offer evidence to demonstrate how the Final Resolution would have been different if the IA would have taken into consideration the additional information. This omission is relevant regarding the existence of a grievance if the violation to the claimant's procedural rights affects the outcome.

Then, Eastman's failure to demonstrate that the procedural breaches affected the outcome of the Final Resolution does not comply with the conditions provided in sections II and III of article 51 of the FLACP. So, if the IA's refusal to admit the additional information, by contrast to other parties, was considered a violation this would not be invalid.

Therefore, the claim IV submitted by Eastman in its Brief is legally useless. Then, this Panel agrees to confirm the aforementioned Final Determination as regards to this point.

- V.** The IA acted unlawfully and inconsistently with the articles 31, 32 and 36 of the FTA; 46, 49, 51 54 and 55 of the FTAR; 2.1, 2.2.1, 2.4, 6.9, 12.2.1 of the ADA when it concluded that other additional elements can exist in the different trade channels which affect the price comparability and when the IA did not provide any defense opportunity to Eastman until the Final Resolution;
- VI.** The IA acted unlawfully and inconsistently with the articles 31, 32, 36 of the FTA; 46, 49, 51, 52, 54 and 55 of the FTAR; 2.1, 2.2.1, 2.4, 6.9 and 12.2.1 of the ADA when it used only two of Eastman's trade channels in the local market comparable with the exportation channels to determine the dumping margin, without considering sales of a lower price and not assessing the appropriateness of adjusting the normal value and when it considered that the product is different; and
- VII.** The IA acted unlawfully and inconsistently with articles 82 and 83 of the FTA, 162 and 163 of the FTAR, 6.8 and paragraph 7 of Annex II of ADA, when it did not dismiss Eastman's information regarding the segmented sales in trade channels but excluded them in the normal value analysis.

Eastman states that the IA's determination, paragraphs 115, 121 and 123 of the Final Resolution is unlawful because "until the issuance of the Final Resolution my client knew that for purposes of margins of dumping calculation, the IA would use Eastman's trade channels in the local

market comparable to the export market, thus the methodology is unlawful.”²⁰ Besides, Eastman affirms that all its sales were made in such volumes in the ordinary course of trade so as to satisfy the provision in article 2.2 of the ADA:

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

Also, Eastman states that the IA should have notified Eastman of the lack of use of trade transactions comparable to the export transactions for purposes of the normal value calculation and provided to Eastman the opportunity to defend its interests. Thus the methodology is unlawful because the IA should have asked Eastman to adjust the non comparable trade transactions instead of dismissing them as is established in articles 36 of the FTA, 49, 51, 52, 53 and 54 of the FTAR, as well as articles 2.1, 2.2.1 and 2.4 of the ADA:

FOREIGN TRADE ACT

Article 36.- The Ministry shall make the necessary adjustments to enable the export price and normal value to be compared, making allowance inter alia for terms and conditions of sale and difference in quantities, physical characteristics or tax charges. When an interested party requests that a particular adjustment be taken into consideration, it shall be incumbent upon that party to provide the corresponding supporting evidence.

FOREIGN TRADE ACT REGULATION

Article 49.- When, according to the second paragraph of article 34 of this Act, the normal value is determined according to the country of origin's price, the export price shall be based equally.

Article 51.- In the cases that the normal value is based on the prices referred to in article 31 of the Act, the effectively paid prices or to be paid shall be used, including the discounts on the list prices, bonus and the reimbursements. The same rule shall

²⁰Page 67 of Eastman's Brief.

be applied for the export prices to Mexico. This determination is independent from the adjustment for the quantities referred in article 55 of this Regulation.

Article 52.- Besides the adjustments referred to in article 36 of this Act, the differences between trade levels also shall be adjusted to the extent that they have not been assessed in another way.

Article 53.- For purposes of the rule set out in article 36 of this Act, the adjustments regarding the sales conditions shall be made based on the normal value as well as in the export price. For its part, the adjustments regarding differences in quantities, physical features, in taxes shall be based in the normal value.

Article 54.-The differences among the normal value and the export price regarding the sales conditions shall be adjusted as long as such differences have a direct relationship with the investigated market. The adjusted expenses shall be incidental to the sales and become part of the price. The admissible adjustments shall include the following:

- I. Packaging Fees;
- II. Transport Fees, including freight and insurance charges, operations outside plant, port and customs expenses;
- III. Credit Expenses;
- IV. Commission Payment, and
- V. Subsequent services payments like technical assistance, maintenance and repair.

The paid wages shall be adjusted to the extent that they represent variable expenses and are equivalent to the commission payment.

The previous adjustments shall be made minus the normal value and based in the export prices.

In general, the differences regarding expenses of a general nature such as research and development shall not be adjusted.

ANTIDUMPING AGREEMENT

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to

another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

Additionally, Eastman states that its sales in the American market not considered in the IA's calculation cannot be considered as one of the situations referred in articles 2.1 and 2.2.1 of the ADA, regarding the sales in the local market not considered in the normal value calculation; hence, the sales whose prices were not comparable with the sales made to the type of clients of the goods exported to Mexico should not have been excluded from the normal value calculation; also Eastman asserts that articles 31 and 32 of the FTA are consistent with the articles of the ADA above quoted as follows:

Article 31.- The normal value of the goods exported to Mexico is the comparable price, in the ordinary course of trade, for identical or like goods when destined for the domestic market of the country of origin.

However, when there are no sales of identical or like goods in the country of origin, or when such sales do not allow a proper comparison, the normal value shall be deemed to be:

- I) The comparable price of identical or like goods when exported from the country of origin to a third country in the course of trade, or
- II) The constructed value in the country of origin obtained from the sum of the cost of production, general costs and a reasonable profit, all in the ordinary course of trade in the country of origin.

Article 32.- 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.

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 constructed value.

In support of its argument, Eastman quotes the Appellate Body Report United States Hot- Rolled Steel from Japan (WT/DS184/AB/R, paragraph 167).

167. We do not mean to suggest that the identity of the seller is irrelevant in calculating normal value under Article 2.1 of the Anti-Dumping Agreement. However, to ensure that prices are "comparable", the Anti-Dumping Agreement provides a mechanism, in Article 2.4, which allows investigating authorities to take full account of the fact, as appropriate, that a relevant sale was not made by the exporter or producer itself, but was made by another party. Article 2.4 requires that a "fair comparison" be made between export price and

normal value. This comparison "shall be made at the same level of trade, normally at the ex-factory level". In making a "fair comparison", Article 2.4 mandates that due account be taken of "differences which affect price comparability", such as differences in the "levels of trade" at which normal value and export price are calculated.

Finally, Eastman states that in section "E" of the Final Resolution, regarding the "information dismissed," the IA does not indicate that the sales in the local market that were not made in the same trade channels in Mexico would not be considered, thus it caused the "nullity of its administrative act based in a procedural analysis."

In this regard, the IA states that article 6.9 of the ADA does not oblige it to release the methodology used in the prices' fair comparison, nor the information that will be dismissed, because the notice of the essential facts does not imply to release the aspects regarding to the assessment nor its result, but "only the factual aspects that the IA will consider principally in order to decide," otherwise that act would be equivalent to release previously the Final Resolution. The IA quotes Panel Report Argentina- Definitive Anti- Dumping Duties on Poultry from Brazil (WT/DS241/R, paragraph 7.228).

On the other hand, the IA during the public hearing informed the participants that "it would assess the effect of the trade channels on the price comparability."²¹

Also, the IA states that it noted the relevant differences in the sales volume by reason of the trade channels in the American market, and this situation was also noted in the sales to Mexico. Besides, the IA also stated that, contrary to Eastman's claim, there is no rule in the FTA, the FTAR or the ADA that oblige the IA to require adjustments by the parties, due to the fact that the IA has discretion to investigate as is established in articles 54 and 82 of the FTA:

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.

Article 82.- The interested parties may adduce evidence of all types except statements by the authorities or material considered contrary to the public order or offensive to morals or decency.

²¹Investigating Authority Brief, April 9, 2013, p. 171.

The Ministry may agree at any time, the administrative practice, 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.

The Ministry shall appoint a period for pleadings following the period for the presentation of evidence to permit the interested parties to make their submissions.

The Ministry's decisions to accept evidence shall not be open to appeal during the proceedings.

In execution of its faculties to investigate, the IA, as is stated in paragraph 114 of the Final Resolution, required Eastman to classify both its local sales and the export sales made to Mexico during the investigated period, since during the verification visit Eastman had said that they are the basis of its sales' policy. The claimant's response is noted in paragraph 114:

114. As a response to said requirement, Eastman noted that the trade channel of its EB sales in the local market are: 1) direct clients, that is to say large coatings formulators; 2) direct clients, small and medium in different markets; 3) distributor clients, large national distributors, and 4) distributor clients, regional small and medium distributors. Regarding the Mexican market, it stated that the channels are 2 and 4. It provided a table which classified its clients according to the trade channel of the investigated good. Which clients have a contract on volume incentives is also noted in the table.

On the other hand, the IA states that Eastman does not explain which adjustment should have been required, but if the adjustment is that established in article 55 of the FTAR regarding differences in quantities, as is stated in paragraph 110 of the Final Resolution, the IA found that the price is very volatile, it can be a low or high price for both small or large volumes, then the adjustment cannot be made. Besides, the IA states that there is no provision which obliges it to require such adjustment.

Likewise, the IA states that Eastman knew that the effects of the trade channels on the normal value comparison would be assessed, since this situation was revealed in the essential facts, hence Eastman had two options: a) suggest an adjustment and accept implicitly that the trade channels could affect price comparability, or b) to assert and recognize that it was not necessary to make any adjustment as a result of the trade channels, which resulted in Eastman choosing

the second option, thus, according to the IA, it is contradictory that Eastman claims that the adjustments should have been required.

Now, regarding Eastman's statements on the sufficiency of the sales volume during the ordinary course of trade, but even so some of them were excluded in the normal value calculation, the IA states that Eastman does not cite any breach of the legislation but in the case Eastman refers to article 2.2 of the ADA, its claim is not granted because said article establishes the case for the calculation of the normal value based in the local sales, the exports to a third country, or based in the constructed normal value, that is to say, it establishes the methodologies that must to be used. Additionally, the IA states that "the fact that the analyzed sales accomplish the requirements to use the local sales methodology does not imply that those sales necessarily should be taken into account in the normal value calculation."²²

The IA also states that the normal value comparison with the export price is a following stage in the normal value calculation in which the IA must analyze in order to determine how the fair comparison will be done according to article 2.4 of the ADA; for that reason the IA asserts that including the sales for the purposes established in article 2.2 of the ADA, does not imply that they have to be considered in the margin of dumping calculation.

Regarding Eastman's claim that the "Dismissed Information" part in the Final Resolution does not mention that the sales in the local market that were not made in the same trade channel to Mexico would not be considered, the IA notes that no applicable provision establishes the duty to use a specific wording for such purposes, hence it is not lawful to assert that all the information not specified in such part of the final resolution has to be considered by the IA.

According with the IA, "after analyzing all the information submitted by Eastman regarding its four trade channels, the IA found that the information regarding two of its trade channels does not allow an appropriate comparison between the normal value and the export price, in such a way that, (...) the authority had to determine that some data was not useful."²³

In relation to Polioles, it supports the IA, stating that first, the essential facts were noticed to all the parties and no applicable rule establishes that the IA is obliged to inform and to notify, during the investigation, its final determination in advance.

Second, Polioles states that Eastman did not submit any element to explain why the IA did not comply with the rules cited by Eastman and thus, its "grievances" are useless.

²²Page 189 of the Investigating Authority Brief.

²³Page 224 of the Investigating Authority Brief.

On the other hand, Polioles argues that Eastman informed the IA that the trade channels have no effect on the comparison among the export price and the normal value, noted in paragraph 117 of the Final Resolution. In this way, Polioles affirms that Eastman's argument regarding the lack of adjustments to the normal value is unfounded, first, because the claimant did not note the differences between the compared prices and second, because the IA compared the export prices of the identical trade channels and thus, it was necessary to make an adjustment for the differences in quantities.

Additionally, during the Public Hearing, the Polioles representative noted to this Panel that the legal basis to exclude two of the Eastman's trade channels is article 40 of the FTAR:

Article 40.- In general, both the normal value and the export price shall be calculated according to the amounts obtained from the weighted average found during the investigation period.

When the normal value is determined based on the prices referred to in article 31 of the Act, these shall be weighted according to the relative participation of every transaction in the total volume of sales in the country of origin or export to a third party.

If the normal value is based on the reconstructed value, the calculated production costs for the subperiods within the investigation period shall be weighted according to the relative participation of the production in each subperiod in the total production volume.

The export prices shall be weighted according to the relative participation of every transaction in the total exported volume.

After analyzing the party's arguments *vis à vis* the administrative record, this Panel concludes:

Article 2.2.1 of the ADA states the methodology does not consider in the normal value calculation those sales not made in the course of ordinary trade; however, the sales made by Eastman are assessed as transactions in the ordinary course of trade, even the IA states in the FR:

108. During the verification visit, the IA developed the following activities: (...)

h. The IA noted that Eastman has an integrated production and it produces, starting from the acquisition of raw material sold by suppliers not related to Eastman. The

names of the suppliers are not found in the list of subsidiary companies provided by Eastman.

(...)

149. As a result, the IA determined that during the investigated period the AB sales made in the local market were made in the ordinary course of trade and they comply with the sufficiency requirement established in the footnote 2 of the ADA, thus Polioles is wrong when it argues that an important amount of Eastman's sales are made at loss.

150. Another of Polioles' arguments refers to the relationship between Eastman and the companies which sell EB's raw materials and, thus, the transfer prices among those enterprises distort Eastman's sale price, hence they cannot be considered made in the course of ordinary trade. However, as it was stated in paragraph 108, subsection h of the Final Resolution, the Ministry did not find any evidence that Eastman buys or acquires its raw material from related suppliers.

Taking into consideration that the IA clearly states that it found evidence regarding the sales made by Eastman in the ordinary course of trade, this Panel concludes that there is no faculty of the IA to eliminate any sale in the normal value calculation.

Regarding article 2.4 of the ADA, this Panel considers that the IA has the power to request from Eastman the information needed for purposes of the fair comparison; however, the IA does not have the power to eliminate any sale. This conclusion is consistent with article 2.4 of the ADA:

(...) If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

This panel notes that the IA required information from Eastman on June 11th, 2012 as is indicated in paragraph 113 of the FR:

113. With the purpose of having more evidence, on June 11th, 2012, the Ministry required Eastman to classify both domestic sales and export sales to Mexico made

during the investigation period in the trade channels, this indicated by Eastman during the verification visit.

However, the Panel considers that paragraphs 109 to 124 of the FR have no legal basis to support the elimination of two of Eastman's four trade channels in the comparison and hence, this Panel concludes that a fair comparison between the export prices and the normal value should have considered the four trade channels submitted by Eastman.

Thus, on this point, the Panel remands the Final Resolution in order for, according to article 1904.8 of NAFTA, the IA to carry out measures not inconsistent with the Panel's decision.

VIII. The IA acted unlawfully and inconsistently with articles 82, 83 of the FTA; 162 and 163 of the FTAR; 6.1., 6.8, 6.9, 12.2.1 and paragraph 7 of Annex II of the ADA, because the IA discriminated against Eastman when it applied other methodologies in order to calculate the normal value for the other parties.

According to Eastman, the IA didn't challenge the sales of the other parties regarding their trade channels; if the Preliminary Resolution did not determine margins of dumping, then the IA applied an individualized methodology to Eastman for the purpose of obtaining positive margins of dumping in the Final Resolution.

Furthermore, Eastman states that the IA should have the necessary requirements to classify the sales of all the exporters according to their trade channels, because if that made the IA presume the fair comparison affected among the prices in the local market and the export market with respect to Eastman, then IA should have analyzed the other exporters in the same way. Eastman supported its argument on the Appellate Body Report United States Hot- Rolled Steel from Japan (WT/DS184/AB/R, paragraph 148).

According to Eastman, the IA acted unlawfully according to the doctrine in section V of article 51 of the FLACP, because it used its faculties arbitrarily, to the detriment of Eastman.

During the Technical Information Meeting on September 20th, 2012, the IA representative stated that if all parties are subject to the same applicable legislation, the analysis and assessment of the information presented by the parties depends on its quality, quantity and type, for which the same methodology could not be used for Eastman and Dow.

On the other hand, the IA asserts that Eastman is mistaken when it argues that the IA acted inconsistently with the applicable legislation, since the legislation allows the IA to apply

different methodologies on a case by case basis in order to determine the differences that affect price comparability. The IA supports its argument with the Panel Report Egypt- Definitive Antidumping Measures on Steel Rebar from Turkey, paragraph 7.352.

Also, the IA argues that “it is not logical to suppose that it must require from all the interested parties the same information, since its power of discretion can be used when the IA needs to clarify the information in order to issue its determination, but it does not imply that it should require the same information from all the interested parties.”²⁴

Further, the IA states that, initially, it requires the same information from all the parties according to the investigation’s official questionnaire, but through the subsequent stages and as the circumstances of the exporters change, the IA determines what information is required from each of them.

In this case, the IA states that since it did not make the verification visit to the other exporters, there was no evidence of a sales policy similar to Eastman’s sales policy, then the IA did not require information from the other companies.

In this sense, after analyzing the participants’ arguments, the Panel decides to confirm the Final Resolution, because it considers that the use of different calculation methodologies for each party does not breach any applicable rule and that this use of different methodologies is possible in the IA’s discretion in its scope for investigation.

b. Claims presented by Dow

- i.** The initiation of the investigation is inconsistent with articles 5.3 and 5.2 of the AA since Polioles acknowledges that the internal prices in the United States that were used at the time as normal “are not the ones that prevailed in the market of such country”.

- A.** 5.3 AAD. Accuracy, relevance and sufficiency of the evidence.

According to Dow, in the investigation request Polioles used as internal prices in the United States the price that was stated in the report “Chemical Business Focus”, published by the consultant TecnonOrbiChem (“Tecnon”)²⁵. Polioles replied that Tecnon is one of the main consultants in the Market for chemicals in bulk, with over 35 years of experience. Polioles said

²⁴Investigating Authority Brief, April 9th 2013, p. 215.

²⁵ Dow’s Brief, p. 39.

that covered by this source are list prices, contract prices, as reported by the biggest producers in the United States, including Dow Chemical, Eastman and Lyondell Basell, among them²⁶.

Taking that into account, the IA determined that the evidence presented by Polioles to establish the normal value was adequate, and could not be considered in any way "artificial", since those are prices reported by the same companies in the United States; prices are used by the chemical industry for decision making; and such prices are gathered by a consultant Company of great standing, even on an international level²⁷.

In the same way, the claimant argued that the internal prices in the United States that Polioles procured from Tecnon and used as normal value were incorrect; since the export prices to that same country²⁸, which should have reflected the real prices in the United States' market during the investigated period (2010), were very much inferior to Tecnon's prices.²⁹

Regarding the accuracy and adequacy of the evidence presented for the initiation of an investigation, article 5.3 of the AA states:

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

Dow says that the IA admitted the prices as valid evidence of normal value of the Ethylene Glycol Monobutyl Ether (EB), and on this basis accepted the argument that the importations had been done in dumping conditions.

It is noteworthy that, according to Polioles' arguments, there is precedent in the resolution published in the DOF December 14th of 2001, in which Dow Chemical participated and therefore accepted that Tecnon was a trustworthy source, containing reasonable data regarding the EB prices in the United States' internal market³⁰.

The IA's defense is based on the fact that, as established by it, it is important to consider that the evidence presented with the application to initiate an investigation doesn't necessarily have to be of a required quality to support a preliminary or definitive determination. In the same

²⁶Final Resolution, paragraph 99.

²⁷Final Resolution, paragraph 103.

²⁸ Dow's Brief, p. 41.

²⁹ Dow's Brief, p. 42.

³⁰RESOLUTION BY WHICH THE APPLICATION OF THE INTERESTED PARTY IS ACCEPTED AND IS DECLARED THE INITIATION OF THE INVESTIGATION ABOUT THE IMPORTS OF ETHYLENE GLYCOL MONOBUTYL ETHER (EB), COMMODITY INCLUDED IN THE TARIFF NUMBER 2909.43.01 OF THE LAW OF GENERAL IMPORTATION TAX, ORIGINATING IN THE UNITED STATES, REGARDLESS OF THE COUNTRY OF ORIGIN.

way, it is also clear that said evidence doesn't have to be more than data or information, that is to say, indications in which dumping, injury and causal link arguments are based; and from its analysis should be observed that (those indications) are enough for the IA to determine that there is a well founded possibility that the claimants' arguments related to unfair practice are correct"³¹.

The IA supports its argument in points 7.74 and 7.76 of the Report of the Panel of the WTO Case MEXICO – ANTI-DUMPING INVESTIGATION OF HIGH FRUCTOSE CORN SYRUP (HFCS) FROM THE UNITED STATES, which state:

7.74 Obviously, the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination of injury...

7.76... Article 5.2 does not require an application to contain analysis, but rather to contain information, in the sense of evidence, in support of allegations ...

From these arguments an investigation shall gradually reach the certainty of the existence of all the necessary elements to establish a measure as the investigation develops; for such purpose, the evidence shall be of such quality that any impartial and objective authority can determine that there is enough evidence of dumping³².

The IA makes reference to paragraph 7.81 of the Panel Report of the WTO case ARGENTINA – DEFINITIVE ANTI-DUMPING DUTIES ON POULTRY FROM BRAZIL, nonetheless the referenced quote is found in paragraph 7.62, which states:

7.62... We do not of course mean to suggest that an investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the quantity and quality that would be necessary to support a preliminary or final determination...

From this precedent we can observe that the quantity and quality of the information presented to initiate an investigation can vary, and still be enough to produce a determination.

That is also supported by the fact that, as affirmed by the IA, "we do not believe that the Applicant denied that the prices published by Tecnon are a good point of reference for the initiation of the investigation. As a matter of fact, the Applicant presented those same prices with its reply to the official form. On the contrary, the Applicant suggests that the intention in

³¹Dow's Brief, p. 545.

³²Dow's Brief, p.547.

requesting that its prices not be compared to those from Tecnon, is precisely because these prices should be adjusted to obtain net sale prices³³.

For said price adjustment, Dow has said that the domestic average price is 1.88 dollars per kilogram, as the exportation price ex-works is 1.416 dollars per kilogram, being incorrect the internal prices in the United States that Polioles obtained from Tecnon, and were used as a normal value reference; because Polioles' exportation prices to that same country were very much inferior to Tecnon's prices, and should have reflected the prices that were given in the United States' market during the investigation period (2010)³⁴.

It is for that reason that the claimant requested that the prices be adjusted by the transportation costs, using an estimate for the cost of freight that was also obtained from the representative of TecnonOrbichem, information from which average normal value was calculated. Nonetheless, Dow argues that Polioles' exportation prices cannot and shall not be compared to those published by Tecnon, because the latter are not the prevailing prices in such country's market³⁵.

Polioles replied that the analysis requested by the claimant, regarding the IA's analysis of Tecnon's information, had been made, as is reflected in point 103 of the Final Resolution. That is why it isn't among the powers of a Panel to act ex officio in this matter³⁶.

Besides, Polioles pointed out that the information obtained from a specialized magazine such as Tecnon, a journal with its own collection methodology, is without a doubt based on the same information given to the journal by the same companies that participate in the domestic market of the United States³⁷. The information given to Tecnon does not contain the details of sale discounts, bonus, prices for volume and other concepts implemented by each company, as its strategy and commercial policy regarding each of their clients. All that is confidential information which neither Polioles, nor Tecnon have access to. Such information is only known by the exporters since the real prevailing prices in the United States' market is information that is practically impossible to obtain by either Polioles or Tecnon³⁸.

As such, the information presented by Polioles for the initiation of the investigation constitutes the best information available for submission; since there is not any additional information presented by the claimant to replace the one submitted by Polioles. This reasoning is complemented by the fact that Dow participated in the resolution of December 14th, 2001 and

³³Investigating Authority Brief, paragraph 550.

³⁴Dow's Brief, p. 40.

³⁵Dow's Brief, p. 42.

³⁶Final Resolution, paragraphs 97 to 103, and Polioles' Brief, p. 72.

³⁷Final Resolution, paragraph 103.

³⁸Polioles' Brief, p. 74.

therefore accepted that the information came from a reliable source with reasonable data regarding EB prices in the United States' internal market³⁹.

Dow has pointed out that according to article 5.3 of the AA, an investigating authority cannot proceed to the initiation of an antidumping investigation unless it is clear that the evidence presented in the application is accurate and adequate⁴⁰. It quotes paragraph 8.39 of the Panel Report of the WTO case GUATEMALA – DEFINITIVE ANTI-DUMPING MEASURES ON GREY PORTLAND CEMENT FROM MEXICO, which states:

(...) we find that no attempt was made to take into account glaring differences in the levels of trade and sales quantities and their possible effects on price comparability. Under these circumstances, an unbiased and objective investigating authority could not in our view have concluded that there was sufficient evidence of dumping to justify the initiation of an anti-dumping investigation.

Thereby, even though the IA discounted the charges for internal freight from Tecnon's prices, according to Dow the IA failed to inquire whether such prices were specified on a net basis, and the application of certain volume arrangements was also omitted⁴¹. Dow also said that the IA neither adequately examined the accuracy and adequacy of the evidence submitted in the application, nor did it make sure that such evidence was enough to justify the initiation of the investigation.

The IA quoted the Panel Report of the case Guatemala – Cement II⁴² and stated that, even if it is obvious that to analyze the accuracy and relevance of the evidence, to determine if there is sufficient evidence to justify the initiation of an investigation is needed, the legal standard to be applied in the case of a determination whether to initiate an investigation is the sufficiency of the evidence, and not its adequacy and accuracy per se. That is why, assuming without conceding that, in fact, the accuracy and relevance of the evidence had not been evaluated, it is not necessarily a flaw regarding the sufficiency of such evidence⁴³.

As such, it is suggested that, if there is a relation between the sufficiency of the evidence, and its relevance and accuracy, whether the evidence is sufficient does not necessarily depend on

³⁹ RESOLUTION BY WHICH THE APPLICATION OF THE INTERESTED PARTY IS ACCEPTED AND IS DECLARED THE INITIATION OF THE INVESTIGATION ABOUT THE IMPORTS OF ETHYLENE GLYCOL MONOBUTYL ETHER (EB), COMMODITY INCLUDED IN THE TARIFF NUMBER 2909.43.01 OF THE LAW OF GENERAL IMPORTATION TAX, ORIGINATING IN THE UNITED STATES, REGARDLESS OF THE COUNTRY OF ORIGIN, DECEMBER 14TH, 2001.

⁴⁰Polioles' Brief, p. 43.

⁴¹Polioles' Brief, p. 45.

⁴²Investigating Authority Brief, paragraph 543.

⁴³Investigating Authority Brief, paragraph 540.

its relevance or accuracy, since the lack thereof does not impede meeting the standard of sufficiency as stated in article 5.3 of the AA.

The IA states that such interpretation is mistaken, since (1) "It is the sufficiency of the evidence, and not its relevance and accuracy per se, which is the legal standard to be applied in determining whether to initiate an investigation"⁴⁴, and (2) to prove that evidence is not exact or irrelevant is not enough to conclude that the standard of sufficiency provided by article 5.3 of the AA is not met⁴⁵.

In this regard, the IA indicates that the Panel in the WTO case MEXICO – ANTI-DUMPING DUTIES ON STEEL PIPES AND TUBES FROM GUATEMALA confirmed that article 5.3 of the AA does not compel an investigating authority to have documented the prices of all producers or exporters, or even of a specific producer or exporter. On the contrary, the Panel acknowledged that it can be extremely difficult for an applicant to obtain evidence of the prices in an internal market, especially from its competitors, the producers or exporters, and consequently the IA is not compelled to verify if the prices published by Tecnon were specified in net terms, being sufficient evidence to initiate the investigation⁴⁶.

Regarding the standard of sufficiency, the IA quotes the WTO Panel in the Case MEXICO –STEEL PIPES, which states:

7.22... it is not necessary for an investigating authority to have irrefutable proof of dumping or injury prior to initiating an anti-dumping investigation. (...)

7.24... While the absolute threshold of sufficiency will depend upon the circumstances of a given case, Article 5.3 makes clear that the determination of sufficiency must be based on an assessment of the "accuracy" and "adequacy" of the information. In this context, we are mindful that a piece of evidence that on its own might appear to be of little or no probative value could, when placed beside other evidence of the same nature, form part of a body of evidence that, in totality, was "sufficient". (...)

The IA further notes that, besides being unnecessary that the authority has unquestionable evidence of dumping or the existence of injury before the initiation of an investigation, the standard of sufficiency is not generalized, but is to be determined case by case. According to the IA, in this case the prices published by Tecnon fulfill the standard of sufficiency stated in article 5.3 of the AA, since its source is the companies in the relevant market⁴⁷.

⁴⁴ Panel Report, Guatemala-Cement II, paragraph 8.31.

⁴⁵ Investigating Authority Brief, paragraph 543.

⁴⁶ Investigating Authority Brief, paragraphs 558 to 560.

⁴⁷ Investigating Authority Brief, paragraph 566.

Dow replied that the information presented by Polioles is faulty and does not reflect the prices prevailing in the internal market, and therefore should not be considered as a legal basis for the calculation of normal value for the initiation of an investigation, since there is no WTC case that can support the thesis that investigation initiations can be sustained by information with inherent defects⁴⁸.

Regarding article 5.3 of the AA, in the case Guatemala – Cement II, the WTO criteria is as follows:

8.35... in order to determine that there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of this practice as outlined in Article 2. This analysis is done not with a view to making a determination that Article 2 has been violated through the initiation of an investigation, but rather to provide guidance in our review of the Ministry's determination that there was sufficient evidence of dumping to warrant an investigation. We do not of course mean to suggest that an investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the quantity and quality that would be necessary to support a preliminary or final determination. An antidumping investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward. However, the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 to justify initiation of an investigation.

8.31 We recall that, in accordance with our standard of review, we must determine whether an objective and unbiased investigating authority, looking at the facts before it, could properly have determined that there was sufficient evidence to justify the initiation of an anti-dumping investigation. Article 5.3 requires the authority to examine, in making this determination, the accuracy and adequacy of the evidence in the application. Clearly, the accuracy and adequacy of the evidence is relevant to the investigating authorities' determination whether there is sufficient evidence to justify the initiation of an investigation. It is however the sufficiency of the evidence, and not its adequacy and accuracy per se, which represents the legal standard to be applied in the case of a determination whether to initiate an investigation.

⁴⁸ Dow's Brief, pp. 25 y 26.

8.62... that investigating authorities need not content themselves with the information provided in the application but may gather information on their own in order to meet the standard of sufficient evidence for initiation in Article 5.3.

Taking into account these precedents, as established by the IA, three issues can be inferred: (1) at the time of the initiation of the investigation, it is not necessary that the authority has evidence of dumping existence in the quality and quantity needed to arrive to a preliminary or definitive resolution. None the less, the evidence shall be of a minimum quality that justifies the initiation of the investigation; (2) the legal standard to be applied in the case of a determination whether to initiate an investigation is the sufficiency of the evidence, and not its adequacy and accuracy per se; and (3) additionally, authorities can gather information by their own initiative in order to ensure that the evidence is sufficient.

Additionally, what has been said is reaffirmed in paragraph 7.24 of the Panel decision in the WTO case Mexico – Steel Pipelines, which states:

... the determination of sufficiency must be based on an assessment of the "accuracy" and "adequacy" of the information. In this context, we are mindful that a piece of evidence that on its own might appear to be of little or no probative value could, when placed beside other evidence of the same nature, form part of a body of evidence that, in totality, was "sufficient". We are, furthermore, aware that it is appropriate for a panel to examine the evidence before the investigating authority at the time of the decision in the light of the investigating authority's own methodology and to review the decision on its own terms. As we have already mentioned, we are not entitled to conduct a de novo review of the investigating authority's determinations.

From this second Panel Report it can be concluded that the determination of slight or null value of some evidence does not eliminate it, but on the contrary, as part of a group of evidence it can be considered sufficient. In this case, the validity of the information provided by Tecnon has been deeply analyzed, based in its reputation and in the adjustments made to the information. As such, it is necessary to analyze if this information constitutes, as Polioles says, the only available information to establish the adequacy of the evidence.

A. 5.2 AA. Reasonably available information to the applicant.

According to Dow, the beginning of the investigation is inconsistent with article 5.2 of the AA, since the application was not drafted considering all information that was reasonably available

to Polioles⁴⁹. As such, it is the purpose of this section to determine if the application contains the information that was reasonably available to Polioles.

Article 5.2 of the AA states in its relevant section:

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

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

As such, an applicant must base the application of initiation of an investigation on the information that is reasonably available regarding the internal prices of the exporting country, among other elements⁵⁰.

Polioles affirms that it submitted the best information available that was within its reach for normal value establishment, since Tecnon is a prestigious and specialized publication that obtains the data from the industries' companies. It also says that using Tecnon data obviously does not allow submission of detailed information of the commercial strategies of each company, because that is sensitive information and it does not have access to it. Polioles used the prestigious magazine Tecnon, and after making several adjustments, submitted the monthly estimation of normal value for the investigated period⁵¹.

Even so, according to Polioles, that is not just the best, but the only available information, since the information given to Tecnon does not contain the details of discounts, bonus, volume prices and other concepts that each company implements as part of its commercial policy and strategy regarding each of its clients. That is because such information is confidential and neither Tecnon, nor Polioles have access to it. Such information is just known by each of the exporter

⁴⁹Dow's Brief, p. 46.

⁵⁰Dow's Brief, p. 46.

⁵¹Polioles' Brief, p. 73.

companies, and the prevailing prices in the United States' market is practically impossible to obtain for both Polioles and Tecnon⁵².

The IA points out that article 5.2 of the AA is an exception in the AA, since it establishes obligations for the applicant, rather than the investigating authority; so that that the rule does not establish obligations for the agency is, by definition, an ineffective argument, since there cannot be a breach of an inexistent obligation⁵³.

The IA cites the decision of the Panel in the WTO case UNITED STATES – FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA, which stated as follows:

7.54 We note that the words "such information as is reasonably available to the applicant", indicate that, if information on certain of the matters listed in subparagraphs (i) to (iv) is not reasonably available to the applicant in any given case, then the applicant is not obligated to include it in the application. It seems to us that the "reasonably available" language was intended to avoid putting an undue burden on the applicant to submit information which is not reasonably available to it.

From this, it is concluded that if the information is not reasonably within the reach of the applicant, it is not compelled to submit it in the application.

According to the Panel in the Case US – Softwood Lumber V:

... Looking at the purpose of the application, we are of the view that an application need only include such reasonably available information on the relevant matters as the applicant deems necessary to substantiate its allegations of dumping, injury and causality. As the purpose of the application is to provide an evidentiary basis for the initiation of the investigative process, it would seem to us unnecessary to require an applicant to submit all information reasonably available to it to substantiate its allegations. This is particularly true where such information might be redundant or less reliable than information contained in the application. Of course, this does not mean that such information will necessarily be sufficient to justify initiation under Article 5.3 – that is a separate question, not encompassed by the issue before us here⁵⁴.

Additionally, the Panel in the case México – HFCS states:

⁵²Polioles' Brief, p. 74.

⁵³ Investigating Authority Brief, paragraphs 570 to 572.

⁵⁴US – SoftwoodLumber V, paragraph 7.54

7.76... Article 5.2 does not require an application to contain analysis, but rather to contain information, in the sense of evidence, in support of allegations. While we recognize that some analysis linking the information and the allegations would be helpful in assessing the merits of an application, we cannot read the text of Article 5.2 as requiring such an analysis in the application itself.⁵⁵

This way, it is possible to conclude that the only information available to Polioles was the data obtained from Tecnon's publication. Since Dow did not submit any evidence that proved a different situation, the data gathered by Tecnon shall be considered as reasonably available information that could be obtained by the applicant, and therefore sufficient for the IA, in order to initiate the investigation.

From all of the above it is concluded that the prices published by Tecnon are adequate for the initiation of the investigation.

- II. The determination of injury is inconsistent with AA article 3.1, since it is not based on an "objective examination of positive evidence".

According to AA article 3.1, a determination of injury shall be based on positive evidence and involves an objective examination of both: (i) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (ii) the consequent impact of these imports on domestic producers of such products.

Dow argues that the injury determination made by the IA is inconsistent with this AA provision as it is not based on an objective examination of positive evidence. Dow bases its argument on the considerations below.

- A. When issuing the Final Resolution, the IA ignored the evidence provided in the record to prove that imports of the subject merchandise in drums did not compete with domestic products and therefore, could not have caused injury to the domestic industry.

In the investigation at issue, the IA considered the total imports of EB made in the analyzed period as the product investigated, meaning that all EB imports were considered regardless of their presentation. According to the FR, the subject merchandise entered under the tariff code

⁵⁵ Of course, the IA shall examine the adequacy and accuracy of the information contained in the application to determine if there is sufficient evidence that justifies the initiation of an investigation, according to article 5.3 of the AA, which will be discussed later on. Nonetheless, this is an investigating authority obligation, and the applicant is not compelled to make an analysis regarding it.

2909.43.01 on TIGIE with the following description: Monobutyl ethers of ethylene-glycol or diethylene glycol.⁵⁶

Dow contends that the IA acted inconsistently with article 3.1 of AA, when they purportedly ignored the result of an antidumping investigation concluded by the very same IA on June 10th 2003, which had decided that EB importation in drums did not compete with the EB produced in Mexico, i.e. bulk EB. Dow points out that this was a public domain “notorious fact”, known by the AI and thus, not subject to examination.⁵⁷

With this argument, Dow notes that the injury analysis should have been limited to bulk EB imports (since only bulk EB imports could have caused damage to the domestic production) and the EB imports in drums should have been directly excluded from the application of countervailing duties.⁵⁸

The IA responded to Dow’s allegations stating that, in the first place, the power to invoke notorious facts corresponds solely to tribunals and not to administrative authorities. Second, assuming that the AI does have the power to invoke notorious facts; it would only constitute an option but not an obligation. Thus, the fact that the AI did not invoke them does not imply a violation of any disposition. Third, facts are factual elements, while law matters are constituted by specific aspects of the norms and their application to the facts.⁵⁹

AI notes that notorious facts are publicly well known to all or most members of a social circle, vis-à-vis, conclusions and findings result from the application of a legal standard to factual matters, being not facts but matters of law.⁶⁰

The AB in Thailand – H. Beams noted that “article 3.1 is an overarching provision that sets forth a Member’s fundamental, substantive obligation” regarding the determination of injury.⁶¹

Furthermore, in interpreting article 3.1, the AB has pointed out that the thrust of the investigating authority’s obligation lies in the requirement that they base their determination on “positive evidence” and conduct an “objective examination”⁶²

The term “positive evidence” relates to the quality of the evidence that authorities may rely upon in making a determination and focuses on the facts underpinning and justifying the injury

⁵⁶Final Resolution, p 1.

⁵⁷Dow Brief, p 57.

⁵⁸ Dow Brief, p.64.

⁵⁹ Final Resolution, p. 249.

⁶⁰ Final Resolution, p. 250.

⁶¹ AB Report, Thailand – Anti-Dumping duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland, para. 106.

⁶²AB Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, para. 192.

determination. The word “positive” means that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible. Meanwhile, the term “objective examination” refers to the investigating process itself. The word “examination” relates to the way in which the evidence is gathered, inquired into and, subsequently evaluated, that is, it relates to the conduct of the investigation generally.⁶³

The obligation under article 3.1 is understood as an obligation to examine the impact of dumped imports on the domestic industry concerned through an evaluation of all relevant economic factors and indexes having a bearing on the state of the industry. For that purpose, article 3.4 lists certain factors considered as relevant in any investigation which must be always assessed by the IA, being cumulative but not exhaustive.

Given that context, this Panel determines that the IA was not only not required to base the injury determination of the reviewed investigation on an earlier determination but also, in the case that they did, they would be acting inconsistently with AA article 3.1.

If an examination is “objective”, the identification, investigation, and assessment of the relevant factors must be exhaustive and impartial. The Investigating Authority must make an objective determination, based on positive evidence, on the importance that should be given to each factor that may be relevant as well as the weight granted to such factor.

While it is true that nothing in article 3 prescribes a methodology that the IA must apply when making an injury analysis, granting it certain discretion in adopting a methodology as a guide for an injury analysis, within the limits of this discretion it can be expected that the IA has to rely on reasonable assumptions or draw inferences.

When relying on reasonable assumptions and drawing inferences, the IA must ensure that its determinations are based on “positive evidence”. Thus, when, in an investigating authority’s methodology, a determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified.⁶⁴

That is, the IA could not rely on a determination regarding a previous procedure, in which completely different circumstances than the ones in the present case were analyzed in the FR. The IA must make its determination in accordance with the merits of each case, and based on an objective examination of positive evidence.

⁶³AB Report, United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, paras. 192 - 193.

⁶⁴ AB Report, Mexico – Definitive Anti-Dumping Measures on Beef and Rice, para 204.

- B. When issuing the Final Resolution, the IA ignored the fact that during the first three of the four years comprising the analyzed period, bulk imports did not participate in the Mexican market, and thus could not be able to cause injury under the AA.

On March 11th, 2011 the Preliminary Resolution of the antidumping investigation was published in the DOF, establishing January 1st to December 31st, 2010 as the investigation period for the dumping determination, while the period analyzed for the determination of injury to the domestic industry included the years 2007 to 2009.⁶⁵

Meanwhile, according to the FR of the antidumping investigation issued on June 10th, 2003, bulk imports of EB had been subject to antidumping duties from July 20th, 2002 to November 18th, 2009.⁶⁶

Dow points out that bulk EB importation were subject to antidumping duties during the first three years (2007, 2008 and 2009) of the four year period analyzed (2007 to 2010). This implies, according to Dow, that during those three years, imports of bulk EB were not able to enter to the Mexican market at dumped prices.⁶⁷

The above mentioned is reinforced, according to Dow, with the FR of the administrative review of antidumping duties, where the IA rejected the claims addressed by Polioles on injury during the examination period (from April 2007 to March 2008).⁶⁸ Dow states, that according to the findings in the review, it was clear to the IA that the absence of injury during the review period was caused by the fact that bulk EB imports were under antidumping duties.

Finally, Dow suggests that the IA could have dealt with this situation by centering or focusing its final injury determination on the investigation under review on the period of time in which bulk EB imports were not subject of antidumping duties, meaning from December 2009 to December 2010.⁶⁹

According to the IA, in the challenged investigation EB entering into Mexico in all its forms was considered, while the current antidumping duty until November 2009, was limited to only some of them (bulk EB), which represent only 8% of the total imports in review for the analyzed period. The remaining imports correspond to EB sold in drums or in containers smaller than 55

⁶⁵ IR, *EB from the United States II*, DOF, 11th March 2011, para. 103.

⁶⁶ From 20th July 2002 to 10th June 2003, provisional antidumping duties on 50.42% of imports for both bulk and drums EB were applied, as from 11th June 2003 to 18th November 2009, antidumping duties for 32.56% were applied only for bulk EB imports. See respectively: FR, *EB from United States I*, DOF, 19th July 2002 and FR, *EB from United States I*, DOF, and 10th June 2003.

⁶⁷ Dow's Brief, p.66.

⁶⁸ Dow's Brief, p. 68, referring to the Final Resolution on EB from United States I, first administrative review of antidumping duties, DOF, 18th November 2009, p.6.

⁶⁹ Dow's Brief, p.71.

gallons or 208.17 liters. That is, the antidumping duties did not affect the imports of EB imports originating in the United States, and indeed, they had only an offset effect on a minor part of the total EB imports from the US.⁷⁰

The IA argues that should it have acted as suggested by Dow, and as a consequence, did not consider the years 2007, 2008 and 2009 on its injury analysis, the result would be a lack of analysis of the vast majority of the product's imported volume, a situation that, evidently could have flawed its determination.

This argument is based on the fact that the determination made by the IA, that the real effect of the antidumping duty in force until November 2009 on the price of EB imports was minimal, a situation that is clear if we look at the implicit prices from the investigated imports, which behaved similarly to the prices that had to pay the duty.⁷¹

As provided by the IA in its brief, if those three years without attribution were excluded, as suggested by Dow, it would have acted inconsistently with the G/ADP/6 recommendation, adopted by the Committee on Antidumping Practices on May 6th, 2000, establishing the period of at least three years of data collection for purposes of injury analysis. As an example, in the case Argentina – Poultry Anti-Dumping Duties the Panel established that the period of data collection for injury investigations should be at least three years, and should include the entirety of the period of data collection for the dumping investigation.⁷²

In addition, the IA argues that it acted in accordance with RLCE article 56. This provision states that the injury analysis shall be made within the context of the economic cycle and economic conditions of the affected industry. This provision establishes that the data collection period, for injury purposes shall comprise at least three years.

The Panel in the dispute Mexico – Steel Pipes and Tubes underlined that the selection by an investigating authority of the period of investigation is clearly a critical element in the anti-dumping investigative process: it determines the data that will form the basis for the assessment of dumping injury and the causal relationship between dumped imports and the injury to the domestic industry.⁷³

It has to be noted that according to the recommendation G/ADP/6, neither article 3.1 nor article 3.5, nor any other provision in AA contains any specific and express rules concerning the period to be used for injury data collection in an antidumping investigation. However, according to the

⁷⁰Investigating Authority Brief, p. 258.

⁷¹Investigating Authority Brief, I, p. 258.

⁷² Panel Report, Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil, para. 7.287

⁷³ Panel Report, Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala, para. 7.224.

criteria established in various precedents related to AA article 3.1, the selection of the investigated period is related to the obligation of conducting an injury analysis based on positive evidence.⁷⁴

The Panel in Mexico – Steel Pipes and Tubes also considered that Article VI of the GATT 1994 and the relevant provisions of the Anti-Dumping Agreement – with terms such as “offset” and the requirement of a current actual link – furnish clear textual indications that antidumping measures may be imposed only to offset dumping currently causing injury. This refers to the approach of previous panels in discerning an inherent real-time link between the investigation leading to the imposition of measures and the data on which the investigation is based. This link connects the imposition of the measure and the conditions for application of the measure: dumping (currently) causing injury.⁷⁵

Following this interpretation, the data on which the resolution is based could be based on a prior period, known as the investigated period. However, as these “historical” data are used to draw conclusions about the current situation, the most recent data are more likely to be inherently more relevant and thus, especially important for the investigation.

This Panel considers that a three year investigating period is consistent with the recommendation G/ADP/6 and the fact that they are considered as “historical” data for the injury determination within the analyzed period, merely makes it consistent with AA article 3.1. Thus, Dow’s insistence that the period to be analyzed should be only from January 1st to December 31st, 2010, would have caused the AI to not fulfill its obligation to conduct an injury determination based on positive evidence, since it would have made a determination based on only 25% of the available information. Additionally, as demonstrated before, the existence of a certain percentage of antidumping duties in only one of the EB presentations does not mean that injury was not caused.

- C. In its Final Resolution the IA made an affirmative determination on the existence of price suppression; however evidence in the administrative record in this regard is not valid or conclusive in the best case scenario.

In the Final Resolution, the IA made an affirmative determination on the existence of price suppression. The IA based its comparison with the tendencies of domestic prices in the United States for EB in bulk, established by Tecnon as domestic prices in Mexico.

⁷⁴Panel Report, Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala, para. 7.225.

⁷⁵Panel Report, Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala, para. 7.227.

Thus, the IA confirmed that from 2007 to 2009, investigated import prices, with and without variable costs, domestic and US prices showed similar tendencies. However, in 2010 EB prices in the US domestic market had an important increase while their export prices to Mexico, showed a clear tendency downwards, a situation that prevented domestic prices from increasing in accordance with US market prices.⁷⁶

In addition, the IA based its determination of price suppression on the fact that in 2010 the prices on the two key raw materials used for EB production (butyl alcohol and ethylene oxide) showed an upward tendency in contrast with the performance of domestic prices during the same period.⁷⁷

Dow questions the first of these two determinations on the basis that the relevant comparison was not reliable since the US domestic prices that were used (those taken from Tecnon) reflected only sales by contract vis-à-vis “spot” sales. Dow holds, as pointed out before, that Tecnon prices used as comparison against Polioles’ domestic prices, are not prevalent in the US. Consequently, Dow contends that the calculation on price suppression made by the IA based on the information reported by Tecnon is completely invalid.⁷⁸

The IA has established that there is nothing in the AA to determine a specific methodology for a price suppression analysis. Further, it notes that according to the Panel in Egypt – Steel Rebar, AA article 3.2 does not contain any requirement that the price undercutting between import and domestic prices must be conducted at any level of trade.⁷⁹

Moreover, the IA argues that determining the presence of price suppression involves knowledge of those price tendencies, in order to know whether the dumped imports impede an increase that, in their absence, domestic prices would have experienced. Meaning that, the fact that the analysis was not made in the very same commercial level, does not lead to a poor or deficient analysis, provided that it is done under the same comparison parameters.

As mentioned above, neither article 3.1 nor 3.2 of the AA contains a requirement concerning the methodology to be used by the IA to make an injury determination. Therefore, whenever the IA makes an objective examination based on positive evidence, any methodology would be deemed as consistent with the AA.⁸⁰

⁷⁶Investigating Authority Brief., para 239.

⁷⁷Investigating Authority Brief., para 239.

⁷⁸ Dow’s Brief, p.76.

⁷⁹Investigating Authority Brief., para. 625, related to Panel Report, Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey, para. 7.73

⁸⁰ Panel Report, Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland. para. 7.159; Panel Report, EC – Anti-Dumping duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, para. 7.292.

Contrary to the argument made by Dow, the IA not only included price information for 2010 but also for 2009, information that was also used to determine the performance of the growth rates. As pointed out by the IA, the object of an injury analysis is to determine whether, in the analyzed period (in this case, 2010), the domestic industry suffered any of the forms of injury provided in the AA. The years comprised in the remaining analyzed period can be used as a reference to determine the trends followed by the domestic industry, and then comparing it with the performance indicators during the investigated period. In this specific case, the IA determined price suppression in 2010 (investigated period) by comparing it with the previous years (analyzed period).

In addition, the IA not only took into account Tecnon data, but also analyzed the investigated import prices and their effects on domestic prices based on information regarding various prices of EB in US and Mexican markets as well as the prices on the main supplies used in their manufacture.⁸¹ These data were obtained from official information systems data, values given by Polioles and data from publications such as Tecnon, PCI, ICIS, Pricing and Xyienes & Polyesters, for the entire analyzed period.

For the reasons stated above, this Panel considers that Dow's claim regarding injury determination by the IA with respect to its consistency with AAD article 3.1, which is allegedly not based on an objective exam of positive evidence contained in the investigation record subject to review as unfounded.

- III. The Final Resolution is inconsistent with AA article 3.2 since the IA determined the existence of price depression even though domestic prices were not reduced in a significant manner.

In its brief, Dow argues that the determination of price depression made by the IA is inconsistent with AA article 3.2 since in order to assess whether dumped imports have had a negative effect on domestic prices, price depression may only exist when domestic prices have fallen in a "significant manner."⁸²

Additionally, Dow argues that in the WTO case EC – Salmon, it was determined that "significance" of an effect is primarily a question of the magnitude of the effect at issue.⁸³

Dow considers that the analyzed period should have been concentrated only in 2010, since in the period from 2007 to 2009, imports of EB in bulk were subjected to antidumping duties and

⁸¹Final Resolution, paras- 229 to 240.

⁸²Dow's Brief, p.83.

⁸³Dow's Brief, p.83.

EB in drums did not compete with domestically produced EB. Moreover, in 2010 a fall in prices was registered with a percentage of 4%, that in Dow's opinion was not significant.

On the other hand, the IA argues that an analysis of price suppression involves the knowledge of price trends, in order to determine whether the dumped imports prevented an increase that in their absence, the prices of domestic products would have experienced.⁸⁴

Under such comparison, the IA has observed that the prices from 2007 to 2009 moved in tandem, however in 2010 US prices increased, which could suggest that domestic prices would also increase, especially considering the rise in prices of supplies. However domestic prices were contained by the investigated imports.⁸⁵

The IA states that when using the years 2007 to 2009, those can be used as a reference to determine the tendencies of domestic products. In that sense, the fact that only in that time the domestic production could transfer the price increase on raw materials to domestic prices, only reinforces the argument that price suppression existed in 2010.

In this sense, the IA in its Final Resolution determines in paragraphs 238 and 239 the following:

238. Furthermore, in order to confirm the effect of imports at discriminatory prices on domestic product prices, the IA analyzed the behavior of: i) the prices of investigated imports; ii) the prices of domestic goods in the internal market; iii) the prices on the US domestic market from Tecnon; and iv) prices of relevant supplies on the production of butyl alcohol obtained from ICIS Pricing and PCI Xylenes & Polyesters.

239. In contrast with the performance of EB prices, the IA confirmed that from 2007 to 2009, the prices of investigated imports with and without variable costs on domestic prices and domestic US market showed similar tendencies. However in 2010, EB domestic prices in the US had a significant increase while export prices to Mexico maintained a clear downwards trend, a situation that impeded the increase on the prices of domestic markets consistent with US domestic prices.

For those reasons, the IA establishes that the price suppression analysis should not be considered independently, as it would be a mistake to take as a starting point the premise stated by Dow under which the IA methodology should be analyzed separating the period from 2007 to 2009, considering that the only section under which EB could have entered in the

⁸⁴ AI Memorial, p. 266.

⁸⁵ AI Memorial, p. 268, 269.

Mexican market under price discrimination is 2010, due to the fact that the undervaluation took place, even with the application of antidumping duties.⁸⁶

Regarding Dow's argument on how the percentage of price suppression on domestic prices was not "significant", the IA notes that Dow conducted its analysis in a biased manner, starting from the premise described above. The IA holds that the reduction should be assessed in conjunction with the 5% undervaluation level found in the price suppression which was also verified, that is even if the undervaluation and the price reduction is minimal, the effect on domestic prices is significant if it is compared with the price performance of the EB in the US market and its principal supplies performance which presented positive growth rates in 2010.⁸⁷

In this sense, Polioles notes that import prices impeded a growth in the EB domestic price consistent with the domestic price in the US market and the supplies costs and the fact that their influence was decisive in the average domestic price, so it can be found that 4% is significant.⁸⁸

Additionally, the IA states that Dow is reading in a partial manner the EC – Salmon WTO case since such precedent points out that the effect on prices should be analyzed taking into account the conditions of competition between domestic and foreign products.⁸⁹

On this comprehensive analysis that should be done in accordance with article 3.2 of the AA, Polioles establishes that the claim is unfounded given that the IA indeed based its decision on AA 3.2 by evaluating all the evidence: i) the dumped imports volume, taking into account whether a significant increase in absolute terms existed, and ii) the impact on imports on all factors (undervaluation, price increase and reduction).⁹⁰

As a result from this analysis on this claim and the arguments set out, this Panel confirms that the IA determined and analyzed the price suppression in a correct manner.

IV. The Final Resolution is inconsistent with AA article 3.5, since the causation determination made by the IA was not based on all the relevant evidence.

Dow states that a contradiction exists first on the fact that the IA disregarded the existence of a severe shortage in 2010, on the basis that 2010 "imports" and "external sources of supply"

⁸⁶ AI Memorial paras. 663 - 667.

⁸⁷ AI Memorial para. 672.

⁸⁸ Polioles Memorial p. 98.

⁸⁹ AI Memorial para 674.

⁹⁰ Polioles Memorial, p.99.

balanced the market, and second, on the determination that US EB imports caused injury to the domestic production in the analyzed period, including 2010.⁹¹

According to Dow, in the IA Final Resolution an affirmative causation determination was made that ignored completely its Preliminary Resolution where it was stated that EB imports from the US played a major role in preventing the shortage of the markets in 2010, ignoring the affirmation made by Polioles in this regard.⁹²

For the above mentioned, the Secretary, according to Dow, did not use all the relevant evidence on the matter of the causal link in its Final Resolution, contrary to article 3.5 of the AA.⁹³

The IA holds that i) it is incorrect that an EB shortage in the Mexican market existed, what really happened was that Polioles had some difficulties in order to meet the demand during the second semester of 2010, a situation that did not imply shortage due to several reasons; ii) it is not correct that US imports were the cause of the severe shortage; and iii) imports from US did not maintain a balance in the market.⁹⁴

On this first point, the IA argues that while Polioles had struggled to meet the domestic demand for EB in Mexico, during the second semester of 2010, a situation derived from external factors impeded them from obtaining the necessary inputs; the indicators from the domestic producers prove that domestic demand was met, and that no difficulties were found due to the shortage of the main inputs, and that during the months where Polioles was not able to meet the demand of domestic EB, other provisions existed.⁹⁵

On the second point, the IA argues that Dow only refers to one of the several reasons as to why the IA concluded that the evidence provided could not lead to the confirmation of the existence of shortage, by decontextualizing the facts.⁹⁶

Regarding the third point, the IA establishes that EB imports in the domestic market increased their participation by 30 percentile points to settle at 50% in 2010 on dumped prices;⁹⁷ a situation that does not alter the determination that investigated imports caused injury to domestic production in the analyzed period.⁹⁸

⁹¹ Dow Memorial, p.87.

⁹² Dow Memorial, p.88.

⁹³ Dow Memorial, p.89.

⁹⁴ IA Memorial, p.296.

⁹⁵ IA Memorial, p. 297 and 298.

⁹⁶ IA Memorial, p.298.

⁹⁷ IA Memorial, p. 298.

⁹⁸ IA Memorial, p. 304.

Moreover, Polioles noted that the IA conducted a comprehensive analysis on the domestic market performance, finding that domestic production decreased in the analyzed period due to anticompetitive imports, even when the Apparent Domestic Consumption registered a growth.⁹⁹

The domestic producer, according to Dow, confused causes and effects given that the analysis made by the IA is for the complete period and not only for 2010; by 2010 the domestic production decreased 15% as a result of the fact that the domestic industry destined for national consumption decreased by 35% and even when Polioles initiated an important exportation policy, -- the production destined for exportation grew by 130%-- it was not sufficient to compensate for the falling internal demand; EB imports at dumped prices resulted in a substantial displacement of the national production directed at the domestic market, a fact that constitutes the main cause of the reduction of the national production of EB destined for the internal market.¹⁰⁰

Article 3.5. of the Antidumping Agreement provides that:

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

This paragraph shows that the article does not provide a particular manner, binding for authorities, when evaluating relevant available evidence during the investigation in order to first determine, before an analysis of whether any other factors could have caused the injury, if dumped imports could be attributed to the injury caused to the domestic industry in the importing country.

The abovementioned is supported by the WTO in the Report of the European Community Appellate Body, tubing accessories in its paragraph 189, which indicates:

⁹⁹Polioles Memorial, p.100.

¹⁰⁰Polioles Memorial pp. 101 and 102.

189. We underscored in *US – Hot-Rolled Steel*, however, that the Anti-Dumping Agreement does not prescribe the methodology by which an investigating authority must avoid attributing the injuries of other causal factors to dumped imports:

We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the Anti-Dumping Agreement. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made.

Thus, provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the "causal relationship" between dumped imports and injury.¹⁰¹

Thus, before conducting an analysis of non-attribution under article 3.5 of the AAD to determine whether other factors could have caused injury to the domestic production of an importing country, the IA has the authority to choose between the methodologies to determine injury causation as exclusive from dumped imports.

In this regard, the exercise of non-attribution in the AA cannot be read independently from paragraphs 2 and 4 of article 3 to determine the existence of injury, which reads as follows:

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization

¹⁰¹AB report, *EC – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, para. 189.

of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

In that respect, the IA shall take all the relevant factors into consideration when making the assessment so as to prove that, by the effects mentioned in paragraph 2 and 4, dumped imports cause an injury in the manner established in the Agreement, as stated in paragraph 5 of AA article 3.

Under its discretionary authority to make an evaluation, the IA in its Final Resolution in paragraph 207 stated that a comprehensive and cumulative analysis would take place of all the arguments and each factor considered in the legislation and in the administrative record for its determination of injury and that dumped imports caused the injury.

With respect to the joint analysis set out in the previous paragraphs, the IA noted in paragraph 265 of its Final Resolution that from the referenced analysis on paragraphs 222 to 264, the IA confirmed the existence of injury to domestic production, determined by the performance of dumped imports.

Additionally paragraphs 266 to 278 of the Final Resolution noted that injury factors other than dumped imports were disregarded, given that even when supply problems existed in EB, that did not change the negative impact found in the prior analysis.

Additionally, this Panel points out that the determinations made by the IA were already found positive with respect to articles 3.1 and 3.2.

For all the reasons mentioned above, this Panel concludes that the IA made an adequate evaluation of the link between injury and dumped imports, since, notwithstanding the irregularities in the supply of EB destined for the domestic market, the IA could prove that dumped imports caused injury to the domestic production, confirming the FR in the section on injury and causality.

V. The Final Determination is inconsistent with Article 3.5 of the ADA because the IA did not properly examine other factors of injury that were known, nor correctly distinguish between the injurious effects of such other factors from those attributed to the dumped imports.

A. Final Resolution is inconsistent with Article 3.5 of the ADA because the IA did not properly examine other factors of injury that were known.

Dow states that during the proceedings of the investigation several companies that were in opposition to Polioles argued that the injury suffered by the domestic industry in 2010 was attributable to a shortage of production, derived in turn from limitations in raw materials and boiler stoppages. Dow also reports that in the Final Determination, the IA determined that during April, September, October and November 2010, there were limitations in the main raw materials for the production of EB; besides that in February of that year a boiler stoppage occurred. In this regard, Dow states that the AI neglected the importance of the production shortages as another factor of injury on the grounds that such a shortage was temporary and involuntary.

In this regard, Dow quotes the case EC-Salmon¹⁰², where the Panel concluded that the IA did not properly examine other known factors of injury, other than the dumped imports, which at the same time were causing injury to the national production. Therefore, Dow concluded that none of the AI considerations upon which rests the analysis of production shortage as an injury factor applies; further Dow notes that the IA did not establish the facts giving factual support for its conclusion.

On the other hand, the IA argued that Dow tried to decontextualize the way in which the IA performed the examination of the relevance of the shortage of inputs as another factor of injury. To this effect, a factor other than such imports should be analyzed in the context of the review of causality, and this factor should cause injury, in order for there to be a temporal correlation between this factor and the dumped imports.

The IA also noted that the Final Determination included an analysis of the supply problem as a possible factor of injury and concluded that it had no impact on the trend in the volume of imports under investigation, so it did not cause any damage. In addition, it reports that the shortage of raw materials only appeared for about twelve weeks in 2010, so no subject imports coexisted with the supply problem.

In order to perform the legal analysis on this claim, it is important to read Article 3.5 of the ADA:

*“3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine **any known factors other than the dumped imports which at the same time are injuring the domestic industry**, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive*

¹⁰²European Communities — Anti-Dumping Measure on Farmed Salmon from Norway (DS-337)

practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.”

From the provision aforementioned, it appears that the ADA provides that, to be considered as such, the other injury factors must meet two requirements: (i) causing injury to the domestic industry, and (ii) that such injury is caused while there are dumped imports. Only after both elements are realized is it relevant then to analyze whether the injury caused by these factors must not be attributed to the dumped imports. This is because if they do not cause injury, or if they do not coexist with the dumped imports, then we are not in the presence of "another factor of injury."

Regarding the first item, in the Final Determination itself the IA concludes that there was a problem of shortage in raw materials for domestic production of EB. It particularly notes this in points 269, 270, 271 and 272 of the Final Determination.

It is then important to analyze the second element: the injury to the domestic industry caused by other factors happening simultaneously to the dumped imports. The requirement known as "non-attribution" in WTO case law refers to the harmful effects of other factors that the IA has knowledge that must not be "attributed" to the dumped imports, unless these factors are properly assessed. In this respect, it applies what the WTO Appellate Body in *US - Hot-Rolled Steel*¹⁰³ stated, where they clarified when the above mentioned requisite of "attribution" is applied according to Article 3.5, as follows:

“223. The non-attribution language in Article 3.5 of the Anti-Dumping Agreement applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry at the same time. In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors.(...)”

Thus, even in the Final Determination, specifically in paragraphs 273 to 278 thereof, in which the Secretariat conducted an analysis of the injury caused by supply problems of EB, concluding that they were not attributed to the dumped imports, it seems unnecessary. Needless to point out that the *EC - Salmon* case is not applicable to the present case, since in that case the injury caused to the domestic industry by the other known factors was at the same time as the dumped imports. Thus, in that dispute the due analysis of non-attribution of the AI was conducted. This analysis should be applied only when there has already been established the existence of other factors of injury.

Whereas the problem of raw material shortages appeared intermittently during 2010, particularly in the months of April, September, October and November, and the investigated period runs from January 1, 2010 to December 31, 2010, no one can consider that the injury

¹⁰³United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (DS-184)

caused by the shortage harmed domestic production at the same time as the dumped imports occurred.

Thus, given that in most of 2010 the dumped imports did not coexist with the injury caused to the domestic industry by shortages of raw materials, it was necessary to conclude that the second requisite of the existence of other factors of injury, as established under article 3.5 of the ADA, was not met.

From the above, it follows necessarily that the argument raised by Dow that "the Final Determination is inconsistent with Article 3.5 of the ADA because the Secretariat failed to properly consider other known injury factors" is inappropriate. Thus, it follows that the **Panel agrees to confirm the aforementioned Final Resolution** as regards to this point.

B. The Final Determination is inconsistent with Article 3.5 of the ADA because the IA did not properly distinguish between the effects of other injury factors from the effects of subject imports.

In addition, Dow states that in the Final Determination, the Secretariat differentiated the effects of the shortage of production from those caused by dumped imports by a statistical exercise. Therefore, Dow argues that the exercise was fundamentally flawed because of multiple deficiencies in focus. Dow concludes that the Final Determination does not satisfy the requirement of "attribution" under Article 3.5 of the ADA.

With regard to the statistical exercise, the IA argued that Dow did not provide any alternative methodology, so there is nothing in the administrative record to suggest that the Secretariat should have acted differently. Therefore, the IA states that the argument is inoperative, since Dow had the burden of presenting evidence and arguments in its own interest. In addition, it states that Dow does not indicate how the use of the aforementioned statistical exercise violates procedural formalities.

Notwithstanding the above, as already noted, in this specific case, it does not apply the analysis of "attribution" of Article 3.5, since the issue of shortage in the supply of raw materials does not coexist with the dumped imports. Worth quoting, as persuasive for this Panel, is the following case law issued by the Supreme Court of Justice of the Nation:

CONSTITUTIONAL CONTROVERSY. THE COMPLAINANT HAS TO POINT OUT SPECIFICALLY WHICH ACTIONS AND RULINGS THEY ARE CHALLENGING AND NOT MAKE A GENERIC OR INACCURATE REFERENCE TO THEM¹⁰⁴.

¹⁰⁴ Época: Novena Época. Registro: 166990. Instancia: Pleno. Tipo de Tesis: Jurisprudencia. Fuente: Semanario Judicial de la Federación y su Gaceta. Tomo XXX, Julio de 2009. Materia(s): Constitucional. Tesis: P./J. 64/2009. Página: 1461

(...) the complainant needs to point out, at least, the grievance caused to them and the reasons that caused it (...)

Thus, any concept of inconsistency raised challenging a decision of an authority must contain the cause of action. That is, the argument must express the grievance of the contested measure, which translates to demonstrate how the act caused an injury to legal rights.

In this regard, specifically on pages 99-109 of its Brief, Dow does not indicate the grievance that was caused by the methodology used by the IA to differentiate the effects of the shortage of production from those caused by dumped imports. Therefore, this Panel notes that Dow only limited itself to infer that if a different method were used, the results would have been different; without explaining why the approach should be different from that posed by the IA in the Final Determination.

Thus, the Panel is unable to rule on the concept of nullification in question, since it is unknown what offense the use of the methodology applied caused to the Claimant. This is so since Dow did not fulfill its legal obligation to explain the cause of action that raised the concept of challenge. This, without forgetting that (for the above reasons) the IA was not required to separate the injury effects of the shortage of production of the dumped imports.

This Panel therefore agrees to **confirm the aforementioned Final Determination** in regards to this point.

VI. The Final Determination is inconsistent with Article 6.2 of the ADA because Dow was deprived of a full opportunity to defend its interests.

A. Dow was deprived of a full opportunity to defend its interests because it could not examine and make critical comments to the alleged exercise of "non-attribution" conducted by the IA and not known until the Final Determination.

B. Dow was deprived of a full opportunity to defend its interests since the IA did not address its request to consider the application of a lower margin than the dumping margin in case of an affirmative Final Determination.

In its brief Dow states that the methodology used by the IA for the exercise of attribution was not known by Dow in the issuance of the Preliminary Determination, but until the issuance of the Final Determination, denying Dow the opportunity to manifest its interest.¹⁰⁵

¹⁰⁵Dow Memorial, page 109.

Dow further notes that the IA omitted from its Final Determination reference to the graphic model presented by Dow in its closing arguments regarding the absence of a causal link between the imports of bulk EB and the alleged injury to the domestic industry.¹⁰⁶

Dow also asserts that the domestic industry should have presented economic projections that would strengthen the claim of the alleged injury, since in the case of denim in China, the Secretariat concluded the case, partly on the grounds that domestic production did not present economic projections to strengthen the allegations of threat of injury.¹⁰⁷

In reply, the IA reiterates that supply problems that Polioles had in 2010 for weeks did not detract from the negative impact of the price suppression on the domestic industry and that the elements mentioned above in its brief permit the presumption that Polioles could have regularly met demand.¹⁰⁸

The IA notes that regarding the above, in paragraphs 288 and 287, the Preliminary Determination states that the IA did not have sufficient evidence to attribute the damage to the domestic production to supply problems of Polioles. Therefore, contrary to Dow's arguments, the participants learned about this situation preliminarily.¹⁰⁹

Regarding the statistical exercise used in the Final Determination, the IA indicates that it is an element of analysis of non-attribution, therefore it could not have been able to reveal it in advance.¹¹⁰

Regarding the graphical model presented by Dow in its brief, the IA said that this model was not issued as part of the second probationary period of the investigation, therefore the IA was not obliged to consider it. This is because this stage of allegations is for the parties to have an opportunity to present reasons of law, it is not a new opportunity to present evidence.

With regard to the allegation concerning the alleged obligation of Polioles to present a statistical model, the IA maintains that the applicant did not have to prove that the shortage did not cause the injury suffered by the domestic industry, on the other hand the obligation to show other injury factors corresponds to the interested parties who claim its existence.

However, Article 6.2 of the ADA provides:

"6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defense of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so

¹⁰⁶ Dow Memorial, page 110.

¹⁰⁷ Dow Memorial, page 111.

¹⁰⁸ IA Memorial, page 362.

¹⁰⁹ IA Memorial, page 365.

¹¹⁰ IA Memorial, page 365.

that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally."

From the above it shows that anti-dumping procedures established by the WTO members during each of its stages will provide an opportunity for interested parties to defend their interests, however, the AI has the power to assess the evidence and arguments presented in the analysis of its final determination.

Indeed, in the exercise of non-attribution, as stated in previous claims already examined by this Panel, we found that the exercise of non-attribution was carried out correctly by the IA, taking into account the factors that the Secretariat found during the investigation and the information submitted by the parties. How the IA performs its analysis is discretionary. There is nothing in the commercial law that imposes an obligation on the IA to analyze economic considerations, therefore, the IA can make use of certain elements considered necessary as it did in this case with the statistical exercise.

Moreover, from the analysis of the administrative record, it shows that the IA gave full opportunity to Dow to defend its interest and present relevant evidence in the procedural stages. While it is true that the claimant could not know that the IA would use a statistical method in its Final Determination, it could tell from the Preliminary Determination that until then the IA did not have sufficient evidence to definitively determine that the cause of the injury was Polioles' in 2010. The statistical exercise was used by the IA once it had all the information provided by the parties and their arguments, including Polioles. Since the types of analysis are a power of the Secretariat, so it considered this exercise necessary to strengthen its assumptions and arguments.

Given the above, this Panel finds that the Claimant had full procedural opportunity to defend its interests during the investigation procedure.

In addition, Dow makes a claim that the IA violated Article 6.2 of the ADA by not heeding the request to consider a lower duty than the dumping margin in the Final Determination; additionally Dow argues that the IA does not explain how it decided to apply such dumping margin, being that in previous cases the Secretariat explained that application of the same duty is a result of the injury margin being greater, for which it cannot support requests of this nature.

To this the IA responds that the reading of Article 6.2 of the ADA does not provide an obligation for the authorities to address such a claim as Dow's. Nothing in this article refers to lower duties than the dumping margin. Also, the IA submits that Article 9.1 of the ADA allows the authority to set a duty equal to the dumping margin, so it is within the powers of the IA.

Now, this Panel does not consider that Article 6.2 and 9.1 of the ADA express that by not meeting the request of the claimant to reduce the antidumping duty once the dumping and injury margins were duly accredited by the Secretariat, the IA must meet the request, otherwise it is in violation Dow's interests.

The Panel has found that the determination of dumping and injury are correct and therefore considers that the IA is not required to impose a lower duty on Dow. On this point, the claim of Dow is rejected.

VII. ORDER OF THE PANEL

In accordance with the revision procedure provided for in Article 1904 of Chapter XIX of the NAFTA and all the arguments indicated above, this Panel determines to **CONFIRM** the Final Determination, except for Eastman's claim regarding the exclusion of two of the trade channels, so, as far as this is concerned, the Final Determination is **REMANDED** to the investigating authority, in order for it to take measures that are not inconsistent with the findings on this point as set out in this decision.

Date: November 26th, 2015.

Signed in the original by:

Lawrence Bogard Lawrence Bogard

Gabriel Cavazos Villanueva Gabriel Cavazos Villanueva

Cynthia Lichtenstein Cynthia Lichtenstein

Carlos Humberto Reyes Díaz Carlos Humberto Reyes Díaz

Juan Manuel Saldaña Pérez. Presidente Juan Manuel Saldaña Pérez

1. The court shall have jurisdiction over all matters arising out of the contract, including but not limited to the interpretation, performance, breach, and termination of the contract. The court shall also have jurisdiction over all disputes relating to the contract, including but not limited to the amount and timing of payments, the quality and quantity of goods or services, and the liability of the parties.

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VII. ORDER OF THE PANEL

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Date: November 26th, 2015.

Signed in the original by:

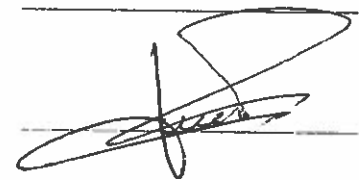
Lawrence Bogard _____

Gabriel Cavazos Villanueva _____

Cynthia Lichtenstein _____

Carlos Humberto Reyes Díaz _____

Juan Manuel Saldaña Pérez. Chair _____



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26 NOV. 2015

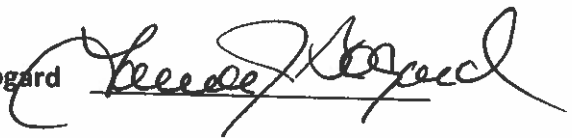
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VII. ORDER OF THE PANEL

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Date: November 26th, 2015.

Signed in the original by:

Lawrence Bogard 

Gabriel Cavazos Villanueva _____

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Carlos Humberto Reyes Díaz _____

Juan Manuel Saldaña Pérez. Chair _____

SECCIÓN MEXICANA DEL
SECRETARIADO DE LOS
TRATADOS COMERCIALES

28 NOV. 2015

RECIBIDO

VII. ORDER OF THE PANEL

In accordance with the revision procedure provided for in Article 1904 of Chapter XIX of the NAFTA and all the arguments indicated above, this Panel determines to **CONFIRM** the Final Determination, except for Eastman's claim regarding the exclusion of two of the trade channels, so, as far as this is concerned, the Final Determination is **REMANDED** to the investigating authority, in order for it to take measures that are not inconsistent with the findings on this point as set out in this decision.

Date: November 26th, 2015.

Signed in the original by:

Lawrence Bogard _____

Gabriel Cavazos Villanueva _____

Cynthia Lichtenstein *Cynthia S. Lichtenstein*

Carlos Humberto Reyes Díaz _____

Juan Manuel Saldaña Pérez. Chair _____

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26 NOV. 2015

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