

DECISION OF THE BINATIONAL PANEL ON THE DETERMINATION ON REMAND OF THE INVESTIGATING AUTHORITY REGARDING THE REVIEW OF THE FINAL DETERMINATION OF THE ANTIDUMPING INVESTIGATION ON IMPORTS OF BOVINE BEEF AND EATABLE OFFAL ORIGINATING FROM THE UNITED STATES OF AMERICA.

Case

MEX-USA-00-1904-02

I. BACKGROUND

On March 15, 2004, this Panel issued its Final Decision in the proceeding cited above. In this decision, the Panel returned the case to the Secretariat of the Economy [hereinafter Investigating Authority (IA)] and ordered it to comply with various requirements indicated in the Panel order.

By means of the pleadings presented to the Mexican Section of North American Free Trade Agreement, on May 26, July 21, and September 3, 2004, the IA presented motions requesting a deadline extension for the presentation of the Determination on Remand for August 16, 2004, thereafter for September 17, 2004, and finally, for October 15, 2004.

On September 20, 2004, this Panel issued an order by which it granted an extension to the IA until October 15, 2004, for the presentation of the Determination on Remand.

On October 15, 2004, the IA presented the Determination on Remand, which it claims complied with the Final Decision of the Panel.

The Determination on Remand, mentioned in the previous paragraph, was published in the Official Gazette of the Federation on October 20, 2004. On the same date, the IA presented the supplementary record of the remand (ECD-15-03-2004) in both confidential and non-confidential versions, as well as its corresponding index.

On November 9, 2004, Tyson Fresh Meats, Inc., Sun Land Beef Company, Inc., National Beef Packing Company, L.L.C., Packerland Packing Company, Inc., and Murco Foods, Inc., (the "Complainants"), presented their respective challenges to the IA's Determination on Remand.

On December 6, 2004, the IA presented the "Non-Confidential" and "Non-Privileged" versions of certain documents, in compliance with the Panel Order issued on November 29, 2004.

II. RESERVATION OF RIGHTS

The parties that challenged the Determination on Remand reserved the right to present additional comments and challenges to it,¹ once this Panel had resolved the then pending motions. However, the Panel order issued on November 29, 2004, dismissed these motions.

On the other hand, the Complainants also reserved the right to challenge the Determination on Remand, in the event that the Panel ordered the IA to: (i) carry out an informational hearing, under the terms of article 84 of the Regulations of the *Ley de Comercio Exterior* (LCE), and (ii) include the analysis of injury and threat of injury that was used to produce the Determination on Remand in the record.² The above was resolved by means of a panel order issued on February 8, 2005, which dismissed these motions.

In light of the foregoing, this Panel must make it very clear that anything that was not challenged in a timely manner shall remain the same, and as such cannot be thereafter challenged, on the basis of Rule 73(2)(b) of the Rules of Procedure of Article 1904 of Chapter XIX of North American Free Trade Agreement (NAFTA).

III. ISSUES RAISED BY THE COMPLAINANTS

1. Compliance with the Panel Decision with respect to the application of an antidumping duty greater than the margin of price discrimination calculated for each of the products subject to the investigation.

The facts contested in this first issue are whether the IA complied with the Final Decision of the Panel with regards to the application of an antidumping duty greater than the margin of price discrimination calculated for each one of the products subject to the investigation and, if the elimination of the classification and useful shelf life certificate leaves open the possibility that the IA can consider the application of a residual duty for certain types of non-classified meat.

¹ Challenges to the Determination on Remand presented by Sun Land Beef Company, Inc. November 9, 2004, page 10; Challenge to the Determination on Remand made by Tyson Fresh Meat, Inc. November 9, 2004, page 10; Challenge to the Determination on Remand made by National Beef Packing Company, L.L.C, Packerland Packing Company, Inc. and Murco Foods, Inc. November 9, 2004, page 10.

² Id. at page 40 of the pleadings challenging the Determination on Remand of the IA and pages 38 and 39 of the pleadings by Sun Land Beef Company, Inc.

In Paragraph 278 of the Determination on Remand the IA decided:

“278. The requirement in point 654 of the final determination, with respect to a certificate issued by the U.S. Department of Agriculture, in order to demonstrate compliance with the classifications “Select” or “Choice” and that no more than 30 days have elapsed since the date of slaughter, is eliminated.”

In this manner, by eliminating the requirement in paragraph 654 of the Final Determination, with respect to the certificate issued by the U.S. Department of Agriculture to show compliance with the classifications “Select” or “Choice,” and that no more than 30 days had elapsed since the date of slaughter, the two classifications set out in the Final Determination for the same product are abolished, in accordance with the Panel in Issue IV and paragraph 20.6 of the Final Decision. As such, the Determination on Remand did comply with the Panel’s decision.

Consequently, the arguments raised by the complainants lack legal basis because the IA did comply in accordance with the Panel’s decision in Issue IV and paragraph 20.6 of the Final Decision. Thus, this point of the Determination on Remand is confirmed.

2. Compliance with the order of the Panel in its Final Decision with respect to the determination of injury to the national production of fresh, chilled, and frozen boneless beef and beef with bone.

With respect to this issue, this Panel wishes to assert that in the first place, it shall only address those challenges presented by Tyson Fresh Meats, Inc., Sun Land Beef Company, Inc., Packerland Packing Company, Inc., and Murco Foods, Inc., and not the challenge presented by National Beef Packing Company, L.L.C., previously Farmland Beef Packing Company, L.P. Although the Panel has a duty to process those challenges before it, this duty is limited to those challenges that are presented during the appropriate points in the proceedings, and is obligated to determine only those issues that are subject of the dispute, that is those that are part of the litigation and do not go beyond the disputed arguments. To act in a manner contrary to this would result in the end of the judicial certainty that is one of the fundamental elements established in Chapter XIX of NAFTA and the Rules of Procedure which the Panel must follow. Thus, this Panel finds itself impeded from tackling this issue, since this was not originally raised by National Beef

Packing Company, L.L.C., and its right to present a complaint is precluded because it was not presented during the proper time in the proceedings.³

In this second part of the challenge, the Complainants claim several grievances, which will be addressed jointly because of the close relationship amongst them.

The Complainants argue that the IA lacked the authority to reopen and supplement the administrative record, and request new information from the companies to carry out a determination of injury to the national production.

This Panel does not agree with the Complainants, because the IA complied with the order of the Panel. The IA completed its analysis of injury using only the imported merchandise found to have been sold at below normal value. The IA complied with the Panel's decision to consider only dumped imports and to exclude the fairly traded imports from its analysis, pursuant to article 1904.8 of the NAFTA.

The determination of the Binational Panel in "Certain Soft-wood Lumber Products from Canada" is inapplicable in this case, because as we can see in that decision, the Panel determined that there was no evidence in the record to support a positive finding of threat of injury. On the other hand, this Panel did not make such a determination, but rather remanded to the IA because in these proceedings, in order to reach a determination of injury, the IA included information other than that required by law. As such, this issue was remanded to the IA so that it could carry out a new analysis consistent with the guidelines set out by this Panel in its Final Decision.

For this Panel to consider the Complainants' allegations, the Complainants must state the injury they have suffered as a result of the supplementation to the administrative record. However, the Complainants failed to specify the nature of their injury. As their complaint is without substance, this Panel cannot analyze this alleged injury. For the reasons stated above, the arguments made by the Complainants lack legal basis.

The Complainants also claim that the IA had sufficient information in the administrative record to comply with the Panel's order. As such, the Complainants argue that the IA should have separated the total imports of boneless beef and beef with bone from those imports made under conditions of price discrimination when it performed its reanalysis of material injury to the national industry.

³ In support of this the following thesis found in *Semanario Judicial de la Federación y su Gaceta*. Second Collegiate Tribunal in the Administrative Subject of the Sixth Circuit. Ninth period Jurisprudence Volume XVIII, December 2003. Thesis VI.2oA. J/7, page 1190. No. Registry 182, 704. **"Concepts of Violation in the Direct Amparo Proceedings. THOSE ISSUES THAT WERE NOT INTRODUCED IN THE NATURAL PROCEEDINGS WILL NOT PROCEED.**

The Complainants also maintain that if the information in the administrative record was insufficient or inconsistent to comply with the Panel's order, this means that the IA itself recognizes that the information requested during the course of the investigation was neither sufficient nor adequate to support a positive finding of injury.

For its part, the IA denies the arguments made by the Complainants, and states that it complied with the Panel order in its analysis in points 131 through 267 of the Determination on Remand. The IA explained that it discovered inconsistencies in the Complainants' information when it began to perform the injury analysis using only the unfairly traded imports, requiring it to supplement the administrative record.

As has been established in the previous paragraphs, the Panel considers that the IA complied with the Panel's order, consistent with Article 1904.8 of the NAFTA.

Thus, this point of the Determination on Remand is confirmed.

3. Compliance with the Panel's order in its Final Decision with respect to the issue of whether or not the Investigating Authority carried out an analysis of the elements required to determine injury, threat of injury, and a causal relationship.

In the third reason for the challenge, the Complainants make several arguments, which will be studied jointly.

The Complainants maintain that the IA failed to carry out the causation analysis required by Article 41 of the LCE, in accordance with the order of the Panel. They assert that it is not sufficient to cite percentages of increase in unfairly traded imports or to state that such imports had an injurious effect on the national industry; rather, the IA must use positive evidence to demonstrate the nexus between the imports and the condition of the national industry. The second argument is that the percentages in the Final Determination and the Redetermination on Remand are different, because the IA improperly obtained additional information during the remand proceeding. The Complainants' third argument, concerning boneless cuts, is that there could have been no injury because both the national production and total capacity increased during the investigated period and, moreover, the Panel order did not give the IA authority to make a finding of threat of injury. Finally, the Complainants contend that the IA erred in using combined financial data for boneless cuts and cuts with bone.

The Panel first notes that the Complainants' arguments are limited to cuts of meat with and without bone. With respect to beef in carcasses, in its Determination on Remand the IA carried out its analysis of the elements that this Panel had ordered and decided, in paragraph 130, that the dumped imports were insufficient to cause injury. Thus, the IA concluded the analysis of injury or threat of injury caused by these imports of meat in carcasses without the imposition of an antidumping duty.

In considering the Complainants' arguments, we first address the second and third arguments. This Panel resolved the second argument under III.2. above. Regarding the third argument, this Panel does not agree with the Complainants. Although paragraph 20.11.2 of the Panel's decision and order refers to the requirements of Article 41 of the LCE, which concerns injury findings, by inference the Panel included the lesser finding of threat of injury. Thus, the Panel dismisses the second and third arguments.

Likewise, the Panel disagrees with the Complainants that the IA erred in using combined financial data for boneless cuts and cuts with bone. Although it would have been preferable for the IA to have isolated the financial information with respect to the two products, it appears that the national producers' accounting procedures did not make a distinction. In any event, the redetermination did not turn on the financial data. If the IA did make a mistake, it had no impact on the result of the Redetermination on Remand and thus is a harmless error.

With respect to the first argument, the Panel does not agree with the Complainants that the IA failed to show causation. While it is correct that the IA did not discuss the effect of the percentages on the national industry, there are certain indicators within the data presented that tend to show the impact of the imports that have dumping margins. For example, with respect to meat in cuts with bone, the dumped imports increased from 13% to 31% participation in apparent national consumption (ANC) and 15% to 55% as compared to the national production. Also, price undercutting due to dumping rose from 7% to 17% (Paragraph 264 of the Remand Results). As for boneless cuts, although the dumped imports decreased as a percentage of ANC, they registered an increase when compared to the national production, from 199% to 402%. During the investigated period, the national production fell from 31% to 11% of the ANC (*Id.*, paragraph 265). The situation is not as clear for boneless cuts as for meat in cuts with bone, which is reflected in the finding of threat of injury for the former and injury for the latter. Nevertheless, these data demonstrate that there was a significant negative effect on the national production from dumped imports of these products. Consequently, there is sufficient support for the IA's findings in its determination on remand.

Due to the above, and with regards to this subject, this Panel confirms that the IA did comply with the order in the Panel's final decision. Thus, this point in the Determination on Remand is confirmed.

4. THE INVESTIGATING AUTHORITY DID NOT COMPLY WITH THE FINAL DECISION OF THE PANEL OF MARCH 15, 2004 WITH REGARDS TO THE INCORRECT USE OF THE METHODOLOGY TO CALCULATE THE SPECIFIC MARGIN OF PRICE DISCRIMINATION

There are other issues to resolve presented by Sun Land and Tyson, arising independently from the fact that these two companies presented a motion requesting this Panel to order the IA to calculate individual margins. The response by the Panel to this motion was that the order was not necessary because that issue had already been resolved in the Panel's Final Decision.

After the Determination on Remand was presented, Sun Land and Tyson once again presented their arguments against the use of the best information available.

In regards to this issue, this Panel questions whether Sun Land or Tyson, or both, had any valid objection to the duties imposed on any of its exports once the requirement for the certificate was eliminated.

The basis for each one of the challenges will be analyzed separately.

Sun Land: Sun Land in its challenge of November 9, 2004 to the IA's Determination on Remand argued that according to the Panel Decision, specifically with respect to Issue IV, the IA should have analyzed and applied the correct methodology to determine Sun Land's individual dumping margin.

Sun Land requested that the Panel remand to the IA with specific instructions to resolve this issue in the manner set forth by Sun Land in its complaint and briefs, to apply the correct methodology and recalculate the applicable dumping margin for Sun Land's exports in question.

It is necessary for this Panel, once again, to establish that issue IV of the Final Decision of the Panel has already been complied with by the IA in this decision.

On the other hand, the original briefs and the Final Determination make clear that the exports in question are only 12 out of a total of 164 product codes. For 152 product codes the IA determined normal value according to the sales price in the U.S. (the home country) and Sun Land did not challenge the margin determined for those codes. For five of the remaining product codes, there was a dispute as to whether the home country prices were representative since the IA claimed that the sales did not represent over 5% of the market; for 4 of the codes Sun Land controverted this figure.

This disagreement, however, would seem to be irrelevant since Sun Land also had proposed an alternative way of calculating normal value, an alternative that the IA found to be defective in that Sun Land did not provide the information which would permit a proper calculation.

Equally, for the remaining 7 codes, since there do not seem to have been any home country sales from which normal value could be calculated.

Sun Land proposed alternative methods of calculation which the IA again found to be insufficient.

Sun Land's brief of September 25, 2000 alleges that the IA never requested the information the IA found to be missing from its proposals or alerted Sun Land as to any problems with the information provided by the company.

Thus, the claim is without legal basis in light of the LCE because the IA does not have the responsibility to inform a participant in the investigation that the responses to the questionnaire are insufficient. That burden is imposed by law on the participant in the investigation. Such participant must assure the quality of the information provided and must ask the IA whether it is satisfied with the responses.

There was also a dispute over the information submitted concerning freight charges: Sun Land submitted published freight charges and the IA wanted proof from invoices that in fact those charges had been charged to the buyers, which is a reasonable position.

The IA points out in its reply brief that the IA made a second request to Sun Land to obtain the freight costs "actually paid to the transportation company" and that Sun Land's reply once again cited the "freight tables for the relevant routes".

The IA indicates that this reply is hardly a reply to "the best of [Sun Land's] ability" and this Panel agrees with the IA.

The IA's reply brief also indicates that the data submitted by Sun Land for the disputed codes in which the home country sales were considered insufficient to be representative contained data outside the period of investigation and that is why those sales were disregarded.

With regard to the suggestions made by Sun Land to the use of an alternative method to calculate the normal value in the absence of sales in the domestic market of a product code specifically, the IA indicated in paragraph 3.6 of the official questionnaire that it requested from the participant in the investigation the participant justify the use of similar product codes.

The IA evidently considers Sun Land's failure to make adjustments to the home country prices of similar product codes to be a failure to comply with this request. This Panel agrees with the IA.

It should also be pointed out that in the case of Sun Land, the “best information available” that was used by the IA when it determined that in some product codes Sun Land’s own replies were not sufficient to determine normal value was the normal value that corresponded “to the highest that was determined for the company for the product groups in which the product codes were classified.” [Final Determination Para. 293].

In general, when the use of BIA by an investigating authority has been challenged before a WTO Panel, the information utilized to substitute for information that the authority considers inadequate is information submitted by domestic producers. This standard is not applicable in this case given that the applicable law is the LCE. The LCE imposes the burden of responsibility for clarifying information that the IA considers insufficient on the party replying to the questionnaire and its instructions and not on the IA to notify the respondent that the replies are insufficient because the instructions have not been followed. Once again this Panel agrees with the IA in this regard.

Tyson: For Tyson, the arguments centered around 17 product codes which Tyson neither sold identical or similar products in the domestic market nor in third countries during the period of the investigation. Thus, the company proposed to use reconstructed value, but in submitting data by which that value could be determined left out the cost of raw materials.

The IA accordingly dismissed the information supplied by Tyson and determined normal value for those 17 codes by the highest that was determined for the company for the product groups in which the product codes were classified.

The IA in its brief argues that Tyson did not act to the best of its ability since the company failed to report the costs of raw material (Pt 329 of IA’s brief of November 24, 2000).

This Panel agrees with the IA, given the view stated above, the IA complies with the requirements established in the LCE.

If Tyson did not keep records of the age (date of slaughter) of the beef which it shipped, it certainly must have had data as to the costs of the cattle which it processed after slaughter and it would seem obvious, to this Panel, that the cost of the animals must be supplied to aid determination of reconstructed value.

Thus in the cases of both Sun Land and Tyson, this Panel concludes that the use of “best information available” by the IA to determine normal value for

certain product codes was justified and in accordance with the law and our Decision of March 15, 2004.

IV. PANEL ORDER

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

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

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

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

Signed in original by:

issued on May 10, 2007.

Lisa B. Koteen.

Lisa B. Koteen.

May 5, 2007.

Cynthia Crawford Lichtenstein.

Cynthia Crawford Lichtenstein.

May 6, 2007.

Ruperto Patiño Manffer.

Ruperto Patiño Manffer.

May 4, 2007.

Jorge Alberto Silva Silva.

Jorge Alberto Silva Silva.

May 6, 2007.

Eduardo Magallón Gómez.

Eduardo Magallón Gómez.

Chairman

May 7, 2007.

ABBREVIATIONS

IA – Investigating Authority

ANC- Apparent National Consumption

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

NAFTA (North American Free Trade Agreement)

SE – Secretaría de Economía (Secretariat of Economy)

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

WTO – World Trade Organization.

Concurring Opinion of Panelists
Lisa B. Koteen and Cynthia Crawford Lichtenstein

We concur in the results of the Panel’s decision affirming the results of the remand proceeding. We offer this separate opinion, however, to highlight one point that the majority opinion does not address.

The Designation of Documents as “Privileged” in the Administrative Record

It is troubling that, in the Final Determination and the final results of the remand proceeding, the IA reports all the data in terms of percentages. When the information is presented in comparative or relative—rather than in finite—numbers, it is difficult to interpret what it really means. Certainly, the comparisons are meaningful but they do not always present a complete picture.

For example, paragraph 139 of the remand results states:

The [investigating authority] observed that the volume of the imports of meat in cuts with bone...in which it did determine a margin of dumping increased by 125.4% in comparing the period from June through December 1996 with its similar period in 1995 and that they increased by 38% in comparing the investigated period with a previous comparable period, reaching an increase of 211% in the entire period analyzed.

(Emphasis in original.)

Although these percentages appear to be very large, the question arises: Percentages of what? If the national production were 100,000 tons, it would make a significant difference if the quantity of imports with a margin of dumping were 100, 1,000 10,000 or 100,000 tons. Thus, to understand better what the percentages signify, it would be useful to know the volume and value of imports with a margin of dumping during the investigated period, as well as the volume and value of the national production during the same period.

It thus seemed reasonable that the Panel should be able to examine the relevant documents in the administrative record. Unfortunately, it appears that the IA did not put those documents in the copy of the administrative record that is on file with the Mexican Section of the NAFTA Secretariat. The IA identified those documents as “Privilegiada” in the index to the administrative record. As a consequence, the Panel did not have access to those documents.

Although Rule 41(4) of the Article 1904 Binational Panel Rules (“rules”) provides that privileged information shall not be filed with the Secretariat, except under certain circumstances, the rules also clearly specify distinctions between public information, proprietary information, and privileged information. “Privileged information” is defined in Rule 3, for Mexico, as “(i) information of the investigating authority that is

subject to attorney-client privilege under the laws of Mexico, or (ii) internal communications between officials of the Secretaría de Comercio y Fomento Industrial⁴ in charge of antidumping and countervailing duty investigations or communications between those officials and other government officials, where those communications constitute part of the deliberative process with respect to the final determination. It is possible that the IA classified the documents in question as “Privilegiada” because they are called “Working Papers,” (*see, e.g.*, paragraphs 123, 129, 133, 149, and 163 of the results of the remand proceeding) which could be considered internal communications.

On the other hand, the information that would be useful for understanding the Final Determination is not deliberative in nature. Rather, it is simply the quantity and value of the Bovine Beef under investigation, in the aggregate from all importers, exporters, and producers in the United States of America and in Mexico. At most, it would be an aggregate of all the parties’ proprietary information. “Proprietary information” is defined in Rule 3 as “información confidencial, as defined under article 80 of the Ley de Comercio Exterior and its regulations.” “Información confidencial” is defined in the Ley de Comercio Exterior and articles 147-161 of the Reglamento. The definition includes, among other things, production processes, costs and components, distribution costs, terms and conditions of sale, transaction and product prices, prices of shipping, and price adjustments. In other words, prices and quantities in each transaction would be included. Aggregate numbers would provide the needed information but those numbers are not accessible in the administrative record.

The IA should not withhold valuable information under the label of “Privilegiada.” Unless a document truly contains attorney-client privileged information or communications reflecting discussions among government officials concerning the appropriate methodology or other decisions they must make in the course of reaching a determination in an antidumping or countervailing duty investigation, that document should be available for inspection. If the document contains proprietary information, those individuals who have obtained access under a proprietary information access order should be able to review it. As required by Rule 47, all panelists and their assistants apply for and receive a Proprietary Information Access Order and therefore should be able to examine the “información confidencial.”

Alternatively, aggregate information such as total volume and value of dumped imports might be made publicly available because it is possible that this information reveals no proprietary information. In the future, the investigating authority may wish to consider including such information in the text of the Final Determination or as an attached chart. There is precedent for including this information in the published determinations in other countries. Such a practice would make the Secretary of Economy’s final determinations more transparent and comprehensible.

The above discussion notwithstanding, the Panel did not pursue this information for several reasons. Foremost among them is that the complainants did not raise this

⁴ Now the Secretary of Economy.

particular issue. Because the Panel only reviews issues raised by the participants in the panel review, pursuing this matter could possibly have represented an overstepping of scope of this Panel's authority. At the least, it would have been a failure of the principal of judicial economy. Therefore, the Panel deemed it inappropriate to raise this issue *sua sponte*.

Second, despite the concerns expressed above, there are certain indicators within the data presented that tend to show the impact of the imports that have dumping margins. For example, with respect to meat in cuts with bone, the dumped imports increased from 13% to 31% participation in apparent national consumption (ANC) and 15% to 55% as compared to the national production. Furthermore, price undercutting due to dumping rose from 7% to 17%. (Paragraph 264 of the Remand Results.) As for boneless cuts, although the dumped imports decreased as a percentage of ANC, they registered an increase when compared to the national production, from 199% to 402%. During the investigated period, the national production fell from 31% to 11% of the ANC. (*Id.*, paragraph 265.) The situation is not as clear for boneless cuts as for meat in cuts with bone, which is reflected in the finding of threat of injury for the former and injury for the latter. Nevertheless, these data demonstrate that there was a significant negative effect on the national production from dumped imports of these products. Consequently, there is sufficient support for the IA's findings in its determination on remand.

C. Conclusion

For the foregoing reasons, we concur in the result of the Panel's decision in this Article 1904 Panel Review.

Lisa B. Koteen
Lisa B. Koteen

May 10, 2007.

Cynthia Crawford Lichtenstein
Cynthia Crawford Lichtenstein

May 10, 2007.