



**FINAL DECISION OF THE BINATIONAL PANEL
REGARDING THE DETERMINATION ON REMAND OF THE
INVESTIGATING AUTHORITY**

CASE: MEX-96-1904-02

Review of the Final Determination of the Antidumping Investigation in the matter of Rolled Steel Plate originating in or imported from Canada.

August 3, 1998

PANEL:

D. M. M. Goldie.
W. Roy Hines.
Lucía Reina Antuña.
Rodolfo Terrazas Salgado.
Gustavo Vega Cánovas (Chairman).



IN THE MATTER OF:

The Review of the Final Determination
of the Antidumping Investigation in the
matter of Rolled Steel Plate originating
in or importer from Canada.

This is a courtesy translation and in
the event there are any differences
between the Spanish and English
texts, the Spanish text governs.

All footnotes references are in the
Spanish text

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Binational Panel's Decision
on the Determination on Remand of the Investigating Authority
related to the Review of the Final Determination of the
***Antidumping* Investigation of the Rolled Steel Plate Imports**
originating in and coming from Canada
Case MEX-96-1904-02

I. Background

1. On December 17, 1997, this Binational Panel issued its Final Decision in the procedure cited above. In it, the Panel remanded the case to the Investigating Authority ("IA") and ordered it to comply, within a period not longer than 60 days, with various requirements related to specific injury and dumping issues of the Final Determination of December 28, 1995.

2. On January 20, 1998, the IA notified to the interested parties the methodology employed to calculate the new dumping margin and the injury analysis, giving them as a deadline January 28, 1998, to present their comments. On the latter date, Altos Hornos de México, S.A. of C.V. (“AHMSA”) and HYLSA, S.A. of C.V. (“HYLSA”) (the “Requestants”), appeared and claimed to the IA that it should reconsider the methodology to be employed, in order to establish a reconstructed value based on section II of Article 31 of the the *Ley de Comercio Exterior* (Foreign Trade Law, “FTL”), to take into account the costs and expenses involved in the transportation and introduction of merchandise from Canada into the United States and the general expenses incurred in that country. They also requested it to determine a residual *antidumping duty* for the rest of the exporting Canadian companies, applying Article 54 of the FTL. HYLSA also requested that the IA should use financial information that supported and confirmed TITAN’s reported profit margins.

3. In a written note presented on January 29, 1998 The Titan Industrial Corporation (“TITAN”, or the “Complainant”) stated, among other things, that the IA had wrongly interpreted Article 31 of the FTL relative to the calculation of the normal value and further alleged that the IA was obliged to carry out a verification, visit to obtain acquisition costs by virtue of the mistakes that the IA recognized it

had made with respect to the Complainant. Dofasco Inc., Algoma, Stelco and Hubbell International Trading Company did not present any comments.

4. On February 16, 1998, the IA issued its Determination on Remand (“DR”) and the Modified Determination, which were published on the 20th of that month in the *Diario Oficial de la Federación* (Official Gazette of the Federation, “DOF”).

5. On February 23, 1998, the IA provided the Mexican Section of the Secretariat of the North American Free Trade Agreement (the “Secretariat”) the Complementary Remand File and its corresponding Index. On the same day, TITAN presented an Incidental Motion requesting this Panel to order the IA to issue a determination that would eliminate the legal effects of the DR and the Modified Determination published in the DOF.

6. On March 4, 1998, the IA presented its answer to TITAN’s Incidental Motion, arguing its inapplicability since its acts had been strictly based upon applicable legal dispositions.

7. On March 16, 1998, TITAN, DOFASCO Inc., ALGOMA and STELCO (the “Complainants”) presented a written note challenging the DR and the Modified Determination.

8. On April 2, 1998, HYLSA presented its answer to the Complainants’ challenge to the IA’s DR and Modified Determination.

9. On April 6, 1998, the IA and AHMSA presented their answer to the Complainants’ challenge to the DR and to the Modified Determination.

10. On April 13, 1998, without being required by any party or this Panel, the IA provided the Secretariat with two *diskettes* containing confidential information, and two containing public information, corresponding to Annexes 2A and 4A of TITAN’s questionnaire, which had not been previously physically found within the respective Volume XIV (confidential version), even though they appeared in the Index of the Administrative Record (“AR”) .

11. On April 15, 1998, the Panel issued an Order requiring the IA to provide it with information classified as privileged within 24 hours starting after the issuance of that Order.

12. On April 16, 1998, the Panel issued an Order to hold an *In-camera* Hearing, which took place on the 24th of the same month at El Colegio de México, A.C., and in which only the counsels of record of the IA and the Complainants, Lawyers Juan Carlos Arreola and Francisco Fuentes Ostos, respectively, participated since they had access to confidential information according to Rule 69 of the Rules of Procedure of Article 1904 of the North American Free Trade Agreement (the “Rules of Procedure”).

13. On April 20, 1998, the Panel issued an Order dismissing the Incidental Motion presented by TITAN on February 23rd, after deciding that the publication of the DR and the Modified Determination in the DOF neither caused any prejudice to the Complainant, nor left it in state of legal defencelessness.

14. On May 15, 1998, the Panel issued an Order that extended the date of issuance of its Decision on the DR until September 4, 1998. This extension was due to the fact that the Panel found it necessary to request information that

the IA classified as “privileged” and to order an *in camera* Hearing to clarify various doubts regarding the confidential information included in the AR.

II. Scope of this Decision

15. To the extent that the parties taking part in the *in camera* Hearing made new arguments and provided additional evidence in contravention of the Panel’s Order when it called the Hearing, this Decision on Remand dismisses these new arguments and evidence and relies exclusively on issues specifically raised in TITAN’s challenge and in the IA’s and the Requestants’ answer to it.

III. Issues outlined by TITAN

1. Normal Value and Reconstructed Value

16. The Complainant TITAN, in its Response to the IA of January 11, 1994, indicated that, since none of the sales of the investigated product were made in the country of origin, the criteria to be applied for the calculation of the normal value was the price for export to a third country, as provided for in Article 43 of the Regulation of the FTL (the “Regulations”). At the same time, TITAN

stated the following concerning the application of the criteria of the reconstructed value:

“It is very important to recall that the activities of TITAN consist of trading commodities like those which are object of investigation under the Resolution. Therefore, their cost is the price paid to acquire the rolled steel plate from the producers.

In conclusion, to determine the normal value of TITAN’s operations, according to the second paragraph of Article 31 of the Law, the Authority must apply, in successive order, ‘(i) the comparable price of an identical or similar merchandise, exported from the country of origin to a third country in the course of normal commercial operations, or (ii) the reconstructed value in the country of origin’. In the case of TITAN, the reconstructed value must be the purchase price of rolled steel plate.”¹

2. Verification Visits

17. Since the IA recognized that it made mistakes during the process with respect to TITAN’s information and calculations, including the corporate relationship between TITAN and DOFASCO Inc.,² the Complainant requested a verification visit be made to its facilities in order to determine its production cost.

¹ Answer of TITAN to the Investigating Authority of January 11, 1998, p. 4, and Challenge of TITAN to the Determination on Remand of the Investigating Authority of March 13, 1998, p. 8.

² The Investigating Authority had considered the independent trading company TITAN as a sales department of DOFASCO.

18. In the same response, TITAN argued that the company was profitable during the period of 1987 to 1991, as shown in paragraph 3.14 of the Questionnaire annexed to TITAN's Response.

19. Based on the foregoing, TITAN argues that if the IA did not carry out a verification visit, it would not only violate the terms of the Panel's Order, but would also leave the Complainant in a state of legal defencelessness. It also claimed that it would result in discriminatory treatment since during the investigations the IA carried out verification visits to other exporters, as shown in paragraphs 35 and 36 of the Final Determination.³

3. Injury

20. In its Challenge to the DR of the IA, TITAN indicated that approximately 3,000 tons of rolled steel plate of Canadian origin exported to Mexico during the period of investigation were of the type known commercially as "second-class quality".⁴

³ Pages 3 and 4 of the Comments of TITAN to the Methodology Employed by the Investigating Authority, January 28, 1998; and pages 9 and 10 of the Challenge of TITAN to the Determination on Remand and the Modified determination of the Investigating Authority of March 13, 1998.

21. In that same Challenge, TITAN indicated that, according to the records of the other Canadian companies, only 3,497 tons of rolled steel plate originating in Canada were exported to Mexico in 1992, in addition to the 3,000 tons exported by TITAN. Furthermore, at paragraph 31 (M) of the Final Determination it is stated that contracts provided by AHMSA showed that this company imported 936 tons of steel plate (representing 0.8% of the total) and not 611 tons (which represent 0.6% of the total), which contradicts the data set out in paragraph 509 of the Final Determination. Also, the Complainant noted that the *Sistema de Información Comercial de México* (Commercial Information System of México, "SIC-M") could have wrongly registered Canadian hot rolled steel sheet imports in 1992 as rolled plate, since the officers that recorded the numbers were not given an explanation of the specification of products that TITAN made in handwriting on the invoices annexed to the Questionnaire that it delivered to the IA.⁵

22. Based on the foregoing TITAN requested the IA to consider whether imports originating in Canada represented less than 3% of the total of imports during the period of investigation to determine if the de minimus rule was applicable and whether they caused injury to domestic production, according to

⁴ Challenge to the Determination on Remand of the Investigating Authority of March 13, 1998, p. 12.

⁵ *Ibid.*, pp. 12-14.

Articles 3.3 and 5.8 of the Agreement relative to the Application of Article VI of the General Agreement on Tariffs and Trade (“GATT”) of 1994.⁶

IV. Issues Outlined by the Investigating Authority

1. Normal Value and Reconstructed Value

23. The IA stated that the answers of TITAN to the Questionnaire annexed to its Response of January 11, 1994, showed that TITAN exported to Mexico merchandise classified in three product codes under tariff items 7208.10.02, 7208.25.99 and 7208.37.01 (which correspond to widths between 4.75 and 10 mm) based on what TITAN had stated in its accounting for its products under codes HRC2, HRC2PUP and HRC3, as indicated in the file PL4ABC.XLS of one of the *diskettes* annexed by TITAN to the above mentioned Questionnaire.

24. The IA stated in its DR of February 16, 1998, that TITAN did not make any sales in the internal market of the country of origin of the product

⁶ See page 4 of the Comments of TITAN to the Methodology Employed by the Investigating Authority, January 28, 1998; and pages 14 and 15 of the Challenge of TITAN to the Determination on Remand of the Investigating Authority of March 13, 1998.

exported to Mexico. Therefore the IA could not use the option of normal value described in Articles 31 (1) of the FTL and GATT Article VI.⁷

25. Based on TITAN's export sales to two different markets other than Mexico, the IA selected the market in which it observed the highest price for one of the product codes,⁸ in order to determine the normal value, in accordance with Article 31 (2) (1) of the FTL and Article 2.4 of the Agreement relative to the Application of GATT Article VI. This market met the criteria provided for in Article 42 of the Regulations.⁹

26. According to Article 32 (2) of the FTL, the IA stated that it excluded from its calculation all sales at a loss, that is, those with lower prices than the total production cost. After doing this, the IA found that all the prices turned out to be lower than the production cost, and therefore it dismissed the normal value based on the option described in Article 31 (1) of the FTL.¹⁰

⁷ Determination on Remand paragraph 25, p. 9.

⁸ Ibid. paragraph 26, p. 9. The IA points out that the sales to two different third countries only show one of the three product codes exported by the company, HRC2, to be specific, according to file PLA2BC.XLS, of the *diskettes* annexed to the Questionnaire of the Answer of TITAN of January 11, 1994.

⁹ Ibid. paragraph 26, pp. 8 and 9.

¹⁰ Ibid. paragraphs 27 and 28, p.10.

27. The IA stated that, due to the fact that the AR did not have information on production costs specifically assigned to each one of the product codes exported to Mexico, it determined an applicable reconstructed value for the three product codes, defined as the sum of the production cost, general expenses and a profit margin.¹¹

28. The IA recognized that for a trading company, the acquisition cost should be substituted for the production cost. Nevertheless, since TITAN did not provide information related to its acquisition costs, the IA, based on Articles 54 of the FTL and 6.8 of the Agreement relative to the Application of GATT Article VI, took the estimated reconstructed value as the one which complied with the normal commercial operations criteria for the investigation in question. The estimate of the reconstructed value came from the study carried out by a specialized consultancy firm, as indicated in paragraphs 46 to 51 of the Determination of the Initiation of the Investigation. The IA did not consider general expenses in its calculations of the reconstructed value, even though it did take into account the profit margins presented by TITAN. Thus, it adjusted a profit margin to the reconstructed value by means of a simple average of the profits of the company.¹²

¹¹ Ibid.Paragraph 29 and 30, p. 10.

29. Based on Article 32 (1) of the Regulations, the IA determined a *dumping* margin applicable to the product under investigation by calculating a weighted average of the individual margins for each of the product codes exported to Mexico. In doing so, the weighting used reflected the relative participation of the exported volume of each product code in the total volume exported to Mexico.¹³

30. In accordance with the foregoing, the IA determined, based on Article 40 of the FTL and on the comparison of average normal values for rolled steel plate exports originating in Canada, a *dumping* margin of 108% for TITAN. At the same time based on Articles 54 of the FTL and 6.8 of the Agreement related to the Application of GATT Article VI, and based on the information contained in the AR of the case, the IA proceeded to apply the highest *dumping* margin found in the investigation for the other Canadian exporters, which was 108%.

¹² Ibid. Paragraphs 31 to 35, pp. 11 and 12.

¹³ Ibid. Paragraph 37, p. 12.

2. Verification Visits

31. In the *In-camera* Hearing of April 24, 1998, the counsel of record of the IA reiterated to the Panel that a verification visit can only be made to verify information and evidence that had been presented in the course of an antidumping investigation. In this instance, TITAN had not provided its acquisition costs.

3. Injury

32. In compliance with the Order in the Panel's Decision of December 17, 1997, the IA proceeded to determine whether TITAN had been the only exporter to Mexico of rolled steel plate of Canadian origin in 1992, and to establish the volume of such exports.¹⁴

33. Based on the information concerning the thickness of the laminates and plates in TITAN's invoices, the IA verified that these included products that were not part of this procedure.¹⁵ Because of this and of the response of the

¹⁴ Ibid. Paragraph 40, p. 13.

¹⁵ Ibid. Paragraph 40 a), p. 13. The IA indicates that the investigated product corresponded exclusively to plate thickness between 4.75 and 10 mm, according to the Tariff of the General Import Tax Law (*Tarifa de la Ley del Impuesto General de Importación*). The product with a lower thickness to 4.75 mm corresponds to hot rolled steel sheet, subject of another procedure.

company, the IA confirmed that TITAN exported approximately 3000 tons of rolled steel plate of Canadian origin to Mexico.¹⁶ Nevertheless, the SIC-M registered 14,291 tons of plate imports originating in Canada during 1992.¹⁷

34. The IA stated that, according to TITAN's invoices, this company exported to five Mexican companies, while the Requesting List by Company of the SIC-M registered nine companies¹⁸ as importers of the investigated product originating in Canada. Based on the above, the IA concluded that during the investigation period, other companies, in addition to TITAN, made direct or indirect exports to Mexico of Canadian rolled steel plate. Therefore, the evidence supported the conclusion that there is no coincidence between the volume of exports made by TITAN and total imports of this product originating in Canada.

35. Based on the foregoing, the IA concluded that TITAN was not the only exporter of Canadian rolled steel plate. The IA proceeded to evaluate whether total imports originating in Canada,¹⁹ including those of TITAN, were significant for accumulation purposes, and concluded that these imports were

¹⁶ Ibid. Paragraph 40 4), p. 14. Of them, only 6% correspond to products of second-class quality.

¹⁷ Ibid. Paragraph 40 e), p. 14. The Investigating Authority indicates that of this volume, 4% corresponded to products imported by AHMSA (611 tons), therefore the total volume of the investigated imports originating in Canada ascended to 13680 metric tons.

¹⁸ Ibid. Paragraph 40 f), p. 14. Including AHMSA.

significant.²⁰ Accordingly, the Authority proceeded to evaluate cumulatively the effects of imports of products of Canada with those originating in Brazil, the United States and Venezuela, to determine if they caused injury to domestic production.

V. Considerations of the Panel

1. Issues concerning TITAN

36. This Panel considers that, in order to adequately solve the issues outlined with respect to the determination of a specific *dumping* margin for TITAN, it is necessary to take into account the following considerations.

37. It is important to emphasize that Chapter XIX of the North American Free Trade Agreement (“NAFTA”) refers to two different procedures to which different legal rules apply. The first is the administrative procedure carried out by the IA, which is governed by Mexican law and, in particular, by the *antidumping* legislation of Mexico. The second is the review procedure carried out before the

¹⁹ Ibid. Paragraph 47, p. 16. Including TITAN

²⁰ Ibid. Paragraph 47, p. 16. For being accomplished in 10 months, registering an increase of 13% per year with respect to the previous one, and representing 14% of total imports and 4% of the apparent national consumption, in addition to the fact that a significant undervaluation in the prices of those imports prices was registered 8% below national prices.

Panel to determine if the IA complied with the *antidumping* legislation cited. This second procedure, as well as the powers of the Panel and the decisions that it can issue are first governed by NAFTA and the Rules of Procedure –which are also part of Mexican internal law -- and then by other rules of Mexican law to which they make reference or are applicable by analogy. (Rule 2 of the Rules of Procedure).

38. Consequently, it is important not to confuse the law that the Panel must apply to judge the legality of the resolutions issued by the IA, with the jurisdiction rules and the procedure applicable to its acts. However, the Panel must interpret and harmonize the two which must be done based on the objectives and legal groundings of the system.

39. In this case, the Panel considers that TITAN has presented a procedural and substantive defence derived from this review,²¹ since the issue is to effectively fulfill the Order of the Panel contained in its Final Decision of December 17, 1997. This issue is governed by NAFTA Chapter XIX and its Rules of Procedure. In particular, this Panel finds that Rules 2, 7(b) and 73 (1) (2) (a) (b) (c) are applicable.

²¹ According to Rule 7(b) of the Rules of Procedure.

40. In this regard, Rule 2 of the Rules of Procedure establishes that

“...the purpose of these Rules is to assure the *fair*, fast and economic review of definitive resolutions”. (emphasis added).

On the other hand, the jurisdiction of the Panel to review the procedural and substantive means of defense invoked in the review before it are derived from Rule 7(b) of the Rules of Procedure.

41. TITAN alleges that the IA, upon recognizing the mistake of confusing the company with the sales department of DOFASCO during the investigation, violated Articles 31 section II and 43 of the FTL, and having been granted by this Panel the opportunity of correcting its mistake, the IA was obliged:

“[...] to carry out an inspection to TITAN's premises in order to determine its acquisition costs”.²²

Otherwise, the Complainant states that it would remain in a state of “legal defencelessness”, and that the IA:

“would not comply with what this Panel ordered with respect to revising those mistakes in order to assure a fair, speedy and inexpensive review”.²³

²² Challenge of the Complainants to both the Determination on Remand and the Modified determination of the IA of March 13, 1998, p. 8.

²³ See the Challenge to both the Determination on Remand and of the Modified Determination of the IA presented by the Complainants, March 13, 1998 p. 10.

42. The IA, on the other hand, alleges that it did not carry out the requested visit, first, because it was not obliged to do so by the law since verification visits are discretionary; second, because the IA could not verify the acquisition costs of TITAN:

“[...] since they were not provided by this company in the course of the investigation and therefore do not form part of the Administrative Record [...]”²⁴

and, finally, because carrying out that visit would re-open the case, thus violating the Order of this Panel. To do so would be:

“[...] unfair for the other parties in the investigation to permit it that new information is presented”.²⁵

43. In this regard, this Panel recognises that the FTL provides that carrying out inspections during an *antidumping* investigation is in fact a discretionary power of the IA. As Article 83 of the FTL provides “the Ministry **may** (emphasis added) verify the information and evidence presented in the course of

²⁴ See the Response of the IA to the Challenge presented by the Complainants both to the Determination on Remand and the Modified Determination of April 6, 1998, pp. 16-17

²⁵ Ibid.

the investigation. To do so it **may** (emphasis added) order in writing **carrying out visits** (emphasis added) at the fiscal domicile, establishment or place where the corresponding information is located...”

44 However, it is important to emphasize that TITAN, from its first intervention in this *antidumping* investigation, and specifically in answering the official questionnaire submitted to it by the IA, always claimed the mistake of being considered a sales department of DOFASCO, and, consequently, of not determining a specific *dumping* margin for it as an independent company.

45. Nonetheless, the IA, during the rest of the *antidumping* investigation, did not make any attempt to verify the information that TITAN delivered to it in its response to the official questionnaire, even though it verified data provided by other companies in the course of the investigation. This omission to verify TITAN's information was due to the fact that the IA continued to consider it as a sales department of DOFASCO.²⁶

46. The result of all of the above was a Final Determination that established a *dumping* margin:

“[...] for rolled steel plate imports originating from any exporting company in Canada of 31.08 percent”.

This 31.08% margin was also applied to TITAN, by virtue of the fact that it was not treated as an independent trading company.

47. Once the review process before this Panel had begun, the IA admitted that it had made a mistake by not establishing a specific *dumping* margin for TITAN, and because of this it requested this Panel to remand the record in order to amend its mistake, without clearly establishing the nature of the mistake, nor how it would amend it.

48. It is important to emphasize that this Panel acceded to the request of the IA, because in its Response to the claims of TITAN, it stated that it could determine a specific *dumping* margin for this firm:

“[...] based on the information that is available in the Administrative Record”.²⁷

Also, during the Public Hearing, the IA reiterated that it had the elements necessary to make the calculation.²⁸ In this connection the FTL and Article 47 of

²⁶ See Final Determination published in the DOF December 28, 1995. page 92

²⁷ See the Brief of the IA, July 26, 1996, pp. 86-87.

its Regulations are very clear and specific in the sense that the normal value of imported goods from an independent trading company must be based on its acquisition costs plus the appropriate adjustments.

49. In the end, the statement of the IA was wrong, since the AR did not include TITAN's acquisition costs, which were indispensable factors in determining normal value, once it was established that TITAN was an independent trading company. Consequently, the DR and the Modified Determination of the IA were based on normal values derived from production cost information that had been provided by the Requestants, plus a minor modification that incorporated a profit margin.

50. As a result of the foregoing, the DR of the IA resulted in a margin of 108% for TITAN, which was reached by substituting the average export price of TITAN in 1992 for the average export price of all Canadian producers on sales to Mexico in 1992. This margin was determined after the IA verified that the options of normal value based on domestic market sales and export prices to third countries were not applicable.²⁹

²⁸ See Transcription of the Public Hearing, Spanish version, p. 79, second paragraph.

51. The fundamental issue for this Panel is whether the DR and the Modified Determination of the IA are consistent with its Order contained in the Final Decision of December 17, 1997. The answer, in the Panel's view, is no for the following reasons.

52. It is clear that the IA did not have the necessary elements to establish a specific margin for Titan because it did not have its acquisition costs.

53. Consequently, the IA, while not having the acquisition costs of TITAN, proceeded to use the information on export prices³⁰ provided by that company and compared these to the normal value which was based on information on the reconstructed value provided by the Requestants. It is worth emphasizing that TITAN's export price data, which was available to the IA had been specifically rejected in the Preliminary Determination as being insufficient.³¹ One possible alternative remaining to the IA in terms of establishing a normal value was to supplement the AR and obtain TITAN's acquisition costs. In fact, TITAN requested the IA to acquire the costs by means of a verification visit, as can be seen in its Response of January 28, 1998 to the IA's Memorandum of

²⁹ Paragraph 26, 27 and 28 of the IA's DR, pp. 8 - 10.

³⁰ This data was included in the *diskettes* that were delivered to the Panel out of time and a week before the *In-camera* Hearing and thus had not previously been available to the Panel. See paragraphs 10 and 55 of this Decision.

³¹ See paragraph 119 of the Preliminary Determination, published in the DOF on April 18, 1995.

January 20, concerning the methodology to be used to calculate the specific *dumping* margin for TITAN and the other exporters.

54. The IA alleges that it decided not to carry out the requested visit for two fundamental reasons: First, because this Panel clearly ordered the IA to limit its search to the AR. Second, because the IA can only verify the information and evidence that has been presented in the course of the antidumping investigation, otherwise the case would be reopened.

55. Regarding the first argument of the IA, it is clear that the IA never felt itself restrained by the order of this Panel to limit its search to the AR since it is a fact that the IA augmented the AR when it provided the Panel with diskettes a week before the *in-camera* hearing which it had used in making the DR. These diskettes should have been included in the AR as part of the response to the questionnaires that TITAN presented on January 11, 1994, (which were recorded as VC 0178, Volume XIV, of the Administrative Record Index, in its confidential

version). Nevertheless, they were added to the file one week before the *In Camera* hearing. On the other hand, it is a fact that the Panel in its Order clearly contemplated the possibility that the IA could supplement the AR which is evident from reading the paragraph of the Panel's Order regarding the Complainants which is as follows:

“3 REGARDING THE COMPLAINANTS

If the Investigating Authority supplements the administrative record (emphasis added) on remand and the Complainants wish to challenge the Determination on remand pursuant to Rule 73 (2) (b) of the Rules of Procedure, the Complainants may do so ...”³²

56. Regarding the second argument of the IA that it could only verify the information that had been presented during the course of the antidumping investigation, it is important to note that the recognition of a mistake by the IA which implied a host of deficiencies in its treatment of TITAN as well as the possibility of correcting them, obliged the IA to make all the necessary efforts to correct its mistake, and, it is clear, in the opinion of this Panel, that the correction could not be achieved by evaluating the limited information that the IA itself had previously rejected for being insufficient. Moreover, the evaluation of insufficient information resulted in a new Final Determination by the IA in which Titan remained in fact and law without the right to defend itself. In the opinion of the Panel, this clearly violates Rule 2 of the Rules of Procedure and a fundamental

³² Final Decision of the Panel, December 17, 1987, page 88

principle of law that requires due process, all of which leads this Panel to declare the DR of the IA illegal in the section that imposes a new margin of discrimination of prices for TITAN.

A. Implications of the illegality of the new margin of price discrimination fixed for TITAN

57. As its Final Decision of December 17, 1997, established, this Panel **does not** possess jurisdiction to **nullify** any part of the Final Determination, the DR of the IA or the Modified Determination by the IA, according to NAFTA Article 1904. As NAFTA Article 1904 (8) establishes, this Panel is only authorised to confirm those resolutions and Determination on Remands, or to remand them to the IA for it to adopt measures that are not incompatible with the Decision of the Panel.

58. By virtue of what was previously argued, this Panel declares the part of the DR and the Modified Determination where a 108% *dumping* margin for TITAN is determined **illegal**, based on sections II and IV of Article 238 of the *Código Fiscal de la Federación* (Fiscal Code of the Federation, “CFF”), and

orders the IA not to give any legal effect to them. The Panel considers illegal this part of the DR and the modified Determination by virtue of the fact that the IA, upon calculating the new margin used information which had been previously rejected by the IA after considering it insufficient. Further, by denying TITAN the opportunity to provide its acquisition costs, the IA denied this company due process, a fundamental principle of law.

59. The Panel is of the view that it would be consistent with the Panel's decision for the IA, on remand, to offer TITAN the opportunity to provide additional relevant evidence, including acquisition costs, as an independent trading company and taking this into account, to make a new decision based on that evidence. The IA may, in the alternative, take any other action permitted by applicable law. The Panel is of the view that grouping TITAN with "all other exporters" (or taking other actions which prejudices TITAN's right to offer relevant information and evidence) would not be consistent with this Order of the Panel.

2. Issues with respect to other Canadian exporters

60. In its Decision dated December 17, 1997, the Panel remanded the Final Determination for action by the Investigating Authority so that it might issue

a new Final Determination which, among other things, would reassess the countrywide price discrimination margin against Canadian exporters other than TITAN. In response to this Order, the Investigating Authority stated the following in the DR:

“By virtue that it has been demonstrated in this Determination that there are exports of Canadian origin which were not identifiable, according to articles 54 of the Law of Foreign Trade and 6.8 of the Agreement relating to the Application of Article VI of the GATT, and based on the information found in the Administrative Record of the case, in particular the highest margin of price discrimination found in the present investigation, SECOFI concluded that the exports made by the other Canadian companies were carried out with a price discrimination margin of 108%.³³”

61. Before stating the Panel’s conclusions in this matter, it is important to examine the factors that led the Panel to order the IA to reconsider the dumping margin that it had established in the Final Determination for these exporters. In the Final Determination, the injury analysis provided by the IA as being attributable to the steel plate imports originating in Canada was based on the assumption that all of these imports, with the exception of those exported by ALGOMA to AHMSA, were dumped³⁴ and, when accumulated with the imports from the other countries involved in the investigation, caused injury to the domestic industry.

³³ See paragraph 53 (B) of the Determination on Remand by the IA.

³⁴ Transcript of the Public Hearing, page 68

62. The Panel's December 17th Decision was based on its conclusion, after examining the Administrative Record that, except for the exports by ALGOMA to AHMSA, there was no evidence that the three Canadian primary steel producers, ALGOMA, STELCO or DOFASCO, had exported rolled steel plate directly to Mexico in 1992 and that TITAN was the only supplier of steel plate from Canada to Mexico in that year.

63. As stated in its Order the Panel concluded that the Investigating Authority "complied with all of the provisions related to procedures regarding notifications in this investigation"³⁵. Specifically, the Investigating Authority, in accordance with Article 53 of the FTL, notified the interested parties of which it had knowledge (emphasis added) of the initiation of the antidumping investigation and published a notice to this effect in the DOF. In this particular case, however, it appears that none of the interested parties that had been notified, other than TITAN, was exporting the product to Mexico. This may explain to some extent why the Investigating Authority did not receive any information concerning normal values and export prices in the Canadian market directly from the exporters. In other words, this may have been a case of ignorance, which of course is no excuse, rather than a deliberate attempt not to cooperate with the IA. In the absence of information from the exporters, the Investigating Authority relied on the "available information", as provided for in Article 54 of the FTL, and based its Final Determination margin of 31.08% on the information submitted to it by the

³⁵ See first paragraph of page 57 of the Final Decision of the Panel dated December 17, 1997

domestic Requestants and the average prices of all imports from Canada during 1992.³⁶

64. The IA, after recognizing its mistake of not establishing a specific margin for TITAN, requested the Panel to remand the Final Determination in order to correct this mistake. At the same time, it sought the Panel's concurrence with all other aspects of the Final Determination. That is, the IA requested the Panel, among other things, to confirm the 31.08% dumping margin that had been established for Canadian exporters other than TITAN in the Final Determination.

65 The Panel, in authorizing the IA to correct its mistake, decided that the IA should also review the general margin for all of Canada since it had never found any precise information and evidence in the AR that enabled it to evaluate the 31.08% margin that had been applied to the other exporters. In this connection, the Panel found that the AR indicated that the only exporter of Canadian subject goods in 1992 was TITAN for the reasons set out below.

66. First, the IA, in its Final Determination as well as in its briefs and at the public hearing, stated that the evidence in the AR showed that TITAN

³⁶ See Paragraph 114 of the Final Determination published in the DOF on December 28, 1995

exported to Mexico approximately 3,000 tons of the subject goods while the SIC-M indicated that 14,291 tons had been imported from Canada in 1992. The IA also noted that the Requesting List by Company of the SIC-M showed that TITAN was not the only Canadian exporter to Mexico in that year.³⁷ According to the IA, this list, as well as the SIC-M data, was included in the confidential version of the AR's Injury Annex. However, the Panel never found this information in the AR nor did it find any other evidence to support the claim that other Canadian exporters were shipping steel plate to Mexico.

67. Second, in reviewing the confidential version of the Injury Annex in the AR the Panel found a paper containing a table in which the SIC-M information was summarized and confirmed that 1992 exports from Canada amounted to 14,291 metric tons of rolled plate originating in Canada. This table, however, only indicated the total volume of imports from Canada and made no reference to the exporting or importing companies involved. Because of the difficulty encountered by the Panel in trying to identify the parties involved in these transactions, the Panel on September 17, 1997 attempted to clarify the matter by requesting access to documents previously classified as privileged information. This did not yield any data to confirm that exporters other than TITAN were involved.

³⁷ This statement was also made by the IA in paragraph 509 of its Final Determination

68. Third, the Panel, on reviewing TITAN's invoices which had been provided with its response to the questionnaire, discovered that the volume of TITAN's rolled steel plate exports to Mexico and the total of all imports attributed to Canada by the SIC-M was surprisingly similar. In the circumstances, the Panel could only conclude that TITAN was the sole exporting company of the subject goods involved.

69. Given the foregoing, the Panel decided to order the IA to review the general margin that it had established for Canadian exporters other than TITAN and as the IA did not establish acceptable volume and value calculations for this firm, it appears to the Panel that all calculations relating to imports of rolled steel plate from Canada are also suspect. In this regard, it is relevant to clarify that the Panel never intended to claim powers that did not correspond to it, according to what the IA in its DR states. In reality, the Panel's appreciation derived from incorrect classification of the information contained in the AR in its confidential version as well as of the nonfulfillment by the IA of the specific orders of this Panel, which requested it to identify the location of the evidence which supported its conclusions in the AR. It is worth noting that this Panel decision was a direct

result of the frustration experienced by the Panel in attempting to locate the relevant information in the AR on which it had to decide the principal issues in litigation and led to the Order of December 17, 1997 to require the IA to definitively establish the volume of rolled plate attributable to TITAN in 1992 and to:

“[...] base its conclusions [...] identifying the relevant parts of the AR and indicating the evidence which supports them.”³⁸

70. In response to the Panel's Order, the IA, in the DR, confirmed that TITAN had only exported 3,000 tons of the subject goods in 1992 and that the SIC-M showed that Canadian exports totalled 14,291 tons. Moreover, the IA's analysis revealed that TITAN exported to only five Mexican companies whereas the Requesting List by Company of the SIC-M showed nine importers, including AHMSA. This information led the IA to conclude that

“[...] during the investigation, other companies in addition to TITAN [...] accomplished direct or indirect exports of rolled steel plate originating in Canada to Mexico.”³⁹

Consequently, there was no coincidence between the volume of TITAN's exports and total export volumes from all Canadian sources and thus, the Panel's presumption in its Order was groundless. It should be noted that in order for the

³⁸ See Paragraph F) of the Order of this Panel regarding Titan in its Final Decision of December 17, 1997.

IA to draw the above conclusions, once again the IA referred to the evidence found in the Injury Annex.

71. As a result of the foregoing, and taking into account that there were unidentified exports that originated in Canada, the IA concluded in its DR that a new dumping margin of 108%, the same rate as it had established for TITAN, should be applied to all other exporters of the subject goods from Canada.

72. The Panel, in studying the DR and noting that the IA had not complied with its Order **to identify the relevant parts of the AR and indicate the evidence which supported their conclusions**, decided once more to request the IA to provide certain privileged documents in an effort to establish whether TITAN was the sole exporter involved. This was not successful and led the Panel to the decision that it was necessary to carry out an *in camera* Hearing to clarify its doubts relating to the confidential information and evidence that supported the conclusions of the IA.

³⁹ Determination on Remand and the Modified Determination, paragraph 41, page 14

73. In this connection, it should be noted again that it was precisely only one week before this hearing that the IA finally submitted to the Panel the diskettes containing crucial information respecting TITAN'S export prices and the calculations made by the IA in determining the *new dumping* margin for TITAN.

74. As a result of the hearing and specific questions posed by Panel members, the Panel was finally able to substantiate some of the assertions of the IA and identify the evidence and information with which the IA arrived at its conclusions in the DR. In particular, it was not until the Panel's *in camera* Hearing that the IA showed to the Panel SIC-M's list of requests by firms which had been wrongly classified in the AR and located in a different volume to which it had been classified in the corresponding Index. As a result, the Panel was able to understand the evidence on which the IA arrived at its first 31.08% dumping margin as well as the second margin of 108%. It is important to emphasize that in order to understand the logic for the second margin of price discrimination, i.e. the 108% margin, it was crucial for the Panel to review the information that was contained in the diskettes that were added to the AR one week before the *in camera hearing* by the IA.

75. It could be argued that it is an obligation on a Panel to make a detailed and specific search of the AR and the fact that the Panel did not find all the relevant information was its responsibility. This Panel respectfully disagrees with this view and takes the position that a Binational Panel cannot be expected to make an exhaustive search of the AR given the nature of the composition of Panels, the different mother tongue of Panel members and the time frames within which they are expected to carry out their reviews. The work of a Panel must be facilitated and assisted by the interested parties and this was clearly recognized by the NAFTA Parties in negotiating Rule 59 of the Rules of Procedure which places a responsibility on interested parties to identify references to evidence in the AR by:

[...] page and, where practicable, by line.”

In this context, the lack of citations and references by the IA to evidence in the AR, in its Briefs and in its presentations in the public hearing, as well as in the DR, were clearly in violation of this Rule.

76. Based on all of the foregoing the central issue for decision by the Panel is whether the new margin of 108% established by the IA for Canadian exporters of the subject goods other than TITAN is consistent with the Order of

the Panel of December 17, 1997 and the applicable legislation. The Panel has concluded that the new margin is not appropriate and that it has no legal effect for the following reasons.

77. In its DR and the Modified Determination, the Investigating Authority established a price discrimination margin of 108% for imports from TITAN and extended this decision to apply to imports from all other Canadian companies. In other words, the Investigating Authority applied the highest margin of price discrimination found in the investigation even though the margin established in the Final Determination, which was based on the information available at that time, was set at 31.08% for all Canadian exporters. At paragraph 39 of the DR the IA referred to Article 54 of the FTL and Article 6.8 of the GATT Antidumping Code as justification for its treatment of the Canadian exporters other than TITAN. The Panel notes that these Articles permit the IA to rely on the available information (emphasis added) in the AR to make its determination but they do not authorize the application of the “highest price discrimination margin found in the investigation” to be applied to all exporters.

78. The process followed by the Investigating Authority in this instance does not appear to the Panel to be either consistent with the requirements of the Mexican law or the GATT Antidumping Agreement. As indicated in paragraph 50

above, the new margin for TITAN was established by substituting its average export price for the average export price of all Canadian exporting firms during 1992 i.e. the figure previously used by the IA to establish the margin of 31.08%. In this connection, it is relevant to note that the margin of price discrimination established for TITAN is a direct reflection of that firm's sales prices. These, of course, may be substantially different from the actual selling prices of the other exporters, i.e. the pricing information that had to have been available to the IA in order for it to establish the 31.08% margin in the Final Determination.

79. The treatment of Canadian exporters other than TITAN is particularly important in this case since their exports of subject goods (some 11,291 metric tons) constitutes 79% of the total exports involved. Counsel for the IA advised the Panel that the reason why the TITAN margin was extended to all Canadian firms in the DR was to ensure that these firms were not rewarded for their lack of participation in the investigation.

80. In the Panel's view, given our decision relating to this firm, and according to Article 40 of the Regulations, TITAN'S volumes and values should no longer be taken into account in calculating a margin for the "other" exporters. In other words, lacking specific data from the "Other" Canadian exporters, the

Investigating Authority must rely on the data available to it in the Administrative Record to determine a rate of price discrimination for the unknown Canadian exporters. In our opinion, the “ available information “ should be the data used to calculate the 31.08% exclusive of any data specific to TITAN. Given the very high margin found for TITAN, it appears reasonable to conclude that the exclusion of TITAN’S figures from the calculations would yield a significantly lower margin for the other exporters, and in any event the margin should not exceed the 31.08% set in the Final Determination.

3. Issues concerning Injury

81. After some of the explanations of the information contained in the AR in its confidential version that the IA made available to this Panel during the *In-camera* Hearing, and based on the answers to the Questionnaire of TITAN and in the analysis of the files FICHA.XLS and C_RESUM.XLS that were presented by the IA after a request by this Panel to submit privileged information, this Panel arrives to the following conclusions:

a) TITAN exported 2,970.069 metric tons of rolled steel plate of Canadian origin to Mexico in 1992,

b) 14,291 metric tons of rolled steel plate of Canadian origin entered Mexico in the same year, and

c) AHMSA imported from the previous figure 611 metric tons, therefore the total net volume of the investigating imports originating in Canada ascended to 13,680 metric tons.

d) there is no coincidence between the export volume made by TITAN and the total of imports to Mexico originating in Canada of this product.

82. Based on the foregoing, the Panel concludes that TITAN was not the only exporter of rolled steel plate from Canada, and that the total of imports to Mexico originating in Canada, including those of TITAN,⁴⁰ were significant for accumulation effects, and therefore the Injury evaluation that the IA made is valid and sound.

IV. ORDER

For the reasons stated above and taking into account the requirements of Article 1904, paragraph 8, of NAFTA, and of Rules 2, 7 (b), 73 (1) (2) (a) (b) (c) of

⁴⁰ It is important to note that the Investigating Authority may leave aside the accumulation of total imports of a given origin accomplished in *dumping* conditions, concerning countries under investigation, and not concerning each one of the involved exporting companies, as Article 43 of the Foreign Trade Law establishes in Article 67 (1) of its Regulation.

the Rules of Procedure, the Panel unanimously hereby decides and orders the following:

I. The Panel upholds the Investigating Authority's Determination on Remand and the Modified Determination in all respects, except as expressly stated below.

1. WITH RESPECT TO TITAN:

II. The Panel declares illegal, under Article 238, Sections II and IV of the Fiscal Code of the Federation the price discrimination margin of 108% that the IA applied to TITAN within the Determination on Remand and the Modified Determination; orders the IA not to give it any legal effect, instructs the Investigating Authority (a) to give TITAN an opportunity to present the necessary evidence, including acquisition costs, to be treated as an independent trading company; b) give TITAN an opportunity to comment on the Investigating Authority's analysis of its evidence, (c) to modify the Final Determination to calculate a new dumping margin for TITAN taking into account any evidence presented by TITAN under (a) above, and (d) to take any other action permitted by applicable law.

2. WITH RESPECT TO ALL OTHER CANADIAN EXPORTERS

III. The Panel declares illegal, under Article 238, Sections II and IV of the Fiscal Code of the Federation , the price discrimination margin of 108% that the IA applied to all other Canadian exporters within the Determination on Remand and the Modified Determination and orders the IA not to give it any legal effect and instructs the Investigating Authority to determine a rate of price discrimination not higher than 31.08% for Canadian exporters other than TITAN based on the data available in the Administrative Record relating to the 1992 imports from all firms other than TITAN.

3. TIME OF REMAND

IV. Pursuant to NAFTA article 1904(8), the Panel directs the Investigating Authority, on remand, to comply with the measures the Panel has directed no later than October 30, 1998

Issued the 3rd of August of 1998.

Signed in the original by:

August 3rd, 1998

Date.

D.M.M. Goldie.

D.M.M. Goldie.

August 3rd, 1998

Date.

W. Roy Hines.

W. Roy Hines.

August 3rd, 1998

Date.

Lucía Reina Antuña.

Lucía Reina Antuña.

August 3rd, 1998

Date.

Rodolfo Terrazas Salgado.

Rodolfo Terrazas Salgado.

August 3rd, 1998

Date.

Gustavo Vega Cánovas

Gustavo Vega Cánovas

Chairman of the Panel