



FINAL DECISION
(COURTESY TRANSLATION)

CASE: MEX-96-1904-03

Review of the Final Antidumping Duty
Determination in the matter of Hot Rolled Steel
Sheet originating in and exported from Canada

June 16, 1997

PANEL:

Víctor Blanco Fornieles.

Víctor Carlos García Moreno (Presidente).

David J. Mullan.

Jorge Sánchez Cordero.

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I. INTRODUCTION

This Panel was constituted pursuant to the provisions of Article 1904 of the North American Free Trade Agreement (“NAFTA”) to review the Final Determination of the *Secretaría de Comercio y Fomento Industrial* (“SECOFI”) with respect to imports of Hot Rolled Steel Sheet from Canada.¹, published in the *Diario Oficial de la Federación* on December 30, 1995, as a result of the administrative investigation carried out in file 33/93, by the *Unidad de Prácticas Comerciales Internacionales* of the (“UPCI”).

The Final Determination was focused on ascertaining the existence of dumping with respect to products covered by customs tariff classifications 7208.13.01; 7208.14.01; 7208.23.01 and 7208.24.01 (“Hot Rolled Steel Sheet from Canada”) of the Tariff Schedule pursuant to the General Tax Import Law of Mexico.

¹ Administrative (Admve.) Record, proprietary version, vol. 18, doc. 1132; non-proprietary version, vol. 18, doc. 1014.

II. BACKGROUND**A) Administrative Investigation Procedure. Chronology of the Proceedings.**

On August 4, 1993, *Altos Hornos de México, S.A. de C.V.* (“AHMSA”) and *Hylsa, S.A. de C.V.*, (“Hylsa”) through their counsel of record appeared before SECOFI to request the initiation of an antidumping and countervailing duty investigation with respect to imports of Hot Rolled Steel Sheet from the Federal Republic of Brazil, the Republic of Venezuela, the Federal Republic of Germany, Canada, the Republic of Korea, the United States of America and the Kingdom of the Netherlands.²

On October 27, 1993, the Initiation of the Investigation was published in the *Diario Oficial* (“D.O.”). This determination accepted the application for an antidumping and countervailing investigation on imports of Hot Rolled Steel Sheet. It fixed the period for investigation as January to December, 1992.³

On April 17, 1995, the Preliminary Determination was published in the D.O. In this, it was determined that the administrative investigation should continue without imposing duties with regards to the imports of Hot Rolled Steel Sheet covered by customs tariff classifications 7208.13.01; 7208.14.01; 7208.23.01 and 7208.24.01 of the Tariff Schedule pursuant to the General Tax Import Law of Mexico, from the Federal Republic of Brazil, the

²Admve. Record, proprietary version, vol. 1, doc. 1; non-proprietary version, vol. 1 and 7, doc. 1.

³Admve. Record, proprietary version, vol. 8, doc. 7; non-proprietary version, vol. 8, doc. 7.

Republic of Venezuela, the Federal Republic of Germany, Canada, the Republic of Korea, and the Kingdom of the Netherlands.⁴

On December 30, 1995, the Final Determination was published in the D.O. imposing final antidumping duties on imports of Hot Rolled Steel Sheet from Canada (Final Determination), as follows:⁵

“D.- Final antidumping duties are imposed on imports of Hot Rolled Steel Sheet originating from Canada covered by customs tariff classifications quoted in the first paragraph of this statement of relief as follows:

a.- For imports of Hot Rolled Steel Sheet from Dofasco, Inc.,
15.37 per cent.

b.- For imports of Hot Rolled Steel Sheet from all the rest of
the exporters from Canada, 45.86 per cent”.

On February 26, 1996, SECOFI published in the D.O., the “*Aclaración*” to the Final Determination published in the D.O. on December 30, 1995, through which SECOFI imposed final countervailing duty on imports of Hot Rolled Steel Sheet from Canada covered by customs tariff classifications 7208.13.01; 7208.14.01; 7208.23.01 and 7208.24.01 of the Tariff Schedule pursuant to the General Tax Import Law of Mexico. In the “*Aclaración*”, DOFASCO, INC. (“Dofasco”) was excluded from the imposition of antidumping duties in the following terms:⁶

⁴ Admve. Record; proprietary version, vol. 14, doc. 665; non-proprietary version, vol. 14, doc. 607.

⁵ See *supra* footnote 2.

⁶ Admve. Record, proprietary version, vol. 18, doc. 1239; non-proprietary version, vol. 18, doc. 1112.

“in page 16, third section, item 581, paragraph d, subparagraph a and b, says:

D.-final antidumping duties are imposed on imports of Hot Rolled Steel Sheet from Canada covered by customs tariff classifications quoted in the first paragraph of this statement of relief as follows:

a.-For imports of Hot Rolled Steel Sheet from DOFASCO. INC: 15.37 per cent.

b.-For imports of Hot Rolled Steel Sheet originating from all the rest of the exporters of Canada, 45.86 per cent.

It should say:

D. a definitive antidumping duty of 45.86 per cent is imposed on imports of Hot Rolled Steel Sheet from Canada covered by customs tariff classifications quoted in the first paragraph of this statement of relief from any exporting company with the exception of DOFASCO INC.

Mexico D.F. February 20, 1996.- The Secretary of Commerce and Industrial Development. Herminio Blanco Mendoza.- rubric”.

B) Procedure before the Panel**1. Chronology of the Proceedings**

On January 29, 1996, Dofasco, Stelco Inc. (“Stelco”), and Algoma Steel Inc. (“Algoma”), through their counsel of record, filed a petition pursuant to NAFTA Article 1904 and the Rules of Procedure under that Article (“Rules of Procedure”), requesting a review of the Final Determination of the investigation of antidumping and countervailing duty in the matter of Hot Rolled Steel Sheet, originating in Canada⁷ published in the D.O. on December 30, 1995.⁸

On February 28, 1996, the Titan Industrial Corporation, (“Titan”), Dofasco, Stelco, and Algoma filed their complaint before the Mexican Section of the NAFTA Secretariat having presented their proof of service.⁹

On March 14, 1996, SECOFI, through the Director General of Legal Affairs, filed a Notice of Appearance of SECOFI¹⁰ opposing each and all the arguments raised by the Complainants, Stelco, Algoma and Titan.¹¹ With regard to the Complaint filed by Dofasco, it asserted that this company should be excluded from the review¹² since, on February 26, 1996, the *Aclaración* of the Final Determination had been published in the D.O. in which

⁷ Sección Mexicana del Secretariado de los Tratados de Libre Comercio (SMSTLC) Record, non-proprietary version; vol. 1; docs. 1, 2 and 3.

⁸ SMSTLC Record, non-proprietary version; vol. 2; doc. 21.

⁹ SMSTLC Record, non-proprietary version; vol. 1; docs. 9, 10, 11 and 12.

¹⁰ SMSTLC Record, non-proprietary version; vol. 1; doc. 15.

¹¹ SMSTLC Record, non-proprietary version; vol. 1; doc. 15, p. 3.

¹² SMSTLC Record, non-proprietary version; vol. 1; doc. 15, pp. 3 and 4.

SECOFI decided that the imports from Dofasco had not been carried out under price discrimination conditions thereby revoking the antidumping duty that had been imposed.

Dofasco, Titan, Stelco and Algoma, through their common counsel of record, accumulated their complaints pursuant to Rule 57(5) of the North American Free Trade Agreement Article 1904 Rules of Procedure (“Rules of Procedure”),¹³ and filed their brief on May 28, 1996.¹⁴

On July 26, 1996, SECOFI, through the Director General of Legal Affairs, filed its brief.¹⁵

On June 29, 1996, AHMSA filed its brief.¹⁶

On July 26, 1996, Hylsa filed its brief.¹⁷

On August 26, 1996, the Panel issued an Order setting the date for the Public Hearing as December 10 and 11, 1996.¹⁸

¹³ Published in the D.O. on June 20, 1994. *Aclaración a las Reglas de Procedimiento del Artículo 1904 del TLCAN*, published in the D.O. on March 20, 1996.

¹⁴ SMSTLC Record, non-proprietary version; vol. 3; doc. 30.

¹⁵ SMSTLC Record, non-proprietary version; vol. 4; doc. 43.

¹⁶ SMSTLC Record, non-proprietary version; vol. 4; doc. 44.

¹⁷ SMSTLC Record, non-proprietary version; vol. 4; doc. 42.

¹⁸ SMSTLC Record, non-proprietary version; vol. 5; doc. 57.

On December 10, 1996, the Public Hearing was held at which the Complainants, Stelco, Titan and Algoma (“the Complainants”), SECOFI and the appearing parties presented their arguments.

2.- Motions and Orders

During the review, the Panel issued several Orders with respect to Motions brought by the parties and with respect to issues raised by the Panel *sua sponte*. The Panel notes that over and above the specific foundation of each specific Order, all the Orders made to resolve Motions were founded on Rule 63 of the NAFTA Article 1904 Rules of Procedure. The foundation and motivation of each Order is described below.

On August 26, 1996, the Panel issued an Order to postpone the dates of the Public Hearing to December 10 and 11, 1996 and to postpone the issuance of the Panel's Final Decision to March 12, 1997. The Order was based on Rule 20 of the Rules of Procedure and was in response to the delay in constituting the Panel.

On September 5, 1996, in response to a Proprietary Information Motion brought by Dofasco, Stelco, Algoma and Titan, the Panel ordered SECOFI to grant, within 10 days of the issuance of the Order, a Proprietary Information Access Order to Francisco Fuentes Ostos, in his capacity as counsel of record for Algoma, Stelco and Titan without requiring the posting of any guarantee or meeting any additional requirement not contemplated in the Foreign Trade Law or in the Rules of Procedure. Also, the Panel ordered that SECOFI not grant a Proprietary Information Access Order to Francisco Fuentes Ostos in his capacity as counsel of record for Dofasco given that the SECOFI's motion with respect to the exclusion of Dofasco was still pending before the Panel. The Panel found that the demand for a

guarantee in exchange for access to confidential information was not lawful since it was not stipulated in the Rules of Procedure, nor in the Foreign Trade Law nor in NAFTA that the providing of a guarantee was a condition of a grant of access to confidential information. On the basis of Article 89, Subsection 1 and in jurisprudential thesis, identified by number 1. 3o. A. j/25, published in the *Semanario Judicial de la Federación*, 8A época, Tomo VII-Enero, p.83 issued by the *Tercer Tribunal Colegiado en Materia Administrativa del Primer Circuito*, whose subject is "Administrative Regulations - Their Limits", the Panel found that some of the requirements demanded by Article 160 of the Regulation of the Law exceeded the limits of these types of legal provision.

On September 10, 1996, the Panel, in response to SECOFI's Motion of July 11, 1996, to exclude Dofasco from the review proceeding before the Panel, issued an Order granting that Motion by finding that Dofasco could not claim legal standing given that it had been excluded from the payment of any duties by virtue of the *Aclaración* published in the D.O. on February 26, 1996. It, therefore, ordered that the legal representative of Dofasco should not be granted access to the confidential information.

In that same Order, the Panel denied SECOFI's Motion to Reject an Argument, dated July 16, 1996. This motion asserted that an argument contained in the Complainants' brief had not been advanced in its Complaint. The Panel found that the fact that SECOFI had qualified in item 529 of the Final Determination¹⁹ the decrease in prices as "considerable", required an adequate founding and motivation; as a consequence the argument presented by Dofasco and the other Complainants in their brief was not beyond the *litis* and therefore lawful.

¹⁹ Item 529 of SECOFI's Final Determination "529. The Canadian exporter Dofasco Inc. affirmed that the decrease in price was due to the fact that national producers wished to increase the production in a depressed international market. On this matter the *Secretaría* considered that this assertion did not take into account that, notwithstanding that the production increased during the investigated period, prices considerably decreased, in such a way that the increase in sales volumes did not compensate for the decrease in the internal sales price, what brought as a consequence a fall in real terms of the income of national producers."

On September 20, 1996, SECOFI's Motion requesting that the Panel revoke its Order issued on September 5, 1996 was rejected by the Panel pursuant to Rule 2 of the Rules of Procedure and pursuant to the *Principio de Definitividad de las Resoluciones Dictadas por una Instancia Procesal*.

On October 2, 1996, the Panel issued, pursuant to Rule 20 of the Rules of Procedure, an Order through which it granted SECOFI a 10 day extension of time to respond to the Complainants' arguments since the Motion to strike an Argument was still pending.

On October 2, 1996, and in reply to a Motion filed on September 19, 1996, through which SECOFI requested the founding and motivation of the Order issued on September 10, 1996, relating to the Motion to strike the Complainants' argument, the Panel issued an Order in which it dismissed that Motion, pursuant to Rules 17.1 and 72. Furthermore, the Panel rejected the Motion filed by Dofasco's counsel of record on September 19, 1996, in which it requested the Panel to reconsider Dofasco's exclusion from the proceedings. It did so pursuant to Rule 2 of the Rules of Procedure and pursuant to the "*Principio de Definitividad de las Resoluciones Dictadas por una Instancia Procesal*".

On October 2, 1996, in response to a "Motion with respect to SECOFI's Response to Motion", dated September 23, 1996, brought by legal counsel for Dofasco, Algoma, Stelco and Titan, the Panel issued an Order dismissing the Petitioners' Motion for the Panel to revoke its Order issued September 5, 1996 on the grounds that this response lacked substance. Once again, the Panel based its decision on Rule 2 of the Rules of Procedure and on the "*Principio de Definitividad de las Resoluciones Dictadas por una Instancia Procesal*".

On October 10, 1996, the Panel made an Order rejecting a Motion filed by legal counsel for Hylsa seeking revocation of the Order of the Panel issued on September 20, 1996. The

Motion lacked substance and the legal foundation is Rule 2 and the “*Principio de Definitividad de las Resoluciones dictadas por una Instancia Procesal*”.

On November 14, 1996, the Panel, by an appropriate Order, rejected AHMSA’s Motion filed on October 24, 1996, because it was not addressed to the Panel.

On December 2, 1996, in response to the Motion filed by the Complainants dated November 7, 1996, the Panel issued an Order in which it decided pursuant to Rule 57.1 of the Rules of Procedure to reject the document presented by SECOFI, dated October 24, 1996, because it contained arguments filed out of time, but added to the Record the Final Decisions of Binational Panels MEX-94-1904-01 and MEX-94-1904-03, because these documents are part of the public domain. In that same Order, the Panel ordered the dismissal of arguments filed by the complainants through their motion dated November 7, 1996, since it was filed out of time, in terms Rule 39 of the Rules of Procedure. Likewise, the Panel dismissed the Motion of the Authority to completely dismiss the Motion filed by the Complainants due to the above mentioned facts.

On February 21, 1997, the Panel issued an Order based on Rules 2 and 41(4) of the Rules of Procedure, requiring SECOFI to file at the Mexican Section of the NAFTA Secretariat information classified as privileged and described in a list annexed to the Order.

On March 10, 1997, the Panel issued an Order based on Rule 20 of the Rules of Procedure, extending the date for the issuance of the Final Determination until June 5, 1997.

On March 19, 1997, in response to the Motion filed by SECOFI, dated March 6, 1997, (in which it requested the revocation of the Panel's Order dated February 21, 1997), the Panel issued an Order dismissing the Motion of the Authority. The Panel granted SECOFI a period of 5 days to present the information requested in that Order. Also, the Panel stated that, in terms of Articles 79 and 80 of the *Código Federal de Procedimientos Civiles*, Articles 230 and 233 of the *Código Fiscal de la Federación*, and Rules 41(4) of the Rules of Procedure, it is the Panel's prerogative, and not that of the parties, to determine what information is necessary to issue its Resolution.

SECOFI responded less than satisfactorily to the Panel's detailed request for information. SECOFI did not identify whether or not a significant amount of the requested information was contained within the complete Administrative Record in its possession and, if it did exist, why it was not produced. Consequently, the Panel is issuing this determination on the basis of the information to which it had access.

III. STANDARD OF REVIEW

Chapter 19 makes it clear that the Parties retain their domestic antidumping law²⁰ and provides for its amendment subject to certain conditions.²¹

While maintaining the integrity of domestic antidumping law, Article 1904 of NAFTA states that:

²⁰NAFTA, Article 1902 (1).

²¹ NAFTA, Article 1902 (2).

(a) “ 1. As provided in this Article, each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational Panel Review.”²²

The Panels under Chapter 19 have jurisdiction to:

(b) “...determine whether such determination was in accordance with the antidumping and countervailing duty law of the importing party..”²³

NAFTA makes it clear that while under Chapter 19 Panels provide an alternative to domestic dispute settlement, the domestic antidumping duty regime of the Parties remains the same.²⁴ In the case of Mexico, its antidumping statute is defined in the relevant part as:

(c) “...the relevant provisions of the Foreign Trade Act Implementing Article 131 of the Constitution of the United Mexican States ... , as amended, and any successor statutes; and

(d) “...the provisions of any other statute that provides judicial review of final determinations ... or indicates the standard of review to be applied to said determinations”.²⁵

²²NAFTA, Article 1904 (1).

²³NAFTA, Article 1904 (2).

²⁴NAFTA, Article 1902.

²⁵NAFTA, Annex 1911.

Article 1904 goes on to state that Chapter 19 Panels shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party would otherwise apply.²⁶

NAFTA maintains the integrity of the Parties' domestic antidumping law. In addition, it establishes certain unique provisions. Specifically, *inter alia*:

- 1.- provides for an alternative system of Panel review,
- 2.- does not provide the Panel with the power to reverse agency determinations;
- 3.- provides that the Panel's decisions do not have precedential effect; and
- 4.- specifically limits the Articles in the Federal Fiscal Code upon which the Panels may rely.

²⁶NAFTA, Article 1904 (3).

Article 1904 limits a Panel to upholding or remanding Final Determinations to SECOFI.²⁷

NAFTA further limits the precedential value of Panels' decisions. NAFTA specifically provides that the effects of a Panel decision are limited to the particular matter between the particular parties before the Panel.²⁸

Finally, NAFTA defines the standard of review, in the Mexican context, as the standard set out in Article 238 of the Federal Fiscal Code.²⁹ This is distinct from the relevant domestic review court which may rely directly upon Articles 237, 238 and 239 of the Federal Fiscal Code. Further, Chapter 19 Review Panels may rely on general legal principles normally relied upon by the domestic court.³⁰

While stressing that the Parties have kept their domestic antidumping law, NAFTA has, by imposing limitations on a Chapter 19 Panel's powers, given the Panels a highly specialized function. This specialized function includes close adherence to domestic antidumping duty law in light of the objectives of NAFTA. The specified objectives of NAFTA include transparency, the elimination of barriers to trade,³¹ and the creation of effective procedures for the implementation and application of NAFTA and for the settlement of disputes.³²

As such, the Standard of Review applicable to this proceeding is a two part standard set out in NAFTA Article 1904 (3) and Annex 1911. The first part is that which is specified in Article 238 of the Federal Fiscal Code. This Article states:

²⁷NAFTA, Article 1904 (8).

²⁸NAFTA, Article 1904 (9).

²⁹NAFTA, Annex 1911.

³⁰NAFTA, Article 102 (1) (a)

³¹NAFTA, Article 102 (1) (a).

“Art. 238.- An administrative determination shall be declared illegal when any one of the following grounds is established:

- I. Lack of jurisdiction or authority of the agency or official issuing the challenged determination or ordering, initiating or carrying out the proceeding in which the challenged determination was issued.
- II. An omission of formal legal requirements which affects the person’s right of proper defense as well as the scope or meaning of the challenged determination, or a failure to provide a reasoned determination based upon the record.
- III. A violation of procedure which affects the person’s right of proper defense as well as the proper scope or meaning of the challenged determination.
- IV. If the facts which underlie do not exist, are different, or were considered in an erroneous way, if was issued in violation of the applicable laws or rules, or if the correct laws or rules were not applied .
- V. Whenever a discretionary determination falls outside the lawful scope of that discretion.

The Federal Fiscal Court might raise *sua sponte*, because of considerations of public order, the incompetence of the authority to issue the challenged determination and the total absence of legal grounds for that determination.

Arbitral tribunals or binational panels that derive their authority from alternative dispute settlement mechanisms in matters regarding unfair trade practices contained in international treaties and agreements to which Mexico is a Party may not raise *sua sponte* the grounds referred to in this Article.”

The second part of the standard of review states that the Panel may also consider:

³²NAFTA, Article 102 (1)(e).

The general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.³³

The above mentioned principles have guided the Panel's review in this proceeding.

IV. JURISDICTION OF THE PANEL

The Panel is competent to review the Final Determination issued by SECOFI on the basis of Articles 1904 and 1906 of NAFTA,³⁴ and Articles 97 and 98 of the Foreign Trade Law.

V. JURISDICTION OF THE INVESTIGATING AUTHORITY

The Complainants request that this Panel declare the Final Determination null on the basis that, during the investigation, some of the relevant authorities did not have competence to perform certain acts. According to the Complainants, these acts rendered the investigation null. Before analyzing the arguments related to the competence issue, the Panel asserts the following:

On the one hand, this Panel realizes that the competent organ to conduct and resolve antidumping investigations is the *Unidad de Prácticas Comerciales Internacionales* ("UPCI"). Under Article 33 of the Internal Regulation of SECOFI of 1993, during the investigation, this Unit performed several acts through the *Dirección General Adjunta*

³³NAFTA, Article 1904 (3).

³⁴See *supra*, footnote 1.

Técnica Jurídica (“DGATJ”) of SECOFI. Likewise, this Panel considers that an analysis of the validity of the investigation should proceed by examining these acts separating them from the issuer and the title under which they are issued. There are two kinds of acts in question: those issued by the Head of UPCI and those issued by the *Director General Adjunto Técnico Jurídico*.

On the other hand, given the Panel’s Order issued on September 10, 1996, excluding Dofasco from this Panel Review, several of the arguments are moot for they apply only to Dofasco. These are:

- incompetence of the official who signed the order authorizing the verification visit;

- incompetence of the officials who performed the verification visit;

- the participation of an external advisor in the verification visit;

- failure to give notice that the verification visit would be carried out during non-working hours; and,

- failure on the part of those conducting the verification visit to warn of the legal consequences of facts or omissions that they might ascertain during their visit in their act.

The remaining arguments are analyzed as follows:

The Complainants raised two categories of argument on the issue of competence: on the one hand, those in relation to the legal existence of DGATJ and, on the other hand, those referring to the powers of the *Dirección*.

The Complainants have argued that the DGATJ had not been legally created and, therefore, could not receive powers by way of the delegation procedure set out in Article 14 of the *Ley Orgánica de la Administración Pública Federal* (“LOAPF”)³⁵. In their brief, the Complainants assert that, even though the DGATJ is mentioned in a Delegatory Agreement, this instrument was not an effective method by which to create administrative units since the only way to create administrative units is through the Laws and Interior Regulations of the State Ministries. Therefore, the reference to this Directorate in the Delegatory Agreement could not in itself constitute a valid constitutive act.

SECOFI responded with three arguments respecting the legal existence of DGATJ. The first was that, according to Article 14 of LOAPF, the creation of administrative units can be achieved through “other legal provisions”. Thus, SECOFI argued that the Delegatory Agreement just referred to constituted a legal provision which acknowledged the creation of DGATJ.

³⁵ Article 14 of the *Ley Orgánica de la Administración Pública Federal*:

"At the head of each Secretariat there is a Secretary of State who, in order to perform the functions within its competence, will be assisted by Under Secretaries, Senior Officers, Directors, Deputy Directors, Department, Office, Section and Subunits Heads and Deputy Chiefs, and by all the other public officers that that are provided for by Internal Regulation and other established legal provisions.

In Amparo proceedings, the President can be represented by the Head of the unit to which the matter corresponds, according to the allocation of competence. Administrative remedies against the acts of Secretaries will be resolved within the scope of the Secretariat's competence under the applicable legal provisions”.

This Panel considers that there is no legal provision from which it can be inferred that the General Directorates must be created in an express and explicit manner in a Law or an Internal Regulation. This is why the creation of General Directorates, along with other units, is contemplated in a generic fashion in Articles 14 and 15 of LOAPF. Under the *Reserva de Ley*, a principle established in the Constitution, the only legal provisions are those contained formally and substantially in a Law. Consequently, this Panel holds that, notwithstanding the fact that the Delegatory Agreements are not legal provisions, the creation of DGATJ is contained in Article 14 of LOAPF.

Regarding the argument supporting the legal existence of DGATJ advanced by SECOFI, this Panel finds that Article 8 of the Internal Regulations of 1993 and 1995,³⁶ which assumes, on the one hand, and establishes in an implicit manner on the other, the existence of the Joint Directors and Deputy Directors is nothing but a reiteration of the legal existence of DGATJ.

This Panel holds that reference to these officials found in SECOFI's Internal Regulation only ratifies the generic existence and creation of these officials originally based in Article 14 of LOAPF.

³⁶Article 8 of the Internal Regulations of SECOFI of 1993:

"At the head of each of the General Directorates and Units, there is a Director General who will be assisted by the Joint Directors, if this is the case, and by the Area Directors and Underdirectors, Department, Office, Section and Subunit Heads and Deputy Heads, along with the specialized personnel who may be required by the nature of the service and whose functions appear in the General Organization Manual and are foreseen in the budget".

Article 8 of the Internal Regulation of SECOFI of 1995:

"At the head of each General Coordination Office, General Directorate and Unit, there will be a Head, who will be assisted by the Directors General or Joint Directors, Area Directors and Deputy Directors, Department Heads and other public officials that are mentioned in the General Organization Manual of the Secretariat and whose positions are foreseen in the budget".

SECOFI also argues that those Internal Regulations, establish another basis for their existence: that these units appear specifically in the Ministry's budget. The Investigating Authority argues that the document it has filed entitled "*Constancia Unica de Movimiento de Personal*", in which Miguel Angel Velázquez Elizarrarás is appointed as *Director General Adjunto Técnico Jurídico*, proves that this Directorate was within the Ministry's budget.

In this Panel's opinion, Article 8 of the Internal Regulation of SECOFI establishes that the Heads of the General Coordination Offices, the General Directorates and Units can be assisted by other public officials appearing in the Ministry's budget. However, this Panel finds that this provision does not create a function nor bring into existence an official but rather it is a way to individually prove their existence within the public service.

The next argument of the Complainants refers to the powers possessed by DGATJ. The Complainants argue that this entity lacked the capacity to perform acts properly since any delegation of power can be directed only to a legally established body. Because the Complainants considered DGATJ to be non-existent, they assumed that it could not receive any power through the delegation procedure. SECOFI responds to this argument by stating that the legal existence of DGATJ would validate the delegation of powers. On this issue, the Panel finds that, since DGATJ had been created in compliance with the applicable legal provisions, the delegation of powers was valid on the basis of Article 14 of LOAPF.

Finally, the Complainants enumerate the acts of nuisance carried out by SECOFI which they consider to be illegal. These acts consist of: demands for information, the admission and service of the initiation of the investigation, service of the Preliminary Determination, the announcement of the public hearing, and the service of the Final Determination.

To this argument SECOFI counters that Article 6 of the Delegatory Agreement of 1985 (as amended in 1988) establishes the following:

“In order to make the work of the competent administrative units more expeditious, Directors and Underdirectors, Heads and Deputy Heads, Heads of Office, Delegates and Underdelegates and Chiefs of Department of Federal Delegations, are hereby empowered to sign documents regarding defined benefits, inspection and domiciliary visit orders; requirements for access to information, data and documentation, and, in general, transaction documents related to the activities of which they are in charge”.

Under the Delegatory Agreement of 1989, this provision continued into force until the publication of the Delegatory Agreement of 1994 in which the express delegation in favor of the *Director General Adjunto Técnico Jurídico* was established. On the other hand, SECOFI states that, according to Article 8 of the 1993 Internal Regulation, administrative units are supported by *Directores Adjuntos*, and therefore the powers delegated to Area Directors should be understood as also delegated to *Directores Adjuntos*.

This Panel considers that the origin of the delegation of powers is legal since, even though in 1985, 1988 and 1989, DGATJ had not yet been created, another entity existed and the powers delegated to this prior entity must be understood to have also been delegated to the DGATJ pursuant to Transitory Article 3 of the 1993 Internal Regulation.³⁷

³⁷ Transitory Article 3 of the Internal Regulations of SECOFI, dated April 1st, 1993, literally states: “THIRD.- In cases where any legal provision makes reference to administrative units, which denomination has been changed or undergone any merger or modification in terms of this regulation, the specific

This Panel has carried out a meticulous analysis of each of the actions taken by DGATJ in order to determine their validity as well as their possible effect upon the Complainants' interests. From this analysis, it became clear that, during the investigation, two kinds of actions were taken: those authorized by agreement of the Head of the UPCI and those authorized directly by the Director General of DGATJ.

With respect to the actions authorized by the Head of UPCI, it is clear that in those cases the person who was acting was in fact the Head and not the Assistant Director General of DGATJ.

This Panel considers that the jurisdiction to authorize such action is grounded properly in law. The first provision supporting this jurisdiction is Article 16 of LOAPF³⁸ which establishes the authority to delegate those powers that under law do not have to be exercised personally by the Minister of Commerce. On the other hand, Article 8 of the Internal Regulation of 1993 states that Unit Heads can be helped by the *Directores Adjuntos*, among other officials, and, finally, Article 33 of this same Internal Regulation establishes in a generic manner UPCI's powers which are capable of being delegated. According to this interpretation, the Panel considers that the Head of UPCI was empowered to authorize the

jurisdiction will be understood in favor of the administrative unit with the established denomination in such regulation or that, that according to the latter, takes over the corresponding duty.

³⁸ Art. 16 of the Organic Law of the Federal Public Administration:

"Originally it is for the State Secretaries and Administrative Departments to carry out and resolve the issues of their competence. However, in order to achieve a better organization of the work, they are allowed to delegate to the public officers mentioned in Articles 14 and 15, any of their powers, except those which the Law or the Internal Regulation, should be exercised precisely by these State Secretaries. When the powers were delegated to office, section and subunit heads of the State Secretariats and Administrative Departments, they will keep their base employees under the Federal Law of Public Sector Employees.

The head of the State Secretariats and Administrative Departments can assign the Administrative Units established in the corresponding Internal Regulations of the Undersecretaries, Major Officer and other administrative units of the same hierarchy that are set forth in the mentioned Internal Regulation..

The agreements through which powers are delegated or administrative units assigned will be published in the *Diario Oficial de la Federacion*".

challenged actions and to be assisted by the *Director General Adjunto Técnico Jurídico* in the setting up and performance of these actions.

On the other hand, there are the other actions challenged by the Complainants. In this Panel's opinion, the remaining challenged actions also have a proper legal basis. The basis, however, is different from that described above. The competence of the *Director General Adjunto Técnico Jurídico* to act directly is based on Article 6 (and the corresponding Articles of the subsequent Agreements) of the Delegatory Agreement of 1988, which was issued pursuant to Article 16 of LOAPF in force at the time this investigation was initiated by virtue of Transitory Article 2 of the 1989 Delegatory Agreement. This Article stated that:

“The Area Directors and Deputy Directors, Department Heads, Regional and Federal Coordinating Delegation Delegates, Subdelegates and Coordinators, are hereby empowered to sign documents regarding determined benefits, inspection and domiciliary visit Orders, Orders requiring access to information, data and documentation, and, in general, the transaction documents related to the activities of which they are in charge”.

The DGATJ did not exist under that name at the time the Delegatory Agreements were published. However, the previously invoked Transitory Article 2 of the 1989 Delegatory Agreement stated that:

“...the Agreements published in the *Diario Oficial* on September 12, 1985, and its amendments of 1988, will continue to be in force to the extent that they are not in conflict with the Internal Regulation and the Agreement, and

it must be understood that any reference in those Agreements to the Administrative Units, the names of which have been changed, or which have been merged, or modified by virtue of the Internal Regulation will be understood as referring to the Administrative Unit which has assumed the relevant function”.

This article provides the basis for DGATJ assuming the powers established in Article 6 of the Delegatory Agreement of 1988 until the specific delegation provided for by the Delegatory Agreement in 1994.

The next issue that the Panel considered was that, regardless of whether all SECOFI's actions were totally valid, none of the actions taken by the DGATJ, when analyzed individually, in any way caused harm or damage to the Complainants' defense or to their participation in the investigation. The Panel considers that the Complainants were fully able to present evidence and raise arguments as well as to state their position throughout the entire proceedings.

Consequently, this Panel rejects the argument made with respect to the legal existence and competence of the DGATJ and its Director and, as a consequence, it is hereby dismissed.

VI. SERVICE OF THE DETERMINATIONS

The second argument raised by the Complainants to support their position, is that the Final Determination is null, because of the lack of timeliness of the service of the Initial, Preliminary and Final Determinations.

The Complainant companies requested this Panel to declare the Final Determination null, arguing they considered that Section II of Article 238 of the Federal Fiscal Code had become applicable because of the untimely notification of the Initial, Preliminary and Final Determinations. According to the Complainants, they should have been notified of these Determinations prior to their official publication. In each of the three cases (Initial, Preliminary and Final Determinations), the notification took place after publication. SECOFI asserts that the Complainants' interpretation is wrong and that the notifications were provided on time in terms of Articles 57 and 59 of the Law.

This Panel finds that, under Articles 57 and 59 of the Law, the legislator did not establish any particular sequence for notification and publication. In fact, this would not have made any sense, as publication in the D.O. is a necessary element for the integration of an administrative act.

Furthermore, having regard to Section II of Article 238 of the Federal Fiscal Code, an omission of a formal requirement of a Law must affect an individual's defense and transcend the challenged determination in order for it to be considered a cause for annulment of the administrative act. Once again, the Panel considers that the defense of the Complainants was not affected nor was their participation in any stage of the proceedings. The Panel does not believe, therefore, that the issue of the notification of the determinations transcended the Final Determination. Consequently this argument must be rejected.

VII. LATE ISSUANCE OF THE DETERMINATIONS

The Complainants, argue that SECOFI delayed considerably in issuing the Initial, Preliminary and Final Determinations in breach of Articles 52, 57 and 59 of the Foreign Trade Law and that, because of this, the challenged Final Determination must be declared null since the formal requirements demanded by law were not observed.

SECOFI argues that, even though it is true that the Initial, Preliminary and Final Determinations were issued after the deadlines fixed by law, this was due to exceptional circumstances by reason of which the investigation deadline was extended pursuant to Article 5.5 of the GATT Antidumping Code. Furthermore, it asserts that the delay in the issuance of the determinations did not change the substance of the investigation in any way whatsoever. Accordingly, it did not affect the challenged determination nor affect the defense of the Complainants.

This Panel agrees with SECOFI. Although it is true that the Initial, Preliminary and Final Determinations were issued out of time, this was due to the fact that, given the nature of this investigation, it was necessary to extend the deadline in order to allow SECOFI to issue the relevant Determinations.

Furthermore, such delay did not transcend the determination. Additionally, the Complainants' right of defense was not affected, since they were able to file evidence and raise arguments during the entire proceedings in accordance with the guarantee of the right to be heard provided for in Article 14 of the Mexican Constitution.

VIII. INJURY

The investigation of injury of the Canadian companies and Titan proceeded on the basis that the entry of Canadian Hot Rolled Steel Sheet into the United Mexican States had caused injury to the domestic producers. It is apparent from both the Final Determination and the Brief of SECOFI that this investigation was concerned with actual damage, not a threat of damage. This was reiterated by counsel for SECOFI at the public hearing. As a consequence, the Panel has no doubt that the investigation conducted by SECOFI was an actual injury investigation.³⁹

SECOFI determined that Hot Rolled Steel Sheet from Canada had entered the United Mexican States during the investigation period under conditions of price discrimination.

At paragraph 486 of the Final Determination, it also determined that imports of Canadian Hot Rolled Steel Sheet from Canada into the United Mexican States during 1992 increased by 105% over the level of imports in the previous year.

On the basis of these conclusions, SECOFI exercised the authority that it had under Article 67 of the Foreign Trade Regulations to assess imports of Hot Rolled Steel Sheet from Canada on an accumulated basis along with those coming from other countries also subject to investigation. Such an accumulation is justified provided that the imports from a particular country are significant.

³⁹Literally, Mr. Uruchurtu said: “Now I shall cover the issue of damage and prior to that I would like to make a precision. This investigation is not of threat of injury. We do not have to review threat of injury. Threat of injury does not have to be reviewed. Injury was determined and in or legislation specific provisions are set out for injury. Therefore, there is not a need to find out what is going on with threat of injury. What could have happened, etc. This is an investigation where the investigating authority determined that injury to domestic industry was being carried out.”

SECOFI evaluated the existence of damage to the extent that it took into consideration that the imported products referred to in custom tariffs are similar to those manufactured domestically as both are produced in ingots or the large metal sheets with different sizes and physical and chemical specifications and under the same international standards. It also put on record those products which are not similar; it evaluated the volume of imports and determined that they had increased substantially; and it evaluated the impact on prices; and it reached the conclusion that the average prices of imports had dropped and that this had caused a reduction in the internal market prices.

In addition, SECOFI evaluated the effects caused by imports on domestic production and concluded that the accumulation of the domestic producers' inventories increased 78 and 168% respectively; it also evaluated but did not take into consideration the argument that the domestic industry is not liable to suffer damage if there is an increase in production inasmuch as it determined that the existence or nonexistence of damage cannot be based on the isolated evaluation of a single indicator but only on an overall evaluation of the industry.

SECOFI concluded that the global and financial results of the appearing parties reflected a significant deterioration.

Finally, SECOFI also evaluated the arguments that the damage could have resulted from causes other than those mentioned in the resolution.

Based on all these considerations, this Panel finds that SECOFI complied with the provisions of the paragraph 2 of Article 39 of the Law in reaching the conclusion that damage to domestic production had been proved to exist and that this was a direct consequence of

imports carried out under conditions of price discrimination, a conclusion which also took into account all the assumptions referred to in Article 41 of the Law.

IX. CONSEQUENCE OF THE ISSUANCE OF THE "ACLARACIÓN" REGARDING DOFASCO, INC.

A) The Nature of the "Aclaración" in the case of Dofasco.

In both the Preliminary (paragraphs 93-106) and Final Determinations (paragraphs 54-70), SECOFI made findings that Hot Rolled Steel Sheet manufactured and sold by Dofasco had entered The United Mexican States during 1992 under conditions of price discrimination. In the Final Determination, SECOFI assessed the margin of that price discrimination at 15.37% (less than the 19.69% margin in the Preliminary Determination).

Thereafter, once SECOFI determined that the accumulated imports of Hot Rolled Steel Sheet from Canada and other countries had been causing injury to the domestic producers of this product, it imposed duty on Hot Rolled Steel Sheet manufactured and sold by DOFASCO at the established 1992 margin of price discrimination (paragraph 581(D)(a) of the Final Determination).

Subsequently, in the D.O. of February 26, 1996, SECOFI issued the *Aclaración* to its final Determination. Included among the matters dealt with in that *Aclaración* was the duty imposed on sales of Hot Rolled Steel Sheet manufactured by Dofasco.

First, in reference to the adjustments that had to be made in calculating whether Dofasco manufactured and sold Hot Rolled Steel Sheet that entered the United Mexican States under conditions of price discrimination during 1992, SECOFI added to paragraph 68 of the Final Determination the factors of American dollars and metric tons. Second, this produced a

consequential change to both paragraphs 70 and 581(D)(a) of the Final Determination. In place of a price discrimination margin of 15.37% attributed previously in paragraph 70 to Hot Rolled Steel Sheet manufactured directly by Dofasco, SECOFI substituted a finding that Hot Rolled Steel Sheet had not entered Mexico under conditions of price discrimination during 1992. This in turn led to the removal from paragraph 581(D) of the imposition of a duty on Hot Rolled Steel Sheet manufactured and sold by Dofasco.

As for Hot Rolled Steel Sheet manufactured by other Canadian companies, including also Dofasco manufactured Hot Rolled Steel Sheet not marketed directly by it but sold through the trading company, Titan, there was no change. This continued to be assessed for duty purposes at the highest margin of price discrimination observed by SECOFI in the importation into the United Mexican States of Canadian Hot Rolled Steel Sheet during 1992, “the so-called “residual” value.” This margin was 45.86%, a figure for which there is in fact no detailed justification in those parts of the Administrative Record to which this Panel had access.

**B) Obligations of SECOFI arising out of the issuance of an
“Aclaración” in the case of Dofasco.**

It is the judgment of the Panel that the application of the rate of 45.86% in the case of all other Canadian Hot Rolled Steel Sheet sold by Titan, required a justification in the aftermath of the “Aclaración” in relation to Hot Rolled Steel Sheet sold by Dofasco, to the extent that no such justification was provided in the “Aclaración”. The assessment of that level of duty on the balance of Canadian manufactured Hot Rolled Steel Sheet produced by companies

other than Dofasco and that sold by Titan ceased to have "*fundamentación y motivación*" in terms of Article 238(II) of the Federal Fiscal Code.

There are two related reasons in particular that made it necessary for SECOFI to reevaluate the overall position of Canadian Hot Rolled Steel Sheet in light of the "*Aclaración*" in the case of Dofasco manufactured and sold Hot Rolled Steel Sheet.

First, once Dofasco is excluded from the calculation of the accumulation of Canadian Hot Rolled Steel Sheet imported into the United Mexican States during 1992 under conditions of price discrimination, an immediate consequence is that SECOFI should have then assessed if Hot Rolled Steel Sheet originating in Canada was of sufficient quantity to justify any further inquiry into allegations that its importation under conditions of price discrimination caused injury to the domestic producers. This concern is underscored by Article 41 of the Foreign Trade Law, subparagraph I, of which requires SECOFI to assess:

“The volume of the merchandise imported under unfair international trade practices involving price discrimination in order to determine whether there has been a significant increase in such imports relative to the domestic output or consumption...”.

However, there is no evidence in the Administrative Record to which the Panel had access that such a reevaluation was ever conducted. Moreover, to the extent that the Administrative Record does not provide any data as to the percentage of Canadian Hot Rolled Steel Sheet entering the United Mexican States and that was purchased directly from Dofasco as opposed to other sources, there is no basis whatsoever for any conjecture by the Panel that such a reevaluation was not really necessary.

Indeed, all of the evidence in the Administrative Record to which the Panel had access supports the opposite conclusion. At paragraph 486 of its Final Determination, SECOFI makes a finding with respect to the relevant percentages of Canadian imports of Hot Rolled Steel Sheet during 1992. Those percentages are 6% of total imports and 1.4% of the domestic consumption of Hot Rolled Steel Sheet. These figures demonstrate that, even including Dofasco manufactured and sold steel, the quantities of the Canadian product were in overall percentage terms at the margin. With the elimination of Dofasco, there was clearly a need to reassess the effects of Canadian-produced Hot Rolled Steel Sheet other than that sold directly by Dofasco for the purposes of Article 41(I) of the Law.

Second, in order to determine whether or not any price discrimination caused injury to the domestic producers of Hot Rolled Steel Sheet in terms of Article 39 of the Law, SECOFI accumulated imports of that product from a group of countries (including Canada).

Such an accumulation is permitted by Article 43 of the same Law on the terms established by Article 67 of the same Regulation.

On the basis of its evaluation of the cumulative effect of these imports of Hot Rolled Steel Sheet, SECOFI determined that there had indeed been injury to the domestic producers.

It, thereafter, proceeded to assess anti-dumping duties on the product of the Complainants by reference to the reasoning identified earlier in the Final Determination in the section assessing the existence and extent of price discrimination.

However, in Article 43, inclusion within such an accumulated base of the imports of a product from a particular country is subject to the terms and "exceptions" set out in the Regulation. Among the "exceptions" in Article 67 of the Foreign Trade Law Regulation, it is provided that SECOFI shall not include imports from a particular country where those imports are not significant and do not have a clear adverse effect on the national production. In elaboration of this standard, the Secretary is directed to consider whether: "...due the nature of the investigated product and the specific characteristics of the national market, such imports have no clear and identifiable influence on the domestic prices or factors that influence such prices of the national product and the conditions of the national industry that produces the same or a similar product".

SECOFI was of the opinion that the level of imports of Canadian Hot Rolled Steel Sheet during 1992, when related to the other relevant factors specified in Article 67 of the Foreign Trade Regulation was sufficient to justify the inclusion of the Canadian-manufactured product within the accumulated basis for the assessment of whether or not injury was caused to the domestic producers.

It is, however, vital to realize that, in terms of the structure of the Law, any assessment of whether there has been injury caused by the relevant imports is preceded by an earlier consideration. That earlier consideration is a determination of whether the product from a particular country has been imported under conditions of price discrimination. Thus, in this case, the decision to include Canadian manufactured Hot Rolled Steel Sheet within the accumulated base came after a determination that Dofasco's Hot Rolled Steel Sheet was being imported into the United Mexican States under conditions of price discrimination. The *Aclaración* modified this situation.

Therefore, the errors made by SECOFI both in finding that Dofasco had sold Hot Rolled Steel Sheet in the United Mexican States during 1992 under conditions of price discrimination and in assessing duty on direct purchases of Dofasco's products, undermined

the initial decision to include Canadian manufactured Hot Rolled Steel Sheet within the accumulated base. As a consequence of this, there should have been a reconsideration by SECOFI, of whether the remaining imports entering Mexico from Canada during 1992 were of such a significant volume as to justify, in terms of Art. 67 of the Foreign Trade Law Regulation, the accumulation of imports from Canada for the purpose of determining of the existence or non-existence of injury. On this point also, there is no evidence in the Administrative Record that such a reassessment ever took place in the wake of the Dofasco *Aclaración*.

Accordingly, there must be a remand to SECOFI to reassess the position of the Canadian imports of Hot Rolled Steel Sheet on all of these related bases.

X. ALGOMA AND STELCO

While SECOFI conceded that, during the “investigation period” (the 1992 calendar year), Algoma and Stelco did not export Hot Rolled Steel Sheet to the United Mexican States, nonetheless, SECOFI considered that they did not answer in a complete manner the official investigation questionnaire by stating that they were not exporting to Mexico during 1992. Rather, SECOFI stated that they had failed to provide answers to those parts of the questionnaire dealing with normal value and the export price of their product.

Notwithstanding these facts, SECOFI in its Final Determination assessed Hot Rolled Steel Sheet manufactured by Algoma and Stelco as liable to duty, duty which was fixed at the highest margin of price discrimination observed in the case of Canadian-manufactured Hot Rolled Steel Sheet entering the United Mexican States during 1992 - 45.86%. There was no basis in law for that assessment.

First, the residual category was established in the light of a finding that Dofasco was exporting Hot Rolled Steel Sheet under conditions of price discrimination. That determination was in effect reversed by the *Aclaración*. Secondly, as noted in the section on Injury in this decision, the whole administrative investigation was premised on alleged actual injury, not threat of injury. As non-exporters during the investigation period, neither Algoma nor Stelco could be found to have caused injury. Finally, given that Algoma and Stelco answered the official questionnaire to the extent that could by law be required of manufacturers not exporting during the investigation period, there was no basis for treating Algoma and Stelco as subject to duty based on the highest margin of price discrimination observed during 1992. In terms of Article 54 of the Law, Algoma and Stelco complied with the requirements of the investigation.

Accordingly, the Final Determination with respect to Algoma and Stelco must be remanded to SECOFI to be dealt with on the basis of the information in the existing Administrative Record and in a manner which is consistent with these reasons.

XI. THE TITAN INDUSTRIAL CORPORATION

A) Facts pertaining to and treatment of Titan.

The Complainant, Titan is an American company with a registered office in the State of New York. On the basis of the evidence to which the Panel had access, during 1992, part of its business involved the reselling of Hot Rolled Steel Sheet, to various Mexican purchasers. This sheet was primarily "second grade" and apparently originated from at least a number of Canadian manufacturers including Dofasco. There is, however, no evidence in those portions of the Administrative Record to which the Panel had access, as to the breakdown in percentages between sales by Titan of Dofasco products and those of other Canadian manufacturers.

In the Preliminary Determination, Titan was identified by SECOFI as a trading company which dealt exclusively in "second grade" sheet manufactured by Dofasco (paragraph 107). It was also stated that Titan, while submitting a response to the required questionnaire, had not provided all of the information that was requested. In particular, it did not provide any information as to its costs of acquisition and the costs of manufacturing Hot Rolled Steel Sheet (paragraph 109). As a consequence, its exports were assessed for duty purposes on

the basis of the highest margin established by SECOFI for the Canadian manufacturers during the period of investigation which was of a 45.86% (paragraph 110).

In the Final Determination, this assessment appears to have been confirmed in so far as all imports of Canadian Hot Rolled Steel Sheet with the exception of those coming directly from Dofasco were assessed at 45.86% (paragraph 581D.b). While this subparagraph refers to "all other Canadian exporters" and while there is no specific reference to Titan, Titan is described earlier in the Final Determination as a "**Canadian**" (emphasis added) company "**part**" (emphasis added) of whose sales to Mexico involved Dofasco's products (paragraph 45).

If this interpretation of the percentage at which Titan was assessed is accurate, what is unclear from the Final Determination is whether that assessment continued to be based on SECOFI's perception that Titan had not completed the questionnaire fully. The reason for Titan being included with the other Canadian manufacturers and assessed at 45.86% is never stated explicitly.

Moreover, at paragraph 45 of the Final Determination, SECOFI seems to accept that Titan did complete the prescribed questionnaire adequately. As a consequence of this failure to articulate the reasons for this apparent assessment of Titan, it is manifest that, in terms of Art. 238(II) of the Federal Fiscal Code, any assessment of products imported into the United Mexican States from Titan was without "*fundamentación o motivación*".

Indeed, any such assessment of imports from Titan of Dofasco's products at 45.86% conflicts with the way in which Titan was otherwise treated or characterized in the Final Determination. At paragraph 47-49,⁴⁰ SECOFI indicates that it will not be setting a margin

⁴⁰ Regarding Titan, in points 47, 48, and 49 of the Final Determination, SECOFI decided the following:

of price discrimination specific to Titan. Rather, it rules that Titan's margin will be the same as that established for its supplier, Dofasco. To allow Titan to take into account the costs of its sales department in the marketing of Dofasco's Hot Rolled Steel Sheet would be to establish erroneously two different price discrimination margins in relation to exports originating from the same source. One implication of this conclusion would seem to be that any failure on the part of Titan to supply information in its questionnaire as to its costs of acquisition would be irrelevant and that, in any event, the assessment of Hot Rolled Steel Sheet emanating from Titan should have been the same as the margin assessed to Dofasco at least to the extent that Dofasco was its supplier.

This analysis has basis in the documentation to which the Panel had access. First, it is clear from the Administrative Record that Titan did submit a completed questionnaire.

As asserted in the Preliminary Determination, that questionnaire did not contain details as to the costs of acquisition nor on the general costs of manufacturing Hot Rolled Steel Sheet. Nonetheless, in its Response to the Petition for an Investigation Regarding Unfair International Trade Practices presented by AHMSA and Hylsa as well in its brief, Titan

“47. The Secretariat resolved not to establish a specific price discrimination margin for Titan as the margin for this marketer must correspond to that which is calculated for producer(s) that provide merchandise for distribution. This determination is obtained from the procedure presented in the following points.

48. Marketers are in charge of some distribution in foreign markets of merchandise manufactured by producers. Specifically, their participation in export operations is limited to finding clients and financing certain sales expenses such as credit expenses. This means that marketers play a similar role to that of the producers' sales departments. In virtue of the above, calculating a price discrimination margin to a marketer is not necessary, because it would be equal to calculating a price discrimination margin for a sales department.

49. This conclusion applies, although there exists a purchase-sale operation between the marketer and the producer. Even in such cases the marketer is not the final receiver of the merchandise and only acts as intermediary between the producer in the country of origin and the consumer in the importing country. If one calculates a price discrimination margin for the producer and another for the marketer, a same export operation could have two different margins. This however, is not reasonable. These are the same transactions and, therefore, it is not logical to sustain that these have a margin when they are analyzed from the producer's perspective, and another one when considered from the marketer's point of view.

asserts that, for the purposes of assessing a margin of price discrimination in its case, SECOFI must base any such margin on Art. 31(2) of the Foreign Trade Law and "a constructed value" as defined in that Article. According to Titan, since it purchased and resold Dofasco's Hot Rolled Steel Sheet, that constructed value can be determined from the information provided by that company.

B) Position of Parties

In its response to Titan's brief, SECOFI conceded that it made an error in the case of Titan. However, that concession was apparently not made with a view to treating Titan as assimilated with Dofasco's direct exports for duty purposes. (Such an outcome would now result in a zero assessment for Hot Rolled Steel Sheet supplied by Dofasco given the *Aclaración* issued by SECOFI in relation to Dofasco's direct exports.) Rather, SECOFI concedes (at pages 118-119 of its brief) that, notwithstanding the statement in paragraph 47 of the Final Determination indicating its intention not to establish a margin of price discrimination specific to Titan, it now wishes to do so. As a consequence, SECOFI asks that the matter of Titan be remanded for the purposes of further analysis of the information in the Administrative Record. On the basis of that analysis, SECOFI will then determine whether it is appropriate to proceed further and establish a specific margin of price discrimination for Titan.

In contrast to the position of SECOFI, counsel for Titan alleged that, in view of the nature of the error committed by SECOFI, a remand to SECOFI with an instruction to reassess Titan is impermissible. On the other hand, counsel for SECOFI is maintaining that not only is such a remand permissible but that it should happen in this case.

C) Assessment of nature of errors in respect to Titan

In the case of Titan, SECOFI possibly made three errors which would justify review by the Panel of this part of SECOFI's Final Determination. First, as already noted, it failed to provide a reasoned basis in the Final Determination for an apparent assessment of Titan at the highest observed margin of price discrimination for Canadian Hot Rolled Steel Sheet entering Mexico during 1992. This error gives rise to review on the basis of Art. 238(II) of the Federal Fiscal Code in that any such conclusion by SECOFI lacked *fundamentación y motivación*. Secondly, SECOFI may have mistakenly decided not to establish a specific margin for Titan. Finally, SECOFI may have assessed Titan's products as liable to duty at 45.86% on the basis on the erroneous conclusion that Titan had failed to answer the prescribed questionnaire adequately. However, none of these errors necessarily means that the Panel must remand the proceedings concerning Titan with a direction to SECOFI that it should not resume or reopen the investigation of Titan. In order for the Panel to remand the matter on that basis, the errors of SECOFI must be of such a magnitude or seriousness as to remove all authority or justification for any further investigation of Titan's sales of Hot Rolled Steel Sheet in Mexico during the investigated period.

On the other hand, there is a difficulty to the extent that SECOFI now seeks a remand to enable it to establish a specific margin for Titan. This arises from paragraph 47 of the Final Determination and the assimilation of Titan with Dofasco. This opens up the possibility that any remand to SECOFI should be on the basis that it assess Titan at the same margin as Dofasco, this in effect amounting to a remand that would have the practical consequence of discontinuing the proceedings against Titan.

However, to do this would go against what SECOFI found to be the facts of the situation as they pertain to Titan. According to the Final Determination, Titan was selling Hot Rolled Steel Sheet of Canadian producers other than Dofasco. To remand on the basis that all

Canadian Hot Rolled Steel Sheet sold by Titan be assessed at the same level as Dofasco would be inconsistent with those facts. On the other hand, to remand the matter to SECOFI to enable it to establish a specific margin of price discrimination would be contrary to the reasoning advanced by SECOFI itself. In particular, it would contradict SECOFI's position by enabling it to establish different margins for the producer and the trading company in relation to sales of the same product depending on whether it was sold directly by the producer or through the trading company.

Accordingly, it is the position of the Panel that any remand in the case of Titan should not allow SECOFI to now establish a specific price discrimination margin for Titan. Rather, any assessment of Titan should be based on the margins at which its individual suppliers are appropriately assessed on the basis of the Administrative Record as it presently exists. Regarding Dofasco, and in accordance with the terms of the *Aclaración*, the margin established for Dofasco is 0%. As a consequence, the margin to be applied to Titan's Hot Rolled Steel Sheet from Dofasco should also be 0%. For all other Hot Rolled Steel Sheet product manufactured by companies other than Dofasco and marketed by Titan, the margin will be contingent on the existence of evidence in the current Administrative Record that these products had been marketed under conditions of price discrimination and caused injury to the domestic producers of Hot Rolled Steel Sheet. Moreover, as already determined in the previous section of these reasons, for the purposes of any injury determination, any assessment of Titan will be contingent on a reevaluation of whether, with Dofasco now excluded, it is appropriate to treat Hot Rolled Steel Sheet originating in Canada within the accumulated base of Hot Rolled Steel Sheet originating in other countries.

XII. ORDER OF THE PANEL

On the basis of all the legal grounds previously mentioned, this Panel unanimously orders the following:

Pursuant to the North American Free Trade Agreement Article 1904.8, the Final Determination is hereby remanded to SECOFI in order for SECOFI to issue a new Determination compatible with the following:

A) Regarding Titan:

1. That, consistent with the reasoning that it accepts in paragraphs 47 to 49 of the Final Determination, SECOFI accord to the imports coming from Titan and supplied by Dofasco the same treatment as for the imports from Dofasco set out in paragraph 581 D of the Final Determination under the *Aclaración* of the Final Determination published in the D.O. on February 26, 1996.

2. That SECOFI, consistent with the reasoning that it adopts in paragraphs 47 to 50 of the Final Determination, assess the imports from Titan supplied by Canadian manufacturers other than Dofasco antidumping duties that are specific to each of those suppliers. Prior to doing this, it shall:

- Evaluate, based on the information already present in the Administrative Record, the impact of the exclusion of the imports coming from Dofasco on the total volume of imports from Canada.

- Assess, based on the information contained in the Administrative Record, whether the resulting total volume of exports from Canadian companies other than Dofasco (whether exported to the United Mexican States directly by Dofasco or through Titan), is still significant and, therefore, justifies its accumulation with the imports from the Federal Republic of Brazil, the Republic of Korea, the Federal Republic of Germany, the Kingdom of the Netherlands and the Republic of Venezuela in the analysis of injury and cause and effect.

In the event that the volume of imports from Canada mentioned in the above paragraph is found to be significant, conduct, based on the information contained in the Administrative Record, an analysis of injury and cause and effect for each of the suppliers of Titan other than Dofasco.

In either of the situations described previously, and on the basis of the information contained in the Administrative Record, calculate for each of Titan's suppliers other than Dofasco, the corresponding antidumping duty to be applied, depending on the case, to imports carried out by Titan different to those incoming from Dofasco.

B) Regarding Algoma and Stelco:

Whereas during the whole investigation procedure and, in particular, in the Final Determination and at the Public Hearing, SECOFI maintained that this was an INJURY and not a THREAT OF INJURY investigation, and whereas under the applicable legal

provisions and, as demonstrated by the evidence in the Administrative Record, the Canadian companies, Algoma and Stelco did not export any Hot Rolled Steel Sheet to the United Mexican States during the investigation period, and whereas both companies did provide the required information to SECOFI during the investigation, SECOFI shall act on the basis that the legal requirements for the imposition of antidumping duties for injury were not met.

In accordance with Rule 73(1) of the NAFTA Rules of Procedure for Article 1904, this Panel orders that in a 60 day period, SECOFI shall, through the Secretariat, file a determination on remand detailing the actions it has taken in accordance with the terms of the Panel's remand.

Issued on June 16, 1997.

Signed in the original by:

June 16, 1997.

Date.

Víctor Carlos García Moreno.

Víctor Carlos García Moreno.

Chairman.

June 16, 1997.

Date.

Víctor Blanco Fornieles.

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Wilhelmina K. Tyler.

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David J. Mullan.

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Jorge Sánchez Cordero.

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