

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

In the Matter of:

Steel Concrete Reinforcing Bar

from Mexico and Turkey

Final Affirmative Injury Determination

Secretariat File No.:

USA-MEX-2014-1904-02

FINAL DECISION

In its Interim Decision and Order of July 14, 2016, the Panel remanded the International Trade Commission's finding that rebar and in-scope deformed steel wire are both part of a single like product and instructed the agency to reconsider the finding, based on evidence already in the record or on new evidence, relating to each of the six like product factors it has traditionally used, with particular attention to manufacturing facilities, production processes and employees, to producer and customer expectations, and to the interchangeability of in-scope deformed steel wire and rebar in certain concrete reinforcement applications.¹ With respect to manufacturing facilities, the Panel noted that the Commission's reference to "other information" from Petitioner supporting its findings was not specified, resulting in the agency's "not clearly articulating the reasons for its conclusions."²

¹ Interim Panel Decision and Order of July 14, 2016, at 26-29.

² *Id.* at 26-27.

Summary of ITC Remand Determination

The Commission looked at each of the six like product factors in greater detail than it had in its original Final Determination of Injury, ultimately finding again that no “clear dividing line” separated in-scope deformed steel wire and rebar and instead that the two products fell into a continuum.³ Although the Commission chose not to reopen the record to collect additional information, it pointed out that it had collected information from the four domestic producers of deformed steel wire after Commerce had made its last-minute change in scope as to deformed steel wire.⁴ Although the Commission used this information in its original determination primarily to support its finding that there was no evidence of domestic production of in-scope deformed steel wire during the investigation, the agency went further in response to the Panel’s concerns and analyzed these responses for their relevance to the like product finding.

The Commission substantiates its like-product analysis mainly in the interchangeability factor, which it applies not only to validate the uses factor, but also in respect of the perceptions of producers and customers. In that regard, the ITC’s Determination on Remand relies heavily on the statements by the Complainant and the Petitioner to both the Commission and to the Department of Commerce in the original investigations that the in-scope deformed steel wire that Deacero produced could be, and was, used as a substitute for rebar.⁵ Commerce even cited Deacero’s statement to this effect in its Decision Memo.⁶ The ITC also pointed to Deacero’s marketing brochure, which indicates that the company markets in-scope deformed steel wire as rebar, using the Spanish word (“Varilla”) that is understood in the industry to mean rebar.⁷

However, the Commission undermines this evidence when it recalls that Deacero stated that its deformed steel wire products were primarily used to manufacture certain welded wire products, such as welded wire mesh and welded wire reinforcement mats, and to a

³ Remand Determination at 31-33.

⁴ *Id.* at 11.

⁵ *Id.* at 7, 21-22.

⁶ Commerce Decision Memo of Apr. 18, 2014, at 2.

⁷ Remand Determination at 22.

lesser extent are used as substitutes for rebar.⁸ As with the explanation that in-scope deformed steel wire and rebar may be substituted for each other “under certain circumstances,” it is also unclear what the parameters are for this “lesser extent,” and what weight the Commission gave to this evidence. This lack of precision is even more pronounced in light of the finding that there is no domestic production of in-scope deformed steel wire, its finding that the volume of subject imports is minimal, and its finding that some firms stated that deformed steel wire was not being used interchangeably with rebar.⁹

The Commission adds confusion when it finds significant the questionnaire responses that “suggest” that in-scope deformed steel wire can be used interchangeably with rebar, but dismisses the same evidence when the response states that presently interchangeability does not occur.

The Commission has substantially clarified its findings with respect to manufacturing facilities, production processes, and employees. In support of its original recognition that Petitioner’s statements note that Nucor could produce both rebar and in-scope deformed steel wire in the same facilities with the same equipment and employees, the Commission pointed to a verification by a Commission auditor that supported these statements.¹⁰

Regarding producer and customer expectations, the agency repeated in its Remand Determination its prior finding that a number of firms responding to the agency’s questionnaires “indicated that they perceive that deformed steel wire and rebar can be used interchangeably to reinforce concrete.”¹¹

Position of the Parties

A. RTAC supports the agency’s finding of a single like product and argues that:

⁸ *Id.* at 21.

⁹ *Id.* at 25.

¹⁰ *Id.* at 26.

¹¹ *Id.* at 29.

The agency has articulated the rationale behind its conclusion, identified the supportive record evidence, acknowledged contrary evidence, and described why it chose to give that contrary evidence limited weight. In other words, the ITC has demonstrated that its determination is grounded in evidence that a “reasonable mind might accept as adequate to support its conclusion (citing *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966)). This is all that the law requires.¹²

B. Deacero disagrees.

While arguing that the Commission, because it elected not to reopen the record, “attempted to provide different explanations based on the same record,” it acknowledges that the agency did in fact obtain additional information by telephone from deformed steel wire producers.¹³ However, Complainant argues that the ITC then proceeded arbitrarily to discount evidence that detracted from its conclusions. Deacero proceeds to catalog what it describes as “confusing,” “internally inconsistent,” and “not clear” information.¹⁴

For example, Deacero argues that when the Commission stated in the Remand Determination that it “will give weight to the information in Appendix D to the extent that it may pertain to in-scope deformed steel wire, and discount the information if it only pertains to out-of-scope deformed steel wire,” the agency has selectively relied on Appendix D information when it supports their findings, by characterizing as out-of-scope deformed steel wire the information that did not support its decision.¹⁵ Deacero contends that the Commission cannot have it both ways; either it must ignore all record information and Appendix D regarding deformed steel wire, or find that there is or could be in-scope deformed steel wire production and use the Appendix D information, including the contradictory evidence, given that the record contains no distinction between in-scope and out-of-scope deformed steel wire.¹⁶

¹² RTAC’s Response to Deacero’s Comments on the Remand Results, Dec. 5, 2016, at 21.

¹³ Deacero’s Comments on the Determination on Remand, Nov. 8, 2016, at 4-5.

¹⁴ *Id.* at 6 & 9.

¹⁵ *Id.* at 7.

¹⁶ *Id.*

Deacero also criticizes the Commission's failure to articulate in greater detail the questionnaire responses from producers that rebar and in-scope deformed steel wire can be substitutes for each other "under certain circumstances." The Panel has noted this shortcoming as well, one that importantly influenced the Interim Decision of the Panel. The crux of Complainant's argument appears to be that the Commission "selectively gives weight" to the evidence of record.¹⁷

C. ITC

As Commission counsel explains, the agency "addressed those questionnaire responses that arguably detracted from the Commission's findings as well as the responses that supported those findings."¹⁸ The ITC "provided a more detailed analysis of all the record information pertaining to the six like product factors than it did in the original determination."¹⁹ Agency counsel contends that, "having urged the Panel to reweigh the record evidence on all these points, Deacero proceeds to offer its own highly selective review of the record information with respect to the Commission's six domestic like product factors", ignoring "the record information presented by Deacero itself."²⁰

Decision of the Panel

As we stated in the Interim Decision, under the "substantial evidence" standard, we must affirm a Commission determination if "it is reasonable and supported by the record as a whole, even if some evidence detracts from the Commission's conclusion."²¹ In that same regard, an agency must articulate a "rational connection between the facts found and the choice made."²²

The Panel continues to have substantial doubts that rebar and in-scope deformed steel wire comprise a single like product. The list of conflicting evidence not rationalized by

¹⁷ See, e.g., Deacero's comments at 12.

¹⁸ ITC Response of Dec. 5, 2016, at 3.

¹⁹ *Id* at 4.

²⁰ *Id* at 6.

²¹ *Altx, Inc. v. U.S.*, 370 F.3d 1108 (2004)

²² *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 (1962)

the agency is long. Typical is the fact that the ITC accords little weight to the responses of producers indicating no knowledge of deformed steel wire. One could easily conclude that this lack of familiarity was also an indication of the lack of similarity of in-scope deformed steel wire with rebar, but the ITC does not even discuss this possibility.

Another example of this kind of thinking is that, on one hand, the Commission finds no evidence in the record that in-scope deformed steel wire is produced in the United States, but on the other hand uses this same record evidence to find that rebar and in-scope deformed steel wire are like products.²³ Further, the Commission finds significant the responses in the questionnaires that “suggest” that in-scope deformed steel wire can be used interchangeably with rebar, but dismisses the same evidence when it states that presently interchangeability does not occur.²⁴ Again, while noting that Nucor could produce both in-scope deformed steel wire and rebar on the same equipment, the Commission repeats that the record indicates that deformed steel wire is usually produced on different equipment than rebar, with a different process, and that rebar is hot-rolled while deformed steel wire is cold-drawn.²⁵

A further example of the agency’s failure either to explain or rationalize conflicting statements is the Commission’s opinion that its finding of a single like product is not undermined by statements from producers that some deformed steel wire has other end uses than as a substitute for rebar, or that deformed steel wire is not presently being used as a substitute for rebar.²⁶ The Commission offers as an explanation for the repeated statement by producers that the two products can be used as substitutes for each other “under certain circumstances” that these circumstances could include “concrete reinforcement applications.”²⁷ Our understanding of the circumstances to which producers were alluding is not, unfortunately, expanded by this term, even if we accept that the producers logically had such applications in mind.

²³ Remand Determination at 15-17.

²⁴ *Id.* at 25.

²⁵ *Id.* at 25.

²⁶ Remand Determination at 30.

²⁷ *Id.*

The Panel was concerned in its Interim Decision that the Commission had passed too lightly over certain evidence relating to its finding that rebar and in-scope deformed steel wire can be used interchangeably “under certain circumstances, used often by domestic producers to describe when in-scope deformed steel wire and rebar would be used interchangeably.”²⁸ The Panel is disappointed that the agency did not at least attempt to narrow the meaning of this obtuse term. Whether such circumstances are frequent or rare could be telling in gauging interchangeability. Perhaps it is the case that only reopening the record could permit the Commission satisfactorily to determine these circumstances, although we believe that the agency could have more satisfactorily amplified these issues and rationalized the contradictory facts without gathering further evidence.

On the other hand, for a U.S. reviewing court to have substantial doubts as to the correctness of an agency decision is not uncommon with respect to a complex subject as to which the evidence often points in different directions that is based on a record which unquestionably would be clarified by the gathering of yet another round of evidence. However, the agency engaged during the remand determination in an explicit reweighing of the evidence, acknowledging both the positive and the negative. As RTAC and the Commission explain, the fact that the reviewing court is left with the belief that further information would lessen its doubts is no basis for refusing to affirm the agency’s findings.

While styled as not meeting the substantial evidence standard, Deacero’s detailed listing of evidence that can be taken one of two or more ways asks the Panel, at bottom, to review the evidence and find that the Commission reached the wrong conclusion. That approach, of course, describes a reweighing of evidence, which is beyond the Panel’s review powers.²⁹

The ITC and Commerce are, in the final analysis, the implementers of the law. This status accords the agencies wide discretion to decide when the fact gathering must end,

²⁸ Interim Panel Decision at 26.

²⁹ *NEC Corp. v. Dept. of Commerce*, 36 F. Supp. 2d 380, 383 (Ct. Int’l Trade 1998)

consistent with the law, the wise use of their resources, and agency policy. The Panel's task is not to agree with the agency's procedural approach, nor its findings, but to decide whether those findings accord with the statute.

As cogently explained by agency counsel, "the Commission frequently makes domestic like product determinations in which one or more factors do not point in the same direction as the Commission's ultimate conclusion," and the U.S. courts support such determinations nonetheless.^{30 31}

Applying the standard of review applicable in U.S. courts, as earlier summarized, we find that the Commission has complied with the Panel's instructions. Its determination

³⁰ *Id* at 33, citing *Cleo v. United States*, 30 CIT 1380, 501 F.3rd 1297-1299 (2006).

³¹ The significant gaps in knowledge in the record would likely not pass muster under the less deferential standard of review in Mexican courts. The applicable statute anticipates reversal in part if one of the following errors is found:

An administrative determination shall be declared illegal when one of the following grounds is established:

I. Lack of jurisdiction of the official who issued, ordered, carried out the proceeding from which the said determination was derived.

II. Omission of the formal requirements provided by law, which affects an individual's defences and goes beyond the result of the challenged determination, including the lack of legal grounding or reasoning, as the case may be.

III. Procedural errors which affect an individual's defences and goes beyond the result of the challenged determination.

IV. If the facts, which underlie the determination, do not exist, are different or were erroneously weighed, or if (the determination) was issued in violation of applicable legal provisions or if the correct provisions were not applied.

V. When an administrative determination issued under discretionary powers does not correspond with the purposes for which the law confers those powers. *Ley Federal de Procedimiento Contencioso Administrativo*, art. 51. Prior to 2006, the standard of review was Article 238 of the *Codigo Fiscal*. See, e.g., *Nullity Should Be Declared in Challenge to a Federal Administrative Proceeding When the Authority Incorrectly Applies the Legal Standard*, Ninth Period. Record: 166615. Instance: Collegiate Circuit Courts. Type of Thesis: Isolated. Source: Federal Judicial Weekly Publication and its Gazette. Volume XXX, August 2009. Subject (s): Administrative. Thesis: I.4o.A.682 A. Page: 1665.

that rebar and in-scope deformed steel wire are both part of a single domestic like product, moreover, is supported by substantial evidence and in accordance with law.

THEREFORE, the Commission's Determination on Remand is, hereby, AFFIRMED.

The Panel directs the United States Secretary of the NAFTA Secretariat to issue a Notice of Final Panel Action in eleven days pursuant to Rule 77 of the Rules of Procedure for Article 1904 Binational Panel Reviews.

SO ORDERED,

Issue Date: February 2, 2017

Signed in the original by:

Stephen Joseph Powell
Stephen Joseph Powell, Chair

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