

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

_____	)	<b>Secretariat File No:</b>
<b>In the Matter Of:</b>	)	USA-MEX-2014-1904-02
Steel Concrete Reinforcing Bar from	)	Business Proprietary Information
Mexico and Turkey: Final Affirmative	)	contained on pages 8 and 26 has been
Antidumping Injury Determination	)	deleted
_____	)	

**INTERIM DECISION AND ORDER OF THE PANEL**

**PANEL MEMBERS:**

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Gabriel Cavazos Villanueva  
Oscar Cruz Barney  
John R. Magnus  
Luz María de la Mora

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**On behalf of the Investigating Authority:**

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U.S. International Trade Commission

**I. Introduction**

This Binational Panel has been established pursuant to Article 1904.2 of the North American Free Trade Agreement (“NAFTA”) to review the Affirmative Final Injury Determination of the U.S. International Trade Commission’s (“ITC,” “Commission,” or “Investigating Authority”) in the Antidumping Investigation of Steel Concrete Reinforcing Bar (“Rebar”) from Mexico and Turkey, published in 79 Fed. Reg. 65,246 (Nov. 3, 2014). On December 1, 2014, Deacero S.A.P.I. de C.V. and Deacero USA, Inc. (collectively, “Deacero” or “Complainant”) filed a First Request for Panel Review of this determination with the United States Section of the NAFTA Secretariat pursuant to Article 1904 of the NAFTA.

The Panel convened a hearing in Washington, D.C., on March 16, 2016, during which counsel for Deacero, the Commission, and the Rebar Trade Action Coalition (“RTAC”) appeared and participated in oral argument. The Parties filed four preliminary motions for extension of time,<sup>1</sup> each of which the Panel GRANTED at the start of its hearing and, by this Order, HEREBY CONFIRMS.

In accordance with NAFTA Article 1904.8, for reasons more fully set out in section VI below, and on the basis of evidence in the administrative record, the applicable law, the

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<sup>1</sup> ITC Notice of Consent Motion of Jan. 20, 2015, Doc. 10; Deacero’s Notice of Consent Motion, Mar. 9, 2015, Doc. 15; ITC Notice of Consent Motion, June 19, 2015, Doc. 15; and Deacero Notice of Consent Motion, Aug. 21, 2015, Doc. 25.

written submissions of the participants, and oral argument at the Panel's hearing, the Panel remands the Commission's finding that Rebar and in-scope deformed steel wire are both part of a single like domestic product. The Commission on remand shall reconsider, based on the existing record evidence and on new information if the Commission elects to reopen the record, all six like product factors to determine whether Rebar and in-scope deformed steel wire are part of a single domestic like product. The Commission shall have 90 days to submit its redetermination on remand.

## II. Background

On September 4, 2013, RTAC concurrently filed with the Commission and the U.S. Department of Commerce's International Trade Administration ("Commerce") antidumping and countervailing duty ("AD/CVD") petitions alleging that imports of rebar from Mexico and Turkey were being sold at less than fair value ("LTFV"), imports from Turkey were subsidized by the Government of Turkey, and that such imports materially injured or threatened material injury to an industry in the United States.<sup>2</sup> Effective September 4, 2013, the Commission instituted AD investigations regarding imports of rebar from Mexico and Turkey and a CVD investigation regarding imports of rebar from Turkey.<sup>3</sup> On September 24, 2013, Commerce initiated its AD investigations of rebar from Mexico and Turkey and its CVD investigation of rebar from Turkey.<sup>4</sup>

On November 6, 2013, the Commission preliminarily determined that there was a reasonable indication that a U.S. industry was materially injured by reason of allegedly

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<sup>2</sup> Steel Concrete Reinforcing Bar from Mexico and Turkey, Initiation of Antidumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations, 78 Fed. Reg. 55,755 (Sept. 11, 2013).

<sup>3</sup> *Id.*

<sup>4</sup> Steel Concrete Reinforcing Bar from Mexico and Turkey, Initiation of Antidumping Duty Investigation, 78 Fed. Reg. 60,827; Steel Concrete Reinforcing Bar from Mexico and Turkey, Initiation of Countervailing Duty Investigation, 78 Fed. Reg. 60,831 (both Oct. 2, 2013).

dumped imports of rebar from Mexico and Turkey, and allegedly subsidized imports of rebar from Turkey.<sup>5</sup>

Subsequent to the Commission's affirmative preliminary determination, Commerce continued the investigations. Commerce preliminarily determined that subject imports from Turkey and Mexico were being sold or were likely to be sold at LTFV.<sup>6</sup> However, Commerce reached a negative preliminary determination regarding the allegedly subsidized imports from Turkey, having calculated a *de minimis* countervailable subsidy rate.<sup>7</sup>

On September 15, 2014, Commerce published its final AD and CVD determinations. Commerce reached a final affirmative determination in the AD investigation of rebar imports from Mexico, including a 20.58% weighted average dumping margin for Deacero, the largest exporter; and a final negative determination as to rebar imports from Turkey.<sup>8</sup>

In the CVD investigation of Steel Concrete Reinforcing Bar from Turkey, Commerce rendered an affirmative final determination, finding a 1.25% rate for Icdas and a *de minimis* rate of 0.74% for the other company specifically investigated, Habas.<sup>9</sup> Icdas has appealed Commerce's determination to the U.S. Court of International Trade.<sup>10</sup>

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<sup>5</sup> Steel Concrete Reinforcing Bar from Mexico and Turkey, Determinations, 78 Fed. Reg. 68090 (Nov. 6, 2013).

<sup>6</sup> Steel Concrete Reinforcing Bar from Mexico and Turkey, Preliminary Determination of Sales at Less Than Fair Value, Preliminary Determination of Critical Circumstances, and Postponement of Final Determination, 79 Fed. Reg. 22802 (Apr. 24, 2014).

<sup>7</sup> Steel Concrete Reinforcing Bar from Turkey, Preliminary Negative Countervailing Duty Determination, and Alignment of Final Decision With Final Antidumping Determination, 79 Fed. Reg. 10,771 (Feb. 26, 2014).

<sup>8</sup> Steel Concrete Reinforcing Bar from Mexico: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, 79 Fed. Reg. 54,967 (Sept. 15, 2014); Steel Concrete Reinforcing Bar from Turkey, Final Negative Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances, 79 Fed. Reg. 54,965 (Sept. 15, 2014).

<sup>9</sup> Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, 79 Fed. Reg. 54,963 (Sept. 15, 2014).

<sup>10</sup> *Icdas Selik Enerji Tersane ve Ulasim Sanayi, A.S. v. United States and RTAC et al.*, No. 14-00267 (Ct. Int'l Trade, filed Oct. 14, 2014).

RTAC challenged Commerce's negative determination of sales at less than fair value,<sup>11</sup> and on November 23, 2015, the Court of International Trade remanded to Commerce on a number of issues.<sup>12</sup> On April 7, 2016, Commerce submitted to the Court its redetermination on remand, finding that one of the investigated Turkish exporters had a weighted-average dumping margin of 3.64 percent, thus reversing its prior negative determination.<sup>13</sup>

In its final antidumping determination concerning imports from Mexico, Commerce added a sentence to the definition of the scope of the investigation, providing for the exclusion of certain types of deformed steel wire produced in the United States from the scope.<sup>14</sup>

As a result of Commerce's determinations, the Commission terminated its AD investigation of imports from Turkey, but continued its final phase AD investigation of imports from Mexico and its CVD investigation of imports from Turkey.<sup>15</sup>

On November 3, 2014, the Commission issued its final affirmative injury determination.<sup>16</sup> The Commission unanimously determined that an industry in the United States was materially injured by reason of imports from Mexico of rebar that were found by Commerce to be sold in the United States at LTFV and by reason of imports from Turkey of rebar that were found by Commerce to be subsidized.<sup>17</sup>

Applying its traditional six-factor like product analysis to determine which domestically-produced products were "like, or in the absence of like, similar in characteristics and uses with" the articles described in Commerce's scope, the Commission defined a

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<sup>11</sup> *Rebar Trade Action Coalition v. United States*, Consol. Ct. No. 14-00268.

<sup>12</sup> Slip-Op 15-130.

<sup>13</sup> RTAC Notice of Subsequent Authorities, April 11, 2016, Exh. B, at 71.

<sup>14</sup> Steel Concrete Reinforcing Bar from Mexico: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, *supra* note 8.

<sup>15</sup> Steel Concrete Reinforcing Bar from Turkey, Termination of Investigation, 79 Fed. Reg. 57131 (Sept. 24, 2014).

<sup>16</sup> Steel Concrete Reinforcing Bar from Mexico and Turkey, Determinations, 79 Fed. Reg. 65,246 (Nov. 3, 2014) ("Rebar from Mexico and Turkey Final").

<sup>17</sup> *Id.*

single like product that was co-extensive with the scope of the investigation, including certain deformed steel wire products within the amended scope of investigation.<sup>18</sup>

For purposes of its injury analysis and because the AD petition on imports from Mexico was filed on the same day as the CVD petition on imports from Turkey, and there was a reasonable overlap of competition between subject imports and among subject imports and the domestic like product in the U.S. market, the ITC cross-cumulated subject imports from Mexico and Turkey. Based on the cross-cumulated imports, the ITC found the volume of subject imports to be significant, both absolutely and relative to U.S. production and consumption.<sup>19</sup> The Commission found particularly probative the high degree of substitutability between the subject imports and the domestic like product and the 18.2 percent increase in demand between 2011 and 2013.

The Commission's finding of pervasive underselling was reached without consideration of transfer sales of the like product to affiliated purchasers, following the agency's standard practice.<sup>20</sup> The ITC found no evidence of price suppression (preventing price increases that otherwise would have occurred) or significant price depression, in light of the decline in raw materials costs during the "POI."<sup>21</sup>

For its analysis of the impact of the subject imports on the domestic industry, the Commission found that some of the indicators of the industry's performance examined (which included production, sales, employment, inventories, and financial factors) showed improvement as domestic demand increased. However, the ITC found that as subject import volumes increased significantly and took market share at the expense of the domestic industry through underselling, these performance indicators "failed to rise commensurately with the increase in domestic demand." The Commission also found

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<sup>18</sup> Views of the Commission Steel Concrete Reinforcing Bar from Mexico and Turkey, Inv. Nos. 701-TA-502, 731-TA-1227, USITC Pub. 4496 (Oct. 29, 2014)(Final) ("Commission Views") at 10-12(Administrative Record Confidential Doc. No. 328) ("AR").

<sup>19</sup> Commission Views, AR at 38.

<sup>20</sup> *Id.* at 41.

<sup>21</sup> *Id.* at 42-43

that the industry's declining market share prevented it from "fully benefiting" from the increased demand, and that other performance factors decreased during the POI.<sup>22</sup>

The Commission found that the industry's failure to benefit fully from increased demand was the result of subject imports and directly affected its revenues and profitability, thus constituting a significant impact on the domestic industry. The Commission gauged whether other factors than the subject imports may have contributed to this impact in order to ensure that injury was not being attributed to these other factors.<sup>23</sup>

On this basis, the Commission concluded that the domestic industry was materially injured by the subject imports from Mexico and Turkey.<sup>24</sup>

### III. Statement of Issues

Complainant Deacero asserts the following errors on appeal:

1. The Commission's determination that an industry in the United States is materially injured by reason of rebar from Mexico that Commerce found to be sold in the United States at LTFV and imports from Turkey that Commerce found to be subsidized is not supported by substantial evidence or otherwise not in accordance with law.
2. The Commission's decision to cross-cumulate subject imports from Mexico that Commerce found to be sold at LTFV with subject imports from Turkey that Commerce found to be subsidized for purposes of the material injury assessment is not in accordance with law.
3. The Commission's determination to find a single like product that includes deformed steel wire is not supported by substantial evidence or otherwise not in accordance with law.

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<sup>22</sup> *Id.* at 44-48. Commission's Brief at 7.

<sup>23</sup> Commission Views, AR at 48-50.

<sup>24</sup> *Id.* at 55.

4. The Commission's refusal to include in the pricing data [***Business Proprietary Information ("BPI")***]<sup>25</sup> transfers of rebar to affiliates for its analysis of price underselling by subject imports is not supported by substantial evidence or law.
5. The Commission's determination that the cumulated subject imports caused the U.S. industry to experience material injury is not supported by substantial evidence or otherwise not in accordance with law.
6. In the event that the U.S. Court of International Trade appeal of Commerce's CVD determination concerning subject imports from Turkey leads to a negative final determination by Commerce, the Commission should issue an amended final determination that is based on an analysis of subject imports that excludes imports from Turkey.

#### IV. Standard of Review

This Panel's authority to review the Commission's injury determination derives from Chapter 19 of the NAFTA. Pursuant to NAFTA Article 1904.3, "the Panel 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 to a review of a determination of the competent investigating authority." When reviewing the determination of the investigating authority, the Panel must apply the standard of review and general legal principles established by the courts of that country.<sup>26</sup>

In a NAFTA chapter 19 review, the Panel adjudicates in lieu of the United States Court of International Trade ("CIT"). The Panel is bound by the same precedent, substantive law, and standard of review as that Court. As a result, this Panel must apply the standard of review set out in § 516A(b)(1)(B) of the Tariff Act of 1930, which establishes that U.S. Courts "shall hold unlawful any determination, finding, or conclusion found...[1]

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<sup>25</sup> Complainant's 57(1) Brief, at 6.

<sup>26</sup> NAFTA, Annex 1911.

to be unsupported by substantial evidence on the record, or [2] otherwise not in accordance with law.”<sup>27</sup>

An administrative agency’s determination must be supported by substantial evidence on the record. When reviewing whether an administrative agency’s determination was based on substantial evidence in the record, such review must be confined to “the [administrative] record...”<sup>28</sup> More specifically, this Panel’s review must be limited to the “information presented to or obtained by [the Commission]... during the course of the administrative proceeding,... a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.”<sup>29</sup> Therefore, such determinations can only be judged on the grounds and findings actually stated in the pertinent determination, not on the basis of any post hoc arguments or facts presented by counsel for the investigative agency.<sup>30</sup>

The agency’s decision must have a reasoned basis in the record. The substantial evidence standard requires “more than a scintilla...such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>31</sup> Thus, the Panel must consider the ITC’s reasons for its conclusions and determine whether there is a rational connection between the facts found on the record and the determination made by Commerce.<sup>32</sup>

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<sup>27</sup> 19 U.S.C. § 1516a(b)(1)(B)(i); NAFTA, Annex 1911 “standard of review” (b).

<sup>28</sup> 19 U.S.C. § 1516a(b)(2)(A).

<sup>29</sup> *Id.*

<sup>30</sup> *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988) (consideration of “what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate”); *Florida Manufactured Housing Assn v. Cisneros*, 53 F.3d 1565, 1574 (11th Cir. 1995) (no consideration when the new interpretation is a mere litigation position); *USX Corp v. Director, Office of Workers’ Compensation Programs*, 978 F.2d 656, 658 (11th Cir. 1992) (no deference to agency’s litigating position absent prior interpretation).

<sup>31</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

<sup>32</sup> *Bando Chem. Indus. v. United States*, 16 Ct. Int’l Trade 133, 136-37, 787 F. Supp. 224, 227 (1992) (citing *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974)).

Therefore, courts and binational panels must consider “the record in its entirety, including the body of evidence opposed to the [agency’s] view.”<sup>33</sup> However, this does not enable courts or binational panels to “reweigh” the evidence or substitute their judgment for that of the original finder of fact.<sup>34</sup> As stated by the Court of Appeals for the Federal Circuit (“Federal Circuit” or “CAFC”):

A party challenging [an agency’s] determination under the substantial evidence standard has chosen a course with a high barrier to reversal. *Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F.3d 1056, 1060 (Fed. Cir. 2001). We have explained that “even if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent [the] determination from being supported by substantial evidence.” *Amer. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001). Accordingly, the question for the Court of International Trade was, and for this court is “not whether we agree with the... decision, nor whether we would have reached the same result... had the matter come before us for decision in the first instance”... [*United States Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed.Cir.1996)]. Rather, “we must affirm [an agency’s] determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the... conclusion. *Altx, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004) (internal quotation marks omitted). In short, we do not make the determination; we merely vet the determination.”<sup>35</sup>

Therefore, if the Commission’s determination is supported by substantial evidence in the record, this Panel may not, “even as to matters not requiring expertise... displace the [agency’s] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.”<sup>36</sup>

NAFTA Chapter 19 Panels must also follow the same standards of review and general legal principles followed by the U.S. courts when reviewing whether an administrative agency’s determination was in accordance with law.<sup>37</sup>

As established by the U.S. Supreme Court, in the absence of a clear intent of Congress, federal courts must defer to the reasonable interpretation made by the agency charged

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<sup>33</sup> *Universal Camera Corp. v. NLRB*, *supra* note 31, at 477.

<sup>34</sup> *Id.* at 488.

<sup>35</sup> *Nippon Steel Corp. v. United States*, 458 F. 3d 1345, 1352 (Fed. Cir. 2006).

<sup>36</sup> *Universal Camera Corp. v. NLRB*, *supra* note 31, at 488.

<sup>37</sup> 19 U.S.C. §1516a(b)(1)(B)(i); NAFTA, Annex 1911.

with administration of a statute.<sup>38</sup> Thus, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's determination is based on a permissible construction of the statute.<sup>39</sup> Accordingly, the Panel must uphold the determination of the Investigating Authority if it is supported by substantial evidence on the record and is not contrary to law, even if the Panel would have made a different determination had it been the initial trier of fact or interpreter of the statute.

#### V. **Should the Panel Grant RTAC's Request for Stay and Assertion of Mootness Based on Its Challenge to Commerce's Negative Dumping Determination in the Rebar from Turkey Case**

As noted in section II, in a redetermination forwarded to the CIT on April 7, 2016,<sup>40</sup> Commerce altered the "no dumping" finding it had previously made with respect to Turkish rebar. Specifically, Commerce determined that during the relevant period of investigation, Turkish rebar was actually dumped at a margin of 3.64% *ad valorem*. This finding applies by its terms to all subject rebar from Turkey except rebar produced and exported by Habas, which was found to be dumped at a *de minimis* margin and therefore deemed not to be dumped at all.<sup>41</sup>

On April 11, 2016, RTAC submitted a statement pursuant to NAFTA Panel Rule 68 regarding the cross-cumulation issue pending before the Panel. RTAC stated that since Commerce has now found Turkish rebar to be dumped, the injury finding at issue here

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<sup>38</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

<sup>39</sup> *Id.*; *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992) (the panel may not substitute its own judgment for that of the agency when there are two legitimate alternative views); *National R.R. Passenger Corp. v. Boston & Marine Corp.*, 503 U.S. 407, 417 (1992) (when considering whether or not a decision is "in accordance with law," the panel must defer "to reasonable interpretations by an agency of a statute that it administers..."); *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-620 (1966) ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.").

<sup>40</sup> RTAC Notice of Subsequent Authorities, April 11, 2016, Exh. B, at 71.

<sup>41</sup> *Id.*

simply cumulates dumped imports from two different countries.<sup>42</sup> According to RTAC, the redetermination replaces Commerce's original determination as a matter of law. RTAC concluded that the Panel should consider the redetermination to have changed the factual basis underlying the Commission's injury determination, thereby mooting Deacero's claim on cross-cumulation.

Deacero disputes both the premise and the conclusion of RTAC's argument. In particular, Deacero emphasizes that Commerce's finding on the dumping of Turkish rebar is not final, as it could be overturned by the CIT or upon further appeal to the CAFC. Deacero contends that even if Commerce's remand determination is considered to replace its original determination, it does not replace or change the Commission determination under review here.<sup>43</sup>

Respondent did not react to RTAC's subsequent authority submission and has not expressed a view on whether any claims in this appeal are now moot.

RTAC's contention on mootness builds on an earlier request by RTAC for a stay of Panel review, at least on the cross-cumulation claim, on the ground that appellate challenge and further agency consideration might produce a finding that the Turkish rebar was dumped.<sup>44</sup> The Panel responds here to that earlier-lodged request for a stay, as well as to the recently-added assertion of mootness.

If there were indeed developments affecting the status (dumped vs. un-dumped) of Turkish rebar that rendered moot Deacero's claim on cross-cumulation, then it would be improper for the Panel to make a decision on the merits of that claim. There would, as to this claim, be no case or controversy; abstaining would not be discretionary but required under U.S. law.<sup>45</sup> However, Commerce's redetermination on dumping of Turkish rebar has not mooted any claim in this appeal. Commerce has issued a new

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<sup>42</sup> *Id.* at Atch. A.

<sup>43</sup> Deacero Response to Notice of Subsequent Authority (Apr. 18, 2016), at 2.

<sup>44</sup> RTAC's Brief at 51.

<sup>45</sup> *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) ("In the absence of a live controversy, the constitutional requirement of a 'case' or 'controversy,' see U.S. Const., Art. III, deprives a federal court of jurisdiction. Accordingly, a case, although live at the start, becomes moot when intervening acts destroy the interest of a party to the adjudication.")

finding on dumping, but the injury determination we are reviewing has not changed. Our job is to review the determination the Commission actually made – not a determination we imagine the Commission might have made (or might make in the future) on cumulating two flows of imports found to be dumped. Beyond the fact that Commerce's revised dumping determination is still subject to being tested on appeal – and the fact that it found only some, not all, Turkish rebar to be traded unfairly – is the more fundamental fact that the Commission did cross-cumulate in the injury determination that is before the Panel. It did so either lawfully or unlawfully, and the determination is a reviewable one. Our review is limited to what the Commission actually did and said, and the evidentiary record it compiled.

In short, we are not required to deny Deacero a decision on the merits of the claim it has raised on cross-cumulation. On the contrary, abstaining would be incompatible both with U.S. law as we understand it, and with the Panel's responsibilities set out in NAFTA Article 1904.

By contrast, the Panel could have decided, and could still decide, as a matter of discretion, to stay its review of the cross-cumulation claim and wait for the Turkish rebar antidumping situation to clarify itself fully. The Panel considered this possibility during its earliest discussions (shortly after panelists were named), and elected not to defer consideration of the cross-cumulation claim simply because challenges to Commerce's negative determination on dumping of Turkish rebar might conceivably succeed. The Panel considered in this regard various factors, including judicial economy, potential hardships to different interested parties, and the value attached in the NAFTA itself<sup>46</sup> to speedy appellate adjudication.

Now that the negative dumping finding on Turkish rebar is, at least provisionally, an affirmative dumping finding, the case for delaying is stronger but still not strong enough. If we were to wait for a truly final outcome on dumping of Turkish rebar, the potential delay in completing the Panel's review could stretch to years. And the balance of hardships tips decisively toward making, rather than deferring, a ruling on the merits of

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<sup>46</sup> NAFTA, Article 1904.14.

the cross-cumulation claim. We are aware of no legal requirement to delay in such circumstances, nor any clear pattern in the behavior of U.S. judges making discretionary decisions about stays.

Accordingly, and with full awareness that this case might eventually come to resemble something other than a textbook “cross-cumulation” case, we have decided to reach the merits and do so below.

## **VI. Whether the Commission’s Inclusion of Deformed Steel Wire with Rebar as a Single Like Product is Supported by Substantial Evidence**

### **A. Background**

In determining whether an industry in the United States is materially injured or threatened with material injury by reason of subject imports, the Commission must define the domestic like product and the industry producing such product. Section 771(7)(B) of the Tariff Act of 1930 (19 U. S. C. § 1677(7)(B)) provides that in making its determinations of injury to an industry in the United States, the Commission:<sup>47</sup>

shall consider (I) the volume of imports of the subject merchandise, (II) the effect of imports of that merchandise on prices in the United States for domestic like products, and (III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States; and... may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.

The statute (19 U. S. C. 1677(10)) defines “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation.” The Commission’s practice in making such a definition considers six factors: 1. Physical characteristics and uses; 2. Interchangeability; 3.

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<sup>47</sup> U. S. International Trade Commission, *Steel Concrete Reinforcing Bar from Mexico and Turkey Investigations Nos. 701-TA-502 and 731-TA-1227 (Final)*, Publication No. 4496, Oct. 2014, at Staff Report (“Staff Report”)(Public Version).

Channels of distribution; 4. Customer and producer perceptions of the product; 5. Common manufacturing facilities; and 6. Price.<sup>48</sup>

In this case, a large category of deformed wire was in-scope from the outset of the AD/CVD proceedings, and was treated in the Commission's preliminary-phase injury investigation as part of a single like domestic product that also included Rebar. In other words, the Commission preliminarily found a single like product co-extensive with the scope.<sup>49</sup> The Commission's final injury determination similarly found a single like product co-extensive with the scope, but by that time Commerce had (at Petitioner's request) removed from the scope much of the originally-covered deformed wire.<sup>50</sup>

Deacero maintains that once the proceedings' coverage of deformed wire was narrowed in this manner, the Commission was obligated to consider the remaining (in-scope) deformed wire as a distinct like product and to render a separate material injury finding for the domestic industry producing that distinct like product.

Rebar is a long-rolled steel product commonly used in construction to provide strength to concrete, and it is manufactured as either plain-round or deformed round bars. In the United States, deformed Rebar is used almost exclusively because it provides greater adherence to concrete due to its ridges.<sup>51</sup> To conform to ASTM specifications, deformed rebar is identified by bar markings to denote the producer's hallmark, mill designation, size designation, specification of steel type and minimum yield designation.

Deformed steel wire is a cold-drawn wire product used for reinforcement of concrete. Deformed steel wire sold in the U. S. market is manufactured to conform to the test standards of ASTM A1064 or ASTM A496. It is used in a wide range of concrete reinforcing applications, often used to produce welded wire mesh for concrete reinforcement that can substitute for Rebar in "certain applications".

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<sup>48</sup> See Commission's Brief at 36.

<sup>49</sup> Commission's Brief at 3.

<sup>50</sup> On June 18, 2014, Petitioner requested that Commerce amend the scope to exclude most types of deformed steel wire, while keeping within the scope deformed steel wire that meets ASTM A1064/A1064M, contains bar markings, and/or is subject to an elongation test. Commerce ultimately did so. See *Rebar from Mexico and Turkey Final*, *supra* note 16, at I-10 *et seq.*

<sup>51</sup> *Id.*

Some U. S. Rebar producers produce additional products using the same equipment, machinery, and production workers that are used to produce Rebar, namely merchant bar, special-bar quality (SBQ) bar products, and wire rod.<sup>52</sup>

None of the firms identified as producers of deformed steel wire that provided responses to the Commission's U. S. producer questionnaire reported producing deformed steel wire meeting ASTM A1064 with bar markings or subject to an elongation test, leading to the ITC's conclusion that "there is no reported domestic production of deformed steel wire that falls within Commerce's scope."<sup>53</sup> At the hearing, Deacero confirmed that to the extent of its knowledge there is no evidence that deformed steel wire meeting *ASTM A1064* rebar markings and being subject to an elongation test actually exist at all anywhere in the world.<sup>54</sup>

During the investigations, Petitioner argued that deformed steel wire produced to meet ASTM A1064 that has bar markings and is subjected to an elongation test is a steel product that can be used for the same purpose as rebar (to reinforce concrete):<sup>55</sup> both have markings (deformations) indicating the mill, size, and grade of rebar.

Deacero argued that although both rebar and deformed steel wire can be used to reinforce concrete, they differ significantly in terms of their physical characteristics and uses; deformed steel wire is more appropriately used to manufacture wire products, such as wire mesh, wire reinforcement mats, and other shapes.

The Commission stated that it did not collect information from U. S. producers and purchasers specifically on in-scope deformed steel wire (*i. e.*, meeting ASTM A1064 with bar markings and subject to an elongation test), but rather on a broader category of deformed steel wire (*i. e.*, meeting ASTM A1064) because the Commission issued questionnaires prior to Commerce's narrowing of the scope. As a result, the information

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<sup>52</sup> *Id.* at I-15.

<sup>53</sup> *Id.* at I-17.

<sup>54</sup> Hearing Transcript at 81.

<sup>55</sup> *Rebar from Mexico and Turkey Final, supra* note 16, at App. D-3 (*Domestic Like Product Issues and Information On Deformed Steel Wire*).

provided by U. S. producers and purchasers concerns the broader category of deformed steel wire.<sup>56</sup>

Regarding producer and customer perceptions, Petitioner argued that the ITC found that customers and producers perceive in-scope deformed steel wire and Rebar as similar products.<sup>57</sup> Deacero contends that deformed steel wire and rebar are sold to different categories of customers and, due to their different price points and predominant uses, are not perceived by U. S. purchasers to be reasonably interchangeable products.<sup>58</sup>

The Commission found that the limited record indicates that both U. S. producers and U. S. purchasers perceive that in-scope deformed steel wire and rebar can be used as substitutes for each other under certain circumstances (*e. g.*, in concrete reinforcement applications).<sup>59</sup>

On the channels of distribution factor, Petitioner argued that in-scope deformed steel wire when sold for use as rebar “will likely be sold in the same channels of distribution as rebar.” Deacero argued that both products generally utilize different channels of distribution, since rebar is sold principally to steel wholesalers and construction contractors, whereas deformed steel wire is sold directly to companies that manufacture welded wire reinforcement products.

Petitioner argued that that in-scope deformed steel wire may be slightly more expensive to produce than Rebar due to the additional processing, while Deacero argued that deformed steel wire is considerably more expensive to make than Rebar due to the more extensive production process required.

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<sup>56</sup> *Id.*

<sup>57</sup> RTAC’s Brief at 25.

<sup>58</sup> September 5, 2014, Deacero Prehearing Brief before the ITC, Doc. No. 240, at 8.

<sup>59</sup> Commission Views, at 8. The limitations of the Commission’s record regarding the like product determination was twice confirmed during the hearing by ITC Counsel. Hearing transcript at 120 & 127.

## B. Deacero's Arguments before the Panel

Deacero, in its Complaint dated December 29, 2014, stated under COUNT 3<sup>60</sup> that the Commission's determination to find a single domestic like product that is coextensive with the scope of the investigations, including deformed steel wire, is not supported by substantial evidence or otherwise not in accordance with law.

In its brief dated April 31, 2015, Deacero stated that the Commission's factual findings are not supported by substantial evidence on the record and are not in accordance with law. "The Commission's conclusion that deformed steel wire is like rebar was based on its findings of similarities with respect to four factors of the six factor test, namely, physical characteristics and end uses, channels of distribution, interchangeability, and customer and producer perceptions."<sup>61</sup>

"In particular, the Commission's determination does not satisfy the applicable legal standards because it failed to consider extensive record information that detracts from its findings and to articulate a satisfactory explanation for its action, including rational connection between the facts found and the choices made."<sup>62</sup>

Deacero argues that the Commission entirely ignored record information showing significant differences in physical characteristics between rebar and deformed steel wire and, instead, only focused on the uses of the products. "Thus, the Commission ignored its own practice of looking at physical characteristics for its determination."<sup>63</sup> Deformed steel wire is wire that is cold-drawn from wire rod, while rebar is essentially plain wire rod manufactured directly from steel billet using a hot-rolled process. Deacero argues that the record reflects major differences in physical characteristics of both products.

According to Deacero's arguments, the legal standard requires that the Commission consider these physical differences and, at a minimum, articulate a reasonable explanation for why it disregarded such differences in its decision to find one like

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<sup>60</sup> Deacero's 57(1) Brief, at 5.

<sup>61</sup> *Id.* at 23.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

product. “However the Commission made no mention of such physical differences and failed to provide any explanation as to why such differences were disregarded.”<sup>64</sup>

Deacero also notes that the record shows only some interchangeability of deformed steel wire and rebar, and the Commission failed to mention the responses of users and producers, failing to meet the legal standard.

Regarding channels of distribution, Deacero argues that there is no evidence showing that channels of distribution for rebar and deformed steel wire would likely be the same. Deacero noted that the only support that the Commission cites for its conclusion regarding channels of distribution is Petitioner’s post hearing brief that only contains a statement that deformed steel wire “will likely be sold in the same channel of distribution as rebar,”<sup>65</sup> contradicting what the Staff Report indicates and that was not considered by the Commission.

Concerning producer and customer perceptions, Deacero argues that the Commission’s interpretation that both U. S. producers and U. S. purchasers perceive that in-scope deformed steel wire and rebar can be used as substitutes for each other under certain circumstances (e. g. , in concrete reinforcement applications) is not supported by the record. The responses of purchasers and producers appear to indicate that deformed wire may be perceived as a substitute only under specific circumstances.<sup>66</sup>

With respect to the price and manufacturing facilities, production processes and employees factor, Deacero argues that the Commission acknowledged that deformed steel wire and rebar were different.<sup>67</sup>

Deacero concludes that even if the Commission were to argue that there is some limited evidence showing similarities and overlap between the products, the legal standard compelled the Commission to consider information that detracted from its findings and to articulate a satisfactory explanation for its actions, including a rational connection between the facts found and the choices made. “Having failed to do so, the

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<sup>64</sup> *Id.* at 25.

<sup>65</sup> *Id.* at 28.

<sup>66</sup> *Id.* at 29.

<sup>67</sup> *Id.* at 30.

Commission's determination should be found unsupported by substantial evidence on the record and not in accordance with law."<sup>68</sup>

In its reply brief, Deacero stated that it is not asking this Panel to reweigh the evidence or to substitute its judgment for that of the Commission. Rather, it is asking the Panel, under its proper authority, to determine whether the Commission's like product findings meet the substantial evidence standard.<sup>69</sup>

The Commission, according to Deacero's Reply Brief, is required to articulate a satisfactory explanation for disregarding or discounting evidence, since the record is less than clear on the existence of domestic production of in-scope deformed steel wire.<sup>70</sup> Deacero contends that there is no evidence that the product described in RTAC's post-hearing brief and cited by the Commission actually exists at all anywhere in the world.<sup>71</sup>

During the hearing, the non-existence of deformed steel wire that meets ASTM A1064 that has bar markings and is subjected to an elongation test was confirmed. Counsel for Deacero stated that "I want to be very clear on this, because there has been some confusion. I know some of you on the Panel are very familiar with that concept. Some may be less familiar with it. But we are not asking this Panel to re-judge the case. We are asking, simply, this Panel to make sure that the Commission's determination is indeed supported by substantial evidence."<sup>72</sup>

### **C. Investigating Authority Arguments before the Panel**

The Investigating Authority argues that the Commission's like product determination was supported by substantial evidence and in accordance with law. In its determination, the Commission defined a single domestic like product that was coextensive with the scope of the investigations, to include rebar and deformed steel wire that meets ASTM A1064/A1064 M, contains bar markings, and is subject to an elongation test "(to the

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<sup>68</sup> *Id.* at 31.

<sup>69</sup> Deacero's 57(3) brief at 13.

<sup>70</sup> *Id.* at 14.

<sup>71</sup> *Id.* at 17.

<sup>72</sup> Hearing transcript at 17.

unknown extent there might be any domestic production of such deformed steel wire).”<sup>73</sup>

The Investigating Authority maintains that Deacero seeks a different result by impermissibly asking this Panel to reweigh the facts and factors on this issue, and by further urging this Panel to ignore the Commission’s longstanding practice, acknowledged during the investigation by Deacero, of declining to define a domestic industry that engages in no production.<sup>74</sup>

The Investigating Authority holds that the Commission must accept Commerce’s determination as to the scope of the imported merchandise, while the Commission is responsible for determining what domestic products are “like” the imported articles included in Commerce’s scope. The Commission is not free to modify Commerce’s scope determination.<sup>75</sup>

They stated that Congress has cautioned the Commission that the requirement that a product be “like” the imported article should not be interpreted in such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the domestic product and the imported article are not “like” each other.<sup>76</sup>

Also, the courts have given substantial deference to the Commission’s like product findings, because the Commission’s like product findings are case-specific and present the Commission with a pure question of fact.<sup>77</sup>

The Commission was unable to gather data specific to domestic “in-scope” (bar-marked and tested) deformed steel wire, and the information it had collected regarding the domestic equivalent to out-of-scope deformed steel wire was no longer applicable to the issues now before it. The Investigating Authority holds that Deacero, other than advocating for a negative injury determination regarding the reportedly non-existent domestic industry producing marked and tested deformed steel wire, provided no

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<sup>73</sup> Commission’s Brief, at 34.

<sup>74</sup> *Id.* at 35.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 35-36.

<sup>77</sup> *Id.* at 37.

argument for the Commission to depart from its usual practice in cases where there is no reported domestic production of a product identical to the imported merchandise. “A negative injury determination regarding the (non-existent) domestic industry producing “in-scope” deformed steel wire would have meant that Commerce would not have issued an antidumping order on the subject imports of “in-scope” deformed steel wire.”<sup>78</sup>

With respect to physical characteristics and uses, the Commission stated that the articles within the scope, including both rebar and deformed steel wire, could be used for construction applications, including the reinforcement of concrete, “citing information supplied by petitioner in its Posthearing Brief, as well as information in the Commerce decision memorandum.”<sup>79</sup>

Also, the Investigating Authority argues that the Commission acknowledged that the evidence concerning manufacturing facilities, production processes, and employees indicated that deformed steel wire is usually produced on different equipment than rebar with a different process.

The Commission found that the limited record information concerning producer and customer perceptions indicated that U. S. producers and purchasers perceived that in-scope deformed steel wire and rebar could be used as substitutes for each other “under certain circumstances.”<sup>80</sup>

Weighing all of this information concerning the like product factors, the Commission reasonably found that, on balance, there was no clear dividing line between rebar and in-scope deformed steel wire.

The Investigating Authority concludes in its brief that the Commission’s like product determination should be found to be supported by substantial evidence and in accordance with law.

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<sup>78</sup> Commission’s Brief, at 44, note 110.

<sup>79</sup> *Id.* at 45.

<sup>80</sup> *Id.* at 47.

#### D. RTAC Arguments before the Panel

RTAC argues in its brief that the ITC's domestic like product determination was supported by substantial record evidence and in accordance with law. RTAC maintains that Deacero misunderstands the applicable standard of review, and its arguments amount to nothing more than an invitation for this Panel to reweigh the evidence. Under U. S. law, agencies must explain their determinations, and must support them with record evidence sufficient to allow a reasonable mind to reach the agency's evidence conclusion. This does not require that agencies cite or discuss every piece of evidence on the record. Rather, U. S. law incorporates a presumption that federal agencies, including the ITC, have considered all record evidence. RTAC also contends "that the ITC did not specifically refer to the evidence cited by Deacero in explaining its finding that rebar and in-scope deformed steel wire have overlapping physical characteristics and uses is not indicative of a failure to "consider an important aspect of the problem."<sup>81</sup>

It is only indicative of the fact that the agency chose not to cite to, or discuss, every piece of potentially relevant information. From RTAC's point of view, it is clear that the ITC made its finding because the record contained evidence showing that rebar and deformed steel wire marked and tested as rebar are both used in concrete enforcement. Deacero has failed to show either that the agency's explanation leaves the reader in doubt as to the path of the agency's reasoning, or that the record cannot be reasonably read to support the agency's conclusion. For RTAC, the logic of the agency's reasoning is discernible, and this is all the law requires. The substantial evidence standard was fulfilled.<sup>82</sup>

During the hearing, RTAC Counsel stated that "as long as there is substantial evidence to support an agency decision, it doesn't matter if the court or, in this case, the Panel might arrive at a different decision, in other words, looking at the same facts. All that has

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<sup>81</sup> RTAC's brief, at 28.

<sup>82</sup> RTAC's Brief, at 25-26.

to -- all that needs to be met for that standard to be satisfied is that it is based on reasonable facts and supported by evidence on the record.”<sup>83</sup>

Accordingly, RTAC concludes that this Panel should affirm the agency’s determination to include deformed steel wire that is marked and tested as rebar within the domestic like product.<sup>84</sup>

### **E. Panel Opinion**

As noted in detail in Section IV, Article 1904(3) of the NAFTA requires this Panel to apply the standard of review and general legal principles that a U. S. court would apply in reviewing a Commission determination. The substantial evidence standard means that the Commission's determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion; it demands more than a mere assertion of evidence that justifies the Commission's determination. The substantial evidence standard requires this Panel to determine whether there was evidence enough which could reasonably lead to the Commission's conclusion.

Also as noted in detail in Section IV, It is clear that this Panel must not reweigh the evidence, or substitute its judgment for that of the Commission. Therefore this Panel may not "displace the (agency's) choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it de novo."<sup>85</sup>

It is also clear that an agency determination must be supported by the administrative record as a whole, including evidence that detracts from the substantiality of the evidence relied upon by the agency. The substantial evidence standard generally requires, with exceptions, the reviewing authority to accord deference to an agency's factual findings and the methodologies selected and applied by the agency.

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<sup>83</sup> Hearing transcript, at 161.

<sup>84</sup> RTAC’s Brief, at 31.

<sup>85</sup> *Universal Camera Corp. v. NLRB*, *supra* note 31, at 474 & 488.

Review under the substantial evidence standard is limited, but this Panel must conduct a meaningful review of the Commission's determination. The reviewing authority may not defer to an agency determination premised on inadequate analysis or reasoning.<sup>86</sup> There must be an adequate explanation of the bases for the agency's decision in order for the reviewing authority meaningfully to assess whether the decision is supported by substantial evidence on the record. The Commission therefore must clearly articulate the reasons for its conclusions.<sup>87</sup>

The practice of the Commission is that the like product determination requires the six-factor analysis in every case.<sup>88</sup> This longstanding practice was not followed in this case, since the findings of similarities were with respect only to four factors of the six factor test, namely, physical characteristics and end uses, channels of distribution, interchangeability, and customer and producer perceptions.

Nevertheless, a determination that (for whatever reason) does not treat two factors of a six-factor test is positioned uneasily in regard to substantial evidence review, especially where the Commission has found the evidence under the four analyzed factors to be quite mixed. For the reasons set out below, the Panel considers that the like product determination now before us is not supported by substantial record evidence.

In its brief, the Commission acknowledges that the evidence concerning manufacturing facilities, production processes, and employees indicated that deformed steel wire is usually produced on different equipment than rebar using a different process, but stated, however, that "other information from petitioner indicated that it was possible for one domestic producer to produce both products in the same facility with the same equipment, even though it was not doing so now."<sup>89</sup> This Panel considers that the Commission is not clearly articulating the reasons for its conclusions. "Other information" is neither presented nor explained by the Commission.

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<sup>86</sup> *USX Corp.*, 655 F. Supp. 487, 492 (Ct. Int'l Trade 1987).

<sup>87</sup> *See, e.g., Mitsubishi Materials Corp. v. United States*, 820 F. Supp. 608, 621 (Ct. Int'l Trade 1993).

<sup>88</sup> Investigating Authority Brief, at 44.

<sup>89</sup> *Id.* at 46-47.

The Commission found that both U. S. producers and purchasers perceive that in-scope deformed steel wire and rebar can be used as substitutes for each other under “certain circumstances”<sup>90</sup>, but this Panel considers that the record does not show substantial evidence regarding that finding. The Commission stated that [BPI].<sup>91</sup>

The Staff Report at D-11 and D-12 contains clear evidence referring to [BPI] producers’ and purchasers’ perceptions<sup>92</sup>: U. S. producers’ comments regarding rebar and steel wire are quite clear on that point; they show [BPI].<sup>93</sup> U. S. purchasers are similar in their comments and most of them [BPI].<sup>94</sup>

This Panel considers that the Commission’s findings are not supported by the evidence of record. A [BPI]<sup>95</sup> of the comments of purchasers and producers indicate that deformed wire [BPI],<sup>96</sup> a large group did [BPI] and some [BPI], but the Commission failed to determine which are the circumstances to which these comments referred and did not take into consideration the evidence referring to differences in producers’ and purchasers’ perceptions. By failing to do so, the Commission did not clearly articulate the reasons for its conclusions.

The Commission did not support its determination on substantial evidence and did not clearly articulate the reasons for its conclusions, thus it was not reasonable to conclude that rebar and deformed steel wire that meets ASTM A1064 that has bar markings and is subjected to an elongation test are like products.

The Commission does have a general practice of declining to break out, as a distinct like product, an item not produced in the United States.<sup>97</sup> While granting the logic underlying this general practice, the Panel does not consider that it can rehabilitate a like product finding that otherwise, as explained above, does not meet the substantial evidence standard. It may turn out that, after considering evidence relevant to all six

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<sup>90</sup> *Id.*

<sup>91</sup> Commission Views, at 11-12, lines 4-5 (PROPRIETARY VERSION).

<sup>92</sup> Staff Report at App. D, Table D-4, pages D-11 to D-12 (PROPRIETARY VERSION).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> ITC’s brief, at 35.

factors, the Commission will find on remand that the relevant domestic industry in regard to in-scope deformed wire is, in fact, the domestic industry making Rebar. Deacero is aware of this possibility.<sup>98</sup> Based on the current record and analysis, however, the Commission's likeness finding cannot stand.

We remand the Commission's finding that Rebar and in-scope deformed steel wire are both part of a single like domestic product. The Commission on remand shall reconsider, based on the existing record evidence and on new information if the Commission elects to reopen the record, all six like product factors to determine whether Rebar and in-scope deformed steel wire are part of a single domestic like product. The Commission shall have 90 days to submit its redetermination on remand.

**VII. In Light of the WTO Dispute Settlement Decision in India—Hot-Rolled Steel CVD, Does the Charming Betsy Canon of Statutory Construction Compel the Panel to Find Inconsistent with U.S. Law the ITC's Cross-Cumulation, for Purposes of its Determination of Material Injury, of Dumped Imports from Mexico with Subsidized Imports from Turkey**

**A. What Is the Impact of Cross-Cumulation on the ITC Injury Determination**

In determining whether the domestic industry is injured by unfairly-traded imports, the Commission examines, *inter alia*, the volume, price, and other effects of such imports on the domestic industry. The effects of an unfairly-traded product on the domestic industry would, of course, be greater—and thus injury more likely to be found—if imports of the product from one country were combined with imports of the product from other countries.

Toward that end, the definitional provisions of the U.S. AD/CVD statute were amended by the Tariff Act of 1984 to provide that the ITC, in determining whether the domestic industry has suffered material injury or the threat thereof, "shall cumulatively assess the volume and effect of imports of the subject merchandise from all countries" as to which

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<sup>98</sup> Hearing Transcript, at 187.

the domestic industry's petitions claiming injury from such imports were filed on the same day.<sup>99</sup>

The "cumulation" provision was added to rationalize the inconsistent practice of various Commissioners with respect to combining imports of the merchandise under investigation from more than one country.<sup>100</sup> This revision mandated the cumulative assessment of like products from two or more countries that were simultaneously subject to investigation, that is, it required the cumulative assessment of allegedly dumped subject merchandise from all countries, and it required the cumulative assessment of allegedly subsidized subject merchandise from all countries. The question remained whether the statute also required "cross-cumulation," that is, assessment of the effects of like product imports from all countries under investigation for both dumping and subsidization. As the Court of Appeals for the Federal Circuit ("Federal Circuit") noted in its landmark *Bingham & Taylor* decision, the wording of the amendment "does not definitively reveal whether Congress intended to require the cumulation of all competing like products subject to investigation, irrespective of whether the investigations covered dumped imports or subsidized imports or both."<sup>101</sup>

Despite the amendment's facial ambiguity, the Court in *Bingham & Taylor* continued its search for the amendment's meaning and concluded, after examination of the legislative history, that the only reasonable interpretation of the statute was that it also mandated cross-cumulation.<sup>102</sup> Since that decision some three decades past, the Commission has had a consistent practice of cross-cumulating subsidized with dumped imports when the statutory conditions are met.<sup>103</sup>

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<sup>99</sup> Imports of the like product from the various countries must also compete with each other and with the domestic like product in the U.S. market. These conditions are not at issue in the present case. 19 U.S.C. §1677(7)(G)(i)(I)-(III)(1984).

<sup>100</sup> *Bingham & Taylor, VA Div. v. United States*, 815 F.2d 1482 (Fed. Cir. 1987).

<sup>101</sup> *Id.* at 1484.

<sup>102</sup> *Id.* at 1487. The ITC sought to preserve the individual discretion of Commissioners by arguing that cross cumulation was permitted, but not required. This provision was again amended to implement the 1994 revision of the WTO Agreements governing the AD/CVD laws. These changes, while adding conditions for cumulation of products from two or more countries, did not further expressly address cross-cumulation. *Id.*

<sup>103</sup> ITC Reply Brief at 22 and case cited in note 54.

## B. Does Bingham & Taylor Apply to the Present Case

Deacero argues, however, that the Federal Circuit's decision in *Bingham & Taylor* does not govern the present case. The contention is based on a footnote in the Court's decision that left open the question whether cross-cumulation would be required "where that practice would clearly lead to a violation of (U.S.) international obligations."<sup>104</sup>

Complainant seizes on this footnote to attempt to carve out a small niche in the longstanding precedent of *Bingham & Taylor* in which to fit a recent WTO dispute panel decision finding that cross-cumulation violates the World Trade Organization ("WTO") Agreement on Subsidies and Countervailing Measures (SCM).<sup>105</sup> In the *India—Hot-Rolled Steel CVD* decision, the Appellate Body found that the SCM does not permit cumulative assessment of imports from different countries unless those other imports are also simultaneously subject to CVD investigations.<sup>106</sup> The facts of the present case appear to correspond to those of the WTO decision: imports of rebar from Turkey found by Commerce to be subsidized, but not dumped, were cumulated by the ITC with imports of rebar from Mexico found by Commerce to be dumped, but not subsidized. Complainant's contention, therefore, is that affirming the ITC's decision to cross-cumulate would clearly put the United States in violation of its international obligations.

Two questions initially present themselves: are WTO dispute settlement decisions among the sources of law available to chapter 19 panels and, if so, what is their status under U.S. law? As to the first question, this Panel's charge, as noted in Section IV, is to decide whether the ITC's determination "was in accordance with the antidumping or countervailing duty law of the importing Party," which of course means in the present case the AD/CVD laws of the United States. NAFTA Article 1904.3 states that Chapter

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<sup>104</sup> *Bingham & Taylor*, *supra* note 100, at note 12. The Court gave no indication why it would need to offer up this *obiter dictum*.

<sup>105</sup> *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS 436/AB/R (Dec. 8, 2014), adopted by WTO Dispute Settlement Body ("DSB") Dec. 19, 2014. ("*India—Hot-Rolled Steel CVD*")

<sup>106</sup> *Id.* at ¶4.600. Only the existence of this adopted decision is relevant to our case; the reasoning of the panels need not be explored.

19 panels must apply domestic law of the importing party in the same manner as a court of the importing party otherwise would apply it.<sup>107</sup>

For this purpose, the treaty declares that the AD/CVD laws of the United States consist of “the relevant statutes, legislative history, regulations, administrative practice and judicial precedents.” Neither treaties nor decisions of international legal bodies are listed. In our view, it follows that such legal sources become relevant to the Panel only to the extent that a court of the United States would find them relevant and admissible to its decision. U.S. courts have recognized that WTO decisions have limited precedential value and are binding only upon the particular countries involved. They are not binding upon other signatory countries or future WTO panels.<sup>108</sup> Further, in *PAM, S.p.A. v. U.S. Dep’t of Commerce*,<sup>109</sup> the Court of International Trade explained that decisions of panels and the Appellate Body (“AB”) adopted by the WTO’s Dispute Settlement Body (“DSB”) are not precedents and do not have a binding effect on the law of the United States. The Statement of Administrative Action accompanying the URAA (“SAA”) confirms that “dispute settlement decisions adopted by the DSB have no binding effect under the law of the U.S.”<sup>110</sup>

### **C. Does the *Charming Betsy* Canon of Statutory Construction Require the Panel to Consider the WTO Decision in the *India—Hot-Rolled Steel CVD* Case as an International Obligation of the United States**

#### **1. Status of WTO Decisions under U.S. Law**

As to the second question (status of WTO decisions under U.S. law), even though WTO dispute settlement decisions do not fall within the Panel’s listed sources of law,

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<sup>107</sup> NAFTA Article 1904.2 & 1904.3.

<sup>108</sup> *Corus Staal BV v. United States DOC*, 259 F. Supp. 2d 1253 (Ct. Int’l Trade 2003).

<sup>109</sup> 265 F. Supp. 2d 1362 (Ct. Int’l Trade 2003).

<sup>110</sup> SAA at 363, House Doc. No. 103-316 (1994) at 1032. The SAA is regarded as “super” legislative history because not only was it drafted by the Executive Branch, but it was also adopted by the Congress as part of the URAA, § 102(d), 19 U.S.C. § 3512(d) (1994): “The statement of administrative action approved by the Congress under section 101(a) shall be regarded as an authoritative interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.”

Claimant nonetheless contends that the decision of the WTO AB in the *India—Hot-Rolled Steel CVD* case is relevant to our determination because of the *Charming Betsy* canon of statutory construction. The *Charming Betsy* doctrine is a means for an agency or court to interpret an ambiguous<sup>111</sup> statute in a manner that is consistent with the law of nations as understood in this country. The operative language of the Supreme Court's decision in that case is as follows:

It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations **as understood in this country.**<sup>112</sup>

In *Whitney v. Robinson*, the Supreme Court elaborated on the emphasized language as follows:

The act of Congress under which the duties were collected authorized their exaction. . . . It was passed after the treaty with the Dominican Republic, and, if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control. . . . **When the (treaty's) stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.**<sup>113</sup>

As the Supreme Court has noted, “[t]here is a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action.” “A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.” The Restatement (Third) of the Foreign Relations of the United States, published in 1987,

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<sup>111</sup> *United States v. Lombardo*, 639 F. Supp. 2d 1271 (2007) (noting that the *Charming Betsy* canon of construction only comes into play where Congress's intent is ambiguous). If Congress' intent is made clear in a statute, “then U.S. Const. art. III courts, which can overrule congressional enactments only when such enactments conflict with the United States Constitution, must enforce the intent of Congress irrespective of whether the statute conforms to customary international law.” *Id.* at 1288; see also *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (explaining that if the intent of the statute is clear, then “that is the end of the matter, for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

<sup>112</sup> *Murray v. The Schooner Charming Betsy*, 6 U.S. 890 (2 Cranch) 64, 118 (1804) (*emphasis supplied*).

<sup>113</sup> *Whitney v. Robinson*, 124 U.S. 190, 194 (1888) (*emphasis supplied*).

provides that “[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”<sup>114</sup>

WTO dispute settlement decisions as to U.S. AD/CVD laws are decidedly not self-executing in this country. The WTO Agreements themselves are not part of U.S. law<sup>115</sup> and U.S. agencies are solely bound by the U.S. law that implements the treaties, the URAA, which prohibits any entity other than the U.S. government from challenging, “in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State, on the ground that such action or inaction is inconsistent with such agreement.”<sup>116</sup>

The URAA sets out an intricate system for action in response to WTO dispute settlement decisions. It directs that the regulation or practice found invalid by the WTO dispute settlement process “may not be amended, rescinded, or otherwise modified... unless and until” these procedures are completed. Consistently with these proscriptions, the Federal Circuit has rejected an argument based upon application of the *Charming Betsy* canon to a WTO decision as to which the United States had not completed the URAA process that ultimately resulted in Commerce’s change of practice.<sup>117</sup>

With regard to the provision that applies solely to WTO panel proceedings involving the AD/CVD laws,<sup>118</sup> the SAA notes that

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<sup>114</sup> Alex O. Canizares, *Is Charming Betsy Losing Her Charm? Interpreting U.S. Statutes Consistently with International Trade Agreements and the Chevron Doctrine*, 20 *Emory Int'l L. Rev.* 591, 601-02 (2006)(Citations omitted; emphasis supplied.)

<sup>115</sup> *Medellin v. Texas*, 552 U.S. 491 (2008).

<sup>116</sup> URAA § 102(c)(1), 19 U.S.C. § 3512(c)(1)(B) (1994).

<sup>117</sup> *Timken Co. v. United States*, 354 F.3d 1334, 1343-44 (Fed. Cir.), cert. denied, 543 U.S. 976 (2004).

<sup>118</sup> Uruguay Round Agreements Act (“URAA”) Section 129, 19 U.S.C. § 3538, P.L. 103-465 (1994). Section 123 sets out a similar procedure that applies to all subjects and to all agencies except the ITC. 19 U.S.C. 3533, P.L. 103-465 (1994).

section 129 requires the Trade Representative to obtain the views of Commerce or the ITC before deciding on an appropriate response to an adverse report. In addition, section 129 provides for frequent consultation between the Trade Representative and the Ways and Means and the Finance Committees (the Committees). After considering the views of the Committees and the agencies, the Trade Representative may require the agencies to make a new determination that is “not inconsistent” with the panel or Appellate Body recommendations and to implement this second determination.<sup>119</sup>

Prior to such action, as recognized by other NAFTA Chapter 19 Panels,<sup>120</sup> WTO dispute panel decisions are not binding on U.S. courts or agencies.<sup>121</sup> The investigation before the Panel of Rebar from Mexico and Turkey has not even been the subject of a WTO dispute settlement case; *a fortiori*, no WTO decision involving this case has been implemented under the URAA procedures. In recognition of this reality, Complainant makes clear that it “is not seeking the direct implementation” of the WTO decision, but instead that this Panel treat the decision as “persuasive authority” for the proposition that the “Commission’s determination to cross-cumulate dumped imports from Mexico with subsidized imports from Turkey to be not in accordance with law.”<sup>122</sup>

In the Panel’s view, even if Congress’s intentions regarding cross-cumulation were ambiguous, Congress’s intent to foreclose litigation challenging any agency action as inconsistent with the WTO Agreement is abundantly clear.<sup>123</sup> Even if the federal statute is inconsistent with the WTO decision in the *US-India Hot Rolled Steel CVD* dispute, the *Charming Betsy* doctrine can neither be used to defeat Congress’s clear refusal to make the WTO Agreements part of U.S. law nor its decision to preserve the independence of agency decisions from WTO AB reports until the political branches decide how to respond to such reports under the URAA.<sup>124</sup>

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<sup>119</sup> SAA at 363, *supra* note 110, at 1023.

<sup>120</sup> *See, e.g.*, Prior Panels addressed Section 123 of the URAA, an alternate URAA means for implementation of certain decisions by Commerce.

<sup>121</sup> 19 U.S.C. § 3538(b)(3) and (d); *Corus Staal B.V. v. United States*, 395 F.3d 1343, 1348-49 (Fed. Cir. 2005)

<sup>122</sup> Complainant’s 57(1) Brief at 18, note 76.

<sup>123</sup> *Andaman Seafood Co. v. United States*, 675 F.Supp.2d 1363, 1373 (Ct. Int’l Trade 2010).

<sup>124</sup> *See, e.g., Rainey v. United States*, 232 U.S. 310, 316 (1914).

Moreover, we would do well to recognize that Respondent in this case is the United States. As the Court of Appeals for the Ninth Circuit recognized in *Arc Ecology v. U. S. Air Force*: “the Supreme Court has never invoked Charming Betsy against the United States in a suit in which it was a party.”<sup>125</sup> The concerns that underlie the canon are “obviously much less serious where the interpretation arguably violating international law is urged upon (the court) by the Executive Branch of our government. When the Executive Branch is the party advancing a construction of a statute with potential foreign policy implications, we presume that “the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States.”<sup>126</sup>

As stated in the *Charming Betsy* decision itself, the law of nations “as understood in this country” should not be violated by an unnecessary interpretation of U.S. law. Here, the URAA tells courts and NAFTA panels how WTO dispute settlement decisions should be understood. The *Bingham & Taylor* footnote is, in effect, an iteration of the *Charming Betsy* canon.

The first requirement of the *Charming Betsy* canon thus is not met here. There is nothing ambiguous about the cumulation provision because *Bingham & Taylor* has resolved any ambiguity. For that reason, even though the *Bingham & Taylor* Court was required to resort to the legislative history “because the statutory language is unclear on its face,”<sup>127</sup> this Panel cannot reinterpret the statute, but must apply U.S. law as it finds it. This is the circular aspect of Deacero’s argument: in order for the condition in *Bingham & Taylor*’s footnote 76 to apply, this Panel must, under the *Charming Betsy* canon, find the WTO AB’s reasoning in the *India—Hot-Rolled Steel CVD* to be persuasive, and yet the Panel may not take that WTO decision into account under *Charming Betsy* because the Court in *Bingham & Taylor* has found the statute to be unambiguous.

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<sup>125</sup> *Arc Ecology v. U. S. Air Force*, 411 F.3d 1092, 1102 (2005).

<sup>126</sup> *Id.*

<sup>127</sup> *Bingham & Taylor*, *supra* note 100, at ¶ 10.

**2. Clarification Made by 1994 Amendment to Cumulation Section**

In any event, the Panel is of the view that the revisions to the cumulation provision made in the URAA, which were not before the *Bingham & Taylor* Court, make its mandatory nature even clearer. As Respondent-Intervenor notes,<sup>128</sup> the 1994 amendment replaced the requirement that the Commission cumulate imports “of like products subject to investigation” with the requirement that the ITC cumulate “subject merchandise from all countries” if petitions as to such merchandise are filed on the same day or investigations are initiated on the same day.<sup>129</sup> The only ambiguity noted by the *Bingham & Taylor* Court was that the term, “subject to investigation,” was not defined, leaving unclear the question of what stage in the Commission’s investigation qualified for cumulation of subject merchandise from various countries.<sup>130</sup>

An attorney with the Commission described the confusion brought on by this term:

The different countries need not be simultaneously subject to investigation, though they need to be “reasonably coincident” in marketing. Thus, imports of foreign producer A may be cumulated with those of foreign producer B from a different country whose imports were earlier investigated by the Commission, even though foreign producer B may not be a party to the second investigation and foreign producer A may not have been a party to the first investigation.<sup>131</sup>

Uncertainty arising from this undefined term was eliminated by the amendment, which required cumulation from all countries of subject merchandise with respect to which petitions were filed or investigations initiated under the AD or CVD law on the same day.

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<sup>128</sup> RTAC’s brief at 10.

<sup>129</sup> 19 U.S.C. § 1677(7)(G).

<sup>130</sup> *Bingham & Taylor*, *supra* note 100, at 1487.

<sup>131</sup> Edwin J. Madaj, *Agency Investigation: Adjudication or Rulemaking?-the ITC’s Material Injury Determinations under the Antidumping and Countervailing Duty Laws*, 15 N.C. J. Int’l L. & Com. Reg. 441, 473 (1990)(citation omitted)(Mr. Madaj was not speaking on behalf of the ITC.)

#### D. Teachings of Other NAFTA Chapter 19 Binational Panels

In its Reply Brief, Complainant cites to the 2005 Chapter 19 binational panel decision in *Certain Softwood Products from Canada* as holding to the contrary.<sup>132</sup> While Deacero claims this Panel decision “has addressed issues nearly identical to this case,” in fact, the WTO decision in that case, finding the agency practice challenged by complainant inconsistent with the Antidumping Agreement, had already been adopted by the United States under the URAA procedures. That is not the situation here, in which the Panel is aware of no WTO dispute settlement proceedings involving this Rebar case. In other words, the WTO decision at issue in the *Softwood Lumber* case challenged the same agency decision involving the same parties that were before the NAFTA panel, also unlike the situation in the present case. As the ITC notes,<sup>133</sup> WTO dispute panel decisions, as is the case with all international dispute resolution decisions, bind only the adjudicating parties.

Most importantly, the statutory provision in question in *Softwood Lumber* had been found ambiguous by the Federal Circuit, which went on to hold that the choice made by the agency (Department of Commerce) was a permissible construction of the statute.<sup>134</sup> In the case before us, the Federal Circuit, while finding the statute ambiguous on its face, resorted to the legislative history to hold that the statute requires cross-cumulation when the statutory conditions are met. We are not here dealing with an ambiguous

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<sup>132</sup> Decision of the Panel Following Remand *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination*, USA-CDA-2002-1904-02 (June 9, 2005) (“*Softwood Lumber*”). In the Sept. 5, 2003, Decision of the Panel *In the Matter of Certain Softwood Lumber Products from Canada: Injury*, Secretariat File No. 2002-1904-07, the Panel found no ambiguity in the statute and therefore rejected a challenge based on the *Charming Betsy* canon: “Since the causation standard which is to guide the Commission’s injury determinations is clearly set forth by the statute, the Panel is not free to consider possible alternate interpretations of the U.S. law based on the international trade agreements. The Charming Betsy doctrine of statutory interpretation, which does not apply where the Congressional language is clear, is, by its terms, inapplicable here.” *Id.* at 49.

<sup>133</sup> Commission’s Brief at 13.

<sup>134</sup> *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004), cert. den. sub nomine *Koyo Seiko v. United States*, 543 U.S. 976 (2004); *Softwood Lumber*, supra note 132, at 24-25.

statutory provision, which is a basic prerequisite for resort to the *Charming Betsy* rule of statutory construction.<sup>135</sup>

In a split decision (3-2) by a Chapter 19 binational Panel in a case involving *Stainless Steel Sheet and Strip in Coils from Mexico*, the majority, while recognizing that contrary indications in the statutory language or its legislative history would negate application of *Charming Betsy*,<sup>136</sup> nonetheless remanded to Commerce to recalculate dumping margins without zeroing, finding that the unimplemented decisions of the DSB constitute part of the WTO Agreements themselves. The majority reached this conclusion through the following unsourced reasoning:

The relevant international obligation of the United States, in the instant case, is the obligation of the US under the Antidumping Agreement to make “fair comparisons” in determining dumping margins. This obligation stems not from any single DSB Reports [sic], but from the Treaty itself.<sup>137</sup>

This statement, critical to the majority’s avoidance of the URAA’s clear language that DSB reports are not binding on U.S. agencies,<sup>138</sup> does not withstand scrutiny. Citing to the section of the treaty being discussed by the WTO panel cannot convert the DSB’s action into a treaty obligation of the United States. As noted by the dissent in the case, “in the case of treaties that United States law considers to be non-self-executing, the obligations of such a treaty are exactly what the Congress in passing the legislation to ‘execute’ the treaty (that is, to incorporate the treaty’s obligations into domestic law) says they are in the implementing statute or statutes.”<sup>139</sup> The dissent returns to the clear prescription by the Congress that reports of WTO panels and the Appellate Body do not state the U.S.’s international law obligations under the Uruguay Round Agreements.<sup>140</sup>

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<sup>135</sup> *Murray v. The Schooner Charming Betsy*, 6. U.S. (2 Cranch) 64, 118 (1804); *United States v. Lombardo*, supra note 111.

<sup>136</sup> Decision of the Panel *In the Matter of the Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of 2004/2005 Antidumping Review*, Secretariat File No. USA-MEX-2007-1904-01, Apr. 14, 2010) at 15 (“*Stainless Steel Sheet and Strip*”)(citing *Luigi Bormioli Corp. v. United States*, 304 F.3d 1362, 1368 (Fed. Cir. 2002)).

<sup>137</sup> *Id.* at 15-16.

<sup>138</sup> SAA at 363, House Doc. 103-316, supra note 110, at 1032.

<sup>139</sup> *Stainless Steel Sheet and Strip*, supra note 126, at 66.

<sup>140</sup> *Id.* at 71.

Thus the canon itself in its original formulation is referring to the United States' understanding of the "law of nations", or to put it another way, to international obligations of the United States as such obligations are incorporated into United States law.<sup>141</sup>

We are also guided by the decision of a binational panel in the *Light Walled* case, in which complainant challenged Commerce's use of its zeroing methodology in calculating the weighted-average dumping margin. The Panel found that, "until the URAA process for implementing the relevant WTO decisions is complete, the Charming Betsy doctrine does not compel a different construction of the statute than that adopted by Commerce."<sup>142</sup>

The Department of Commerce observed in the redetermination ordered by the Panel that, in light of Congress's unambiguous statements, "the Charming Betsy doctrine cannot, and does not, create a right for private parties to force the Executive Branch to change its actions to come into compliance with adverse WTO decisions."<sup>143</sup>

Complainant also cites the Panel decision involving *Carbon and Certain Alloy Steel Wire Rod from Canada*. Complainant there argued that the Charming Betsy canon required the Panel to construe the AD statute in "harmony" with decisions adopted by the DSB that had found zeroing to be inconsistent with the WTO Antidumping Agreement.<sup>144</sup> The Chapter 19 Panel, noting that "in the case before the Panel, Commerce applied a longstanding and judicially approved methodology of calculation of antidumping duties (a methodology which "zeroes") which has been since the enactment of the URAA its interpretation of the basic antidumping statutory section," held that "Charming Betsy does not form a basis to remand Commerce's continuation of the application of zeroing in this administrative review."<sup>145</sup>

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<sup>141</sup> *Id.* at 67 (emphasis supplied.)

<sup>142</sup> *Light-Walled*, supra note 120, at 20.

<sup>143</sup> Final Results of Redetermination Pursuant to Remand *In the Matter of Binational Panel Review of Light-Walled Rectangular Pipe and Tube from Mexico*, USA-MEX-2011-1904-02 (December 5, 2012), at 27, citing *Corus Staal I*, 395 F.3d 1343, 1347-1348 (Fed. Cir. 2005).

<sup>144</sup> *Carbon and Certain Alloy Steel Wire Rod from Canada*, Secretariat File No. USA-CDA-2008-1904-02, May 11, 2012, at 23.

<sup>145</sup> *Id.* at 34.

### **E. Does the Commission’s Redetermination in the *India Hot-Rolled Steel CVD* Case Have Implications for the Present Case**

The December 2014 adoption by the WTO Dispute Settlement Body of the Appellate Body’s Report in the *India—Hot-Rolled Steel CVD* decision has been the subject of recent ITC action. We explore here whether the ITC’s action in that case has implications for the present complaint.

As noted earlier, Section 129(a)(1) dictates an extensive process by which the ITC, following a finding by the WTO Appellate Body that an action of the ITC in a particular proceeding is not in conformity with U.S. obligations under the Antidumping, Safeguards, or Subsidies Agreements, and in response to a request from the U.S. Trade Representative (USTR), would issue an advisory report

on whether title VII of the Tariff Act of 1930 [which includes the AD/CVD law as amended by the URAA] or title II of the Trade Act of 1974 [which implements the WTO Safeguards Agreement], as the case may be, permits the Commission to take steps in connection with the particular proceeding that would render its action not inconsistent with the findings of the panel or the Appellate Body concerning those obligations.” with the WTO decision, “if” such action is “in accord with U.S. safeguards, antidumping, or countervailing duty law.”<sup>146</sup>

If the Commission determines that it may do so, the USTR consults with the Congressional trade committees and may then issue a request to the ITC to take the action indicated.

Writing “pursuant to Section 129(a)(1),” U.S. Trade Representative Michael Froman on October 2, 2015, requested the Chairman of the ITC “to issue an advisory report on whether Title VII of the Tariff Act of 1930 permits the Commission to take steps in connection with the aforementioned investigation (the WTO’s *India—Hot-Rolled Steel CVD* case) that would render its action in that proceeding not inconsistent with the DSB recommendations and rulings in this dispute.”<sup>147</sup>

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<sup>146</sup> Section 129 of the Uruguay Round Agreements Act, P.L. 103-465, 19 U.S.C. 3538 (2016).

<sup>147</sup> Deacero Notice of Subsequent Authorities Exh. 2, March 28, 2016, Doc. 34.

On October 23, 2015, the Chairman of the Commission responded to Mr. Froman that “Title VII of the Tariff Act of 1930 permits it to take steps in connection with the aforementioned investigation that would render its action not inconsistent with the DSB recommendations and rulings in DS436.”<sup>148</sup> Without further action of known written record, the ITC proceeded to take these steps, giving notice on November 6, 2015, of

the schedule for issuance of a consistency determination following receipt on November 6, 2015, of a request from the United States Trade Representative (USTR) for a determination under section 129(a)(4) of the URAA that would render the Commission's action in connection with its countervailing duty investigation regarding imports of hot-rolled steel products from India, in Inv. No. 701TA-405, not inconsistent with the recommendations and rulings of the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) in United States--Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (DS436).<sup>149</sup>

After issuing additional questionnaires and receiving comments from the parties to the original investigations, the Commission proceeded to revisit its injury determination by cumulating imports only from countries subject to CVD investigations, omitting consideration of its previous cross-cumulation with subject imports from India or other countries with AD investigations.<sup>150</sup> Deacero believes the Commission's actions to implement the WTO's decision in the *India—Hot-Rolled Steel CVD* case are “relevant and important” to the Panel's consideration of the issues in the present case because they confirm that the Commission has considered and determined that 19 U.S.C. § 1677(7)(G)(i)(I) permits an interpretation to not require the cross-cumulation of subsidized imports with dumped imports and, in fact, has issued a decision based on that interpretation. These authorities also confirm that, contrary to statements made by the Commission in its brief and during the oral argument, the statute, 19 U.S.C. §

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<sup>148</sup> *Id.* at Exh. 1.

<sup>149</sup> 80 Fed. Reg. 230 (Dec. 1, 2015).

<sup>150</sup> USITC Pub. 4599, at 1 and note 2 (March 2016). The countries subject to AD investigations were China, Kazakhstan, the Netherlands, Romania, Taiwan, and Ukraine.

1677(7)(G)(i)(I), is ambiguous given that the Commission believes that it can comply with the WTO ruling without the need for the statute to be amended.<sup>151</sup>

For its part, counsel for the ITC at oral argument distinguished the statute in question from judicial precedent interpreting that statute, stating that its reconsideration of the *India—Hot-Rolled Steel CVD* case was based on its advisory report to the USTR that “Title VII of the Tariff Act of 1930” permitted the reconsideration; that is, the ITC looked only to the words of statute, unencumbered by judicial precedent interpreting those words, including the Federal Circuit’s decision in *Bingham & Taylor*.<sup>152</sup>

Consistently with their oral argument, in their response to Deacero’s notice of subsequent authorities ITC counsel finds the agency’s action in implementing the DSB’s *India* decision “irrelevant to the Panel’s evaluation of whether the Commission’s determination in the Rebar investigation was consistent with U.S. law as that law would be applied by a U.S. court” because “the sole matter before the Commission in the Section 129 proceeding was the subsidized imports from India.”<sup>153</sup>

The Notice also observes that the ITC continues to treat *Bingham & Taylor* as mandating cross-cumulation, citing to a recent preliminary determination in a case involving pneumatic tires. Importantly, the ITC’s revision of its determination in the *India—Hot-Rolled Steel CVD* decision does not, and cannot, predict whether the Commission would make a similar change in the Mexican Rebar case before us or in any future case. The Executive Branch has taken one action in regard to one determination in response the DSB’s decision regarding that single case, without revealing what the government’s plan will be either as to further implementation or non-implementation. As far as this Panel can discern, there has been no policy decision as to cross-cumulation.<sup>154</sup> As ITC counsel noted in the hearing,

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<sup>151</sup> Deacero’s March 28, 2016, Notice of Subsequent Authorities, at 1-2.

<sup>152</sup> Hearing Transcript, at 90-91.

<sup>153</sup> Investigating Authority’s Response to Complainants’ Notice of Subsequent Authorities at 2, April 4, 2016.

<sup>154</sup> Hearing Transcript at 135.

I would also note that even as of today, despite the ITC issuing its recent inconsistency determination, there has been no implementation (of the *India* decision). That is something that USTR has to do.<sup>155</sup>

we did not say (in the section 129 compliance report) that we don't have to continue to cross-cumulate. We said there is a way that we can apply this particular determination under our statute.<sup>156</sup>

Because WTO dispute settlement decisions apply only in the contested case before the WTO panels, the United States could continue to defend the ITC's cross-cumulation in further WTO disputes, as it did in the challenge to zeroing by the Department of Commerce, the "single most litigated subject in the history of the WTO," which absorbed several years and at least eight decisions of the DSB before the United States yielded.<sup>157</sup>

As the Executive Branch deliberates on its further action, presumably in consultation with the Congress and the ITC, the Commission continues to defend its cross-cumulation in the case before the Panel, despite its action with respect to the *India* DSB decision. The SAA predicted this situation:

Since implemented determinations under section 129 may be appealed, it is possible that Commerce or the ITC may be in the position of simultaneously defending determinations in which the agency reached different conclusions. In such situations, the Administration expects that courts and binational panels will be sensitive to the fact that under the applicable standard of review, as set forth in statute and case law, multiple permissible interpretations of the law and the facts may be legally permissible in any particular case, and the issuance of a different determination under section 129 does not signify that the initial determination was unlawful.<sup>158</sup>

The ITC has applied in the case before us a longstanding and judicially approved methodology of cross-cumulation, one that has been its interpretation of the cumulation provision of U.S. AD/CVD law since the 1987 *Bingham & Taylor* decision. Given the complex process involved in changing, or deciding not to change, a 30-year agency practice, the Panel agrees that it must be sensitive to the Commission's defense of two

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<sup>155</sup> Hearing Transcript at 85 (emphasis supplied).

<sup>156</sup> *Id.* at 83-84.

<sup>157</sup> Thomas Pruse & Edwin Vermulst, *A One-Two punch on Zeroing: US-Zeroing (EC) and US-Zeroing (Japan)*, 2009 World Trade Review 188.

<sup>158</sup> SAA at 358, House Doc. 103-316, *supra* note 110, at 1027.

different interpretations of the statute simultaneously. Turning the ship of state around in the face of a 30-year practice can be expected to be encumbered both by inconsistencies and by hesitation.

In sum, the extensive procedure outlined in the URAA for deciding whether DSB decisions shall be incorporated into U.S. law has only begun. The ITC's action in the single case of *India—Hot-Rolled Steel CVD* is of minimal value in predicting what the Executive and Congressional branches have decided or will decide with respect to U.S. policy, practice, regulation, or statute in respect of cross-cumulation. In fact, the statement by the U.S. representative at the January 16, 2015, meeting of the DSB noted expressly that “the United States would need a reasonable period of time in which to” “implement the DSB’s recommendations and rulings in a manner that respected the US WTO obligations.”<sup>159</sup> The Commission’s actions in the *India* case surely cannot be taken to constitute the sum total of such implementation, as ITC counsel made clear during the hearing and in response to Deacero’s Notice. Other than that single statement, uttered in response solely to the *India* case, the Panel has been advised of no position taken or statement made by the Executive or Congressional Branches with respect to U.S. policy regarding cross-cumulation.

As the conduct of foreign relations is committed by the Constitution to the political branches of the federal government, the Panel defers to the Executive Branch’s treatment of the decision of the WTO DSB.<sup>160</sup>

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<sup>159</sup> Dispute Settlement Body—Minutes of Meeting, WT/DSB/M/355 (Jan. 16, 2015).

<sup>160</sup> See *United States v. Pink*, 315 U.S. 203, 222-23 (1942); *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1582 (Fed. Cir.1995). This is not to say that the Panel agrees with the Commission’s parsing of Section 129(a)(1)’s remit “to issue an advisory report on whether title VII of the Tariff Act of 1930 permits the Commission to bring its action into conformity with the Appellate Body’s ruling.” The definitive SAA reads that charge as more broadly including judicial precedent interpreting the law: “Subsection (a)(1) provides authority for the Trade Representative . . . to request advice as to whether U.S. law provides the ITC with discretion to render its action . . . ‘not inconsistent’ with an adverse (WTO)report.” SAA at 354, House Doc. 103-316 (I) at 1023. Similarly in describing section 129’s limitations in general, the SAA confirms that USTR may request the ITC or the Department of Commerce to take action not inconsistent with a WTO panel

## F. Has Congress Ratified the Mandatory Nature of Cross-Cumulation

Complainant contends that Congress, in enacting the relevant statutory provision in 1984 and amending it in the 1994 URAA, left some ambiguity as to the lawfulness of cross-cumulating where AD and CVD petitions are filed simultaneously on the same merchandise.<sup>161</sup> In the circumstances, the doctrine of legislative ratification permits no doubt that Congress meant to (and did) leave ITC's practice of cross-cumulating undisturbed.

Under the doctrine of legislative ratification, Congress is presumed to legislate against the backdrop of both prior judicial precedent and agency practice.<sup>162</sup> The doctrine of legislative ratification is well established. In the case of a widely known judicial decision or agency practice, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."<sup>163</sup> As explained by RTAC, Congress must be presumed to have been aware in 1994 of the ITC's cross-cumulation practice, which was well-established and consistent.<sup>164</sup> Legislating against that backdrop, when Congress amended the statutory

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report only if such action is in accord with U.S. safeguards, antidumping, or countervailing duty law, as the case may be. In the event that U.S. law precludes such action, the Administration would need to request the Congress to enact legislation to address the conflict between U.S. law and the Uruguay Round agreement in question. *Id.*

We would not be remiss in noting that Article III of the U.S. Constitution vests with the federal courts the "final, binding guidance on how to interpret any law until and unless that law is then later amended by Congress." *See, e.g.,* Paul M. Hamburger, *Mandated Health Benefits*, ¶1910 COBRA LITIGATION ISSUES, 2004 WL 5038148.

We make these observations not to challenge the ITC's action in the *India-Hot-Rolled Steel CVD* case, which challenge clearly is beyond the subject matter jurisdiction of the Panel, but to underscore the Panel's finding that the Federal Circuit's analysis in *Bingham & Taylor* that 19 U.S.C. § 1677(7)(G) mandates cross-cumulation in the listed circumstances continues as binding U.S. law until the statute is amended.

<sup>161</sup> Deacero's 57(3) brief *passim*.

<sup>162</sup> RTAC's Brief at 11.

<sup>163</sup> *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732, 739 (Fed. Cir. 2011).

<sup>164</sup> RTAC's Brief at 11, citing *GPX Int'l Tire Corp. v. United States*, *id.* at 739-740.

provision without disturbing what the ITC had been doing, it ratified that practice. Therefore, there is no ambiguity to be found.

The Panel is of the view that legislative ratification in this case is even weightier than articulated by RTAC. This is because the URAA was not an ordinary piece of legislation, but an implementing bill specifically designed to make (or bring about) all changes to U.S. law and practice necessitated by the WTO Agreements, including in regard to the AD/CVD laws of the United States. As explained in the URAA Statement of Administrative Action (SAA)

Section 102 establishes the relationship between the Uruguay Round agreements and U.S. law. The implementing bill, including the authority granted to federal agencies to promulgate implementing regulations, is intended to bring U.S. law fully into compliance with U.S. obligations under those agreements. The bill accomplishes that objective with respect to federal legislation by amending existing federal statutes that would otherwise be inconsistent with the agreements and, in certain instances, by creating entirely new provisions of law.

As section 102(a)(2) of the bill makes clear, those provisions of U.S. law that are not addressed by the bill are left unchanged. ...

Section 102(a)(1) clarifies that no provision of a Uruguay Round agreement will be given effect under domestic law if it is inconsistent with federal law, including provisions of federal law enacted or amended by the bill. Section 102(a)(1) ... reflects the Congressional view that necessary changes in federal statutes should be specifically enacted ....

The Administration has made every effort to include all laws in the implementing bill and identify all administrative actions in this Statement that must be changed in order to conform to the new U.S. rights and obligations arising from the Uruguay Round agreements. Those include both regulations resulting from statutory changes in the bill itself and changes in laws, regulations and rules or orders that can be implemented without change in the underlying U.S. statute.

Accordingly, at this time it is the expectation of the Administration that no changes in existing federal law, rules, regulations, or orders other than those specifically indicated in the implementing bill and this Statement will

be required to implement the new international obligations that will be assumed by the United States under the Uruguay Round agreements.<sup>165</sup>

Congress could not but have been aware that the 1984 *Bingham & Taylor* decision interpreted the cross-cumulation provision as mandatory, nor of the Commission's consistent seven-year practice in applying *Bingham & Taylor* as requiring cross-cumulation in the appointed circumstances. In extending "every effort" to revise U.S. AD/CVD law to bring the United States into full compliance with the WTO treaties, Congress had the perfect opportunity to change the mandatory nature of cross-cumulation if that had been its wish. Thus, it is not plausible to conclude that Congress "might have been" looking to put an end to cross-cumulation, *i.e.*, to find that the statute is ambiguous in the sense suggested by Complainant.<sup>166</sup>

On the contrary, U.S. legal principles strongly confirm that Congress has ratified the mandatory nature of cross-cumulation. As the Court in *United States v. Lombardo* held,

If Congress's intent is made clear in a statute, "then U.S. Const. art. III courts, which can overrule congressional enactments only when such enactments conflict with the United States Constitution, must enforce the intent of Congress irrespective of whether the statute conforms to customary international law."<sup>167</sup>

In the circumstances, the Panel finds that no other permissible construction of the statute is possible than that advanced by the ITC in this matter and approved by the Federal Circuit.

#### **VIII. Is the Commission's Exclusion of Transfer Prices from its Analysis of Price Underselling Supported by Substantial Evidence and in Accordance with Law**

Deacero contends that the Commission erred by limiting the data used in quarterly price comparisons to arms'-length transactions, thereby excluding domestic producers' sales

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<sup>165</sup> SAA, *supra* note 110, at 13-14.

<sup>166</sup> Deacero's 57(1) brief at 17.

<sup>167</sup> *United States v. Lombardo*, *supra* note 111, at 1288.

made to affiliates at “transfer prices.” This contention has been framed both as a stand-alone claim in the appeal<sup>168</sup> and as an argument supporting Deacero’s broader claim that the Commission’s “causation” analysis was legally inadequate.<sup>169</sup>

Quarterly pricing data collected by the Commission are used to test for underselling as part of the “price effects” component of the 3-part analysis required by the statute (volume, price effects, and impact). Section 771(7)(C)(ii), directs the Commission to check for “significant price underselling by the imported merchandise relative to the price of products manufactured in the United States” and also to examine whether “the effects of subject imports have depressed prices, or prevented price increases that otherwise would have occurred to a significant degree.”<sup>170</sup>

#### **A. Did Deacero Exhaust Its Administrative Remedies**

The Panel has determined to reach the merits of this issue despite Respondent’s objection that Deacero failed to raise the issue properly (exhaust its administrative remedies) at the agency level.<sup>171</sup> To be sure, the most appropriate time to raise concerns about the selection of “pricing products,” and about the detailed reporting instructions relating to those pricing products, is when the Commission’s questionnaires are circulating in draft form. In this case, Deacero did submit comments (some of which were accepted) at that time concerning the selection of pricing products, but it did not raise any objection regarding the Commission’s standard instruction to provide only arm’s-length transactions for the selected products.<sup>172</sup>

When the Commission then finalized its questionnaires, the nature of the quarterly pricing data to be collected was fixed. By raising concerns about the exclusion of transfer-priced sales only later, Deacero put itself in the position of insisting, near the end of the final-phase injury investigation, that the Commission should not utilize the data it had instructed questionnaire recipients to supply. Nevertheless, Deacero’s comments on this issue in briefs and at the ITC hearing did bring the issue to the

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<sup>168</sup> Deacero’s December 29, 2014, Complaint at count 8.

<sup>169</sup> Deacero’s 57(1) Brief at 31-40 and 42-44.

<sup>170</sup> 19 USC § 771(7)(C)(ii).

<sup>171</sup> Commission’s Brief at 51-54.

<sup>172</sup> Deacero’s 57(3) Brief at 20. Hearing Transcript at 65 and 111-112.

agency's attention, and were sufficient to earn some treatment in the Commission's final determination.<sup>173</sup> Although there is precedent for finding a claim on appeal to be barred under such circumstances,<sup>174</sup> the Panel considers that this was enough to enable the Commission's actions (and its explanation) to be tested on appeal.

## B. Analysis

The parties agree that the Commission has a longstanding, consistent practice of limiting quarterly pricing data to arm's-length sales of the selected products. Deacero points out that this practice is not directly required by statute, and contends that while the practice may be a reasonable one in most cases, following it here was unreasonable because of this case's unique characteristics. Specifically, Deacero points to the large value, and number, of transfer-priced sales of the pricing products by domestic producers.<sup>175</sup>

Respondent defends the Commission's standard approach by noting that transfers between affiliates may not occur at meaningful or reliable prices (e.g., may reflect allocation decisions). Respondent also notes that the Commission looked into this issue during and after the hearing, insofar as the evidentiary record that had been compiled permitted it to do so, and concluded that the results of the test for underselling would have been only minimally affected had transfer-priced sales been included. Finally, Respondent maintains that the Commission's methodological choices, particularly when it is following a longstanding methodology, are entitled to deference.<sup>176</sup>

In the Panel's view, the relevant question is not whether transfer-priced sales by the domestic producers were frequent, large in value, or otherwise significant. Nor can the Panel's judgment be based on how we would have chosen to design a data set, to test for underselling, if the investigation had been ours to conduct. Rather, the question is whether comparing arm's-length transactions of foreign and domestic suppliers is a

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<sup>173</sup> Hearing Transcript at 113. Commission Views, at 39-40.

<sup>174</sup> *Consolidated Fibres v. United States*, 574 F.Supp.2d 1371, 32 C.I.T. 855, 861-862 (2008).

<sup>175</sup> Deacero's 57(1) Brief at 33-38; Deacero's 57(3) Brief at 21-22; Hearing Transcript at 63.

<sup>176</sup> Commission's Brief at 56-57; Hearing Transcript at 113.

lawful way of testing for underselling, and whether the finding of underselling here based on that approach is supported by substantial record evidence. The answer to both questions is yes.

It is important to distinguish two different notions of “representativeness.” We do not understand Deacero to be arguing that the pricing product selections themselves were unrepresentative, *i.e.*, incapable of yielding sufficiently broad coverage of either the subject imports or the like domestic products.<sup>177</sup> Rather, Deacero maintains that with transfer-priced sales omitted, the data collected were unrepresentative of the domestic industry’s pricing on the products that were selected.<sup>178</sup> Yet, with all its limitations – only certain products selected and only arm’s-length sales of those – the quarterly pricing data set appears to have covered roughly one third of domestic industry shipments, nearly 60% of domestic industry commercial shipments, and 81 percent of subject imports from Mexico. At the Panel hearing, counsel for Respondent asserted that such coverage falls within a range typically regarded as adequate; counsel for Deacero, invited to rebut this characterization with examples, did not do so.<sup>179</sup>

The Panel is not prepared, in such circumstances, to hold that the evidentiary basis for the Commission’s underselling finding was insubstantial. Whether more or different evidence could have been collected is irrelevant under the standard of review we must apply. Moreover, the transactions actually examined represented a large volume and value of commercial activity, and showed consistent underselling by subject imports.

We are also mindful that faulting a standard questionnaire instruction, used by the Commission every time it conducts an import injury investigation, is not something to be done lightly. U.S. courts give careful attention to the practical consequences of the judgments they issue, and it is appropriate for binational panels to do the same. The Commission knows in every case that it must select pricing products that will, after excluding transfer-priced sales, still achieve adequate coverage on both sides of the underselling comparison required by the statute. At the “draft questionnaire” stage,

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<sup>177</sup> Deacero’s 57(3) Brief at 24-25; Hearing Transcript at 66-67.

<sup>178</sup> *Id.*

<sup>179</sup> Hearing Transcript at 63-67 & 124.

pricing product selection is vetted with interested parties, as occurred here, to help ensure representativeness. The ultimate pricing product selections typically enjoy no party's full and enthusiastic support. But that does not render those selections, or the Commission's methodology for making them, unlawful.

In sum, the Panel does not agree with Deacero that the Commission's underselling analysis was legally flawed on account of the arm's-length-only pricing data underlying it. To the extent that Deacero is challenging how the Commission used its observations on underselling, in reaching its ultimate decision on causation (injury "by reason of" subject imports), that is a separate matter addressed in this Panel decision at section IX below.

**IX. Whether the Commission Articulated a Reasonable Causal Relationship Between Subject Imports and the Material Injury Experienced by the Domestic Industry in Support of its Determination that the Subject Imports Were a Cause of Material Injury to the Domestic Industry**

**A. The position of the Complainant**

Deacero states that, regarding the causation analysis, the Commission is required to articulate a rational connection between the facts found and the choices made. The Complainant recalls that the investigating authority determined that the rising volume of subject imports at prices that undersold domestic industry prices caused the industry to lose market share. Deacero quotes the Commission's statement that "the domestic industry's loss of market share and its inability to benefit fully from increased demand, both as a result of subject imports, had a direct effect in the industry's revenues, and consequently its profitability".<sup>180</sup>

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<sup>180</sup> Deacero's 57(1) Brief at 42-43.

Deacero argues that the domestic industry lost market share only because its sales volume increased less rapidly than the growth in US rebar demand. The claimant also argued that the loss of market share did not translate into declining domestic sales volume and revenue during the POI, but reflected the difference in the rate of US producers' sales compared to the expansion of the market<sup>181</sup>.

The Complainant also contended that the Commission failed to explain how it found a causal nexus between the loss of market share due to subject imports (a volume impact) and the declining profitability by domestic industry (price-effect impact). Deacero recalls that the domestic industry's profitability declined, notwithstanding the increases in sales and revenue. The Complainant also points out that other factors examined by the Commission showed the same mixed pattern.<sup>182</sup>

According to Deacero, there is no record evidence supporting the ITC's finding that subject imports caused the decline in domestic's industry profitability. The Complainant therefore argues that the Commission relied on the loss of market share as the cause of material injury, but ignored record evidence that directly contradicted its causation determination.<sup>183</sup>

For the Complainant, in the absence of any adverse price effect by subject imports, there is no record evidence supporting the Commission's determination that subject imports caused the decline in the domestic industry's profitability.<sup>184</sup>

In the hearing, Deacero insisted that the Commission relied on two coincidental events: the U.S. industry's lost market share and the domestic industry's declining profitability to find that the former was the cause of the latter. Philippe M. Bruno, counsel for Deacero, stated before the Panel that, in most cases, this would probably be enough to justify an affirmative finding of material injury by reason of the imports. However, this case is

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<sup>181</sup> *Id.* at 43.

<sup>182</sup> *Id.* at 44.

<sup>183</sup> *Id.* at 46.

<sup>184</sup> *Id.*

different because the Commission has failed to establish the necessary causal link between imports and injury based on the evidence on the record.<sup>185</sup> According to the counsel for Deacero, "...the loss of market share did not translate into declining sales quantity and revenue. The domestic industry lost market share only because the sales did not increase at the same rate as the U.S. market."<sup>186</sup> In addition, Deacero argues that the Commission expressly found that the imports did not have any significant depressing or suppressing effect on U.S. prices, therefore, "...imports did not cause the U.S industry to lower its prices or to not raise them."<sup>187</sup>

In sum, Deacero states that the domestic industry's inability to fully benefit from the increased U.S. demand as a result of subject imports is not supported by substantial evidence. In the Complainant's view, in determining that the domestic industry did not "fully" benefit from the growth, the Commission engaged in an impermissible exercise of discretion.<sup>188</sup> The Complainant argues that, while the domestic industry's benefit may not have been as great as they anticipated, they did benefit from the market growth.<sup>189</sup>

## **B. The position of the Investigating Authority and the Domestic Industry**

With respect to the causation analysis, the Commission confirmed that, when analyzing whether an industry is materially injured "by reason of "subject imports, it considers the volume of subject imports, their price effects, and their impact on the domestic industry.<sup>190</sup> It points out that no single factor is dispositive, and the Investigating Authority considers all relevant factors as required by the statute "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." Moreover, when analyzing causation, the Commission notes that it draws

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<sup>185</sup> Hearing transcript at 61.

<sup>186</sup> *Id.* at 62.

<sup>187</sup> *Id.* at 63.

<sup>188</sup> Deacero's 57(1) brief at 51.

<sup>189</sup> *Id.* at 50.

<sup>190</sup> Commission's Brief at 62.

reasonable inferences from the data before it, including, but not limited to, trends and relationships.<sup>191</sup>

In this context, the Commission states that it found that the “volume of subject imports increased at a much greater rate than the US consumption... as a result of this rapid increase, the subject imports took market share from the domestic industry.”<sup>192</sup> The Investigating Authority argues that, although a number of indicators in the domestic industry’s performance showed improvements, they failed to rise commensurately with the increase of US consumption between 2011 and 2013; as subject import volumes increased and took market share.<sup>193</sup>

The Investigating Authority explains that the fact that the domestic industry’s indicators did not rise commensurately with the increase in demand has a direct effect on the industry’s revenues, which were lower than they would have been if subject imports had not caused the loss in market share. Consequently, because the revenues were lower, the industry’s profitability was likewise lower.<sup>194</sup>

RTAC argues that, since the demand for the product increased significantly over the POI, one would normally expect the domestic performance and financial indicators to rise steadily. But, as the volumes of subject imports entered the market at prices consistently below the domestic ones, the subject imports prevented the U.S. industry from increasing sales in proportion to the market share that it had at the outset of the POI.<sup>195</sup>

The Commission states that it expressly explained the causal link between subject imports and the material injury.<sup>196</sup> In fact, in the final determination the Investigating Authority discussed other factors, and specifically conducted an analysis of the decline

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<sup>191</sup> *Id.* at 62-63.

<sup>192</sup> *Id.* at 64-65.

<sup>193</sup> *Id.* at 67.

<sup>194</sup> *Id.* at 69-70.

<sup>195</sup> RTAC’s Brief at 41.

<sup>196</sup> Commission’s Brief at 70.

of raw material prices, but found that it could not explain the loss of market share.<sup>197</sup> Additionally, the Commission analyzed the effects of non-subject imports, which it found to have non injurious effects on the domestic industry.<sup>198</sup>

The Commission also replies that the prevalence of underselling prices throughout the POI was found to be significant, particularly in the light of high substitutability between subject imports and domestically produced rebar, and the importance of price in purchasing decisions. Coupled with the domestic industry's loss of market share, the Investigating Authority found that subject imports had adverse effects on the domestic industry.<sup>199</sup>

RTAC points out that U.S. law does not require an agency to respond to or to discuss every piece of information on the record.<sup>200</sup> The Domestic Industry stated that, as long as the effects of the subject merchandise are not merely incidental, tangential, or trivial, the foreign product sold at less than fair value meets the causation requirement.<sup>201</sup>

### C. Analysis

The Panel is charged by the NAFTA to apply the relevant U.S. law to review the investigating authority's final determination. In this context, the AD law requires the Commission to determine whether an industry is materially injured "by reason" of the imports under investigation.<sup>202</sup> To make this determination, the Commission shall consider the volume of subject imports, the effect on prices for the domestic like product, and the impact on domestic producers of the domestic like product.<sup>203</sup> Also, the

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<sup>197</sup> *Id.* at 71.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 65.

<sup>200</sup> RTAC's Brief at 44.

<sup>201</sup> *Id.* at 41.

<sup>202</sup> 19 USC § 1673d(b)(1).

<sup>203</sup> 19 USC § 1677(7)(B)(i).

Commission may consider other relevant factors to determine whether there is material injury “by reason” of subject imports.<sup>204</sup>

In this context, the Commission must determine whether an industry in the United States is materially injured by reason of the imports under investigation. The “by reason of” standard requires the Commission to establish a causal link between the subject imports and the material injury experienced by the domestic industry.<sup>205</sup>

In order to arrive at this determination, the statute does not compel the Commission to employ a particular methodology,<sup>206</sup> as long as “the injury to the domestic industry can reasonably be attributed to the subject imports.”<sup>207</sup>

This Panel considers that, in light of the arguments presented by the parties, as well as the evidence on the record, the Commission analyzed every factor established in the statute to render its final determination, including, for instance, the decrease in the raw material prices as “other economic factors.”

As has been stated, the Investigating Authority is not compelled to apply a specific methodology to establish the causal link required by law. This deferential authority has been sustained by relevant case law. For example, in *Swiff Train Co. v. United States*, the Federal Circuit ruled that the Commission “has *discretion to choose an appropriate methodology for analyzing causation*” in an antidumping investigation. . . . although strict counterfactual but-for analysis might be necessary in some instances, the “by reason of” standard does not require the Commission to address the causation issue in any particular way and instead it is “*simply required to give full consideration to the causation issue and provide a meaningful explanation of its conclusions.*”<sup>208</sup>

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<sup>204</sup> 19 USC § 1677(7)(B)(ii).

<sup>205</sup> *Swiff-Train Co. v. United States*, 904 F.Supp.2d 1336 (Ct. Int’l Trade 2013).

<sup>206</sup> *Angus Chemical Co. v. United States*, 140 F.3d 1478, 1484-85 (Fed.Cir.1998).

<sup>207</sup> *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380 (Fed.Cir.2008).

<sup>208</sup> *Swiff-Train Co. v. United States*, 793 F.3d 1355 (Fed. Cir. 2015) (*emphasis supplied*).

In *Nippon Steel Co. v. United States*, the Federal Circuit ruled that the AD statute's causation requirement for material harm is met so long as the effects of dumping are not merely incidental, tangential, or trivial.<sup>209</sup>

Also, the Court determined that in an AD case, *the assessment of the proper weight to accord to testimony regarding the conditions of competition in the domestic industry is within the role of the International Trade Commission*, not the Court of Appeals and not the Court of International Trade<sup>210</sup>. Finally, in the same case it was established that a determination by the ITC must be affirmed on judicial review if it is reasonable and supported by the record as a whole, even if some evidence detracts from the Commission's conclusion.<sup>211</sup>

In *Camesa*, the Federal Circuit ruled that the determination by the ITC that the domestic industry was suffering material injury from LTFV sales of imported steel wire rope from Korea and Mexico was supported by sufficient evidence. The Court's holding was reached notwithstanding the assertion by a foreign producer that physically fungible domestic and imported products were not commercially fungible; since there was evidence that products were sold interchangeably, that price was an overwhelming factor in the purchasing decision of a large number of end users, and that consumption of the domestic product decreased during that period.<sup>212</sup>

This case is relevant because the Investigating Authority cites it to argue that is not necessary for the Commission to find price suppression or depression if there is significant underselling and a significant and increasing volume of subject imports took away the domestic industry's market share.<sup>213</sup>

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<sup>209</sup> *Nippon Steel Corp. v. United States*, *supra* note 35.

<sup>210</sup> *Id.* *Emphasis supplied.*

<sup>211</sup> *Id.*

<sup>212</sup> *Grupo Industrial Camesa v. United States*, 85 F.3d 1577 (Fed. Cir. 1996).

<sup>213</sup> Commission's Brief at 65.

Deacero argues that the precedential value of *Camesa* is limited to the facts in that case, and that in that case the Commission's determination was supported by other factors in addition to price underselling: decline in industry's production, capacity utilization, net sales, and operating income<sup>214</sup>. Notwithstanding these arguments, the Panel finds *Camesa* as highly persuasive for the present case.

This Panel considers that *Altx, Inc. v. United States* is also a relevant case for the present analysis. In this case, the CAFC ruled that the "substantial evidence" needed to support the ITC's fact finding in AD investigations "requires more than a mere scintilla... but is satisfied by something less than the weight of evidence... the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."<sup>215</sup>

In addition to the relevant cases, and although they do not have a precedential value for this particular binational Panel review, it is important to make reference to other Panels' decisions. In particular, in *Hard Red Spring Wheat from Canada*, the Panel established that:

Under the applicable standard of review, the Commission enjoys a broad discretion to employ the appropriate methodologies and interpret statutory terms. However, this discretion is not unfettered, and requires that the ITC sufficiently articulates its rationale so that the reviewer might reasonably discern its path of logic.<sup>216</sup>

In light of the above-mentioned cases, this Panel must analyze, in accordance with the statute, whether the causal link presented by the Commission was "reasonable."

In the case *Nippon Steel Corp. v. United States*, the Federal Circuit observed that, as long as the subject imports' price effects "are not merely incidental, tangential or trivial" the causation requirement is met.<sup>217</sup> This must be proved by evidence in the record.<sup>218</sup>

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<sup>214</sup> Deacero's 57(3) Brief at 26-27.

<sup>215</sup> *Altx, Inc. v. United States*, 370 F.3d 1108 (Fed. Cir. 2004).

<sup>216</sup> Decision of the Panel *In the Matter of Hard Red Spring Wheat from Canada*, USA-CDA-2003-1904-06 (Jun. 7, 2005), at 37.

<sup>217</sup> *Nippon Steel Corp. v. United States*, *supra* note 35.

<sup>218</sup> *Mittal Steel Point Lisas Ltd. v. United States*, *supra* note 207.

Deacero did not argue or otherwise prove that the adverse price effects on the domestic industry analyzed by the Commission "were merely incidental, tangential or trivial." On the contrary, from the previous considerations it is clear that the domestic industry suffered injury because of undersold subject imports. The ITC has relied on substantial evidence on the record showing that domestic producers lost sales, even though demand was increasing, because the subject import's prices were lower than theirs. These lost sales led to the decline in both profitability and operating income. Also, the Panel acknowledges that the Commission considered that the subject imports did not depress U.S. producers' prices to a significant degree; nonetheless, it is noteworthy that some domestic producers did reduce their prices to compete.

With respect to the evidence on the record regarding the subject imports' price effects, in the Staff Report we can find an explanation to demonstrate that the domestic industry's revenues "were lower than they would have been if subject imports had not caused the industry's loss in market share and its inability to benefit from the increased demand." This evidence relies mostly on the assertions of U.S producers and purchasers, but we consider them as reliable sources of information that is consistent and coherent.<sup>219</sup>

For these reasons, the Panel considers that the Commission's causation analysis was supported by substantial evidence and made in accordance with law.<sup>220</sup>

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<sup>219</sup> Staff Report at V-29 - V-36 (PROPRIETARY VERSION).

<sup>220</sup> Although most of the counts in Deacero's 14-count Complaint, which is the jurisdictional document for the Panel under Rule 7 of the *NAFTA Article 1904 Panel Rules*, are incorporated into the six issues pursued in Complainant's 57(1) Brief, see p. 6-7, others appear to have been either abandoned and will not be addressed separately by the Panel. See Counts 4, 5, 6, 9, & 13 of Deacero's Complaint, Doc. 6, Dec. 29, 2014.

**X. ORDER OF THE PANEL**

THEREFORE, on the basis of evidence in the administrative record, the applicable law, the written submissions of the participants, and oral argument at the Panel's hearing, the Panel remands the Commission's finding that Rebar and in-scope deformed steel wire are both part of a single like domestic product. The Commission on remand shall reconsider, based on the existing record evidence and on new information if the Commission elects to reopen the record, all six like product factors to determine whether Rebar and in-scope deformed steel wire are part of a single domestic like product. The Commission shall have 90 days to submit its redetermination on remand.

AND FURTHER, the Commission's holdings with respect to the other issues addressed herein are HEREBY AFFIRMED.

**XI. SEPARATE OPINION OF PANELIST LUZ MARÍA DE LA MORA,  
CONCURRING IN PART AND DISSENTING IN PART.**

According to Rule 72 of the Rules of Procedure for Article 1904 "A panel shall issue a written decision with reasons, together with any dissenting or concurring opinions of the panelists, in accordance with Article 1904.8 of the Agreement." Since I do not agree with the Panel majority in the reasoning of certain issues, I have decided to present this Particular Opinion, concurring in part and dissenting in part with the Majority Opinion, as follows:

AGREE

**I. Should the Panel Grant RTAC’s Request for Stay and Assertion of Mootness Based on Its Challenge to Commerce’s Negative Dumping Determination in the Rebar from Turkey Case**

I concur with the opinion of the Panel majority about Deacero’s contention that even if Commerce’s remand determination is considered to replace its original determination, it does not replace or change the Commission determination under review, although it should be taken into consideration once the determination is final.

**II. Whether the Commission’s Inclusion of Deformed Steel Wire with Rebar as a Single Like Product is Supported by Substantial Evidence**

I concur with the opinion of the Panel majority that the Commission on remand shall reconsider, based on the existing record evidence whether Rebar and in-scope deformed steel wire are part of a single domestic like product. But I do not agree that the Commission should reopen the record to consider new information since I found that it is beyond the Panel’s faculties.

**III. In Light of the WTO Dispute Settlement Decision in *India—Hot-Rolled Steel CVD*, Does the *Charming Betsy* Canon of Statutory Construction Compel the Panel to Find Inconsistent with U.S. Law the ITC’s Cross-Cumulation, for Purposes of its Determination of Material Injury, of Dumped Imports from Mexico with Subsidized Imports from Turkey**

**A. What Is the Impact of Cross-Cumulation on the ITC Injury Determination**

I reject the majority's position regarding the finding of a material injury by reason of subject imports from Mexico, since as stated by Deacero, it would have been even more

tenuous had the Commission not cross-cumulated the dumped imports from Mexico with minimally subsidized imports from Turkey. It is highly doubtful that the Commission could have found that the volume of subject imports from Mexico, on a non-cumulated basis, was significant either in absolute terms or relative to production or consumption.<sup>221</sup>

The Commission determined that the U.S. statute requires cumulation of subject imports for purposes of the Commission's analysis of impact as well as its analyses of volume and price effects. It said that the relevant legislative history establishes that Congress enacted the statutory cumulation provision because it sought to ensure that the impact of imports from multiple countries would be addressed cumulatively when the conditions for cumulation were satisfied.<sup>222</sup>

In that sense Deacero affirms that "A statute -19 USC S.1677(7)(G)(i)- should not be construed in a manner that conflicts with the United States' international obligations. Thus a WTO-consistent interpretation of the cumulation provision is required by U.S. law."<sup>223</sup> And according to the Charming Betsy doctrine I think .the Commission's interpretation of the statute should be consistent with the WTO Dispute Settlement Body (DSB) decision in the *US-India Hot Rolled Steel* dispute which Appellate Body report was circulated to Members on December 8th, 2014.

On October 23, 2015 about the WTO recommendation, the United States Trade Commission (USTC) said to the United States Trade Representative (USTR) Amb. Froman that "the Commission hereby reports that Title VII of the Tariff Act of 1930 permits it to take steps in connection with the aforementioned investigation that would render its action in that proceeding not inconsistent with the DSB recommendations and rulings in DS436".<sup>224</sup>

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<sup>221</sup> Complainant's Brief at 11.

<sup>222</sup> Commission's Brief at 8-9.

<sup>223</sup> Complainant's Brief at 18.

<sup>224</sup> Letter from Meredith Broadbent to USTR Michael Froman. October 23, 2015.

As a response, the USTR answered that pursuant to Section 129(a)(1) of the Uruguay Round Agreements Act (URAA) and asked for assistance to render its action not inconsistent with the DSB recommendations and rulings in that WTO dispute.<sup>225</sup>

Both letters were presented as subsequent authorities by Deacero on March 29, 2016, as invited by the Panel during the public hearing held on March 16 and according to Rule 68(1)(b) of the NAFTA Article 1904 Rules of Procedure.<sup>226</sup>

Even when the Commission considers these subsequent authorities are not relevant to this Panel's analysis of whether the Commission's 2014 Final Determination was in accordance with law, including its cross-cumulation of dumped imports from Mexico with subsidized imports from Turkey,<sup>227</sup> in light of the subsequent authority regarding the Commission's affirmative response to the USTR request on whether Title VII of the Act of 1930 permits the Commission to take steps in connection with the WTO-DSB recommendations and rulings in the *US-India Hot Rolled Steel* dispute;<sup>228</sup> and taking into account the Commission's redetermination rendering its action in that proceeding not inconsistent with DSB recommendation and rulings, the Investigating Authority's interpretation of the cross cumulation statute has to be done in a consistent manner with the Charming Betsy doctrine and its interpretation of the federal statute should be in conformity with WTO jurisprudence with respect to all investigations.

Even when the DSB recommendation is a persuasive precedent, we must take into account the fact that we are reviewing the same measure found as incompatible with the WTO Agreements, as it was recognized by the United States Government through the USTR and the USITC letters of reference.

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<sup>225</sup> Letter from USTR Amb. Froman to Hon. Broadbent of the USITC.

<sup>226</sup> Complainants Notice of Subsequent Authorities. March 29, 2016.

<sup>227</sup> Commerce's reply to Complainants Notice of Subsequent Authorities. April 4, 2016.

<sup>228</sup> WTO. United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India. DS436. The Panel and the Appellate Body found that Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement do not authorize investigating authorities to assess cumulatively the effects of subsidized imports with the effects of non-subsidized, but dumped imports. At the DSB meeting on 16 January 2015, the United States stated that it intended to implement the DSB's recommendations and ruling in a manner that respects its WTO obligations. The deadline to do that expired on April 18, 2016.

Does Chevron deference to administrative agencies allow for inconsistent interpretations of the same federal statute? We think it does not. In *Dongbu Steel v. United States*<sup>229</sup> the answer is clear: the US agency may alter its interpretation of the statute to respond to the WTO decision, but to interpret the statute differently in one context but not in another would be unreasonable and arbitrary. Even under Chevron, agency action is arbitrary and capricious unless the agency offers a sufficient explanation for treating similar situations differently.

I am also concerned that cross-cumulating in this case may amount to discrimination since to have one rule for one country and one rule for another, treating Indian imports differently from Mexican imports under the same circumstances would be discriminatory, as discussed during the public hearing.<sup>230</sup> Deacero stated that “as of today, an India case was decided without cross-cumulation; and, as of this moment, a Mexican steel products case remains with a decision based on cross-cumulation... there is discrimination. The only discussion really is what can or should be done about it.”<sup>231</sup>

But even if this Panel is not allowed to recommend an interpretation of the statute consistent with the WTO India determination, after reviewing the administrative record, analyzing the parties’ arguments and making some clarifications during the public hearing,<sup>232</sup> I would like to emphasize that in this specific case, cross cumulation is unreasonable, since the market share of Mexican rebar in the US industry, if considered alone without cumulating with Turkey, not only shows a small market share but also an actual decline in the period of investigation (13 quarters between 2011 and 2014).

In the Commission’s Final Report it is stated that Mexico’s share in the US market went from 4.3% in 2011 to 4.0% in 2012 and 4.4% in 2013.<sup>233</sup> For the first quarter of 2013 Mexican imports market share were at 4.2% and 4.2% during the same period in 2014. In other words, Mexico’s market share experienced a growth of 0.1% between 2011 and

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<sup>229</sup> See *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011)

<sup>230</sup> Public Hearing. March 16, 2016 at 48-53.

<sup>231</sup> Hearing Transcript at 51-52.

<sup>232</sup> Public Hearing. March 16, 2016 at 8-13.

<sup>233</sup> US ITC. Publication 4496. Table C-3.

2013; a negative growth of 0.3% between 2011 and 2012; and a stood still of 4.2% in the first quarter of 2013 and 2014.<sup>234</sup>

Had Mexican imports not been cumulated with subsidized Turkish imports, Mexican imports would not have been part of this investigation since its market participation not only did not increase but it actually declined during the period of investigation.

The recent responses of the U.S. authorities to the WTO recommendations are relevant because the Investigating Authority should not treat similar situations differently and it has been demonstrated that 19 U.S.C. Section 1677(7)(G9(i)(I) permits an interpretation to not require the cross-cumulation of subsidized imports with dumped imports. It is an ambiguous disposition that requires interpretation of the cross cumulation statute in a consistent manner with the international obligations, as mandated by the Charming Betsy doctrine.

I agree with the Majority that the Panel cannot remand on this issue, although I consider of great importance to notice the relationship between the WTO decision and this case.

#### **IV. Is the Commission's Exclusion of Transfer Prices from its Analysis of Price Underselling Supported by Substantial Evidence and in Accordance with Law**

I reject the Panel majority's position with respect to Deacero's argument that the Commission erred by limiting the data used in quarterly price comparisons to arms'-length transactions, thereby excluding domestic producers' sales made to affiliates at "transfer prices."

Quarterly pricing data collected by the Commission are used to test for underselling as part of the "price effects" component of the 3-part analysis required by the statute (volume, price effects, and impact). See Section 771(7)(C)(ii), directing the Commission to check for "significant price underselling by the imported merchandise relative to the price of products manufactured in the United States" and also to examine whether "the

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<sup>234</sup> Memorandum. October 29, 2014. Doc. 545345.

effects of subject imports have depressed prices, or prevented price increases that otherwise would have occurred to a significant degree.”<sup>235</sup>

#### **A. Did Deacero Exhaust Its Administrative Remedies**

The majority of the Panel has determined to reach the merits of this issue despite Respondent’s objection that Deacero failed to raise the issue properly, by exhausting its administrative remedies at the agency level.<sup>236</sup> The statute does not require a specific time-frame to raise concerns about the selection of “pricing products,” and about the detailed reporting instructions relating to those pricing products. In this case, Deacero did submit comments, and they were sufficient to earn some treatment in the Commission’s final determination, but the IA concluded that *it did not believe* that including transfer priced sales would yield results different from those in the record.<sup>237</sup> It is my concern that the investigating authority is basing its results and conclusions on “beliefs” and not on the evidence in the record or facts. Basing its conclusions on a conjecture or a simple possibility could yield an illegal determination.

The Commission affirms that Deacero did not challenge its exclusion of transfer sales from its price underselling analysis during the administrative investigation, so the exhaustion of administrative remedies is required.<sup>238</sup> It is my opinion that even when the Commission has discretion with respect to whether to require exhaustion, Deacero affirms that this issue was raised in the prehearing and posthearing briefs, and that the Commission expressly admitted it.<sup>239</sup>

According to the 28 U.S. Code § 2637 (d) - Exhaustion of administrative remedies- “the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies”. There is no doubt that it has the discretion of requiring exhaustion, but, the exhaustion doctrine requires a party to present its claims before the administrative agency before raising those claims to the Court or in this case, to the Panel. Deacero did present those claims during the administrative investigation and the

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<sup>235</sup> 19 USC § 771(7)(C)(ii).

<sup>236</sup> Commission’s Brief at 51-54.

<sup>237</sup> Hearing Transcript at 113. Commission Views, at 39-40.

<sup>238</sup> Commission Brief at 51-54.

<sup>239</sup> Deacero Reply Brief at 19.

Commission addressed the issue in its final determination, so the administrative remedy was exhausted.<sup>240</sup>

In my opinion, the argument raised by the Commission about the exhaustion of remedies doctrine in this case is meritless and not supported by substantial evidence on the record and it is not a reasonable cause for the exclusion of transfer sales from its price underselling analysis.

## **B. Analysis**

I also reject the Panel majority's position regarding the argument that the Commission has a longstanding, consistent practice of limiting quarterly pricing data to arm's-length sales of the selected products. Deacero points out that this practice is not directly required by statute, and contends that while the practice may be a reasonable one in most cases, following it here was unreasonable because of this case's unique characteristics. Specifically, Deacero points to the large value, and number, of transfer-priced sales of the pricing products by domestic producers.<sup>241</sup>

Deacero asserts that the Commission refused to include sales from the domestic producers to their downstream affiliates in the analysis, that represented significant amount of the domestic industry's sales during the POI, made by the three largest U.S. producers that drove the filing of the antidumping and countervailing duty petitions against the subject imports.<sup>242</sup> Deacero also argues that the omitted sales comprised a significant amount of pricing information, which was crucial to performing a thorough underselling analysis, in light of the considerable size of the transfer sales and their potential impact on pricing in the U.S. market.

The three largest U.S. rebar producers accounted for a significant amount of the reported transfer sales. The Big Three's transfers represent a significant amount reported quantity of net sales in 2013. "Furthermore, record evidence also shows that

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<sup>240</sup> Administrative Record List 2, Doc. 280. September, 2014. Deacero Prehearing and Posthearing Briefs.

<sup>241</sup> Deacero's 57(1) Brief at 33-38. Deacero's 57(3) Brief at 21-22. Hearing Transcript at 63.

<sup>242</sup> *Id* at 32-33.

these transfer sales are not isolated from market conditions and competition.”<sup>243</sup>

Deacero maintains that with transfer-priced sales omitted, the data collected were unrepresentative of the domestic industry’s pricing on the products that were selected because the domestic industry was selling these same products to related and unrelated customers.<sup>244</sup>

Deacero states that “in those instances in which affiliated purchasers buy from multiple sources, transfer sales compete in the U.S. marketplace with rebar sold from other sources. This means that transfer prices are relevant in the purchasing decision of affiliated distributors/fabricators, and further demonstrates that competition is not limited to the subject imports but instead extends to all sources of rebar whether U.S. or foreign. Because competition permeates the market in which transfer sales compete, the Commission has no legitimate grounds for excluding transfer sales from the underselling analysis.”<sup>245</sup>

Deacero argued that the average unit value (“AUV”) for U.S. producers’ sales to their related end users/distributors tend to be lower than the AUVs of commercial shipments and thus the exclusive focus on U.S. commercial sales inflates the margins of underselling in the pricing data in section V.32.<sup>246</sup>

Respondent defends the Commission’s standard approach by noting that transfers between affiliates may not occur at meaningful or reliable prices (e.g., may reflect allocation decisions).

The Commission states that it followed its long-standing practice of collecting pricing data for specific products in which subject imports and the domestic like product competed in the U.S. market only with respect to arm’s length sales to unrelated customers and that by following its customary practices, the Commission employed a reasonable methodology, and ensured that the data that it collected provided

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<sup>243</sup> *Id* at 33-34

<sup>244</sup> Transcript at 74-75

<sup>245</sup> Deacero Brief at 35

<sup>246</sup> Staff Report at V-26

meaningful comparisons between prices for the domestic like product and the subject imports in the U.S. market.<sup>247</sup>

The Commission also argues that according to the Commission practice, “the primary purpose of pricing data collection and analysis is to provide, *to the extent possible*, “apples to apples” comparisons of specifically and carefully defined products where U.S. and subject product directly compete in the U.S. market. Thus, the Commission does not necessarily seek to collect pricing data on all relevant products produced domestically; it focuses on collecting comparative pricing data on particular products *where subject imports are competing in the U.S. market.*”<sup>248</sup>

The Commission explains that part of its “long-standing practice includes, *to the extent possible*, the collection of pricing data only for arm’s length transactions between unrelated parties and not to transactions between corporate affiliates ... By contrast, prices for non-arm’s length transactions between related corporate affiliates reflect factors other than market conditions concerning the specific product. *Transfer prices may vary depending on where the corporation chooses to allocate a profit or loss on the product in a particular time period.*”<sup>249</sup>

Nevertheless, the Commission maintains that contrary to Deacero’s contentions, it did not exclude or ignore any data it possessed regarding the transfers. Although the Commission did not collect specific pricing data for non-arm’s length transfers in light of the failure of any party to request that it do so, the Commission did collect and fully consider other data in the record related to the transfers, including AUV data offered by the parties in response to Commission requests. The Commission also asked questions regarding the underselling analysis and the transfers to affiliates. The parties provided information in their posthearing briefs, specifically the petitioner submitted affidavits from representatives of US producers.<sup>250</sup>

Respondent also notes that the Commission looked into this issue during and only after the hearing, insofar as the evidentiary record that had been compiled permitted it to do

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<sup>247</sup> Commission Brief at 54-56

<sup>248</sup> *Idem.*

<sup>249</sup> *Idem.*

<sup>250</sup> *Id at 57*

so, and concluded that the results of the test for underselling would have been only minimally affected had transfer-priced sales been included, it viewed the pricing data reported by the domestic industry as reliable and representative, and did not believe the method proposed would yield results different from those in the record.<sup>251</sup>

The Commission's conclusion that it "viewed the pricing data reported by the domestic industry as reliable and representative, and did not believe the method proposed would yield results different from those in the record", is not supported by substantial record evidence. It should be noted that the Commission finds that "*the relatively large share of transfer sales is also a notable feature of the industry's financial results.*"<sup>252</sup>

In that regard, it is important to notice that US producers' shipments of rebar to related firms (distributor level) account for a significant amount, while US importers' shipments of rebar from subject sources also account for a significant amount i.e. there is an overlap of sales between domestic producers to their related firms and subject imports.

Therefore transfer priced sales constitute an important part of the marketplace reality. Being the primary purpose of the Commission on pricing data collection and analysis to provide, *to the extent possible*, "apples to apples" comparisons of specifically and carefully defined products where U.S. and subject product directly compete in the U.S. market, transfer priced sales need to be included in the underselling price analysis.

It is important to distinguish two different notions of "representativeness". Deacero is not arguing that "the pricing product selections themselves were unrepresentative, *i.e.*, incapable of yielding sufficiently broad coverage of either the subject imports or the like domestic products".<sup>253</sup> Rather, Deacero maintains that with transfer-priced sales omitted, the data collected were unrepresentative of the domestic industry's pricing on the products that were selected because the domestic industry sells the same products to affiliate and unaffiliate customers.<sup>254</sup> The exclusion of an important amount of sales to affiliates "raises the issue of the representativeness of the pricing data."<sup>255</sup>

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<sup>251</sup> *Id* at 58; *Transcript* at 131

<sup>252</sup> Staff Report. Oct 28, 2013 at p. VI-2.

<sup>253</sup> Deacero 57 (3) Reply Brief at 24-25; *Transcript* at 66-67.

<sup>254</sup> Deacero's 57(1) Brief at 124 and *Transcript* at 63-67.

<sup>255</sup> Deacero's Reply Brief at 25.

The administrative record indicates that marketplace realities reflect that transfer sales constitute a substantial share of the US rebar market and are equally important as commercial domestic 3B's shipments.<sup>256</sup> The record also shows that transfer and market prices of intra-firm sales and arm's length sales, respectively, maintain a constant difference in all 13 quarterly comparisons.

Even if I recognize the deference ought to the investigating authority, the extent of deference to be granted to an agency's determination depends on the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements.<sup>257</sup> Nevertheless, in this case the Commission's conclusion is based on an assumption rather than on an analysis and is not supported by substantial evidence in the record.

For the above-mentioned reasons, it is my opinion that in this case, the price underselling analysis should include transfer prices since this is the only way in which the IA can effectively check for significant price underselling of subject imports.

**V. Whether the Commission Articulated a Reasonable Causal Relationship Between Subject Imports and the Material Injury Experienced by the Domestic Industry in Support of its Determination that the Subject Imports Were a Cause of Material Injury to the Domestic Industry**

My concern in this particular issue is that the majority's opinion affirms that "The ITC has relied on substantial evidence on the record showing that domestic producers lost sales, even though demand was increasing, because the subject import's prices were lower than theirs. These lost sales led to the decline in both profitability and operating income ... the Commission considered that the subject imports did not depress U.S. producers' prices to a significant degree; nonetheless, it is noteworthy that some domestic producers did reduce their prices to compete."<sup>258</sup>

I do not agree with the Panel's majority conclusion that domestic producers lost sales

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<sup>256</sup> Staff Report note 157/ Table III-7.

<sup>257</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>258</sup> USITC. Publication 4496. October 2014. p.28

since the administrative record shows that sales of domestic and subject imports increased throughout the POI as demand was increasing.

It is my opinion that the administrative record does not show those lost sales. The ITC Brief states that commercial sales quantity, value and unit value increased between 2010 and 2012. During the first half of 2013 there was an increase in terms of quantity and only in this 6 month-period was there a decrease in terms of value and unit value compared to the same period in 2012.<sup>259</sup> The Commission finds that domestic price increases ranged from 14.6 to 21.2

percent during January 2010 to June 2013.<sup>260</sup> This information on the administrative record contradicts the majority of the Panel's conclusion that the ITC relied on substantial evidence on the record to show that domestic producers lost sales

## VI. MY CONCERN WITH THE ORDER OF THE MAJORITY OF THE PANEL

The majority is inviting "the Commission to reopen the record to consider, based on the new information that the parties and the Commission may add as well as the existing record evidence, and on all six like product factors to determine whether rebar and deformed steel wire that meets ASTM A1064 that has bar markings and is subjected to an elongation test could be defined or not as a single domestic like product."

I am concerned about inviting the Commission **to reopen the record to consider, new information, since I found that it** is beyond the panel's faculties. It is my understanding that we can only base our review on the administrative record that was created during the investigation.

NAFTA Article 1904.2 states that "An involved Party may request that a panel review, **based on the administrative record**, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine

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<sup>259</sup> Staff Report. Oct 28, 2013 at Tables VI-1 and VI-2.

<sup>260</sup> Staff Report at p. V-15.

whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party.”

In addition, Article 1904.8 states that “The panel may uphold a final determination, or remand it for action *not inconsistent with the panel's decision*.” But the Panel is not allowed to authorize or even to invite the Investigating Authority to reopen the record nor to add new evidences.

By including “**based on the new information that the parties and the Commission may add**,” it would be in violation of the abovementioned article since it would go beyond the administrative record. And, even if the Panel decides to go further, we should then open the record for the rest of the issues, so all the parties would have the same opportunities on presenting new evidence in every single challenged issue.

SO ORDERED.

Issued on July 14, 2016

Signed in the original by:

Stephen Joseph Powell

Stephen Joseph Powell, Chair

Gabriel Cavazos Villanueva

Gabriel Cavazos Villanueva

Oscar Cruz Barney

Oscar Cruz Barney

John R. Magnus

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Luz María de la Mora Sánchez

Luz María de la Mora Sánchez