A-201-822
POR: 7/1/07 - 6/30/08
PUBLIC DOCUMENT
AD/CVD, Office 7: PSE, BCD

February 3, 2010

MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils from Mexico

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SUMMARY:

We have analyzed the case brief and rebuttal brief of interested parties in the administrative review of the antidumping duty order on stainless steel sheet and strip in coils (S4 in coils) from Mexico. As a result of our analysis, we have made changes to the margin calculation as discussed below. We recommend that you approve the Department of Commerce's (the Department's) position described in the "Discussion of Interested Party Comments" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this administrative review on which we received comments and rebuttal comments from parties:

Comment 1: Clerical Errors
Comment 2: Offsetting for U.S. Sales that Exceed Normal Value
Comment 3: Date of Sale
Comment 4: U.S. Indirect Selling Expenses
Comment 5: Calculation of Credit Expenses
Comment 6: Whether to Apply an Alternative Cost Averaging Methodology
Comment 7: G&A Ratio (Employee Profit Sharing)
Comment 8: G&A Ratio (Gains on Sale of a Warehouse)
Comment 9: Financial Expenses

BACKGROUND:

On August 7, 2009, the Department published the preliminary results of the administrative review of the antidumping duty order covering S4 in coils from Mexico. *See Stainless Steel Sheet and Strip in Coils from Mexico; Preliminary Results of Antidumping Duty Administrative Review and Intent Not To Revoke Order in Part*, 74 FR 39622 (August 7, 2009) (*Preliminary Results*). The merchandise covered by the order is S4 in coils from Mexico, as described in the "Scope of the Order" section of the final results *Federal Register* notice. The period of review (POR) is July 1, 2007, through June 30, 2008. This review covers ThyssenKrupp Mexinox S.A. de C.V. (Mexinox S.A.) and its U.S. affiliate, Mexinox USA, Inc. (Mexinox USA) (collectively referred to as Mexinox or respondent).

In the *Preliminary Results*, we invited parties to comment. *See Preliminary Results* at 39631. In response, Mexinox submitted (1) a request for a public hearing and (2) a case brief on September 4, 2009, and September 15, 2009, respectively. *See* Letter from Hogan & Hartson LLP (counsel for respondent) titled "Stainless Steel Sheet and Strip in Coils from Mexico – Request for Hearing," dated September 4, 2009; *see also* Case Brief from Hogan & Hartson, LLP titled "Stainless Steel Sheet and Strip in Coils from Mexico – Case Brief," dated September 15, 2009 (Case Brief). Allegheny Ludlum Corporation, AK Steel Corporation, and North American Stainless (collectively, petitioners), submitted their rebuttal brief on September 24, 2009. *See* Letter from Kelley, Drye, & Warren, LLP (counsel for petitioners), titled "Stainless Steel Sheet and Strip in Coils from Mexico – Petitioners' Rebuttal Brief," dated September 24, 2009 (Rebuttal Brief). To accommodate respondent's request, a public hearing was held on October 2, 2009. *See* Transcript of "In the Matter of: The Administrative Review of the Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils from Mexico" dated October 9, 2009.

DISCUSSION OF INTERESTED PARTY COMMENTS:

<u>Comment 1</u>: Clerical Errors

Mexinox argues the Department made seven ministerial errors in its preliminary margin calculation. First, Mexinox argues that the Department failed to convert the total cost of manufacture (COM) from a per metric ton (MT) basis to a per hundred weight (CWT) basis in its recalculation of U.S. inventory carrying costs. *See* Case Brief at 1. Second, Mexinox argues the Department excluded sales (without further processing) made by Ken-Mac Metals (Ken-Mac) in the margin calculation.[1] *Id*. Third, Mexinox contends the Department (in its margin calculation) included non-subject sales made by Ken-Mac. *Id*. Fourth, Mexinox argues that the Department applied the incorrect net interest expense ratio to further processing performed by Ken-Mac. *Id*. Fifth, Mexinox contends the Department excluded fuel surcharges by Ken-Mac in its calculation of the U.S. net price. *Id*. at 2. Sixth, Mexinox argues that the Department should revise its assessment rate calculation to reflect a single importer-specific assessment rate for Mexinox

[1] Ken-Mac Metals is an affiliated service center headquartered in Cleveland, Ohio, whose primary business is the resale and further-processing of aluminum, stainless steel, and other metals. *See* Mexinox's October 7, 2008, response to the Department's section A antidumping duty questionnaire (AQR) at 15-18 for additional information regarding Ken-Mac's operations.

USA. *Id*. Finally, Mexinox argues that the Department should revise its assessment rate denominator to include the entered value of sales made outside the U.S. *Id*.

Petitioners did not comment on the aforementioned alleged ministerial errors.

Department's Position:

We have reviewed Mexinox's claims of these clerical errors and have determined that each, stated above, are warranted. In particular, we find that the Department inadvertently failed to convert the total COM from a per MT basis to a per CWT basis in its recalculation of U.S. inventory carrying costs. Furthermore, we find that the Department inadvertently excluded Ken-Mac's further processed sales, fuel surcharges incurred on its U.S. sales, and inadvertently included non-subject sales also made by Ken-Mac. We furthermore find that the Department's calculation of the net interest expense on Ken-Mac's further processing, assessment rate calculation, and calculation of entered value were in error. Therefore, the Department has revised its margin calculation program to correct for these errors for purposes of these final results. A detailed explanation and the programming language used to affect these changes is provided in the Memorandum to the File, from Patrick Edwards and Brian Davis, Case Analysts, through Angelica Mendoza, Program Manager, titled "Analysis of Data Submitted by ThyssenKrupp Mexinox S.A. de C.V. for the Final Results of the Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils from Mexico (A-201-822)," dated February 3, 2010 (Final Analysis Memorandum) at pages 2 through 7.

Comment 2: Offsetting for U.S. Sales that Exceed Normal Value

Mexinox argues the Department improperly used "simple zeroing" in the calculation of the dumping margin in the *Preliminary Results*. Mexinox states that in accordance with both international and national law, the Department should not apply simple zeroing for these final results.

First, Mexinox asserts the practice of simple zeroing is no longer permitted under U.S. law, claiming there is no provision in the U.S. statute which requires zeroing. *See* Case Brief at 20-26. Mexinox states that the statute does not require the Department to use zeroing in administrative reviews and that the courts (including the U.S. Court of Appeals for the Federal Circuit (Federal Circuit)) have ruled the U.S. statute is "at best 'silent' on the question of zeroing." *Id*. at 21. In *Timken Co. v. United States*, 354 F.3d 1334, 1340-42 (Federal Circuit 2004) (*Timken*), Mexinox avows, the Federal Circuit explicitly stated the statute does not require the Department to assign a margin of zero to non-dumped sales. *Id*. Mexinox asserts that zeroing is not required by regulation, agency policy bulletin, or "any other form of written guidance or rule of general or prospective effect." *Id.*

Mexinox also argues the Department must, to the extent possible, interpret and apply the U.S. antidumping laws in a manner that does not conflict with its international obligations, such as those under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 (World Trade Organization (WTO) Antidumping Agreement). *Id*. In particular, Mexinox claims the WTO Appellate Body confirmed in *United States – Laws,* *Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R (April 18, 2006) (*US-Zeroing (EC)*) that the zeroing methodology used by the Department in administrative reviews is inconsistent with the WTO Antidumping Agreement as applied in specific cases before the dispute settlement panel. *Id*. Mexinox also refers to the WTO Appellate Body rulings in *United States -Measures Relating to Zeroing and Sunset Reviews, Appellate Body Report*, WT/DS322/AB/R (January 9, 2007) (*US- Zeroing (Japan)*) and *United States – Final Antidumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (May 30, 2008) (*US-Zeroing (Mexico)*) that simple zeroing in administrative reviews is "as such" inconsistent with Article VI:2 of the GATT 1994 as well as Article 9.3 of the WTO Antidumping Agreement. *Id*. at 21-22.

Mexinox states this principle is also established in *Alexander Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (*Charming Betsy*), in which the Supreme Court stated "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *See* Case Brief at 22-23. Mexinox states that while the Department generally has broad discretion under the *Chevron*[2] principles, to interpret the antidumping statute it is administering (*see Chevron*, 467 U.S. 837), "*Chevron* must be applied in concert with the *Charming Betsy* doctrine when the latter doctrine is implicated" (*Hyundai Electronics Co., Ltd. v. United States*, 53 F. Supp. 2d 1334, 1344 (CIT 1999)). *Id*. at 23.

In the instant review, Mexinox contends that zeroing has been found to be inconsistent with the United States' international obligations. *Id*. Furthermore, Mexinox insists, U.S. antidumping law can be interpreted and applied so as to avoid zeroing. *Id*. Mexinox cites an Article 1904 binational panel in carbon and certain alloy steel wire rod from Canada, which concluded that "*Charming Betsy*. . .would call for construing U.S. law itself as disallowing zeroing if doing so is a 'possible construction'." *Id*. citing *Carbon and Certain Alloy Steel Wire Rod from Canada*, Secretariat File No. USA-CDA-2006-1904-04 (November 28, 2007) (*Wire Rod from Canada*) at 31. Mexinox further states the WTO has repeatedly condemned zeroing, disallowing it as a possible construction of U.S. law consistent with the United States' international obligations. *Id*. Therefore, interpreting U.S. antidumping laws to allow zeroing is contrary to *Charming Betsy*. *Id*. Mexinox also emphasizes that in the instant case, rather than asking the Department to comply with any particular ruling adopted by the WTO Dispute Settlement Body, Mexinox's references to prior WTO panel and Appellate Body reports point to the scope and nature of the United States' substantive obligations under Article VI:2 of the GATT 1994 and Article 9.3 of the Antidumping Agreement. *Id*. at 24. Once these obligations are established, Mexinox argues, the Department's obligations under U.S. law pursuant to *Chevron* and *Charming Betsy* are clear. *Id*.

Mexinox asserts that the Uruguay Round Agreement Act (URAA) cannot be used to justify the Department's refusal to abandon zeroing on the grounds that the WTO dispute settlement reports at issue have not yet been implemented pursuant to the procedures set forth in sections 123 and 129 of the URAA for two reasons. *See* Case Brief at 24-26. First, Mexinox states it is not seeking implementation of a WTO dispute settlement report, but rather adherence to preexisting substantive commitments under Article VI:2 of GATT 1994 and Article 9.3 of the WTO Antidumping Agreement. *Id*. at 24. Second, Mexinox states Congress excluded "informal

[2] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

agency practices," such as zeroing, from the scope of those implementation provisions (section 123(g)(3) of the URAA) which require consultations with Congress before the Department may change a "regulation or practice." *Id*. at 25-26. Mexinox states that zeroing is not a regulation or an agency practice as Congress has defined that term for purposes of these consultative procedures. Rather, Mexinox states, zeroing is an "informal practice that is not embodied in any regulation or other written policy guidance of general applicability." *Id*. Mexinox also contends that because zeroing is not inconsistent with U.S. law (as it asserts), the Department is not prevented from abandoning the practice of zeroing due to section 102(a) of the URAA, 19 U.S.C. 3512(a) which states that no provision of the WTO agreements that is "inconsistent with any law of the United States" shall be evoked. *Id*.

Finally, Mexinox contends that there are compelling reasons for the Department to exercise its authority (given that Mexinox states no statute, regulation, or written guideline requires the Department to zero or forbids the Department from zeroing) and abandon its practice of zeroing in the instant case. *See* Case Brief at 26. First, Mexinox states that as WTO dispute settlement panels have repeatedly found, zeroing artificially inflates dumping margins. *Id*. Mexinox argues that refraining from zeroing in this review would allow for a more accurate dumping margin calculation. *Id*. Second, Mexinox argues that refraining from zeroing in this review would avoid actions that are contrary to U.S. obligations under GATT 1994 and WTO Antidumping Agreement, as discussed above. *Id*. at 27. Lastly, Mexinox contends that the only rationale the Department appears to have advanced in support of the practice of zeroing is that it exposes "masked dumping." However, Mexinox asserts that in this case, there is no evidence, and no allegation, that Mexinox has engaged in masked dumping. *Id*. at 28. Therefore, for the reasons described above, Mexinox argues the Department should not apply zeroing in this case.

Petitioners contend the Department rejected these same arguments in *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 47191 (September 15, 2009) and accompanying Issues and Decision Memorandum at Comment 3 (*Frozen Warmwater Shrimp from Vietnam*). *See* Rebuttal Brief at 2-6. *See also* Rebuttal Brief at 4 where petitioners cite to *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1381-82 (Federal Circuit 2008), *Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1290-91 (Federal Circuit 2008), *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347-49 (Federal Circuit 2005) (*Corus Staal I*), *Timken*, *Antidumping Proceedings: Calculation of the Weighted-Averaged Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722, 77724 (December 27, 2006) for additional Department precedence with regard to zeroing. In the instant review, petitioners argue Mexinox has presented no basis for altering the Department's position expressed in *Frozen Warmwater Shrimp from Vietnam*. Petitioners also note the Department disagreed with Mexinox's arguments in prior reviews and urge the Department for this segment of the proceeding to deny once again Mexinox's request and continue to not offset for U.S. sales that exceed normal value (NV) in its dumping margin calculation. *Id*. at 4-5.

Petitioners claim the Department's responsibility is to interpret the U.S. antidumping statute, which is distinct from the WTO Antidumping Agreement, and that this often requires the Department to fill gaps Congress has either intentionally or inadvertently left in the statute. *See* Rebuttal Brief at 5. Petitioners maintain the courts have long recognized the Department's interpretation and application of the statute is given special deference, citing *Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Federal Circuit 1983) holding "the Secretary has broad discretion in executing the {antidumping} law." *Id*. at 5. Petitioners also assert that under 19 U.S.C. 3533(g), WTO decisions are not "supreme law" in the United States and can only be implemented after careful and deliberate evaluation by Congress and the affected agency.

Finally, petitioners argue that contrary to Mexinox's contention, *Charming Betsy* does not require the Department to change its established methodology because the courts have already addressed this issue. *See* Rebuttal Brief at footnote 2 on page 6 for citations to these cases, including *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Federal Circuit 2007) (*Corus Staal II*), *Corus Staal I* (395 F.3d at 1347), *Timken* (354 F.3d at 1343), and *SNR Roulements v. United States* (341 F. Supp. 2d 1334, 1343-44) (CIT 2004) which all recognize the primacy of the comprehensive statutory scheme that, as petitioners claim, renders the *Charming Betsy* doctrine inapplicable.

<u>Department's Position</u>:

We have not changed our methodology of calculating Mexinox's weighted-average dumping margin as suggested by respondent for these final results.

Section 771(35)(A) of the Tariff Act of 1930, as amended (the Act), defines "dumping margin" as the "amount by which the normal value exceeds the export price and constructed export price of the subject merchandise." Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than export price (EP) or constructed export price (CEP). As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The U.S. Court of Appeals for the Federal Circuit has also held that this is a reasonable interpretation of the statute. *See Timken*, 354 F.3d at 1334, 1342; *see also Corus Staal I*, 395 F.3d at 1347, *cert. denied*; 123 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006).

Section 771(35)(B) of the Act defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term aggregate dumping margins in section 771(35)(B) of the Act is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) of the Act as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV permitted to offset or cancel out the dumping margins found on other sales.

This does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the POR; the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

The Federal Circuit explained in *Timken* that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value." *See Timken*, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted by the Department. No U.S. court has required the Department to demonstrate "masked dumping" before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. *See, e.g.*, *Timken*, 354 F.3d at 1343; *Corus Staal I*, 395 F.3d 1343; *Corus Staal BV v. United States*¸ 502 F.3d 1370, 1375 (Federal Circuit 2007) (*Corus Staal II*); and *NSK Ltd. v. United States*, 510 F.3d 1375 (Federal Circuit 2007) (*NSK*).

The respondent has cited WTO dispute-settlement reports (WTO reports) finding the denial of offsets by the United States to be inconsistent with the WTO Antidumping Agreement. As an initial matter, the U.S. Court of Appeals for the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA. *See Corus Staal I*, 395 F.3d at 1347-49; *accord Corus Staal II*, 502 F.3d at 1375; *NSK*, 510 F.3d at 1375. Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. *See, e.g.*, 19 U.S.C. 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. *See* 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. *See* 19 U.S.C. 3533(g); *see, e.g.*, *Antidumping Proceedings: Calculation of Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27, 2006) (*Zeroing Notice*). With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure.

With respect to *US-Zeroing* (*EC*), the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27, 2006) (*Zeroing Notice*). In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. *Id.* at 71 FR 77724.

With respect to *US-Zeroing* (*Japan*) and *US-Zeroing* (*Mexico*), the steps taken in response to these reports do not require a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review.

Mexinox's reliance upon the Article 1904 binational panel in *Wire Rod from Canada* is misplaced. This non-final decision has no instructive value. First, the panel in that case was dismissed *before* the decision became final, and therefore, there is no final decision of the panel. Further, even if the panel's decision had become final, it would not bind the Department in this administrative review because Art. 1904 binational panel decisions have no binding effect except with respect to the particular determination under review. *See* NAFTA article 1904(9). Moreover, to reach the conclusions it did, the panel fundamentally misinterpreted the U.S. law by concluding that the Federal Circuit decisions are not binding. However, under U.S. law, decisions of the Federal Circuit are precedential decisions on what U.S. law is, and the Department is bound by such decisions.[3]

For all these reasons, the various WTO Appellate Body reports regarding "zeroing" do not establish whether the Department's denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the export transactions examined in this review are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect to other transactions.

<u>Comment 3</u>: Date of Sale

Mexinox explains that in response to the severe price volatility experienced in the stainless steel market, it entered into binding agreements which purportedly fixed all material terms of sale, including price and quantity, with certain customers during the instant POR. *See* Case Brief at 30. Therefore, Mexinox notes, the Department should reverse its preliminary date of sale analysis and rely upon contract date as the appropriate date of sale to these customers. *Id.* at 29-38. Mexinox argues that the Department's use of the invoice date as the date of sale in the *Preliminary Results* for sales subject to these contracts is erroneous and, therefore, should use the contract date as the date of sale for sales made pursuant to these contracts for these final results. *Id*.

Petitioners contend that in all prior segments of this proceeding, the Department determined that the date of invoice should be the basis for the date of sale for Mexinox's U.S. and home market sales. Moreover, petitioners argue that Mexinox's own statements in its Case Brief, as well as record evidence submitted by Mexinox, confirm that the date of invoice is the proper date of sale for *all* of Mexinox's sales of subject merchandise during the POR.

<u>Department's Position</u>:

The Department continues to find that the invoice date is the appropriate date of sale for all of Mexinox's U.S. and home market sales. Due to the proprietary nature of this issue, the case and rebuttal brief summaries as well as the Department's position are contained in the Memorandum: "Proprietary Arguments from the Issues and Decision Memorandum for the Final Results of the

[3] *See, e.g., Paul Muller Industrie Gmbh & Co. v. United States*, 435 F. Supp. 2d 1241, 1245 (CIT 2006) (citation omitted) (explaining that, "[u]nless the Supreme Court or the Federal Circuit expressly overrule *Timken* or *Corus Staal*, this court does not have the power to re-examine the issue of zeroing in administrative reviews"); *Strickland v. United States*, 423 F.3d at 1338, n. 3 (explaining the Federal Circuit is bound by its own decision unless it overrules it *en banc*).

Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils from Mexico," dated February 3, 2010 (Proprietary Decision Memorandum).

Comment 4: U.S. Indirect Selling Expenses

Mexinox argues the Department incorrectly calculated its U.S. indirect selling expenses for the *Preliminary Results* by not allowing the expenses that are incurred on behalf of Mexinox USA's two affiliates (*i.e.*, ThyssenKrupp Nirosta North America (TKNNA) and ThyssenKrupp Acciai Speciali Terni USA, Inc. (TKAST USA)) as an offset to Mexinox USA's reported indirect selling expenses. *See* Case Brief at 38-39. Mexinox argues that the Department's current methodology has shifted the cost burden away from TKNNA and TKAST USA and assigned close to 100 percent of indirect expenses onto Mexinox. *Id*. Mexinox contends that the Department's current methodology should be revised to a system of allocation that is proportionally based. *Id*.

Mexinox stated in its responses that Mexinox USA shared its corporate offices with its affiliates TKNNA and TKAST, as these companies were comprised of minimal operational and administrative employees and are unequipped to carry out, on their own, the range of activities that are required to sell and distribute their products in the United States and Canada. *See* Case Brief at 40. Therefore, Mexinox claims, a common pool of employees and assets from Mexinox USA provide the same level of selling and administrative services equally across all three companies. *Id*. at 41. Mexinox states that Mexinox USA, TKNNA, and TKAST USA present a joint corporate identity (called ThyssenKrupp Stainless North America) to the U.S. and Canadian markets in describing the joint sales operations of the three companies. *Id*. at 41.

Mexinox explains that in preparing the U.S. indirect selling expenses calculation submitted to the Department, it closely analyzed the indirect selling expenses of Mexinox USA, TKNNA, and TKAST USA, and segregated such expenses between common expenses (*i.e.*, those that are incurred by Mexinox USA in support of sales by all three companies and cannot be separately identified) and company-specific expenses that are separately identifiable. *See* Case Brief at 42. Further, Mexinox states that it is neither meaningful nor feasible to further identify and segregate these expenses by individual companies because (1) these expenses are commonly incurred in providing the selling functions "equally" to all three sales entities, and (2) indirect selling expenses are by nature not easily attributable to specific sales transactions and do not vary directly with the volume of sales. *Id*. Mexinox contends that if they were easily attributable to specific sales transactions, they would instead be categorized and reported as direct selling expenses. *Id*. Therefore, Mexinox argues that if the employees are shared in common it is unreasonable to deduce that a Mexinox USA employee dedicates a disproportionate amount of time, effort, or expense on Mexinox USA sales vis-à-vis the sales of TKNNA or TKAST USA. *Id*. at 43.

Mexinox contends that the Department's methodology is arbitrary and overstates selling expenses related to Mexinox USA's sales because the Department allocated "almost none" of the common selling expenses to TKNNA and TKAST USA while allocating the "vast majority" to Mexinox USA despite the fact that the "underlying selling activities performed on behalf of the three companies are identical." *See* Case Brief 44. Mexinox further states that the Department's allocation methodology from the *Preliminary Results* is flawed as it combines Mexinox USA's sales revenue with the value of services provided to TKNNA and TKAST USA in the denominator of the ISE calculation. *Id*. at 45.

Mexinox argues that the Department should accept the services revenue as a "reasonably accurate" measure of Mexinox USA's selling expenses incurred on behalf of TKNNA and TKAST USA. *See* Case Brief at 46-47. Mexinox argues that its methodology is correct because the service fee payments made by TKNNA and TKAST USA were negotiated at arm's length and were intentionally structured by the companies to reflect, as accurately as possible, the relative level of selling activities and expenses incurred in supporting sales by each of the three entities. *Id*. at 46.

Mexinox contends that even if the Department were to continue to conclude that the services revenue is not a reasonable measure of Mexinox USA's actual selling expenses incurred on behalf of TKNNA and TKAST USA, the Department can still allocate the common selling expenses on a reasonable basis by allocating the total common expenses over the combined value of the sales of the three companies to which they relate. *See* Case Brief at 47-49. Mexinox cites to *Stainless Steel Sheet and Strip in Coils from the Republic of Korea*; *Final Results and Rescission of Antidumping Duty Administrative Review in Part*, 72 FR 4486 (January 31, 2007) (*Stainless Steel Sheet and Strip from Korea)* and accompanying Issues and Decision Memorandum at Comment 3, noting that "it is the Department's normal practice to base the indirect selling expense ratio calculation on total sales value," as evidence that the Department's established practice is to allocate indirect selling expenses over the relative value of the sales to which they relate. *Id*. at 47-48.[4] Mexinox also references *Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review*, 70 FR 73444 (December 12, 2005) (*2003-2004 S4 in Coils from Mexico Final Results*) and accompanying Issues and Decision Memorandum at Comment 3), in which the Department allocated common selling expenses over combined sales of all three companies. *Id*. at 48.

Petitioners contend that as in prior proceedings, the Department should continue to deny Mexinox's claim to offset its indirect selling expenses by the revenues received from TKNNA and TKAST USA. *See* Rebuttal Brief at 14-16. Petitioners argue that the Department has maintained a consistent record of denying the claimed offsets as well as a consistent methodology in the calculation of indirect selling expense ratio. Therefore, petitioners aver, in keeping with prior administrative reviews, the Department has properly calculated the total U.S. indirect selling expenses.

[4] Mexinox also cites as past Department precedent, *Notice of Final Determination of Sales at Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Indonesia*, 70 FR 13456 (March 21, 2005) (*PET Resin from Indonesia*) and accompanying Issues and Decision Memorandum at Comment 4, *Notice of Final Results of Antidumping Duty Administrative Reviews: Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea*, 67 FR 11976 (March 18, 2002) (*1999-2000 Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea Final Results*) and accompanying Issues and Decision Memorandum at Comment 1, and *Stainless Steel Wire Rod from Spain*; *Final Results of Antidumping Duty Administrative Review*, 66 FR 10988 (February 21, 2001) (*Stainless Steel Wire Rod from Spain*) and accompanying Issues and Decision Memorandum at Comment 2.

Petitioners argue that instead of acknowledging that (1) the Department has calculated the ratio in keeping with the information on Mexinox's own books and records and (2) the Department calculated Mexinox's U.S. indirect selling expenses using the same methodology that it uses in every other review, Mexinox insists that the Department should accept Mexinox's "distorted" method for calculating indirect selling expenses in a manner that significantly reduces this ratio. *See* Rebuttal Brief at 15. Petitioners contend that the burden is on Mexinox to provide the Department with usable data, especially when it is seeking to lower its expenses in a manner that would reduce its dumping liability. *Id*. at 15 (where petitioners reference 19 CFR 351.401(b)(1), which states that the interested party in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment). Petitioners assert that, as Mexinox itself has consistently acknowledged, Mexinox has been unable to produce evidence that shows the actual expenses incurred by each company. *Id*.

Petitioners argue that Mexinox's logic, that there is no reasonable basis to conclude that it takes Mexinox USA's employees proportionally any more time or expense to support Mexinox USA's sales of stainless steel as compared to the sales of stainless steel by TKNNA or TKAST USA, is inaccurate. *Id*. Petitioners contend that it is just as logical to presume that Mexinox USA exists to support sales of the Mexican producer and thus its first and primary responsibility is to make these sales. Furthermore, as no evidence exists to the contrary, petitioners further contend that as an incidental part of its business Mexinox has agreed to take over some sales responsibilities for its sister companies although providing these services is not its primary function. *Id*.

Therefore, petitioners argue that the Department's methodology, as outlined in the *Preliminary Results* should continue to be used for these final results.

Department's Position:

We have made no changes to our calculation of Mexinox's U.S. indirect selling expense ratio for these final results. Our calculation applied in this review is in accordance with the Department's normal practice and is consistent with the 2006-2007, 2005-2006, and 2004-2005 administrative reviews of this case.[5]

[5] *See Stainless Steel Sheet and Strip in Coils From Mexico; Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 45708 (August 6, 2008), unchanged in *Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review*, 74 FR 6365 (February 9, 2009) (*2006-2007 S4 in Coils from Mexico Final Results*) and accompanying Issues and Decision Memorandum at Comment 3; *Stainless Steel Sheet and Strip in Coils from Mexico*; *Preliminary Results of Antidumping Duty Administrative Review*, 72 FR 43600, 43602 (August 6, 2007) (*2005-2006 S4 in Coils from Mexico Preliminary Results*), unchanged in *Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review*, 73 FR 7710 (February 11, 2008) (*2005-2006 S4 in Coils from Mexico Final Results*) and accompanying Issues and Decision Memorandum at Comment 3, unchanged in *Stainless Steel Sheet and Strip in Coils from Mexico: Amended Final Results of Antidumping Duty Administrative Review*, 73 FR 14215 (March 17, 2008) (*2005-2006 S4 in Coils from Mexico Final Results*); *and Stainless Steel Sheet and Strip in Coils from Mexico; Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 35618 (June 21, 2006) (*S4 in Coils from Mexico Preliminary Results*) unchanged in *Stainless Steel Sheet and Strip in Coils From Mexico; Final Results of Antidumping Duty Administrative Review*, 71 FR 76978 (December 22, 2006) (*2004-2005 S4 in Coils from Mexico Final Results*) and accompanying Issues and Decision Memorandum at Comment 4.

The Act does not outline a particular methodology for calculating indirect selling expenses. *See Micron Tech. Inc. v. United States*, 243 F.3d 1301, 1314 (Federal Circuit 2001); *see also, Heveafil SDH. BHD. v. United States*, 25 CIT 147 (CIT February 27, 2001) ("The statute does not define indirect selling expenses"). Similarly, the Statement of Administrative Action (SAA) accompanying the URAA, H.R. Doc. 103- 316, Vol. 1 (1994) at 824 explains that the Department is not required to use a specific calculation methodology, merely stating that indirect selling expenses "would be incurred by the seller regardless of whether the particular sales in question are made, but reasonably may be attributed (at least in part) to such sales." The Department's standard methodology, however, is to calculate indirect selling expenses based on expenses incurred and sales revenue recognized (or cost of goods sold (COGS)) during the same period of time. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Ecuador***,** 69 FR 76913 (December 23, 2004) and accompanying Issues and Decision Memorandum at Comment 26. In other words, the Department considers actual indirect expenses incurred in the numerator of the indirect selling expense ratio, while revenue recognized is included in the ratio's denominator. Respondents must properly identify indirect selling expenses because the classification of individual expenses substantially affects the outcome of the Department's comparisons of EP and CEP to NV. 19 CFR 351.401(b)(1) states that "the interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment." Accordingly, we determine that Mexinox did not meet this burden in the current administrative review.

For this review, we declined to use Mexinox's reported services revenue from affiliates in the expense-based numerator of the indirect selling expense ratio because there was no evidence on the record demonstrating the services revenue represented actual expenses incurred. We find Mexinox incorrectly calculated its indirect selling expenses in two ways: (1) by including certain services revenue in the numerator of the indirect selling expense ratio, and (2) by using the revenue at issue as an offset to its total indirect selling expenses. First, the services revenue at issue relates to payments Mexinox USA received for performing administrative functions on behalf of its affiliates TKNNA and TKAST USA during the POR. As stated above, the Department's standard methodology recognizes revenue in the revenue-based denominator of the indirect selling expense ratio. Second, the services revenue at issue should not be used to offset Mexinox's total indirect selling expenses because Mexinox, a party in possession of relevant information, is unable to identify which expenses were incurred as a result of providing services to TKNNA and TKAST USA and which were incurred in selling its own merchandise. *See* Case Brief at 42. *See also* Mexinox's November 12, 2008, response to section C of the Department's antidumping duty questionnaire (CQR) at C-52.

The fact that Mexinox simply received revenue related to administrative services does not establish that the revenue received is equal to the actual expenses incurred by Mexinox USA. As a result, we determine it inappropriate to offset Mexinox USA's indirect selling expenses for the services revenue at issue and therefore added the revenue received from TKNNA and TKAST USA back to our expense-based numerator (*i.e.*, we reversed the offset) of the indirect selling expense ratio. Consequently, the revised numerator includes indirect selling expenses incurred in relation to Mexinox USA's, TKNNA's and TKAST USA's sales. Next, in calculating the revenue-based denominator of the indirect selling expense ratio, we added the same services revenue to Mexinox USA's net sales revenue of finished goods. Thus, total expenses are allocated to the corresponding revenue that Mexinox received in connection with the activities performed to incur such expenses. S*ee* Memorandum to the File titled "Analysis of Data Submitted by ThyssenKrupp Mexinox S.A. de C.V. for the Preliminary Results of the Antidumping Duty Administrative Review on Stainless Steel Sheet and Strip in Coils from Mexico," dated July 31, 2009 (Preliminary Analysis Memorandum), at Attachment 8.

Mexinox contends that the Department's methodology overstates selling expenses related to Mexinox USA's sales because the Department allocated "almost none" of the common selling expenses to TKNNA and TKAST USA while allocating the "vast majority" to Mexinox USA despite the fact that the "underlying selling activities performed on behalf of the three companies are identical." The Department's methodology is not unreasonable simply because the amount of revenue from services is much smaller than the amount of revenue from sales, and, thus, most expenses are allocated to the sales revenue. The allocation reflects the reality that the core business of Mexinox USA is to sell its own products, and assisting its affiliates with their sales is a relatively minor aspect of its business. Not surprisingly, the amount of revenue from services to affiliates is much smaller, which is reflected in the normal books and records of Mexinox USA. *See* Mexinox's SSQR at Attachments C-39-A (TKNNA) and C-39-B (TKAST USA). In contrast, Mexinox seeks to allocate the indirect selling expenses of Mexinox USA to the revenue that TKNNA and TKAST USA received from their own sales, which in the real world has no bearing upon Mexinox USA's bottom line.

We find that the two alternate methodologies proposed by Mexinox for deriving the indirect selling expense ratio are flawed. With respect to Mexinox's suggestion that we accept its reported indirect selling expenses, and as stated in our *2006-2007 S4 in Coils from Mexico Final Results*, we conclude Mexinox improperly equated the service revenue Mexinox USA received from TKNNA and TKAST USA to the actual expenses Mexinox USA incurred to provide services for the sales of both affiliates. Rather, although the services revenue that Mexinox USA received from TKNNA and TKAST USA is certain, the amount of expenses that Mexinox USA incurred in providing services to both affiliates is unknown.[6] Mexinox identified only minimal expenses specific to Mexinox USA and did not distinguish the majority of those expenses incurred as a result of providing services to TKNNA and TKAST USA from those Mexinox USA incurred in selling its own merchandise. *See* Mexinox's CQR at Attachment C-18-A. As such, we determine there is no support for accepting Mexinox's reported revenue offset based on unknown expenses. It was solely Mexinox USA that incurred the actual selling expenses and there is no record evidence demonstrating an alleged "equal distribution" of these expenses among affiliates.

We also reject Mexinox's proposal to include the sales revenue of TKNNA and TKAST USA in the denominator of the U.S. indirect selling expense ratio. Under this suggested calculation, the denominator of the formula would include the following: (1) Mexinox USA's income from its own sales activities, (2) TKNNA's income from its sales of non-subject merchandise; and (3) TKAST USA's income from its sales of non-subject merchandise. *See* Case Brief at 46-49. We

[6] We also note that the arrangement between Mexinox USA and TKNNA and TKAST USA was created only after imposition of the antidumping duty order. Although Mexinox is free to modify its arrangements with affiliates and the way it reports selling expenses, Mexinox should have been aware of the Department's reporting requirements.

find that this approach would distort the denominator of the ratio by including gross sales of the three companies while the numerator would not reflect all selling expenses related to these sales. For example, Mexinox reported separate selling and general administrative expenses specific to TKNNA and TKAST USA which were not covered under the payments Mexinox USA received for its services. *See also* Mexinox's response to the Department's supplemental questionnaire, dated July 6, 2009 (SSQR) at Attachments C-39-A and C-39-B and the respective sub-Attachments 1 (documentation of the services revenue recorded by Mexinox USA), 2 (documentation of the services expenses recorded by TKNNA and TKAST USA), and 3 (the indirect selling expenses ratios for TKNNA and TKAST USA). In addition, the record evidence demonstrates that TKNNA and TKAST USA maintain a small sales force outside of its arrangement with Mexinox USA. *See* Mexinox's AQR at A-12; *see also* Mexinox's CQR at C-52, footnote 32 and Mexinox's SQR at 5-6. We note that this methodology proposed by Mexinox would also overstate the denominator, as the income TKNNA and TKAST USA received from their own sales has no effect on Mexinox USA's net earnings.

As a result, Mexinox's citations to *Stainless Steel Sheet and Strip from Korea, PET Resin from Indonesia*, *1999-2000 Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea Final Results* and *Stainless Steel Wire Rod from Spain* are inapposite because Mexinox's proposed calculation would not result in an allocation of expenses over the relative value of the sales to which the expenses relate. In contrast, the Department's methodology allocates Mexinox USA's actual expenses incurred in providing services to affiliates over the actual revenue Mexinox realized from providing such services. Although the Department's denominator for the indirect selling expense ratio for the *2003-2004 S4 in Coils from Mexico Final Results* included the sales revenue of Mexinox USA and TKNNA, the Department subsequently disallowed this allocation methodology in the *2004-2005 S4 in Coils from Mexico Final Results*, *2005-2006 S4 in Coils from Mexico Final Results*, and *2006-2007 S4 in Coils from Mexico Final Results*.[7] Moreover, the Department's acceptance of a particular allocation methodology in one review does not relieve an interested party from demonstrating that the allocation is not distortive. *See NSK*, 510 F.3d at 1381 (Federal Circuit 2007) ("Commerce's acceptance of an allocation methodology in a previous review does not relieve a party of its burden of demonstrating the methodology is non-distortive in the current review").

Furthermore, in a June 3, 2009, supplemental questionnaire, the Department asked Mexinox to explain whether Mexinox USA realizes a profit or loss from its arrangement with TKAST USA and TKNNA and if so, to document the actual profit/loss and provide supporting documentation for this amount. In its SSQR, Mexinox stated that the services agreement is, "not intended to generate profits or losses for Mexinox USA," but is instead is, "structured to determine as accurately as possible the amount of expenses actually incurred by Mexinox USA to provide sales and administrative services to TKNNA and TKAST USA and to charge those companies accordingly." *See* SSQR at 27-28. However, Mexinox did not substantiate its claim that the services agreement is, "not intended to generate profits or losses," by providing any evidence

[7] We employed the latter methodology in the 2003-2004 administrative review. However, we continue to find that Mexinox's alternate proposal is inapposite in the instant review because Mexinox USA's agreement with TKAST USA to perform the services at issue was not in effect during the 2003-2004 administrative review of this proceeding.

that the service agreement does not contain any provisions that state that it is not intended to generate profits or losses and is not titled a "reimbursement agreement."

Therefore, considering the above, we continue to conclude that Mexinox's claim that the selling expenses at issue were incurred in common and equally distributed is inaccurate and that Mexinox did not, in fact, meet the burden of proving otherwise in the current administrative review. As a result, and consistent with the *2004-2005 S4 in Coils from Mexico Final Results*, *2005-2006 S4 in Coils from Mexico Final Results*, and *2006-2007 S4 in Coils from Mexico Final Results*, we have made no changes (from the *Preliminary Results*) to our calculation of Mexinox's U.S. indirect selling expense ratio for these final results.

Comment 5: Calculation of Credit Expenses

Mexinox argues the Department should use customer-specific average credit periods (rather than actual payment dates) to calculate home market and U.S. imputed credit expenses for several reasons. *See* Case Brief at 49-51. First, Mexinox contends that the Department has accepted this reporting methodology in previous segments of this proceeding. *Id*. at 49-50. Furthermore, Mexinox argues that petitioners raised no objections to this reporting methodology in its administrative briefs, and there is no evidence on the record that this reporting methodology presented any problems or inaccuracies in the margin calculations. *Id*. at 49. Mexinox cites two cases where the Department has permitted respondents to report payment dates using the accounts receivable methodology where reporting actual dates proved to be difficult.[8] *Id*. at 50, footnote 14.

Second, Mexinox contends that credit expenses based on customer-specific average credit periods are more accurate and consistent than transaction-specific credit periods because at the time prices and sales terms are set, sellers cannot know exactly when individual customers will pay for the material. *See* Case Brief at 50. However, Mexinox contends, they can know what the payment experience has historically been with the customer. *Id*. Mexinox argues that like warranty expenses, imputed credit expense adjustments are intended to capture differences in the circumstances of sale between specific markets and customers. *Id*.

Finally, Mexinox argues that customer-specific average credit periods are easier to calculate and verify because the source documentation is obtainable directly from the relevant customer-specific accounts receivable in the trial ledger. *See* Case Brief at 51. Therefore, for the reasons stated above, Mexinox believes the Department should continue to use customer-specific average credit periods to calculate imputed credit in the final results.

[8] *See* (1) *Polyethylene Terephthalate Film, Sheet, and Strip From the Republic of Korea*: *Final Determination of Sales at Less Than Fair Value*, 56 FR 16305 (*PET Film from Korea*) (April 22, 1991) and accompanying Issues and Decision Memorandum at Comment 4 and (2) *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea*: *Final Results of Administrative Reviews*, 64 FR 12927 (March 16, 1999) (*1996-1997 Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea Final Results*) and accompanying Issues and Decision Memorandum at Comment 1.

In rebuttal, petitioners contend that the Department has used transaction-specific dates for calculating imputed credit expenses in at least two previous segments of this proceeding (*see, e.g.*, July 30, 2008, Memorandum to the File for the 2006-2007 administrative review regarding Analysis of Data Submitted by ThyssenKrupp Mexinox S.A. de C.V. for the Preliminary Results of the Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils From Mexico A-201-822 (public version) at 8 and 13, *see also* July 31, 2007 Memorandum to the File for the 2005/2006 Administrative Review regarding Analysis of Data Submitted by ThyssenKrupp Mexinox S.A. de C.V. for the Preliminary Results of the Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils From Mexico A-201-822 (public version) at 8. *See* Rebuttal Brief at 17-18.

Petitioners argue that the Department's analysis is based on comparisons involving specific sales or groups of sales and, therefore, the most accurate comparison methodology is to use transaction-specific data (*i.e.*, actual payment dates) rather than averages. *See* Rebuttal Brief at 18. Additionally, petitioners contend that verification of actual payment dates for individual sales involves only a review of the payment documentation while verification of customer-specific average payment information requires calculation and confirmation of average accounts receivable turnover data. *Id*. Furthermore, petitioners argue, the Department outlined its calculation methodology in Section B of its November 12, 2008, antidumping duty questionnaire. *Id*. Therefore, for the above mentioned reasons, petitioners believe that the Department should calculate imputed credit expenses on a transaction-specific basis (using actual payment dates) for its final analysis.

Department's Position:

We have made changes to our calculation of Mexinox's imputed credit expenses for these final results. For purposes of the *Preliminary Results*, and in the absence of more specific and accurate information, we preliminarily accepted Mexinox's reporting of imputed credit expenses based on reported payment dates (*i.e.*, customer-specific average credit periods). *See Preliminary Results* at 39360. However, in order to be consistent with past administrative reviews of this case, we requested additional information, following the issuance of these *Preliminary Results*, in an August 24, 2009, supplemental questionnaire regarding the actual date of payment for these sales. *See* Preliminary Analysis Memorandum; *see also, e.g., 2006-2007 S4 in Coils from Mexico Final Results, 2005-2006 S4 in Coils from Mexico Preliminary Results* at 43605, *2005-2006 S4 in Coils from Mexico Final Results*, *2005-2006 S4 in Coils from Mexico Amended Final Results*, and *2004-2005 S4 in Coils from Mexico Preliminary Results* at 35623 (unchanged in *2004-2005 S4 in Coils from Mexico Final Results*). Specifically, we requested that Mexinox report the actual date of payment for these sales. Mexinox provided this information in its September 8, 2009, response to the Department's supplemental questionnaire (SSSQR) at pages 4-7. Therefore, for all home market and U.S. sales (in U.S. dollars and Mexican pesos) where credit was originally calculated using a weighted-average credit period for each customer, we recalculated Mexinox's imputed credit expense ratio to reflect transaction-specific payment dates (reported in the variable field PAYDTACTH) which we used to revise reported credit expenses. *See* Final Analysis Memorandum at pages 8 through 9.

Section 773(a)(6)(C)(iii) of the Act allows the Department to make circumstance of sale adjustments. Section 351.410(b) of the Department's regulations states that with the exception of commissions paid in one market, the Secretary will make circumstance of sale adjustments under 773(a)(6)(C)(iii) of the Act, only for direct selling expenses and assumed expenses. In our August 24, 2009, supplemental questionnaire, the Department asked Mexinox to (1) clarify whether or not they are able to calculate per-unit credit expenses based on the actual number of days between date of shipment to the customer and the date of payment, and (2) report the transaction-specific payment dates if feasible. *See* Mexinox's SSSQR at page 4. As stated in its response, Mexinox clarified that it was feasible to report the transaction-specific payment dates. Although Mexinox suggested that such reporting would be "burdensome," it nevertheless reported transaction-specific payment dates for home market and U.S. sales. *See* field PAYDTACTH/U. *Id*. at 7.

The Department has a preference for using actual data (*e.g.*, the actual date of payment), rather than less precise averaged data (*e.g.*, customer-specific average credit periods) as this allows the Department to calculate the most accurate margin. *See U.S. Steel Group A Unit of USX Corp. v. United States*, 998 F. Supp. 1151, 1159 (CIT 1998) (states that the statutory preference is to use actual data to ensure accuracy). The Department finds Mexinox's argument that the Department has accepted this reporting methodology (*i.e.*, the use of customer-specific average credit periods) in previous segments of this proceeding as well as other cases (*i.e.*, *PET Film from Korea* and *1996-1997 Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea Final Results*) to be inapposite. While the Department may have determined it appropriate to accept a respondent's reporting methodology in the above mentioned cases, in the instant case, Mexinox has provided the actual dates of payment for each specific transaction. As a result, there is no justification for using a less accurate adjustment methodology when a more precise methodology is available and easily implemented. Therefore, we find that Mexinox has provided no legal authority or other definitive evidence to demonstrate why the Department should utilize customer-specific average credit periods rather than the actual transaction-specific dates of payment to calculate Mexinox's imputed credit expenses.

Therefore, given the above, and in order to be consistent with past administrative reviews of this case and the Department's preference to rely on actual data, the Department has recalculated Mexinox's imputed credit expense ratio to reflect transaction-specific payment dates for home market and U.S. sales.

<u>Comment 6</u>: Whether to Apply an Alternative Cost Averaging Methodology

A. Legal Framework and Case Precedent

Mexinox contends that the Department's preliminary decision to use quarterly costs[9] for the below-cost test is not appropriate for this current review and should be reversed for the final results. Mexinox argues that when properly measured, the increases in costs for the sampled products in this period were for the most part below the Department's required 25 percent threshold, and those above that threshold were not significant. Moreover, costs and prices did

[9] We refer to our alternative cost calculation methodology as quarterly costs. This should not misconstrue the mechanics of the calculation that while quarterly price level indices are a part of the calculation, the resulting costs are not truly quarterly costs.

not change on any consistent basis during the POR, but instead fluctuated in various directions at different points during the period. Further, due to the unique purchasing and inventory experience during the period of review, the alloy surcharge mechanism failed to link costs and prices during the last six months of the POR. Mexinox insists that all of these circumstances point strongly against the use of quarterly costs.

Mexinox states that during the immediately preceding the eighth (2006-2007) administrative review of this case, global prices for nickel significantly increased and Mexinox's cost and sales prices for austenitic grade stainless steel products increased significantly. Mexinox maintains that these increases were significant and consistent throughout the POR. Thus, Mexinox believes the Department appropriately determined in the eighth administrative reviews that it was necessary to apply an alternative cost averaging methodology, relying on quarterly rather than POR average costs, to avoid distortions in the margins calculations.

Mexinox argues, however, that the circumstances presented in the instant administrative review are different from the circumstances in the previous review and do not support the use of shorter quarterly cost averaging periods. Mexinox argues that the cost changes experienced during the current review period are neither consistent nor significant compared to the previous review period. According to Mexinox, if properly calculated, the submitted cost data for the five largest austenitic control numbers (CONNUMs) shows that the cost changes were not uniform and/or substantially above the 25 percent threshold. This is in contrast to data in the eighth administrative review which showed cost increases substantially above the Department's 25 percent threshold for all austenitic products. Thus, the magnitude of the cost decreases in this case simply does not support a departure from the Department's preferred reliance on period average costs. These are not the "limited circumstances" envisioned by the Department as justifying the application of special alternative cost methodologies. *See Antidumping Methodologies for Proceedings that Involve Significant Cost Changes Throughout the Period of Investigation (POI)/Period of Review (POR) that May Require Using Shorter Cost Averaging Periods; Request for Comment*, 73 FR 26364, 26366 (Department of Commerce) (May 9, 2008) (May 9 Request for Comments).

Petitioners contend that the Department's decision to use quarterly costs for the *Preliminary Results* in this ninth administrative review is consistent with the Department's stated practice and should be continued for the final results. According to petitioners, it is the Department's practice to use shorter than annual cost periods only when there are significant changes in costs and cite to *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Plate in Coils from Belgium*, 73 FR 75398 (December 11, 2008) (*2006-2007 SSPC from Belgium*) and accompanying Issues and Decision Memorandum at Comment 4, and *2006-2007 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5. Petitioners point out that in *2006-2007 SSPC from Belgium* and *2006-2007 S4 in Coils from Mexico Final Results,* the Department stated that it will use shorter than annual cost periods only when there are significant changes in costs, and, in both these cases, the Department determined that it should use a 25 percent difference in COM as its threshold for a finding of significant difference in costs. According to petitioners, the Department stated that it established a threshold of a 25 percent difference in COM and that this 25 percent threshold originates from International Accounting Standard (IAS) 29. According to the petitioners, IAS 29 was developed to provide guidelines for enterprises reporting in the currency of a hyperinflationary economy so that the financial information provided is meaningful, and that IAS 29 establishes when it is appropriate for an entity to depart from normal accounting standards and adopt an alternative method. Petitioners further point out that in *2006-2007 SSPC from Belgium* the Department explained that it calculated the percent change by comparing COM in the lowest cost quarter to the highest quarterly COM. Thus, according to the petitioners, to meet the Department's significance threshold, there must be a difference of at least 25 percent in the COM for the lowest cost quarter and the highest cost quarter.

B. Significance of the Changes in Cost

Mexinox points out that for the *Preliminary Results*, the Department determined that the 25 percent threshold was met by dividing the difference in costs between the lowest and highest cost quarters of the POR by the cost of the lowest quarter of the POR.[10] According to Mexinox, calculating the change in cost in this manner is contrary to standard methods of economic analysis of changes over a specified time period. It is inherently biased toward inflating the measure of change over time by arbitrarily measuring the change relative to the lowest available figure in the chronological series, regardless of when the lower cost was determined. Mexinox advocates that any reasonable methodology would instead compare the change in costs during the period to the costs at the beginning of the period and urges the Department to correctly calculate the cost changes in this manner. Mexinox maintains that if the Department calculates the change in costs as advocated by Mexinox, it limits the number of austenitic products sampled that would meet the 25 percent threshold, and of those that do meet the threshold, one is just above the threshold.

Mexinox alleges that to the best of its knowledge, the current review is the first segment of a proceeding in which the Department has utilized and articulated this unorthodox calculation to determine the percent change in costs during the POR. In previous reviews, the Department measured changes in the cost data based on the percent increase (or decrease, implicitly) in the costs over the POR, with the earlier period serving as the denominator or baseline against which the observed change is measured. Mexinox opines that a fair administration of the antidumping laws requires some predictability in the Department's calculations. A calculation that utilizes the earlier period as the denominator or baseline is a more fair and appropriate standard because a respondent can measure where it stands as it progresses through the review period. When the later period is used for this purpose on a retrospective basis, a respondent cannot gauge where it stands until after the review period has ended. Mexinox asserts that utilizing the earlier period as the base period is also more appropriate because it provides context to any increase or decrease that occurs. Speaking hypothetically, if costs start at a level of 100 and either increase by 20 or decrease by 20, the same percent change should be measured (*i.e.*, 20 percent). Under the Department's approach, the increase would be measured as a 20 percent change, while the decrease would be measured as a 25 percent decrease. In the context of that particular review, the same absolute change should yield the same percent change.

[10] *See* Memorandum to Neal M. Halper, Director, Office of Accounting, from Sheikh Hannan, Senior Accountant, Cost of Production, Constructed Value, and Further Manufacturing Calculation Adjustments for the Preliminary Results - ThyssenKrupp Mexinox S.A. de C.V. and Ken-Mac Metals, A-201-822 (July 31, 2009) (Preliminary Results Cost Calculation Memorandum) at page 2.

Mexinox further argues that a second deficiency in the data is that the cost changes at issue were not consistent throughout the period but instead fluctuated. In prior cases, the Department has appropriately attached great importance to the consistency of the cost changes throughout the period in question. Indeed, in the fourth (2002-2003) administrative review of Mexinox, the Department appears to have attached decisive importance to this factor, having denied Mexinox's request for the use of monthly costs in that review almost exclusively on these grounds. *See Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Mexico*, 70 FR 3677 (January 26, 2005) (*2002-2003 Final Results*) and accompanying Issues and Decision Memorandum at Comment 8. In that case, the Department noted that it requires evidence of "a significant and consistent decline or rise in {the respondent's} cost throughout the reporting period. Conversely, when there are inconsistent fluctuations in both directions, we use a single weighted-average cost for the entire period." Mexinox asserts that in this case, the data does not show consistent trends during the POR. To the contrary, it is a clear demonstration of the type of fluctuations and differences in trends that the Department has recognized requires the smoothing effect of a POR-wide average. This contrasts with the very large and consistent cost changes that supported the use of quarterly costs in the eighth administrative review.

Petitioners maintain that the Department used the same methodology to calculate percent changes in COM for this current administrative review as it did in the eighth administrative review. In the eighth administrative review, the Department calculated the percentage difference between the highest and lowest quarterly COM. *See 2006-2007 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5. Using the same methodology in this ninth review as in the previous eighth administrative review, the Department determined that the changes to Mexinox's COMs exceeded the 25 percent significance threshold established by the Department.[11]

Petitioners rebut Mexinox's arguments for changing the Department's methodology for calculating the percent change in COM for several reasons. First, the 25 percent threshold established by the Department relates to the percent changes in COMs, not to the absolute changes in COMs. The Department's use of the lowest quarter COM as the denominator results in the same percent change whether costs are going up during the POR or whether they are going down during the POR. Thus, the Department's formula should provide a consistent basis for calculating the percent changes in COMs.

Second, Mexinox's proposed methodology is improper because it does not provide a consistent basis for calculating percent changes. As a matter of mathematics, when a larger number is used in the denominator, the *percent* change for decreases in costs will be lower even if the absolute amount of the decrease is the same as the absolute amount of an increase in costs. Thus, Mexinox's proposed methodology would improperly result in finding that percent increases in cost are greater than percent decreases in costs, even when the actual amount of the increase and decrease are the same.

[11] *See* Preliminary Cost Calculation Memorandum at page 2 ("The data shows that the percentage difference between the highest and lowest quarterly COM clearly exceeded 25 percent during the POR").

Third, the methodology advocated by Mexinox of using the first quarter COM as the denominator results in a change of more than 25 percent for a majority of Mexinox's home market sales of austenitic products examined, whether measured as a percent of the CONNUMs or as a percent of the total home market sales quantity.[12] Thus, acceptance of Mexinox's improper methodology would still warrant the use of a quarterly cost analysis for Mexinox's austenitic products.

Finally, Mexinox's statement that "the cost changes experienced during the current ninth review period are not anywhere near the scale experienced in the eighth review period" is not relevant. *See* Case Brief at 52. The Department established a significance threshold of 25 percent to determine whether to use quarterly cost data and each review stands on its own record. Given that each review stands on its own, Mexinox's suggestion that the Department should not use quarterly costs in this review because the changes in costs may have been greater in the previous review has no bearing on this issue.

Contrary to Mexinox's claim, petitioners argue that the cost changes were consistent throughout the POR. Petitioners point out that the table at Attachment 2 of Mexinox's Case Brief shows fifteen instances where changes in quarterly costs can occur and in fact predominantly change in one direction throughout the POR (*i.e.*, five CONNUMs with four quarters of COM data). *See* Case Brief at Attachment 2, page 1. Thus, it is difficult to understand how Mexinox can claim that "by no stretch of the imagination can this data reasonably be portrayed as exhibiting a 'consistent trend'."

In addition, petitioners claim that as shown by the following statement from the Issues and Decision Memorandum for the previous review, Mexinox's use of selected data appears at odds with Mexinox's previous statements:

> With respect to petitioners' conclusion that an analysis of Mexinox's reported VCOM shows that quarter-to-quarter changes were not identical for each grade of austenitic steel and each quarter, Mexinox argues there is no established precedent that the Department require identical changes in costs for every product or grade of product under consideration. *Mexinox also objects to petitioners' arbitrary use of selected data for the purposes of their analyses*.

See 2006-2007 S4 in Coils from Mexico Final Results and accompanying Issues and Decision Memorandum at Comment 5 (emphasis added).

C. Linkage Between Cost and Sales Information

Mexinox claims that the linkage that normally exists between costs and prices by virtue of the alloy surcharge mechanism failed to function during the ninth administrative review period for certain specific and unique reasons.

[12] *See* Petitioners' July 2, 2009 letter to the Department at 5 n.5.

Mexinox states that in the eighth administrative review, the Department found that the necessary linkage between changes in costs and changes in prices was demonstrated in the data and was explained by the operation of the "alloy surcharge" mechanism. *See 2006-2007 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5. The Department particularly emphasized that the surcharge mechanism established the necessary close linkage due to the calibrated time lag between market prices used as the basis for the surcharge. *Id*. at 22. Thus, alloy surcharges applied to sales were found to be closely linked to changes in the cost of raw materials used to produce the products based on two elements: (1) an examination of the data; and (2) the existence of the alloy surcharge mechanism.

Mexinox claims that the Department's conclusions concerning the operation of the alloy surcharge mechanism during the eighth review period was fully supported by the record evidence in that review. However, the evidence on the record of this ninth review demonstrates that the alloy surcharge mechanism failed to establish such a linkage between changing costs and prices. According to Mexinox, due to the unique circumstances present during this administrative review, the normally close correlation between changes in costs and sales prices for cold-rolled stainless steel products simply does not exist. Thus, while the alloy surcharge mechanism was in existence during the POR, an examination of the data do not support the finding of linkage between costs and sales. Mexinox alleges that the Department's Preliminary Results Cost Calculation Memo makes no mention that it even considered the actual sales and cost data. Instead, the Department relied on the existence of the alloy surcharge mechanism. Mexinox maintains that a review of the data clearly demonstrates the divergent trends between sales and cost data. Quite simply, the sales data and the cost data are not correlated in any manner resembling the correlation that existed during the eighth review period, and therefore do not support a finding of a reasonable linkage. According to Mexinox, if one were to accept the Department's distortive calculations measuring the percent change in costs (dividing by the minimum value), this same calculation methodology applied to the sales data would demonstrate that only two of the five products examined had a significant change in sales value. If the products examined are divergent as to whether the changes in sales and costs during the POR are significant, then it is unreasonable to draw the conclusion that they are "correlated."

Furthermore, Mexinox claims that it provided detailed statistical analyses of the sales and cost data for austenitic products, and this data demonstrates conclusively that there was no significant correlation between sales and costs during the POR. Mexinox also provided a profile analysis that demonstrates that the sales and cost data for austenitic grades do not have similar profiles, and therefore cannot be considered to be correlated. In addition, Mexinox asserts that the Department recognized the fact that the sales and cost data were not correlated for austenitic grades during the POR based on the information requested in its supplemental questionnaires concerning explanations for why during the second half of the POR "the U.S. net sales transaction prices were increasing while the manufacturing costs were decreasing." *See* SSQR at 33. Mexinox states that it has explained and documented the underlying reason for the de-linking of costs and prices in this period is unique to Mexinox's experience in this period. Specifically, the reasons for the decline in Mexinox's material costs during this period relates to the specific raw material purchasing, production, consumption and inventory patterns experienced at Mexinox during this period.

Mexinox states that the Department found during the eighth administrative review of this case, Mexinox's costs and prices are normally linked through the operation of the alloy surcharge mechanism and therefore track each other. However, while prices recovered and alloy surcharges began increasing in the first half of 2008, raw material costs continued to decline for Mexinox. As stated earlier, the reasons for the decline in Mexinox's material costs during this period, notwithstanding the general increase in market prices, relates to the specific raw material purchasing, production, consumption and last in first out (LIFO) inventory patterns experienced at Mexinox during this period. Mexinox claims that faced with significant excess inventory, Mexinox reduced its new purchases of hot band. As a result, during the first two quarters of 2008, Mexinox had relatively less than usual hot band inventory available to consume from the contemporaneous months' inventory (*i.e.*, from contemporaneous months' purchases) and therefore increasingly consumed hot-band from earlier months' inventory layers in the LIFO structures as products were produced and material was consumed. Thus, the temporal linkage between hot band purchases and consumption of inventory for accounting purposes was disrupted and derailed during this period as Mexinox increasingly consumed raw materials from earlier inventory layers. As a result in prior periods, the linkage between contemporaneous costs and prices is not facilitated by operation of the alloy surcharge mechanism.

Petitioners contend that in the eighth administrative review the Department found that the necessary linkage between changes in costs and changes in prices was demonstrated in the data and was explained by the operation of the 'alloy surcharge' mechanism. The Department particularly emphasized that the surcharge mechanism established the necessary close linkage due to the calibrated time lag between market prices used as the basis for the surcharge.

Petitioners insist that the alloy surcharge mechanism was also in existence during this current ninth administrative review, and therefore, supports the finding of linkage between costs and sales. Petitioners argue that the Department should not accept Mexinox's claim that the linkage between costs and sales was disrupted during the first half of 2008 (*i.e.*, the third and fourth quarter of the POR) due to Mexinox's LIFO layer depletion of hot band because the Department's definition of linkage does not require direct traceability between a specific sale and its specific production cost, but rather relies on whether there are elements which would indicate *a reasonably positive correlation* between the underlying costs and the final sales prices levied by the company. Petitioners assert that during the eighth administrative review of this case, the Department determined the existence of linkage because Mexinox had an alloy surcharge mechanism in place, which was derived by incorporating the average market prices for inputs used in the manufacture of stainless steel plate in coils.

Further, petitioners maintain that Mexinox's arguments are not consistent with the Department's stated requirements concerning the linkage between costs and prices. The following explanations the Department provided in the *2006-2007 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5 make clear that the Department requires only a reasonable linkage between changes in costs and changes in prices:

> Consistent with past precedent, if the Department finds cost changes to be significant in a given administrative review or investigation, the Department subsequently evaluates whether there is evidence of linkage between the cost

> changes and the sales prices for the given POI/POR. *See, e.g.*, *SSPC from Belgium* and accompanying Issues and Decision Memorandum at Comment 4. Our definition of linkage in the instant case does not require direct traceability between a specific sale and its specific production cost, but rather relies on whether there are elements which would indicate *a reasonably positive correlation* between the underlying costs and the final sales prices levied by the company….
>
> In the instant case, we evaluated whether the sales prices during the shorter cost-averaging period *were reasonably correlated* with the cost of production (COP)/constructed value (CV) during the same shorter cost-averaging period. During the POR, Mexinox had an alloy surcharge mechanism in place, which was derived by incorporating the average market prices for inputs used in the manufacture of stainless steel plate in coils, including nickel, chromium, molybdenum, and titanium….
>
> Because the alloy surcharge reflects the changes in the market price for the relevant inputs, we determine that *a reasonable level of correlation exists* between the underlying input costs and final sales prices charged by Mexinox. *See* Memorandum to Neal M. Halper, Director, Office of Accounting, from Sheikh Hannan, Senior Accountant, Cost of Production, Constructed Value, and Further Manufacturing Calculation Adjustments for the Final Results - ThyssenKrupp Mexinox S.A. de C.V. and Ken-Mac Metals, A-201-822 (February 3, 2010) at Attachment 1, pages 1 to 5 (Final Results Cost Calculation Memorandum).

In addition, petitioners point out that Mexinox's new requirement of a direct correlation of changes in costs and changes in prices is also contradicted by Mexinox's own statements on this issue in the previous eighth administrative review (when Mexinox was asking the Department to use a quarterly cost analysis):

> Mexinox refutes petitioners' argument that an absolute "lockstep" linkage between the changes in costs and prices is required. Mexinox asserts that in the *Preliminary Results*, the Department found the alloy surcharge regime used by Mexinox is a pass-through mechanism developed to account for raw material prices. This pass-through mechanism, according to Mexinox, demonstrates a link between production and sales prices, *even if the alloy surcharges do not directly correspond to changes in the applicable raw material* as found in *Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Duty Order: Brass Sheet and Strip from the Netherlands*, 65 FR 742, 743 (January 6, 2000) (*Brass Sheet and Strip from the Netherlands*). Further, Mexinox contends the lag time in the alloy surcharges (*i.e.*, the one-month lag from the producing mill and two-month lag in shipment) is designed to ensure a reasonable linkage between costs and prices.

See 2006-2007 S4 in Coils from Mexico Final Results and accompanying Issues and Decision Memorandum at Comment 5 (emphasis added).

Petitioners further point out that the cost and price data submitted by Mexinox in Exhibit 2 of Mexinox's Case Brief demonstrates that there was a reasonable linkage between changes in costs and prices over the period of review. Additionally the petitioners state that Mexinox's use of correlation analysis is inappropriate because the operation of the alloy surcharge formula results in a time lag between changes in costs and changes in prices. *See 2006-2007 S4 in Coils from Mexico Final Results* Issues and Decision Memorandum at Comment 5 ("The record evidence shows there is a two-month lag between the market prices used as a basis for the surcharge computation and Mexinox's surcharge calculation.)" Moreover, the petitioners assert that the statements in Mexinox's case brief confirm the linkage between changes in costs and changes in prices. For example, Mexinox stated:

> Demand increased as U.S. service centers restocked, nickel prices increased, and transaction prices started rising. Predictably, alloy surcharges also rose in the first two quarters of 2008 as nickel prices increased.

See Case Brief at 59.

Petitioners point out that this statement by Mexinox shows that when nickel costs increase, the alloy surcharges increase, and prices increase (*i.e.*, Mexinox's prices increase when Mexinox's costs increase). Further, Mexinox's comments about reductions in its purchases of hot band coils and the use of LIFO inventory layers from 2007, 2006 and even earlier are not consistent with other information in its response.

Petitioners allege that Mexinox's statements in its case brief for this review are also inconsistent with Mexinox's claims in the previous administrative review where Mexinox stated.

> Mexinox asserts that in the *Preliminary Results*, the Department found the alloy surcharge regime used by Mexinox is a pass-through mechanism developed to account for raw material prices. This pass-through mechanism, according to Mexinox, demonstrates a link between production and sales prices, even if the alloy surcharges do not directly correspond to changes in the applicable raw material as found in *Brass Sheet and Strip from the Netherlands*.

See 2006-2007 S4 Final Results and accompanying Issues and Decision Memorandum at Comment 5

In summary, petitioners maintain that the Department reviewed Mexinox's alloy surcharge practices in the previous eighth administrative review and determined that this surcharge formula provided a reasonable level of correlation between Mexinox's costs and prices. *See 2006-2007 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5.[13] Petitioners assert that Mexinox has provided no information that shows a change to its alloy surcharge formula during this current review, and, therefore, there is no basis for

[13] "Because the alloy surcharge reflects the changes in market price for the relevant inputs, we determine that a reasonable level of correlation exists between the underlying input costs and final sales prices charged by Mexinox."

Mexinox to claim that the linkage between costs and prices suddenly evaporated during the first six months of 2008.

D. Substantial Quantities and Recovery of Costs

Mexinox contends that pursuant to section 773(b)(1) of the Act, the Department may disregard for the purpose of determining normal value sales made "within an extended period time" and "in substantial quantities" that are: (1) below cost at the time of sale; and (2) at prices which do not "permit recovery of all costs within a reasonable period time." Mexinox points out that with regard to the first test – whether the sales were below cost at the time of sale – the statute does not specify the period over which costs must be calculated and the Department is therefore afforded some discretion to determine the most appropriate period over which to average the costs. Mexinox states that normally, the Department averages costs over the entire period of investigation or review. In this case, the Department averaged the costs over calendar quarters. As discussed above, it is Mexinox's view that the Department erred in using quarterly costs and that such decision is not supported by substantial evidence on the record of this investigation and should be reversed in favor of using period average costs in the final results. However, if the Department continues to use quarterly costs, Mexinox maintains that the statute does *not* grant discretion to the Department to select the averaging period used in the cost recovery test but instead specifies precisely the period over which the costs must be averaged. Section 773(b)(2)(D) provides:

> If prices which are below the per unit cost of production at the time of sale are above the weighted-average per unit cost of production *for the period of investigation or review*, such prices *shall* be considered to provide for recovery of costs within a reasonable period of time.

There is nothing ambiguous, permissive, or discretionary in this language – the period over which costs must be averaged is "the period of investigation or review." Where prices are above the period-average costs such prices "shall" be considered to provide for the recovery of costs within a reasonable period of time.

According to Mexinox, it is well-established that the Department's discretion to interpret the statute is governed by the two-part test established by the United States Supreme Court in *Chevron*, 467 U.S. at 842-43. The first step asks "whether Congress has directly spoken to the precise question at issue." If it has, and the intent of Congress is clear, the Department must give effect to that unambiguously expressed intent. If Congress has not spoken to the issue, or the intent of Congress on the question is otherwise unclear, the Department then has the discretion to interpret the statute, and its interpretation will be upheld so long as it is reasonable. The latter act of interpretation by the agency, and review of such interpretation by the courts is referred to as "Step 2" of *Chevron* and is not reached unless the intent of Congress is unclear.

Mexinox asserts that in this case, as described above, the intent of Congress is clear and unambiguous. The statutory language specifies that where prices in the home market are above the weighted-average costs for the review, such sales "shall" be deemed to permit recovery of costs. Accordingly, under the statute, and consistent with Congressional intent, such sales may not be excluded from the normal value calculation.

Mexinox points out that the CIT reached the same conclusion in *Acciai Speciali Terni S.p.A. v. United States*, 142 F. Supp. 2d 969 (CIT 2001). Reviewing the legislative history of the provision, the CIT observed that "Congress unambiguously expressed its intent in the Statement of Administrative Action, where it stated that § 1677b(b)(2)(D) '*specifies* when particular prices provide for cost recovery within a reasonable period of time.'" *Id*. (citing SAA at 832) (emphasis as supplied by the court). Mexinox reiterates that in fact, the SAA notes that prior to its amendment by the Uruguay Round Agreements Act, the U.S. dumping statute failed to provide a "clear definition of cost recovery." SAA at 832. The current provision supplies that "clarity" by "specifying" a well-defined circumstance where prices must ("shall") be deemed to provide for recovery of costs within a reasonable period of time.
Applying the court's obligation under *Chevron* Step-1, the CIT affirmed that "{t}he agency *must* give effect to this clear statement." *Id*. (emphasis added).

Mexinox contends that the Department neglected to explain in the *Preliminary Results* how it has reconciled its use of quarterly costs with the clearly stated intent to require the use of period average costs. However, based on positions taken by the Department in other proceedings, Mexinox anticipates the Department and petitioners may seek to advance two arguments: (1) that the quarterly costs used in this case are actually period-average costs that have merely been "adjusted"; and (2) that Congress intended the Department to "adjust" unit costs in this manner prior to conducting the below-cost test. Neither argument holds water.

Mexinox argues that there is no doubt that the costs at issue are not adjusted period averages but are instead quarterly-specific average cost figures. While it is true that conversion costs for these products continue to be calculated on a period-average basis, such costs are a negligible part of the overall costs. It would therefore be absurd to refer to these as "period" costs that have merely been "adjusted." Indeed, the Department itself refers to this as "quarterly cost data" at page 2 of the Preliminary Results Cost Calculation Memo. No matter what label the Department may affix to these costs, they clearly were intended to be, and are, *quarterly* cost averages – *i.e.*, costs averaged over shorter 3-month periods rather than the 12-month period average required by the statute. Mexinox asserts that a careful review of the Department's description of the calculation methodology (*see* Preliminary Results Cost Calculation Memorandum at page 4) reveals that it is in fact a quarterly cost calculation. As described, the costs were first indexed to a common beginning of period cost level. The Department fully admits that the costs were then "indexed back to the appropriate quarter" based on the index for the quarter. It is the final indexing back that established quarter-specific weighted average costs.

In addition, Mexinox notes that the Department has also offered other policy justifications for departing from the statutory mandate in this area, including claims that cost recovery findings may otherwise turn on the "fortuitous circumstances of timing." Such arguments remain legally irrelevant where, as here, Congress has already spoken clearly to the issue. Finally, Mexinox respectfully urges the Department to avoid the error it made in the eighth administrative review and to apply the statute as Congress intended it.

The petitioners contend that the Department properly conducted the cost recovery test. The petitioners point out that the Department conducted the quarterly cost test and the 20 percent test based on sales during the entire period of review. As such, the Department properly conducted the cost recovery test and argues that there is no need for the Department to conduct another test as proposed by Mexinox to determine whether the remaining sales that are below cost continue to remain below cost when considered on an annual, or "period of review", basis. *See* Mexinox Case Brief at 65. Mexinox seeks to support this "third" bite at the apple in a transparent effort to limit the degree to which its sales are below cost by creating a third improper cost test.

Petitioners maintain that the Department in the eighth administrative review explained that the Department's indexing methodology complies with the cost recovery test as required by Section 773(b)(2)(D) of the Act. This methodology allows the Department to consider whether a respondent is able to recover its costs during the same time period that is being examined to determine whether sales are made below cost. Thus, the Department should reject Mexinox's argument.

Department's Position:

We agree with petitioners that for austenitic S4 in coils, it is appropriate to deviate from our normal annual average cost methodology in this case. As such, consistent with the *Preliminary Results*, we have used an alternative cost-averaging methodology to calculate COP and CV for austenitic products.

A. Legal Framework and Case Precedent

The Department has a consistent and predictable methodology of calculating COP on an annual-average basis over the entire POR. As such, the Department's standard questionnaire requests that respondents report their costs on an annual-average basis over the entire POR. *See Notice of Final Results of Antidumping Duty Administrative Review: Certain Pasta from Italy*, 65 FR 77852 (Dec. 13, 2000) and accompanying Issues and Decision Memorandum at Comment 18 and *Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 FR 3822 (January 24, 2006) and accompanying Issues and Decision Memorandum at Comment 5 (where the Department explains its practice of computing a single weighted average cost for the entire POR).

The calculation of COP is relevant in determining which sales of merchandise in the foreign market will be used to compare to sales in, or to, the U.S. market to determine dumping margins. Specifically, section 771(34) of the Act defines dumping as the sale or likely sale of goods at less than NV. Dumping occurs when imported merchandise is sold in, or for export to, the United States at less than the NV of the merchandise. Section 771(35)(A) of the Act defines the dumping margin as the amount by which the NV exceeds the EP or CEP of the subject merchandise. In calculating NV, the Department will consider only those sales in the comparison market that are in the "ordinary course of trade." Generally, sales are in the "ordinary course of trade" if made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product. *See* section 771(15) of the Act. Specifically, sales disregarded under section 773(b)(1) of the Act are defined by section 771(15)(A) of the Act as outside the ordinary course of trade. Section 773(b)(1) of the Act describes how sales may be disregarded if they have been made at prices which represent less than the COP of that product. Section 773(b)(3) of the Act defines the COP as:

> an amount equal to the sum of -
> (A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;
> (B) an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; and
> (C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment.

Section 773(b)(1) of the Act states that if no sales made in the "ordinary course of trade" remain, "the normal value shall be based on the CV of the merchandise. CV is defined at section 773(e) of the Act as the cost of materials, plus fabrication expenses, selling, general and administrative expenses, profit and packing expenses.

The Act does not dictate a specific method of calculating COP during the POR, nor does it provide a definition for the term "period" in calculating COP and CV. Thus, the Department adopted a consistent and predictable approach in using annual-average costs over the entire POR - the result being a normalized, average production cost to be compared to sales prices covering the same extended period of time. *See Notice of Final Results of Antidumping Duty Administrative Review: Color Television Receivers From the Republic of Korea*, 55 FR 26225, 26228 (June 27, 1990) (where the Department stated that the use of quarterly data would cause aberrations due to short-term cost fluctuations) and *Notice of Final Results of Antidumping Duty Administrative Review: Gray Portland Cement and Clinker From Mexico*, 58 FR 47253, 47257 (September 8, 1993) (where the Department explained that the annual period used for calculating costs accounts for any seasonal fluctuation which may occur as it accounts for a full operation cycle).

In an antidumping context, the Department's preference is to calculate costs on annual weighted average basis rather than to calculate costs over shorter periods because as costs are calculated over shorter periods, it directly limits the periods of time over which sale prices can reasonably be matched, thus limiting price-to-price comparisons. Before moving away from the normal method of calculating an annual average cost, the Department must find that a change in production costs during the POR is significant. The Department has articulated in several past proceedings that the use of an alternative cost averaging methodology may be appropriate in situations where a reliance on our normal annual weighted average cost method would be distortive due to significant cost changes. These situations include, but are not limited to, high inflation, rapid technological advancements, and significant raw material cost volatility. *See Notice of Final Results of Antidumping Duty Administrative Review: Certain Steel Concrete Reinforcing Bars from Turkey*, 66 FR 56274 (November 7, 2001), *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 FR 8909 (February 23, 1998) (*SRAMs from Taiwan*), and *Brass Sheet and Strip from the Netherlands*.

Recently, there have been several cases in which we considered whether to deviate from our normal annual average cost methodology due to significant changes in the COM throughout the cost reporting period. *See Notice of Final Results of Antidumping Duty Administrative Review: Certain Steel Concrete Reinforcing Bars from Turkey*, 73 FR 66218 (November 7, 2008) (*2006-2007 Rebar from Turkey*) and accompanying Issues and Decision Memorandum at Comment 2, *2006-2007 SSPC from Belgium* and accompanying Issues and Decision Memorandum at Comment 4, *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Mexico*, 74 FR 6365 (February 9, 2009) (*2006-2007 S4 in Coils from Mexico*) and accompanying Issues and Decision Memorandum at Comment 5, and *Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Stainless Steel Pipe from the Republic of Korea*, 74 FR 31242 (June 30, 2009) (*2006-2007 Pipe from Korea*) and accompanying Issues and Decision Memorandum at Comment 1.

As this issue has continued to arise in more and more cases, we recognize the importance of having a consistent and predictable approach to analyzing the issue and determining when to deviate from our normal annual average cost methodology. Accordingly, the Department has made a concerted effort to develop a more predictable methodology for determining when the use of its alternative cost averaging methodology is more appropriate than the established practice of using annual cost averages, due to the occurrence of significant cost changes throughout the POI or POR. As part of this effort, on May 9, 2008, the Department published a Federal Register notice to solicit comment on this issue. The Department stated in the Federal Register notice that we continue to regard our practice of using annual cost averages in proceedings as generally the most appropriate methodology, and that we intend to deviate from this practice only under limited circumstances. *See Antidumping Methodologies for Proceedings that Involve Significant Cost Changes Throughout the Period of Investigation (POI)/Period of Review (POR) that May Require Using Shorter Cost Averaging Periods; Request for Comment*, 73 FR 26364, 26366 (May 9, 2008) (May 9 Quarterly Request for Comments). We acknowledged that in certain cases, possible distortions may result when our normal annual average cost method is used during a period of significant cost changes. Accordingly, we asked outside parties for comments and suggestions on the factors to consider, tests to apply, and thresholds to apply when deciding whether to rely on cost averaging periods of less than one year. We received comments from nine parties on June 23, 2008.

The Department conducted a careful review of the comments received in response to the May 9 Quarterly Request for Comments. We also considered interested party comments on the same issue in *2006-2007 Rebar from Turkey* and accompanying Issues and Decision Memorandum at Comment 2, *2006-2007 SSPC from Belgium* and accompanying Issues and Decision Memorandum at Comment 4, *2006-2007 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5, and *2006-2007 Pipe from Korea* and accompanying Issues and Decision Memorandum at Comment 1 and reaffirmed in the final results of these cases that the two most important factors in considering whether to deviate from our normal average cost methodology are (1) whether the cost changes throughout the POI or POR were significant, and (2) whether sales during the shorter cost averaging period could be reasonably linked with the COP during the same averaging period.

We reaffirmed in the remand of Turkish rebar case which was upheld by the Court that these are the two most important factors to consider in determining whether to deviate for our normal annual average cost methodology. *See Final Results of Redetermination Pursuant to Court Remand aff'd Habas Sinai ve Tibbi Gazlar Isthihsal Endustrisi A.S. v. United States,* Slip Op. 09-133 (CIT November 23, 2009) (*Turkish Rebar CIT Remand*). In light of these cases, we continue to believe these two factors are the most important in determining whether to deviate from our normal annual average cost methodology.

We disagree with Mexinox's arguments that the Department's decision to use its alternative cost averaging methodology in this case is inappropriate. As explained further below we have applied the same standards to this case as in *2006-2007 Rebar from Turkey*, *2006-2007 SSPC from Belgium*, *2006-2007 S4 in Coils from Mexico Final Results*, *2006-2007 Pipe from Korea*, and *Turkish Rebar CIT Remand*. The only difference between our past practice and the approach taken in recent decisions is that we more clearly defined the significance and linkage thresholds. In *2006-2007 Rebar from Turkey*, we did not deviate from our normal annual average cost methodology because the respondent's changes in costs during the POR were less than the threshold set by the Department. In *2006-2007 SSPC from Belgium*, *2006-2007 S4 in Coils from Mexico Final Results*, *2006-2007 Pipe from Korea*, and *Turkish Rebar CIT Remand*, we deviated from our normal annual average cost methodology because the respondents' change in costs during the POR were more than the threshold set by the Department and the respondents' sales during the quarterly periods could be reasonably linked with the COP during the same quarterly period.

In this administrative review, we find that Mexinox's cost changes throughout the POR were significant (*i.e.*, the respondent's changes in costs during the POR were more than the 25 percent threshold set by the Department) and sales during the shorter cost averaging period could be reasonably linked with the COP during the same averaging period. As a result, we find the use of our alternative cost-averaging method in this ninth administrative review is supported by evidence on the record and is in accordance with law.

B. Significance of the Changes in Costs

The administration of antidumping duty cases is better served through a reasonable numeric threshold for determining what constitutes a significant cost change. A numeric threshold for significant change avoids confusion because it is transparent, can be applied consistently, and parties are better served when a predictable and transparent practice is in place. This objective numerical threshold ensures a more equitable and consistent application of the alternative cost calculation methodology. In determining whether the change in production costs is significant, we analyze, on a product-specific basis, the extent to which the total COM changed during the POR. We do this by analyzing, on a CONNUM-specific basis, the difference between the lowest quarterly average COM and the highest quarterly average COM, as a percentage of the lowest quarterly average COM. *See 2006-2007 Pipe from Korea* and accompanying Issues and Decision Memorandum at Comment 1. If the percentage difference exceeds 25 percent, we will normally consider the significant cost change threshold to be met. For purposes of determining the significance of the changes in cost for this ninth review, consistent with *2006-2007 Rebar from Turkey*, *2006-2007 SSPC from Belgium*, *2006-2007 S4 in Coils from Mexico Final Results*, *2006-2007 Pipe from Korea*, and *Turkish Rebar CIT*

Remand we have set our significance threshold at the 25 percent rate. In the Decision Memoranda of these determinations, we have discussed and explained in detail how we developed this 25 percent significant cost change threshold and why the Department analyzes the change in costs on a product-specific basis and applies this threshold irrespective of whether the costs are increasing, decreasing, or trending in both directions.

In performing this analysis, the use of quarterly average COMs is preferred over monthly average COMs to ensure the change in cost is sustained for a reasonable time rather than for only an isolated month or two. We believe that this significance threshold is high enough to ensure that we deviate from our annual average cost methodology only in circumstances where changing input costs are clearly affecting the appropriateness of our annual average cost calculation. As such, we solicited information from Mexinox in order to determine the magnitude of cost changes during the POR and whether it would be appropriate to use shorter cost averaging periods in this ninth administrative review. We analyzed the difference in COM for the five most frequently sold CONNUMs in the U.S. market. Based on this analysis, we found that the difference between the lowest quarterly average COM and the highest quarterly average COM for all sampled austenitic CONNUMs exceeded the 25 percent threshold. As with our normal practice followed in *2006-2007 SSPC from Belgium, 2006-2007 S4 in Coils from Mexico Final Results, 2006-2007 Pipe from Korea, and Turkish Rebar CIT Remand*, we calculated the change in costs by expressing the difference between the lowest quarterly average COM and the highest quarterly average COM, as a percentage of the lowest quarterly average COM. *See* Preliminary Results Cost Calculation Memorandum at page 2.

As noted above, the numeric threshold for significant cost changes will avoid confusion because it is transparent, it can be applied consistently, and the interested parties will be able to predict when the alternative cost methodology will be used. Likewise, we believe it's appropriate to establish a predictable, consistent, and reasonable approach to the manner in which the change in cost is calculated to determine whether or not the change meets the established numeric threshold. The predictable and reasonable approach the Department has established in the most recent cases, involving quarterly costs, is to divide the difference between the highest and lowest quarters average COM for the POR by the lowest quarter average COM for the POR. *See 2006-2007 Pipe from Korea* and accompanying Issues and Decision Memorandum at Comment 1. This approach is predictable, reasonable and the most appropriate because it meets the purpose for what the Department is measuring.

The purpose for calculating the change in cost is to measure the volatility of the COM between quarters during the POR, regardless of whether the COM is trending consistently up, consistently down or up and down during the POR. In certain cases, even though the relative change in costs, if comparing the costs at the beginning of the POR to those at the end of the POR may not be significant, the change within the period may be significant. *See 2006-2007 Pipe from Korea* and accompanying Issues and Decision Memorandum at Comment 1. As such, the Department's approach of dividing the difference between the highest and lowest average quarters COM by the lowest average quarter COM, equally applies in periods where costs are increasing, decreasing or trending in both directions during the POR because it measures the volatility in costs between quarters irrespective of when the volatility occurs. In other words, the Department's approach sets the same standard for measuring the significance of the change in cost regardless of the direction(s) the costs are trending during the POR. For example, if the first quarter average COM was used as the denominator, as proffered by Mexinox and costs were consistently trending up during the POR, it would result in the use of the lowest average quarter COM as the denominator. However, if the opposite were occurring and the costs were consistently trending down, it would result in the use of the highest average quarter COM as the denominator. The result would be a different percentage change in costs even though the absolute change may be the same. This example demonstrates that a different standard would be set for measuring the significance of the change in cost for periods of increasing costs versus decreasing costs during the POR (*i.e.*, the larger denominator results in a smaller resulting percentage change). The Department's approach sets a standard that can be equally applied regardless of the direction(s) the costs are trending. Therefore, the Department's approach of dividing the difference in cost between the highest and lowest average quarters COM by the lowest average quarter COM for the POR results in a neutral predictable and reasonable way to measure the change in costs to determine if it meets the 25 percent threshold, irrespective of whether costs are increasing, decreasing or trending in both directions during the POR. *See 2006-2007 Pipe from Korea* and accompanying Issues and Decision Memorandum at Comment 1.

Mexinox claims that during this current administrative review the Department has set a new standard for calculating the change in costs than was used in the preceding administrative review. Specifically, Mexinox asserts that the Department used the first quarter average COM as the denominator in calculating the change in costs in the preceding administrative review, as opposed to using the third and fourth quarter average COM as the denominator in the instant case. However, Mexinox misinterpreted the Department's approach. We calculated the change in costs in the preceding administrative review in the same manner as we calculated the change in costs in this review (*i.e.*, namely by taking the difference between the highest quarter cost and the lowest quarter cost and expressing the difference as a percentage of the lowest quarter cost). We believe Mexinox's misconception occurred only because the lowest average quarter COM in the preceding administrative review was the first quarter and the highest quarter average COM was the fourth quarter of the POR. However, as we have established in this case and prior cases, we calculate the change in costs by expressing the difference between the lowest quarter average COM and the highest quarter average COM, as a percentage of the lowest quarter average COM. *See 2006-2007 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5 and *2006-2007 Pipe from Korea* and accompanying Issues and Decision Memorandum at Comment 1.

With regard to Mexinox's claim that the changes in costs during the POR were not consistent,[14] we find it irrelevant because we do not consider this to be a critical factor in our analysis. *See 2006-2007 Pipe from Korea* and accompanying Issues and Decision Memorandum at Comment 1. In deciding whether the use of quarterly costs is appropriate, we do not require that the change in costs from quarter to quarter be consistent. *See 2006-2007 Pipe from Korea* and accompanying Issues and Decision Memorandum at Comment 1. We only measure the cost change threshold between highest and lowest quarters irrespective

[14] Even if a consistent trend in costs was deemed to be a relevant factor, Mexinox's costs did in fact trend in a consistent manner. As stated by the petitioners, Attachment 2 of Mexinox's Case Brief shows that for the most part, Mexinox's costs trended in a consistent manner.

where these quarters occur in the POR. As we stated in *2006-2007 Pipe from Korea* and accompanying Issues and Decision Memorandum at Comment 1, a change in costs that exceeds 25 percent, even if only between two quarters of the POR, is significant enough to create a distortion when using a single annual average cost methodology. Also, we find Mexinox's claim that the changes in costs during the eighth administrative review of this case were more significant than this ninth administrative review, not relevant. We do not compare the change in costs of one POR to the change in costs in another POR in deciding whether or not to use our alternative cost methodology. We confine our analysis to the current segment of the proceeding and in this ninth administrative review, Mexinox has met the significant cost change threshold of 25 percent.

C. Linkage Between Cost and Sales Information
Consistent with past precedent, if the Department finds cost changes to be significant in a given administrative review or investigation, the Department subsequently evaluates whether there is evidence of linkage between the changing costs and the sales prices during the shorter averaging periods. *See*, *e.g.*, *2006-2007 SSPC from Belgium* and accompanying Issues and Decision Memorandum at Comment 4 and *2006-2007 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5. Our definition of linkage does not require direct traceability between specific sales and their specific production costs, but rather relies on whether there are elements which would indicate a reasonably positive correlation between the underlying costs and the final sales prices charged by a company. *See 2006-2007 SSPC from Belgium* and accompanying Issues and Decision Memorandum at Comment 4, *2006-2007 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5, and *2006-2007 Pipe from Korea* and accompanying Issues and Decision Memorandum at Comment 1. We believe that requiring too strict a standard for linkage would preclude this remedy for commodity-type products where there is no pricing mechanism in place and it may be very difficult to precisely link production costs to specific sales.

The Department has approached its consideration of linkage between sales and costs in various ways and to varying levels of precision. In *SRAMs from Taiwan* (at 8909, 8911, 8925-8926), we did not require any linkage between price and costs but rather agreed with the parties that because both price and cost consistently trended downward due to expected technological advancements, we would use quarterly data. In *Brass Sheet & Strip from Netherlands*, we examined the correlation between sales prices and cost during the shorter cost averaging periods and found that the information on the record revealed that the sales prices for the subject merchandise correspondingly and consistently declined during the POR. We found that the sales prices and costs were linked because the respondent purchased the input raw materials on the customer's behalf and then billed the customer for the cost of the metals, the terms of which were set forth on the finished products' sales invoice along with the associated processing costs as a separate item describing this factual situation as a pass-through. Thus, the Department has accepted varying degrees of correlation. In *SRAMs from Taiwan*, we did not perform any direct analysis, but we found a consistent decline in both price and cost. In *Brass Sheet & Strip from Netherlands*, we found a direct link in that the price setting and materials acquisition process formed a pass-though mechanism. In two recent cases, *2006-2007 S4 in Coils from Mexico Final Results* and *2006-2007 SSPC from Belgium*, we found reasonable linkage due to the fact that the respondents operated using an alloy surcharge mechanism. That is, they made sales with a provision that allowed them to pass on any increase in the cost of their main inputs to their customers.

As noted, our definition of linkage in recent cases does not require direct traceability between a specific sale and its specific production cost, but rather relies on whether there are elements which would indicate a reasonably positive correlation between the underlying costs and the final sales prices levied by the company.[15] These correlative elements may be measured and defined in a number of ways depending on the associated industry, the overall production process, inventory tracking systems, company-specific sales policies, inventory turnover ratios, price and cost trend analysis, and pricing mechanisms present in the normal course of business (*e.g.*, alloy surcharges, raw material pass through devices).

In this ninth administrative review, we evaluated whether the sales prices during the shorter cost-averaging periods were reasonably correlated with the COP during the same shorter cost-averaging periods. During the POR, Mexinox had an alloy surcharge mechanism in place. The alloy surcharge for each sale is derived by incorporating the average market prices for inputs used in the manufacture of stainless steel plate in coils, including nickel, chromium, molybdenum, and titanium. *See* Mexinox's second supplemental questionnaire response, dated June 3, 2009, at pages 14 and 15. This alloy surcharge mechanism has been adopted as an industry standard and is followed by stainless steel producers. *See 2006-2007 SSPC from Belgium* and accompanying Issues and Decision Memorandum at Comment 4. It was developed as a means for producers to effectively charge their customers for rising raw material costs through an additional levy added to the base sales price. In fact, and as stated in *2006-2007 SSPC from Belgium*, the domestic stainless steel producers also compute monthly surcharge amounts, and publicly release the surcharge amounts on their company websites, and apply them on sales to their final customers. Similarly, Mexinox publicly displays its surcharge information as a means to inform customers of the monthly surcharges applicable to their stainless steel purchases. *See* Mexinox's response to the Department's second section D supplemental questionnaire, dated June 3, 2009 (SSDQR), at Attachment D-35-A-1. In the eighth administrative review of this antidumping duty order, the linkage between cost and sales was established solely through Mexinox's alloy surcharge mechanism. *See 2006-2007 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5.

Through the alloy surcharge mechanism, we continue to consider Mexinox's sales prices to be linked to its current purchases of input coil. However, at issue is whether the company's use of its LIFO inventory valuation method causes the alloy surcharge mechanism to no longer link quarterly prices and costs. Under the LIFO inventory valuation method, the consumption cost for input raw materials (steel coils in this case) consumed in production is determined based on the most recent purchase prices for the coils. If in a given month the company purchases more steel coils than consumed, the cost of consumption is based on the average purchase cost in that month. If the company consumes more coils than was purchased in a given month, the excess of consumption over purchases is valued based on purchase prices from prior months when the particular coils in inventory were most recently purchased. As a result, in some instances the

[15] *See, e.g., SSPC from Belgium* and accompanying Issues and Decision Memorandum at Comment 4 and *2006-2007 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5.

cost of coils consumed in production in a particular quarter may not entirely reflect the current market prices for that input. *See* Mexinox's response to section D of the Department's antidumping duty questionnaire, dated November 12, 2008, at Attachment D-21-C.

To facilitate our analysis, we compared by quarter, the weighted average home market and U.S. sales prices for the five most frequently sold CONNUMs in the U.S. market and the corresponding weighted average COM.[16] The information, summarized in graph form, reveals that sales prices and costs for each of the sample CONNUMs generally trended downward during the first-half (*i.e.*, the first and second quarters July to December 2007) of the POR. During the second-half (*i.e.*, the third and fourth quarters January to June 2008) of the POR, the sales prices for the most part trended upward while the COMs mainly trended downward. Mexinox explained that during the second-half of the POR sales prices increased because of current market forces while COMs decreased because of its LIFO layer depletion (*i.e.*, Mexinox used input coils that were purchased prior to the 2008 fiscal year). *See* Mexinox's SSQR at page 35. In addition, Mexinox claims that the input coils purchased in years prior to the 2008 fiscal year and used in the production of austenitic products during the second-half of the POR were at lower prices than the corresponding current prices.[17]

We agree with Mexinox that the LIFO layer depletion appears to be causing the price and cost trends to diverge during the last part of the POR. For those months where the company consumed more coils than was purchased, the average cost of coils consumed reflects both current market coil costs (which the alloy surcharge mechanism tracks) and purchases from prior months. While we acknowledge that there is no perfect solution available on the record to fine tune the LIFO layer affect, the affect is diluted for most of the POR (*see* the discussion below). Moreover, if we were to rely on our normal annual average cost approach, coil costs would be equal to all four quarters' despite significant changing market prices. In light of the significant changes in cost of the coils during the POR, this single annual average cost would mean very little when compared to alloy surcharge pegged sales prices throughout the year. The lowest cost period costs would be artificially inflated by the high cost period costs, and the high cost period costs would be artificially reduced by the lowest cost period costs. This is the precise argument Mexinox provided in the prior review in support of the Department deviating from its normal annual average cost methodology in that review.

As can be seen at Attachment 34-E-2 of Mexinox's SSDQR, the vast majority of Mexinox's POR quarterly coil consumption cost is based on the cost of purchases in the same quarter of consumption. In other words, when the average cost of coils consumed reflects both current purchases and purchases from prior years, the majority of the coils consumed were from current purchases. *See* Mexinox's SSQR at page 35. Thus, the average cost is weighted more towards current market prices. As a result, the impact of the LIFO layer depletion on the reported quarterly average coil costs is diluted for most of the POR. Thus, we consider the distortion that would result from simply relying on our annual average cost methodology (*i.e.*, artificially inflating or deflating costs in highest and lowest cost periods), to far outweigh that resulting from the LIFO layer depletion and the use of our alternative quarterly average cost methodology. In addition, the most noticeable divergence of sales prices and costs occurs in

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[16] *See* Final Results Cost Calculation Memorandum at Attachment 1, pages 1 to 5.
[17] *See* Mexinox's SSQR at pages 33 to 38 and Attachment D-37-E.

the third and fourth quarters of the POR, and in those quarters the LIFO layer depletion affect appears to cause increased profitability. The result of increasing prices due to current market conditions and decreasing costs due to the LIFO layer depletion is fewer sales falling below cost in those quarters.

In summary, Mexinox is correct that the facts before us in this current review lend themselves to varying interpretations. However, we considered the totality of (1) Mexinox having an alloy surcharge mechanism in place during the POR, (2) sales prices and costs trending for a good part of the POR, and where there is divergence between sales price trends and cost trends, the results appear to be conservative (*i.e.*, as noted earlier, fewer sales fall below cost) to Mexinox and that divergence is caused by the LIFO layer depletion accounting methodology, and (3) the fact that the Department's definition of linkage does not require direct traceability between a specific sale and specific production costs, but rather relies on whether there are elements which would indicate a reasonably positive correlation that the linkage requirement has been established. Accordingly, the significant changes in COM during the POR coupled with the linkage established above provide a reasonable basis for using our alternative cost methodology for the final results.

Further, in an attempt to prove that no correlation exists between the sales and cost data, Mexinox provided statistical analysis using sophisticated computer programs. However, a perfect correlation between the sales and cost data will rarely exist, and thus, requiring such a correlation would preclude the Department's use of quarterly costs even when the change in costs is significant. Instead, the Department prefers to rely on general price and cost trend analysis. *See Turkish Rebar CIT Remand* (states that there must be only *some* reasonable correlation). As it is the prices themselves that we are testing as to whether they are dumped or below cost, it is unrealistic to expect such prices to trend perfectly with cost changes throughout the year. In addition, the Department takes into account the presence of any pricing mechanism that permits the pass through of the change in costs to the buyers.

D. Substantial Quantities and Recovery of Costs

The Department properly deviated from its normal methodology in conducting the "below cost" and "cost recovery" tests for austenitic grades of scope merchandise in response to significant changes in the COP of austenitic grades of stainless steel sheet and strip in coil products. These two "tests" stem from section 773(b)(1) of the Act, which authorizes the Department to disregard for purposes of determining normal value "sales made at less than COP" that "(A) have been made within an extended period of time in substantial quantities; and (B) were not at prices which permit recovery of all costs within a reasonable period of time." The Department normally calculates the costs of production using a single weighted-average cost for the entire period of review. *See Thai Pineapple Canning Indus. Corp.v. United States*, 273 F.3d 1077, 1084 (Federal Circut 2001). Accordingly, consistent with section 773(b)(1) of the Act, the Department usually compares a respondent's sales prices against a single weighted-average COP for the period of review to determine whether sales were made at less than the cost of production and whether the sales prices permit recovery of all costs within a reasonable period of time. Because the use of a single period of review average properly captures the COP, the Department departs from its normal methodology only in certain rare situations where, as here, cost and price averages calculated over the entire period do not permit proper comparison.

In the current review period, Mexinox's cost changes throughout the POR were significant (*i.e.*, the respondent's changes in costs during the POR were more than the threshold set by the Department) and sales during the shorter cost averaging period could be reasonably linked with the COP during the same averaging period through the alloy-surcharge mechanism. The Department recognized that during a period of significant and sustained cost change, as was the case with Mexinox in this review, a single annual average cost does not reasonably reflect costs associated with sales of the merchandise throughout the period of review. In light of the foregoing, the Department deviated from its normal methodology of using a single unadjusted weighted-average cost period to avoid inappropriate and skewed results.

Mexinox argues that for purposes of the "cost recovery test" the Department should have compared home market prices to a single period-wide average COP. However, as we have discussed above, due to the significant change in COM throughout the POR, the use of an annual average cost becomes meaningless when used to test sales prices throughout the year. In the alternative, as detailed below, the Department used an annual average cost calculation approach that incorporates an indexing method that neutralizes the distortive effects the significant change in cost has on the calculations.

Mexinox argues that with respect to the cost recovery test, "the statute does not grant discretion to the Department to select the averaging period used in the cost recovery test but instead specifices precisely the period over which the costs must by averaged." *See* Case Brief at 63. Mexinox primarily relies upon the CIT's decision in *Acciai Speciali Terni S.p.A. v. United States*, 142 F. Supp. 2d 969, 996-97 (CIT 2001), in which the Court sustained the Department's methodology of using annual POR costs. Mexinox argues that the Court "observed that Congress unambiguously expressed its intent in the SAA, where it stated that 1677b(b)(2)(D) '*specifies* when particular prices provide for cost recovery within a reasonable period of time' (emphasis as supplied by the court)." *See* Case Brief at 64. However, the Court did not find that the statute is unambiguous and that the Department had no discretion; rather the Court found that "[t]he statute itself is unclear." *See Acciai*, 142 F. Supp. 2d at 997. The Court found that the Department's application of the statute, *i.e.*, the use of annual average costs, properly gave effect to the Congressional intent expressed in the SAA, which unambiguously specified when particular prices provide for cost recovery within a reasonable period of time.

Although we agree that the Congress intended that the Department should normally use the single period average cost for the POR or POI when costs experience short term fluctuations in different directions but otherwise are generally stable, we disagree that the Congress mandated the use of a single period of review weighted-average cost when it leads to significant distortions. *See* section 773(f)(1)(A) of the Act (explaining that the costs must reasonably reflect the costs associated with the production and sale of the merchandise); *see also* SAA at 832 (The determination of cost recovery is based on an analysis of actual weighted average prices and costs during the POR or POI).

In light of the statutory requirement that costs must reasonably reflect the costs associated with the production and sale of the merchandise, Congress provided the Department with discretion to adjust a respondent's costs, as appropriate, in response to significant variations in unit costs.

SAA at 832. For example, the SAA gives an illustration of when unit costs may be significantly increased during the period when a major maintenance is performed and depressed in other years. While the list of illustrative examples in the SAA is not exhaustive, they illustrate that Congress intended that the Department should have discretion to adjust annual weighted-average prices and costs, as appropriate, to address significant variations in per unit costs.

In this case, the Department reasonably exercised this discretion to address significant and sustained variations in the cost of a major input that caused the per-unit COM to significantly change during the period of review. The magnitude of cost changes from quarter to quarter during the period of review was so significant that the Department deviated from its normal methodology of using a single period of review weighted-average cost in performing the sales below cost test because it would have resulted in a cost that does not reasonably reflect the costs associated with the production and sales of the merchandise. To adjust for the distortion in performing the sales below cost test, but failing to adjust in performing the recovery of costs test would lead to similarly distortive results.

In calculating costs for purposes of section 773(b)(1) of the Act, the antidumping statute requires the Department to use the costs that reasonably reflect the costs associated with the production and sale of the merchandise. *See* section 773(f)(1)(A) of the Act. Relying upon a single annual average costs during a period of significant cost change does not meet this requirement. Consequently, the Department adopted an alternative annual average cost calculation approach. As requested by the Department, Mexinox reported quarterly material costs, the primary driver of the significant changes in COM throughout the POR, and annual weighted average costs for all other cost elements. In the margin calculation program used for the *Preliminary Results*, the Department indexed the quarterly material costs to the common beginning of the period cost level, thereby, neutralizing the effect of the significant cost changes for the input between quarters. Then, consistent with the antidumping statute, the Department calculated a period of review weighted-average per unit cost. Finally, the weighted average per unit cost for the period of review for the input materials was indexed to the appropriate quarter to keep the weighted-average per unit costs consistent with the main input's significantly changing price levels occurring between quarters. This methodology addresses the statute's requirement of weighted-average costs for the period (*i.e.*, recovery of cost test) while preserving the indexed differences between quarters resulting from the significant price level changes. *See* Comparison Market Program beginning at line 181.

Mexinox contends that the Department did not use a single period of review weighted-average cost, but rather used costs for separate quarters of that single period. However, under the Department's indexing methodology, the CONNUM-specific costs reflect the period of review weighted average of other materials, conversion costs, and average usage rates for the significantly changing input. The only cost component adjusted to reflect price level changes throughout the year is the price of the input experiencing significant cost change. Thus, the Department's methodology relies upon weighted-average costs for the entire period of review, while also neutralizing the distortive effect of the significant cost changes for the input at issue.

The rationale for the Department's methodology is consistent with the intent of the statute. If the Department were to use an unadjusted weighted-average per unit cost for the period of review for purposes of the cost recovery test, sales prices which were determined to be below cost may be erroneously considered to have recovered costs based simply on the law of averages and timing of the sale. It is undisputed that the cost of the primary input, steel coils, drastically decreased from the beginning to the end of the POR. In addition, a reasonable linkage between sales prices and costs has been established. When costs change significantly, and prices follow such cost changes, using an unadjusted annual average cost in performing the recovery of cost test will result in virtually all sales during the highest cost periods passing the recovery of cost test simply due to the timing of the sale in relation to the cost change cycle. This comparison says little about true cost recovery; rather it simply shows which sales were made during high cost periods. Even if the company were to bleed cash daily from unprofitable below-cost sale prices that never catch up with rapidly raising costs, prices during the highest cost period will still almost always be higher than the annual average costs. Accordingly, the test would erroneously indicate that the costs have been recovered, regardless of the true financial state of the company.

Mexinox argues that the sales that are below cost at the time of sale, but are above the average cost for the period of investigation or review, must be included in the normal value calculation. Mexinox argues that the statute intends that the timing of sales should influence the results under the cost recovery test.

We disagree with Mexinox that the cost recovery test is intended to incorporate elements of distortion and hinge on fortuitous circumstances of timing. The antidumping statute does not require the Department to blindly rely upon unadjusted annual average costs in an environment of significant cost change. Mexinox's unadjusted annual average cost does not reasonably reflect the costs associated with the production and sale of the merchandise as required by the antidumping statute. *See* section 773(f)(1)(A) of the Act. Due to the significant change in the cost of manufacturing the product throughout the year, using an unadjusted annual average cost, where low cost periods are inflated by the highest cost periods, and highest cost periods are deflated by low cost periods, the comparison of individual prices during the highest and lowest cost periods to a single average cost becomes meaningless, including for cost recovery purposes.

<u>Comment 7</u>: General and Administrative Expense Ratio (Employee Profit Sharing)

For the *Preliminary Results*, the Department recalculated Mexinox's general and administrative (G&A) expense ratio by adding an amount, to account for the employing profit sharing expenses, to the numerator of the G&A expense ratio. *See* Preliminary Results Cost Calculation Memo at page 6 and Attachment 2.

Mexinox contends that the Department should not include this employee profit sharing amount in the G&A expense ratio calculation because this item relates to distribution of profits and is therefore not an expense. Mexinox claims that it did not include the employee profit sharing amount in its reported cost because as shown in its audited financial statements, employee profit sharing is not a period expense. Mexinox claims that the employee profit sharing amount is based on taxable income as prescribed by the Mexican income tax law. Therefore, employee profit sharing is a distribution of Mexinox's taxable income that is determined at the close of the fiscal period**.**

Mexinox maintains that employee profit sharing is not an "expense" incurred in connection with the production of subject merchandise (or any other operations of the company), but instead is functionally equivalent to dividend distributions or income tax payments, neither of which are included in COP or constructed value. The Department's consistent practice with respect to dividends and tax payments is to exclude them from the cost calculation because such payments relate to the level of income that a corporation realizes, not the expenses themselves and cites to *Notice of Final Determination of Sales at Less than Fair Value: High Information Content Flat-Panel Displays and Display Glass Therefore from Japan*, 56 FR 32376, 32392 (July 16, 1992) ("the Department does not consider income taxes based on the aggregate profit/loss of the corporation to be a cost of producing the product.").[18]

Mexinox points out that although the Department has, in past reviews, revised Mexinox's G&A expense factor to include employee profit sharing, it continues to disagree with such treatment because employee profit sharing is not a period expense, but rather a "below the line" distribution of profits that should be treated in the same manner as taxes. Therefore, Mexinox requests that for the final results of this review, the Department should not include the employee profit sharing amount in the G&A expense ratio calculation.

Petitioners contend that Mexinox's payments to its employees do not constitute dividends because these payments were not payments to shareholders. Petitioners further claim that these employee profit sharing payments are not tax payments because they are not payments to the government. According to petitioners, the Department in the previous three reviews of this order has adjusted Mexinox's G&A expenses to include employee profit sharing expenses and explained extensively the reasons for doing so. Petitioners cite, as support for Department's treatment of these expenses, several cases including *2003-2004 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5, *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil*, 65 FR 5554, 5581 (February 4, 2000) (*Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil*), and *Notice of Final Results of Antidumping Duty Administrative Review: Porcelain-on-Steel Cookware From Mexico*, 62 FR 25908, 25914 (May 12, 1997) (*Porcelain-on-Steel Cookware from Mexico*).

Petitioners assert that the Department's reasoning in these cases is clear and addresses all of the arguments raised by Mexinox. Also, petitioner's note that the Department explained why Mexinox's payments to its employees for profit sharing should be included in Mexinox's G&A expenses and COP and CV calculations. Therefore, petitioners argue that for the final results of this review, the Department should continue to include employee profit sharing in the calculation of Mexinox's G&A expense ratio.

[18] Mexinox also cites *Notice of Final Results of Antidumping Duty Administrative Review: Color Picture Tubes from Japan*, 56 FR 37915, 37925 (September 14, 1990) and *Notice of Final Results of Antidumping Duty Administrative Review: Television Receivers, Monochrome and Color from Japan*, 54 FR 13917, 13928 (April l6, 1989).

Department's Position:

For the final results, we have continued to adjust Mexinox's G&A expenses to include employee profit sharing expenses. Consistent with our established practice, and as addressed in the four prior administrative reviews of this case, we determine that employee profit sharing is a benefit bestowed on the employees of the company and, as such, employee profit sharing expenses should be included in the calculation of COP and CV. *See 2006-2007 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 7, *2005-2006 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 8, *2004-2005 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 7, and *2003-2004 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5. *See also Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil* where the Department determined that "Because employee profit sharing is a cost of labor and it is an expense recognized within the POI, it should be included in the reported cost . . .".

Mexinox correctly pointed out that it is the Department's practice not to include dividends and income tax payments in the COP and CV calculations. However, the item at issue is employee profit sharing expenses and not a dividend distribution or income tax payment. Dividends are paid to shareholders or owners of the company while income taxes are paid to government agencies. Employees participating in a company's profit sharing benefit are neither shareholders nor government agencies. Moreover, as explained in *Notice of Final Results of Antidumping Duty Administrative Review: Porcelain-on-Steel Cookware from Mexico*, 61 FR 54616, 54620 (October 21, 1996) and the *2006-2007 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 7, employee profit sharing expenses are distinct from dividends for two reasons. First, employee profit sharing payments are payments to workers involved in the manufacturing process. Second, we determine that the right to participate in employee profit sharing does not convey any ownership rights in Mexinox. Accordingly, the Department's practice is to include employee profit sharing expenses in G&A expenses of a company. *See 2006-2007 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 7, *2005-2006 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 8, *2004-2005 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 7, and *2003-2004 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 5. *See also Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil* where the Department determined that "Because employee profit sharing is a cost of labor and it is an expense recognized within the POI, it should be included in the reported cost . . .".

Comment 8: General and Administrative Expense Ratio (Gains on Sale of Warehouse)

For the *Preliminary Results*, the Department recalculated Mexinox's reported G&A expense ratio to exclude an offset to the numerator for gains on the sale of a warehouse. *See* Preliminary Results Cost Calculation Memo at page 6 and Attachment 2. Specifically, the Department adjusted the total revenue of the asset sale with the book value of the asset to derive the net gain on this asset, and then effectively denied the net gain as an offset to the G&A expense ratio.

Mexinox contends that it is the Department's practice to include gains or losses on the routine sale of fixed assets in the reported G&A expenses, as long as it relates to the respondent's general operations (*i.e.*, manufacturing and selling merchandise) and cites to *Notice of Final Results of Antidumping Duty Administrative Review: Oil Country Tubular Goods, Other Than Drill Pipe from Korea*, 72 FR 9924 (February 27, 2007) (*Oil Country Tubular Goods, Other Than Drill Pipe from Korea*) and accompanying Issues and Decision Memorandum at Comment 6. Mexinox claims that the sale at issue here is of a warehouse which is clearly related to Mexinox's general operations and as such, the Department should not exclude this gain from the G&A expense ratio calculation.

In rebuttal, petitioners contend that the Department's denial of the gain on the sale of the warehouse as an offset to Mexinox's G&A expenses is correct and should be continued for the final results. Petitioners argue that all of the expenses associated with Mexinox's warehouses are selling expenses that Mexinox reported in section B of its questionnaire responses. *See, e.g.*, Mexinox's November 10, 2008, response to section B of the Department's antidumping duty questionnaire (BQR) at pages B-33 and B-34. Thus, Mexinox should have included gains from the sale of its warehouse in its reported home market selling expenses. Petitioners state that the Department clearly explained this practice in its Preliminary Results Cost Calculation Memo where the Department stated that it denied other income offsets to G&A expenses that were claimed by Mexinox "because the corresponding expense items are reported by Mexinox as selling activities." *See* Preliminary Results Cost Calculation Memo at page 6.

Petitioners argue that as the owner of the warehouse in question, Mexinox would have included the depreciation expenses associated with the warehouse in its home market warehousing expenses in previous administrative reviews. *See, e.g.*, Mexinox's AQR at page A-16 where Mexinox reported it sold its "old" Tlalnepantla warehouse in Mexico City prior to the POR. Thus, Mexinox has already claimed the major portion of the gain on the sale as selling expenses in previous administrative reviews where these warehouse expenses were claimed as deductions from home market prices. Petitioners maintain that Mexinox cannot be permitted to double count these home market selling expenses by claiming the warehouse expenses as a reduction to its home market prices in previous administrative reviews and then again as a reduction to its G&A expenses in this administrative review.

According to petitioners, the case cited by Mexinox (*Oil Country Tubular Goods, Other Than Drill Pipe from Korea*) makes clear that gains that may be allowed as an offset to G&A expense are limited to routine gains from the disposition of assets incurred in the ordinary course of trade. *See* Issues and Decision Memorandum for *Oil Country Tubular Goods, Other Than Drill Pipe from Korea* at page 10 (Comment 3) ("As the gain on the sale of land in this case is not related to the Husteel's general operations (*i.e.*, manufacturing and selling merchandise), we have not included it in the CEP profit calculation for the final results"). Petitioners argue that Mexinox is not in the business of buying and selling warehouses, and thus, the sale of the Tlalnepantla warehouse is not related to Mexinox's routine operations.

Petitioners advocate that the Department should treat Mexinox's reported gain on the sale of its Tlalnepantala warehouse as an offset to Mexinox's reported home market selling expenses because Mexinox has claimed the expenses it incurred to operate warehouses in Mexico as home market selling expenses. *See, e.g.*, Mexinox's BQR at B-33 and B-34. In this manner the revenue that Mexinox earned from providing selling activities could properly be treated as an offset to the expenses that Mexinox incurred to provide these selling activities.

Department's Position:

When determining if an activity is related to the general operations of the company, the Department considers the nature, significance, and relationship of that activity to the general operations of the company. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From India*, 69 FR 76916 (December 23, 2004) and accompanying Issues and Decision Memorandum at Comment 16.

It is the Department's practice to include gains or losses incurred on the routine disposition of fixed assets in the G&A expense ratio calculation. *See Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber from Canada*, 70 FR 73437 (December 12, 2005) (*Softwood Lumber from Canada*) and accompanying Issues and Decision Memorandum at Comment 8. The Department follows this practice because it is expected that a producer will periodically replace production equipment and, in doing so, will incur miscellaneous gains or losses. Replacing production equipment is a normal and necessary part of doing business. For example, the sale of an old machine that is replaced by a new machine due to modernization and replacement of equipment for changes in technology are considered routine disposition of fixed assets. *See Softwood Lumber from Canada* and accompanying Issues and Decision Memorandum at Comment 8. In all of these cases, the producer's facility continues to produce the product after the change is made and the facility remains an asset of the respondent. The costs associated with assets currently being used in production are recognized, and become part of the product cost, through depreciation expenses. *See Softwood Lumber from Canada* and accompanying Issues and Decision Memorandum at Comment 8. The Department includes such gains and losses from the routine disposal of assets in G&A expense rather than as a manufacturing expense, because the equipment, having been removed from the production process prior to the sale or disposal, is not an element of production when the disposal or sale takes place. Rather, it is simply a miscellaneous asset awaiting disposal. The gains or losses on the routine disposal or sale of assets of this type relate to the general operations of the company as a whole because they result from activities that occurred to support on-going production operations. *See Softwood Lumber from Canada* and accompanying Issues and Decision Memorandum at Comment 8. In short, it is a cost of doing business. The Department's approach for these types of gains and losses is to allocate them over the entire operations of the producer. In *PET Resin from Indonesia* and accompanying Issues and Decision Memorandum at Comment 13, the Department included the gains from the sales of the respondent's office assets in the G&A expense ratio calculations. Similarly, in *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Carbon-Quality Steel Products from Japan*, 64 FR 24329, 24356 (May 6, 1999), the Department included losses from the sales of a respondent's fixed assets used in the production of steel products in the G&A expense ratio calculation

Non-routine sales of fixed assets do not relate to the general operations of the company and the resulting gains and losses from non-routine sales of fixed assets are not included in the calculation of the G&A expenses. For example, the sale of an entire production facility is a non-routine disposition of fixed assets because it is a significant transaction, both in form and value, and the resulting gain or loss generates non-recurring income or losses that are not part of a company's normal business operations, and are unrelated to the general operation of the company. *See Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber from Canada*, 69 FR 75921 (December 20, 2004) and accompanying Issues and Decision Memorandum at Comment 9.

The sale of an entire warehouse does not support a company's general operations. Rather, it represents a strategic decision on the part of management to no longer employ the company's capital in a particular production activity. These are transactions that significantly change the operations of the company and are non-routine in nature. From a cost perspective, it would not be reasonable to assign the gain or loss on the disposition of an entire facility to the per-unit cost of manufacturing of the products that are still being produced at the respondent's other facilities, because the facility in question now has nothing to do with producing the respondent's products. In *Softwood Lumber from Canada* and accompanying Issues and Decision Memorandum at Comment 8, the Department did not include respondents gain on a sale of a sawmill and losses on the sale of production facilities in the calculation of the G&A expense ratios. Also, in *Notice of the Final Results of the Changed Circumstances Review: Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea*, 73 FR 18259 (April 3, 2008) and accompanying Issues and Decision Memorandum at Comment 8, the Department did not include the gains from the sales of the respondent's headquarter building, employee apartments, and employee health and entertainment complex in the calculation of the G&A expense ratio. Similarly, in *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Brazil*, 69 FR 76910 (December 23, 2004) and accompanying Issues and Decision Memorandum at Comment 8 the Department did not include the loss from the sale of a respondent's shrimp farm in the G&A expense ratio calculations.

Mexinox is in the business of manufacturing and selling stainless steel products and not in the business of selling warehouses. Mexinox's sale of the warehouse at issue constitutes a significant transaction, both in form and value. Moreover, the resulting gain from this transaction generated non-recurring income that is not part of the company's normal operations and is unrelated to the general operations of the company. Therefore, for the final results, we have continued to recalculate Mexinox's reported G&A expense ratio to exclude an offset to the numerator for the net gain on the sale of this warehouse.

Finally, we do not agree with petitioners that the gain from the sale of this warehouse should be allowed as an offset to Mexinox's home market selling expenses because selling expenses are incurred in connection with the sales of finished products and are recurring, whereas, the sale of this warehouse is Mexinox's strategic decision to liquidate the company's asset. *See Purified Carboxymethylcellulose from Sweden: Final Results of Antidumping Duty Administrative Review*, 78 FR 75395 and accompanying Issues and Decision Memorandum at Comment 1.

<u>Comment 9</u>: Financial Expense Ratio

ThyssenKrupp AG (TKAG) is the parent company of Mexinox. For the *Preliminary Results*, the Department adjusted the net interest expense factor by excluding the packing expenses from the COGS denominator. This adjustment was made by estimating the amount of packing expenses that are included in TKAG's COGS based on the ratio of packing expenses to COGS recorded by Mexinox. This ratio was then applied to the consolidated TKAG COGS to determine the amount of packing expenses to exclude from the TKAG's COGS denominator. *See* Preliminary Results Cost Calculation Memo at page 7 and Attachment 3. The purpose for doing so was to maintain symmetry between the COGS denominator used to calculate the net interest expense ratio and the COM to which this ratio was applied.

Mexinox contends that while the goal of attaining symmetry in the calculations is appropriate, the manner in which the adjustment for packing expenses was made in this instance was not. According to Mexinox, the underlying problem with this methodology is that it is not reasonable to assume that the ratio of packing expenses to COGS experienced by Mexinox bears even a remote relationship to the ratio of packing expenses to COGS at the consolidated TKAG level. The consolidated TKAG entity is comprised of hundreds of companies involved in activities as diverse as real estate, distribution, logistics and other services, elevator manufacturing, automotive parts manufacturing, and manufacture of carbon, alloy, and stainless steel products, machinery, and systems and components. *See* Mexinox's AQR at Attachment A-3-D. Each of these industries has very different products and associated packing. For example, Mexinox states that packing for certain automotive parts may be comprised of cardboard boxes, whereas packing for steel coils requires edge protectors, steel bands, pallets, *etc*. Therefore, Mexinox argues that it is not reasonable to apply Mexinox's packing cost experience as a stainless steel producer to the consolidated packing costs of this very diverse business group.

Mexinox points out that the Department does have a reasonable and precise alternative to achieve the same goal of symmetry. Specifically, the Department could continue to calculate the interest expense factor without adjusting the COGS denominator for packing expenses, and then apply the factor to CONNUM specific costs that includes an appropriate amount for packing expenses. This alternative methodology properly avoids the distortions inherent in the methodology used by the Department for the *Preliminary Results*, and is precise and reliable.

Mexinox claims that in anticipating the need for this adjustment, it has reported CONNUM specific average packing costs in the submitted COP data listings under the field PACK. The revised interest expense ratio can easily be applied to a total COM (TOTCOM), inclusive of packing, by using the amounts reported in this field. Mexinox maintains that the Department has an obligation to calculate dumping margins as accurately as possible and cites to *Viraj Group, Ltd. v. United States*, 162 F.Supp.2d 656, 662 (CIT 2001) ("Both this Court and the United States Court of Appeals for the Federal Circuit have consistently held that the Department is under a duty to determine dumping margins as accurately as possible.") (citing *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Federal Circuit 1995); *Allied Tube & Conduit Corp.*, 127 F.Supp.2d 207, 218 (CIT 2000)). There is no justification for using an inaccurate adjustment methodology when a precise methodology is available and easily implemented.

Mexinox requests that for the final results of this review, the Department include the packing expenses from the COGS denominator of the net interest expense factor and apply this factor to a CONNUM specific TOTCOM inclusive of packing expenses.

Petitioners contend that the methodology used by the Department is appropriate for several reasons. First, the Department's use of Mexinox's reported COP data to calculate the ratio of packing costs to cost of sales is the best and most accurate data available because it relies on data specific to the product that is subject to review and verification by the Department (*i.e.*, stainless steel sheet and strip in coils produced by Mexinox). Moreover, this ratio is based on the respondent's actual costs for the merchandise subject to review. In contrast, Mexinox's suggested methodology relies on a cost of sales denominator that covers a diverse group of products and is not focused on the merchandise under review.

Second, the methodology advocated by Mexinox suffers from the same "problems" that Mexinox attributes to the Department's methodology. Petitioners point out that it is unclear why Mexinox believes it would be appropriate to use TKAG's packing-inclusive costs to calculate a financial expense ratio when Mexinox itself claims that TKAG's packing costs do not bear a fair relationship to Mexinox's packing costs. Petitioners opine that the appropriate solution would have been for Mexinox to report a cost of sales denominator for TKAG that did not include packing expenses, but Mexinox did not do so. Petitioners maintain that Mexinox's claim that TKAG's packing costs are not comparable to Mexinox's packing costs confirms that the Department's decision to use Mexinox's costs to calculate a packing cost ratio is the most appropriate methodology.

Finally, petitioners state that the Department used the same methodology to calculate the financial expenses in this review as it is used in previous administrative reviews of Mexinox; and the same methodology was also applied to TKAG's data in the administrative reviews of stainless steel sheet and strip in coils from Germany. *See Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Germany*, 69 FR 6262 (*SSSS in Coils from Germany*) (February 10, 2004) and accompanying Issues and Decision Memorandum at Comment 3. Thus, the methodology the Department used to determine the financial expense for Mexinox's sales is reasonable and consistent with the Department's practice.

<u>Department's Position</u>:

It is the Department's normal practice to exclude a company's packing expenses from the COGS denominator used in the calculation of the net financial expense ratio. *See Notice of Final Results of Antidumping Duty Administrative Review: Certain Orange Juice from Brazil*, 74 FR 40167 (August 11, 2009) and accompanying Issues and Decision Memorandum at Comment 6. In the instant review, the actual amount of packing costs included in TKAG's consolidated COGS used to calculate Mexinox's net financial expense ratio is not on the record. The Department normally uses the actual packing expenses, but if such actual expenses are not available, the Department may estimate such expenses. *See Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Mexico*, 70 FR 25809 (May 16, 2005) and accompanying Issues and Decision Memorandum at

Comment 12. As such, for the *Preliminary Results*, we estimated the amount of packing expenses that are included in TKAG's COGS based on the ratio of packing expenses to COGS recorded by Mexinox and applied this ratio to the consolidated TKAG's COGS to determine the amount of packing expenses to be excluded from the TKAG's COGS denominator. In the eighth (*i.e.*, 2006-2007) review of this order, we used the same methodology and Mexinox did not object to the Department's methodology. *See* Memorandum to Neal M. Halper, Director, Office of Accounting, from LaVonne Clark, Senior Accountant, Cost of Production, Constructed Value, and Further Manufacturing Calculation Adjustments for the Preliminary Results - ThyssenKrupp Mexinox S.A. de C.V. and Ken-Mac Metals, A-201-822 (July 30, 2008) at page 2 and Attachment 2 (unchanged for the final results).

We also used the same methodology for the seventh (*i.e.*, 2005-2006) review of this order and Mexinox objected. *See 2005-2006 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 12. We stated in *2005-2006 S4 in Coils from Mexico Final Results* that Mexinox continues to claim that due to the large number of entities that make up TKAG's structure, the packing expenses included in TKAG's consolidated COGS denominator could not be isolated. We also explained that using a ratio of Mexinox's packing cost to its cost of sales and applying the ratio to TKAG's cost of sales to estimate TKAG's packing cost is a reasonable approximation of TKAG's packing expenses, absent any quantification of TKAG's actual experience. We note that this methodology was also used in other past reviews under this order. *See*, *e.g.*, *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Mexico*, 69 FR 6259 (February 10, 2004) and accompanying Issues and Decision Memorandum at Comment 15 and *2003-2004 S4 in Coils from Mexico Final Results* and accompanying Issues and Decision Memorandum at Comment 7. Moreover, as noted by petitioners, we used the same methodology in another antidumping case involving the same parent company to estimate the packing costs included in the parent company's consolidated COGS. *See SSSS in Coils from Germany* and accompanying Issues and Decision Memorandum at Comment 3.

TKAG's consolidated packing expenses are unknown to the Department because the relevant data are not on the record of this review. As such, any conclusion about whether the Department's methodology or the respondent's proposed methodology is superior is inherently speculative. Out of the members that comprise the TKAG group, Mexinox's packing costs are the only actual costs of the TKAG group's members available on the record. Absent any quantification of TKAG's actual packing cost experience, or demonstration by substantial evidence that Mexinox's packing costs are aberrational, it is reasonable to use the actual packing costs of a member of a group as a proxy for the average packing costs in the group.

In fact, to approximate the TKAG group's average packing expense, as a percentage of COGS, the Department used the method that is more closely related to the TKAG group's packing experience than the methodology advocated by Mexinox. As Mexinox argues, the TKAG group is a large consolidated group of companies that produce many different products, sold in many different markets. The Department's approach of using Mexinox's company-wide packing experience as a percentage of COGS, relies upon the company-wide experience of one of the TKAG group companies that produces several different products sold in several different markets. In contrast, Mexinox's proposed methodology relies on the packing experience for only a subset of Mexinox's company-wide experience, *i.e.*, the packing cost for only the merchandise under consideration sold by Mexinox in the United States and Mexican markets. As a result, Mexinox's methodology relies upon a smaller universe of products and markets than those reflected in Mexinox's company-wide experience utilized under the Department's methodology. In other words, Mexinox relies upon partial packing expenses of a company that are even further away from those reflected in the TKAG group's financial statements than the Department attempted to approximate.

Moreover, Mexinox's proposed methodology of including TKAG's consolidated packing expenses in the denominator of the financial expense ratio and applying it to a cost which includes Mexinox's packing expenses also assumes that TKAG's and Mexinox's packing are comparable. Finally, packing expenses are not CONNUM-specific, but sale-specific. Consequently, as a general matter, Mexinox's proposed methodology could result in different costs for products within a single CONNUM where different sales of a single product have different packing costs. Although we recognize that in the context of a particular case a respondent could mitigate this flaw by presenting additional data, using an alternative methodology is a better approach because it does not contain this methodological flaw and, thus, obviates the need to remedy this deficiency altogether. Therefore, for the final results, we have continued to estimate the amount of packing expenses that are included in TKAG's COGS based on the ratio of packing expenses to COGS recorded by Mexinox and applied this ratio to the consolidated TKAG COGS to determine the amount of packing expenses to exclude from the TKAG's COGS denominator.

Finally, we recognize that for determining packing expenses, the most precise methodology is to quantify the amount of actual packing expenses included in TKAG's consolidated COGS. As such, in future reviews, we intend to require Mexinox to provide the actual packing expenses involved in TKAG's consolidated COGS.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the positions set forth above. If these recommendations are accepted, we will publish the final results and the final weighted average dumping margin for Mexinox in the *Federal Register*.

Agree____________ Disagree____________

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Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

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Date