

April 28, 2011

MEMORANDUM TO: Paul Piquado
Acting Deputy Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the Five-Year (“Sunset”) Review of the Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils from Mexico

Summary:

We have analyzed the case brief and the rebuttal comments of interested parties in the full second sunset review of the antidumping duty order on stainless steel sheet and strip (“SSSS”) in coils from Mexico and recommend that you approve the positions we have developed in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues for which we received a case brief and rebuttal brief from interested parties:

1. Likelihood of the Continuation of Dumping
2. Magnitude of the Margin Likely to Prevail

Background:

On December 27, 2010, the Department of Commerce (“Department”) published a notice of preliminary results of the full sunset review of the antidumping duty order on SSSS in coils from Mexico pursuant to section 751(c) of the Tariff Act of 1930, as amended (“the Act”). *See Stainless Steel Sheet and Strip in Coils From Mexico: Preliminary Results of the Five-Year (“Sunset”) Review of the Antidumping Duty Order*, 75 FR 81221 (December 27, 2010) (“*Preliminary Results*”). In those *Preliminary Results*, we provided interested parties an opportunity to comment on our preliminary results and to request a hearing. On January 23, 2011, Mexinox timely filed a request for a hearing. The Department received a case brief from the respondent, ThyssenKrupp Mexinox S.A. de C.V., and its affiliated U.S. importer Mexinox USA, Inc. (collectively referred to as “Mexinox”) on February 15, 2011. On February 18, 2011, the Department published the amended final results of the 2008-2009 administrative review, in which it calculated a weighted-average dumping margin of 12.13 percent for Mexinox. *See Stainless Steel Sheet and Strip in Coils From Mexico: Notice of Amended Final Results of Antidumping Duty Administrative Review*, 76 FR 9542 (February 18, 2011). On February 22, 2011, the Department received a rebuttal brief from the

domestic interested parties¹; also on that date, the Department invited parties to submit comments addressing the issue of whether dumping is likely to continue or recur, if the antidumping duty order is revoked, in light of the amended final results of the 2008-2009 administrative review.² On February 23, 2011, Mexinox withdrew its January 23, 2011, request for a hearing. On February 28, 2011, both Mexinox and the domestic interested parties filed comments on the information with respect to the 2008-2009 administrative review, and Mexinox and the domestic interested parties filed rebuttal comments on this issue on March 4, 2011.

Discussion of the Issues:

In accordance with section 751(c)(1) of the Act, the Department is conducting this sunset review to determine whether revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping. Drawing on the guidance provided in the legislative history accompanying the Uruguay Round Agreements Act, specifically the *Statement of Administrative Action accompanying the Uruguay Round Agreements Act* (“SAA”)³, the House Rep. No. 103-826, pt. 1 (1994), and the Senate Report, S. Rep. No. 103-412 (1994), the Department normally determines that revocation of an antidumping duty order is likely to lead to continuation or recurrence of dumping where (a) dumping continued at any level above *de minimis* after the issuance of the order; (b) imports of the subject merchandise ceased after the issuance of the order, or (c) dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly. See *Granular Polytetrafluoroethylene Resin from Italy: Final Results of Expedited Sunset Review of the Antidumping Duty Order*, 76 FR 12939 (March 9, 2011). In addition, pursuant to section 752(c)(1)(B) of the Act, the Department considers the quantity of imports of the subject merchandise for the period before and after the issuance of the order.⁴

In its *Preliminary Results*, the Department found that dumping of the subject merchandise continued at levels above *de minimis* after the issuance of the order, including throughout the five years preceding this sunset review. The Department also found imports from Mexico were significantly below pre-order levels in the most recent years covered by this sunset review and determined that the order has imposed a discipline on exports. We address the comments of the interested parties below.

1. Likelihood of the Continuation of Dumping

Respondent Comments:

Mexinox argues that the Department erred in its preliminary determination that dumping is likely to continue or recur upon revocation of the order. See Mexinox’s February 15, 2011 case brief at 1.

¹ AK Steel Corporation; Allegheny Ludlum Corporation; North American Stainless; the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial Service Workers International Union; United Auto Workers (“UAW”) Local 3303; and UAW Local 4104 (collectively, “domestic interested parties”).

² See Memorandum from Richard Weible to the File dated February 22, 2011, entitled “Opportunity to Comment on the Amended Final Results of the 2008-2009 Administrative Review on Stainless Steel Sheet and Strip in Coils from Mexico.”

³ SAA, H.R. Doc. No. 103-316, Vol. 1 (1994), at 838, reprinted in 1994 U.S.C.C.A.N. 3773.

⁴ See *Policies Regarding the Conduct of Five-year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin*, 63 FR 18871 (April 16, 1998) (“*Policy Bulletin*”).

Mexinox contends that while it was dumping in the original investigation, it has eliminated dumping and maintained and even increased its market share during the life of the order. *Id.*

Mexinox acknowledges that the statute directs the Department to consider weighted-average margins determined in the investigation and subsequent reviews, and the volume of imports of subject merchandise for the period before and after the issuance of the order. *See* Mexinox’s February 15, 2011 case brief at 1. However, citing to the SAA, the respondent claims that “declining (or no) dumping margins accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is less likely to continue or recur if the order is revoked.” *Id.* at 2, citing the SAA at 889-90. Furthermore, citing the Department’s *Policy Bulletin*, the respondent claims that if dumping was eliminated and import volumes remained steady or increased, the Department normally will determine that dumping is not likely to continue or recur if the order is revoked. *Id.*

A. Comments Regarding Whether Dumping Continued at Any Level Above De Minimis After the Issuance of the Order

First, Mexinox argues that the Department erred in its preliminary determination with respect to the elimination of dumping in the administrative reviews during the period covered by the sunset review. Mexinox claims that the prior published margins are unlawful because of the use of zeroing in such reviews, and that Mexinox recalculated its margins from the prior periods of review using an alternative methodology and that nobody identified any flaws in these revised calculations. *See* Mexinox’s February 15, 2011 case brief at 3.

Second, Mexinox claims that the issue is not whether the Department has chosen to adopt a specific World Trade Organization (“WTO”) settlement report. *See* Mexinox’s February 15, 2011 case brief at 3. Rather, Mexinox believes that the Department’s calculation methodology is unlawful because the WTO Agreement forbids the use of zeroing and because the Department is obliged to interpret U.S. law, whenever possible, consistent with international obligations. *See* Mexinox’s February 15, 2011 case brief at 4. Citing to U.S. Court of International Trade (“CIT”) cases and the Department’s regulations, Mexinox argues that the Department would violate U.S. law by relying on margins of dumping that have been calculated using the Department’s methodology irrespective of whether the Department has determined to implement a particular WTO report. *Id.*

Third, Mexinox claims that the Department has determined to implement certain WTO rulings and published a proposal under Section 123 for changing its methodology. *See* Mexinox’s February 15, 2011 case brief at 4. Furthermore, Mexinox claims that the Department’s methodology is not required by the statute and that the proposal says the statute does not require the Department to rely on dumping margins when such reliance would render the determination inconsistent with the United States’ international obligations. *Id.* at 5. Mexinox concludes that the Department must recalculate the administrative review margins using Mexinox’s alternative methodology of recalculating margins without zeroing, so that it can properly consider whether dumping is likely to continue or recur upon revocation. *Id.* Mexinox argues that all the necessary information is on the record. *Id.* at 6. Furthermore, Mexinox believes that the Department can eliminate its methodology at any time outside of the statutorily mandated Section 123 process because the methodology is based on an unwritten practice rather than a written regulation. *Id.*

Fourth, Mexinox argues that the 2008-2009 administrative review results only reinforce Mexinox's position that dumping is not likely to continue or recur in this case. *See* Mexinox's February 28, 2011 comments on the 2008-2009 Amended Final Results at 2. Mexinox argues that the amended final results of 12.13 percent are under appeal and not final. *Id.* at 3. Mexinox argues that in addition to the issue of offsetting non-dumped sales, there are several methodological errors, which once corrected, would result in a zero margin. *Id.* Mexinox provided the Department what it claims are necessary revisions to the calculation program in Attachment 1-A. *Id.* at 4. Mexinox also submitted Attachment 2-A, in which Mexinox recalculated the margins from 2008-2009 administrative review making several methodological changes, such as providing certain offsets, allowing contemporaneous sales matching within the 90/60 day window, modifying the date of sale from the invoice date to a contract date for certain sales, modifying the methodology for calculating indirect selling expenses, modifying the cost recovery methodology, modifying the selling, general, and administrative expense ratio for purposes of the "major input" analysis. Mexinox argues that once all of these methodological changes are made it would obtain a negative margin. *See* Mexinox's February 28, 2011 comments on the 2008-2009 Amended Final Results at 4.

B. Comments Regarding Whether Import Volumes for the Subject Merchandise Declined Significantly after the Issuance of the Order

With respect to the Department's preliminary determination regarding declining volumes, without disputing that the volumes declined, Mexinox believes the Department's dismissal of market share data and its exclusive reliance on absolute import quantities is contrary to both the SAA and the *Policy Bulletin*. *See* Mexinox's February 15, 2011 case brief at 7. Mexinox argues that its market share increased or remained steady. *Id.* Mexinox states that the Department is wrong to rely on absolute volumes rather than market share and that the SAA makes clear that "declining (or no) dumping margins accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share... and that dumping is less likely to continue or recur if the order were revoked." *Id.* citing the SAA at 889-90. In addition, Mexinox cites to the Department's *Policy Bulletin* to argue that the relevant basis for evaluating the significance of absolute volume figures is to assess them in terms of market share. They base their argument on the belief that the *Policy Bulletin* states the Department will normally consider companies' relative market shares and that parties should provide such information to the Department. *Id.* at 8, citing the *Policy Bulletin* at 18872.

Additionally, Mexinox argues that only relying on market share as a secondary factor to be considered is an approach that can lead to erroneous results. *See* Mexinox's February 15, 2011 case brief at 9. Mexinox argues there is a fundamental difference between situations in which import volumes increase and there is a corresponding increase in market share and when there is a decline in market share. Mexinox believes that both the SAA and the *Policy Bulletin* make clear that an analysis of import volumes must include consideration of what those volumes mean in the context of the market. *Id.* at 9. In Mexinox's view, an absolute decline in export volumes may only signify that market consumption has declined rather than an inability to compete in the market without dumping. *Id.* Mexinox claims it is absurd to expect a respondent to increase market share during economic downturns in order to qualify for a negative likelihood determination. Citing to a steep decline in demand for SSSS in coils in the United States in 2009, Mexinox disputes the

Department's interpretation of such a decline and claims that the decline says more about the state of the SSSS in coils market in 2009 than the disciplining effects of the order. *Id.* at 10.

Finally, Mexinox argues that the market share data placed on the record by Mexinox is not "inherently imprecise" because it is an estimate. *See* Mexinox's February 15, 2011 case brief at 10. Mexinox argues there is no actual number available and that in fact its approach parallels the methodology used by the International Trade Commission ("ITC") in its analysis and that the Department has indicated no flaws in the data other than to say it is imprecise. *Id.* Mexinox also disagrees with the Department's analysis that Mexinox is likely to dump its products in order to increase volumes and maintain production capacity. Mexinox argues that there is no record evidence that U.S. prices are likely to fall and that it is incorrect for the Department to draw conclusions that Mexinox's export prices have somehow put downward pressure on U.S. market prices in 2009 based on simplistic data points involving volumes and average unit values ("AUVs") of all subject imports. *Id.* at 11. Furthermore, Mexinox disagrees with the use of AUVs based on an averaging of values across product lines as not providing a meaningful measure of product-specific price levels. *Id.* at 12. Mexinox argues that it is unable to increase volumes to utilize its production capacity and argues that the real reason why market prices have declined is because of the recession. *Id.*

Domestic Interested Parties' Rebuttal Comments:

A. Comments Regarding Whether Dumping Continued at Any Level Above De Minimis After the Issuance of the Order

The domestic interested parties dispute Mexinox's claims that the dumping margins calculated in administrative reviews during the sunset review period were "unlawfully calculated" and cannot be relied upon. *See* the domestic interested parties' February 23, 2011, rebuttal comments at 4. The domestic interested parties believe that Mexinox has based its arguments on a recalculation of margins actually found by the Department and that such recalculations are contrary to statute and Departmental practice. *Id.* Citing to the statute, the domestic interested parties note that the Department is required to consider "the weighted average dumping margins determined in the investigation and subsequent reviews." *Id.* at 5. Citing to the actual margins in the sixth through tenth reviews, the domestic interested parties note that the margins have risen from 1.16 percent to 12.13 percent. *Id.* They further argue that the actual dumping margins, and not margins that are based on speculation, are what the Department is required to consider. *Id.* at 6. Citing to other sunset reviews, they claim the Department has made it clear that it is inappropriate for the Department to consider margins other than the published margins calculated by the Department. *Id.* at 6, citing cases including *Brake Rotor from the People's Republic of China; Notice of Final Results of Expedited Second Sunset Review of Antidumping Duty Order*, 73 FR 1319 (January 8, 2008) ("*Brake Rotors*"). The domestic interested parties believe that the Department's consistent practice, based upon the statute, is to rely on margins actually calculated and not modify them in the sunset context. *Id.* at 7.

The domestic interested parties also claim that Mexinox's attempts to link the Department's decision in this sunset review with its recent proposal to alter its calculation methodology in administrative reviews are misguided as the proposal is subject to comment and has not been finally

adopted or implemented. *Id.* Furthermore, the domestic interested parties note that contrary to Mexinox's assertions on the lawfulness of the Department's calculation methodology, such use is legal under U.S. law and that any WTO Panel Reports are not self-executing. *Id.* at 8.

With respect to Mexinox's assertions on the Department's statements in the proposed rule that it is not required to rely on margins when such margins are inconsistent with international obligations, the domestic interested parties note that there are no other margins on which to rely upon. *See* the domestic interested parties' February 23, 2011, rebuttal comments at 9. Furthermore, they also claim that even if the Department were to modify its calculation methodology, it is not clear that zero margins would occur, in light of other issues that may arise with any recalculation. *Id.* at 10. The domestic interested parties therefore note that it would be premature to claim that a methodological change will necessarily eliminate margins. *Id.* Furthermore, they also state that the proposal suggests that any final rule would be prospective in nature and apply only for reviews in which preliminary results are due more than 60 days after publication of the final rule. *Id.*

The domestic interested parties also claim that the 2007-2008 administrative review results would be positive, even if there were any non-dumped sales and offsets for such sales were granted, and claim that Mexinox's recalculation is based on an alleged ministerial error unrelated to non-dumped sales. *See* the domestic interested parties' February 23, 2011, rebuttal comments at 11. Furthermore, they also argue that when the 2008-2009 administrative review is examined, the rate of 12.13 percent does not show a zero margin and there is no evidence on the record to show that would be the case. *Id.* at 12. The domestic interested parties argue that there is no evidence that Mexinox does not have the "declining (or no) margin" scenario envisaged by the SAA which would indicate that dumping would be less likely to occur in the absence of an order. *Id.* Indeed, citing to the *Policy Bulletin*, the domestic interested parties argue that if dumping occurred at any margin above *de minimis*, the Department will normally determine revocation is inappropriate. Given the increasing dumping margins in reviews covered by this sunset period, the domestic interested parties believe the Department properly determined that dumping would continue upon revocation. *Id.* at 13.

In their rebuttal concerning the results of the 2008-2009 administrative review, the domestic interested parties request that the new data submitted by Mexinox in its initial comments should be stricken from the record as being untimely filed. *See* the domestic interested parties' rebuttal comments dated March 4, 2011, at 2. If the Department does not reject the data, the domestic interested parties claim that the results from the 2008-2009 administrative review are the tenth consecutive period in which an affirmative margin has been calculated and published. *Id.* at 4. They reiterate that it is these actual published margins that must be used in the Department's sunset review analysis. *Id.* Moreover, with respect to Mexinox's claims on errors in the amended final results, the domestic interested parties cite to CIT and U.S. Court of Appeals for the Federal Circuit (Federal Circuit) decisions in which the courts determined that the results of reviews are subject to a legal presumption of correctness. *Id.* at 5. Therefore, the referral of this case to a NAFTA panel does not meet the burden of proving incorrectness of the finding. *Id.*

The domestic interested parties argue that U.S. law permitted the Department's calculation methodology, including the treatment of non-dumped transactions, at the time each review final result was published, and therefore may not be changed in a collateral sunset review. *See* the

domestic interested parties' rebuttal comments dated March 4, 2011, at 7. Furthermore, the domestic interested parties cite to Departmental precedent to underline their belief that the statute specifically instructs the Department to consider the actual calculated dumping margins from the investigation and reviews, without modification in the sunset context. *Id.* at 8. The domestic interested parties believe the published margins are the only valid predictors of Mexinox's actual behavior. *Id.* at 9. The domestic interested parties also claim that there is no legal or logical reason for the Department to recalculate final margins as the Department has not determined all the details of its new methodology in the recent proposal. *Id.* at 10. To do so would be premature, and it would be speculative to claim that granting offsets for non-dumped transactions will result in the complete elimination of margins. *Id.* The domestic interested parties claim any recalculation of rates would be hard to accomplish given that the Department would have to conduct a complete redetermination in each of the reviews in question, and that the Department does not have the time or resources to do so in the context of this sunset review. *Id.*

The domestic interested parties argue that the results of the 2008-2009 administrative review show a continuing trend towards increased margins in the periods of review covered by this sunset review. *See* the domestic interested parties' comments on the 2008-2009 Amended Final Results, dated February 28, 2011, at 3. The domestic interested parties claim that Mexinox did not place on the record any evidence which demonstrates that granting offsets for non-dumped sales alone, would lead to a zero margin in the 2008-2009 review. *Id.* The domestic interested parties believe that Mexinox has failed to undermine the preliminary finding that dumping by Mexinox is likely to continue or recur without the discipline of the order in place. *Id.* at 5. The domestic interested parties also note that the evidence from the 2008-2009 administrative review confirms that Mexinox is dumping in order to achieve its current volume and market share. *Id.* The domestic interested parties reiterate their belief that the 12.13 percent margin is a sign of increasing margins and that the Department should report the 30.69 percent margin from the investigation to the ITC as it is the only margin showing Mexinox's true commercial behavior as it was based on the absence of the discipline of the order in place. *Id.* at 6.

B. Comments Regarding Whether Import Volumes for the Subject Merchandise Declined Significantly after the Issuance of the Order

With respect to the arguments concerning a decline in import volumes, the domestic interested parties concur with the preliminary results and argue that the statute expressly requires the Department to consider "the volume of imports of the subject merchandise." *See* the domestic interested parties' February 23, 2011, rebuttal comments at 13. The domestic interested parties indicate that Mexinox's reliance on the *SAA* and the *Policy Bulletin* to substantiate its claim that market share is the relevant factor in assessing the likelihood of dumping is misplaced. *Id.* at 14. The domestic interested parties cite to the statutory requirements for the Department to consider the weighted-average dumping margins determined in the original investigation and subsequent reviews and the volume of imports for the periods before and after issuance of the order in making its likelihood determination. *Id.* The domestic interested parties cite to the recent decline in the volume of exports from Mexinox and increasing margins to demonstrate their belief in the beneficial effects of the discipline of the order. *Id.* The domestic interested parties agree with the Department's conclusions that the market share data is "inherently imprecise" and that Mexinox has not demonstrated that its numbers represent actual market shares. Furthermore, these data, in the

domestic interested parties' view, shows that Mexinox's market share has fluctuated rather than increased or been maintained. *Id.* at 15. In fact, the domestic interested parties believe that any market share has been maintained through dumping. *Id.* They further claim that with increasing margins revocation is not appropriate regardless of Mexinox's market share as, according to domestic interested parties, any above *de minimis* dumping margins mean revocation is inappropriate. *Id.* at 16.

The domestic interested parties also concur with the Department's preliminary conclusion that the declining prices with a steady or increasing market share are consistent with the likelihood of increased dumping, especially in a high fixed cost industry like SSSS in coils. *Id.* at 17. The domestic interested parties therefore believe that the Department's conclusion that Mexinox is likely to dump its product in order to increase volumes and maintain production capacity is both reasonable and supported by the record evidence. *Id.*

Department's Position:

As part of its determination of whether revocation of an antidumping order is likely to lead to the continuation or recurrence of dumping, the Department will examine whether: a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable; b) imports of the subject merchandise ceased after issuance of the order or the suspension agreement, as applicable; or c) dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined. In this particular case, the record demonstrates that dumping has continued at a level above *de minimis* and the import volumes for the subject merchandise declined after the issuance of the order.

A. Dumping Continued at Any Level Above De Minimis After the Issuance of the Order

First, with respect to Mexinox's claim that the Department should rely upon dumping margins calculated by Mexinox instead of the dumping margins that the Department calculated and published in its prior determinations, we disagree. Section 752(c)(1) of the Act provides that the Department "shall consider . . . the weighted average dumping margins determined in the investigation and subsequent reviews." The Department's regulations provide: "Even where the Department conducts a full sunset review, only under the most extraordinary circumstances will the Secretary rely on a countervailing duty rate or a dumping margin other than those it calculated and published in its prior determinations . . ." 19 C.F.R. 351.218 (e)(2)(i). Consistent with the statute, the Department has considered the margins calculated and published in the five most recently completed administrative reviews and the margin from the investigation, as modified by the *Section 129 Determination*.⁵ Mexinox did not argue that this case presents "extraordinary circumstances."

We also disagree with Mexinox's characterization of prior Department determinations as "unlawful." Although Mexinox challenged the final results of prior reviews before NAFTA binational panels, unless or until there is a final judgment invalidating these results, by statute, these results are presumed to be correct. *See Shandong Huarong Gen. Group Corp. v. United States*, 122

⁵ *See Implementation of the Findings of the WTO Dispute Settlement Panel and Appellate Body in United States-Final Anti-Dumping Measures on Stainless Steel from Mexico: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act*, 74 FR 19527 (April 29, 2009) ("Section 129 Determination").

F. Supp. 2d 143, 148 (CIT 2000) (“By statute, Commerce’s administrative review determinations are presumed to be correct and the burden of proving otherwise rests exclusively upon the party challenging such decision.” (citing 28 U.S.C. 2639a(1))). Because the results of the administrative reviews are presumed to be correct for a court action appealing them, they must also be presumed to be correct in the context of a sunset review.

The Department has never stated that its methodology is unlawful and the courts have repeatedly sustained the methodology under U.S. law despite the same arguments that Mexinox advances here. *See, e.g., SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011). Furthermore, the Department’s transparent process of conducting administrative reviews allows for multiple layers of review by the courts and absent a final and conclusive court decision invalidating the final results, the final results of each review, as published and without recalculation, stand as the results the Department relies upon in its conduct of sunset reviews. *See Brake Rotors*, and accompanying Issues and Decision Memorandum at 15-16. Moreover, second-guessing and recalculating the final results of multiple prior administrative reviews and reassessing every argument that was made in prior segments within the statutory deadlines for conducting sunset reviews under section 751(c)(5) of the Act would be a waste of the Department’s limited resources and an exercise in administrative futility. In our view, to the extent that parties disagree with a determination in a particular administrative review, they have adequate judicial remedy under 28 USC 1516a(a)(2)(A) and (B)(iii). A sunset review proceeding is not an opportunity to reargue the issues that were addressed in prior administrative reviews.

Second, we disagree with Mexinox’s argument that it is irrelevant whether the United States implemented a particular WTO report. The Federal Circuit repeatedly sustained the Department’s methodology as a reasonable interpretation of the antidumping statute and “WTO decisions do not change the United States law unless implemented pursuant to an express statutory scheme.” *SKF USA Inc. v. United States*, 630 F.3d at 1375. The WTO panel and Appellate Body reports, and any findings therein, are not self-executing.

Third, the Department’s recent proposal under section 123 does not establish that the final results of prior reviews are unlawful under the U.S. law. To the contrary, the Department made a proposal to modify its practice pursuant to the express statutory scheme for responding to WTO reports. Section 123 provides that no regulation or practice may be amended, rescinded or otherwise modified unless and until, the final rule or other modification has been published in the *Federal Register*. *See* 19 U.S.C. 3533(g)(1)(F). No such final rule or modification was published in the *Federal Register*. The Department will not prejudice the implementation of any final rule with respect to its dumping calculations when the process under section 123 has not yet been completed. As the Department has stated earlier, the antidumping statute and its regulations require the Department to consider the margins published in the *Federal Register*. We find that this case does not present extraordinary circumstances that would warrant a departure from a well-established rule codified in the Department’s regulations to rely on previously calculated and published weighted-average dumping margins. In each administrative review, Mexinox’s margins are above *de minimis*.

With respect to the 2008-2009 administrative review, Mexinox claims that if the Department corrects certain alleged methodological errors, and grants offsets for non-dumped transactions, the

margin for that review would be negative in nature. Mexinox argues that the following methodological changes should be made: (1) providing offsets for non-dumped transactions; (2) allowing contemporaneous sales matching within the 90/60 day window; (3) modifying the date of sale from the invoice date to a contract date for certain sales; (4) modifying the methodology for calculating indirect selling expenses; (5) modifying the cost recovery methodology; (6) modifying selling, general, and administrative expense ratio for purposes of the “major input” analysis. Accordingly, we do not understand Mexinox to argue that granting offsets for non-dumped transactions alone would result in a *de minimis* margin in the 2008-2009 administrative review. Moreover, it is clear from Attachment A of Mexinox’s March 4, 2011, response that even if we accepted Mexinox’s own calculations, which we do not, the margin calculated with offsets for non-dumped transactions, and no other revisions, would still be above *de minimis*. See Mexinox’s February 28, 2011, comments on the 2008-2009 Amended Final Results at Attachment 2-A. Accordingly, even aside from the fact that WTO reports are not self-executing, the record demonstrates that even under Mexinox’s own calculations with offsets for non-dumped sales, the margin in the most recent review is above *de minimis*. In other words, with respect to 2008-2009 administrative review, Mexinox seeks to modify numerous methodologies that have nothing to do with the WTO reports that Mexinox cites.

Finally, the Department disagrees with Mexinox’s assertion that the amended final results are not final because they have been appealed to a NAFTA panel. As an initial matter, Mexinox does not cite any legal authority that stands for the proposition that the final results of an administrative review lack administrative finality because an interested party requested a judicial review. Mexinox’s argument is contrary to U.S. law. Under U.S. law, unless and until there is a final judgment invalidating these results, by statute, these results are presumed to be correct. See *Shandong Huarong Gen. Group Corp. v. Untied States*, 122 F. Supp. 2d at 148 (“By statute, Commerce’s administrative review determinations are presumed to be correct and the burden of proving otherwise rests exclusively upon the party challenging such decision.” (citing 28 U.S.C. 2639a(1))). See also *American Silicon Technologies v. United States*, 273 F. Supp. 2d 1342, 1346 (CIT 2003) (where the court upheld the Department’s use as an adverse facts available rate of a margin calculated for another company during a prior administrative review, though that rate was subject to an appeal at the time); *D&L Supply Co. v. United States*, 113 F.3d 1220, 1224 (Fed. Cir. 1997) (where the court held that although the Department cannot rely upon a prior margin that has been conclusively invalidated by the courts, a margin that has not been overturned is presumed accurate); and *Carpenter Tech. Corp. v. United States*, 474 F. Supp. 2d 1347 (CIT 2007) (where the court upheld the Department’s decision to use prior zero or *de minimis* margins in support of partial revocation of an order, though those margins were subject to appeals at the time). Therefore, the above *de minimis* dumping margin determined in the 2008-2009 administrative review is presumed correct despite the pending NAFTA review. The Department’s practice is to recognize that the existence of a margin at any level above *de minimis* over the five year review period indicates there is still a likelihood of continued or recurred dumping. As we explained earlier, pursuant to the antidumping statute and the Department’s regulations, the Department must consider dumping margins that were calculated and published by the Department. Such margins are above *de minimis*, and support the Department’s determination that dumping is likely to continue or recur if the order is revoked.

B. Import Volumes for the Subject Merchandise Declined Significantly after the Issuance of the Order

Even if we were to conclude that Mexinox eliminated dumping in the administrative reviews at issue, the Department would find that dumping is likely to continue or recur if the order is revoked. Even where dumping is eliminated after the issuance of an order, where import volumes for the subject merchandise declined significantly, the Department considers this to be evidence that the existence of the order is disciplining the occurrence of dumping. *See Granular Polytetrafluoroethylene Resin from Italy: Final Results of Expedited Sunset Review of the Antidumping Duty Order*, 76 FR 12939. Accordingly, the Department could find a likelihood of dumping based on the significant decline in imports volumes over the period of the sunset review, even if a respondent completely eliminated dumping.

Mexinox does not dispute the factual finding that the import volumes of subject merchandise declined significantly from the pre-order levels. However, citing the *SAA* and the *Policy Bulletin*, Mexinox claims that the Department does not need to consider the significant decline in its import volumes because, by having increased or steady market share, Mexinox has proven that it is able to sell in the United States without dumping. We disagree. The plain language of the statute instructs the Department to consider the volume of imports of subject merchandise for the periods before and after the issuance of the antidumping duty order. The statute makes no mention of market share, but requires the Department to consider import volumes.

This is not to say that market share is irrelevant. The Department agrees with Mexinox that market share is a relevant consideration and is considered by the Department in sunset reviews, but not in the manner suggested by Mexinox. Declining or (no) dumping margins, accompanied by steady or increasing imports, may indicate that exporters do not have to dump to maintain their market share. To determine that dumping is not likely to continue or recur, the Department considers *both* the import volumes and market share. Mexinox was unable to cite to a single determination by the Department where an order was revoked solely because a company's market share remained steady or increased, but the volumes declined significantly after the issuance of the order. In *Shrimp from Vietnam*, the Department found that the respondents' argument that they maintained a stable or increasing market share "does not outweigh the likelihood analysis based on the existence of margins and decline of imports." *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam; Final Results of the First Five-year "Sunset" Review of the Antidumping Duty Order*, 75 FR 75965 (December 7, 2010) ("*Shrimp Vietnam Sunset*") and accompanying Issues and Decision Memorandum, at Comment 1. Moreover, Mexinox's own estimated market share data contradicts Mexinox's assertion that its market share increased and remained steady, because the market share fluctuated during the sunset period as compared to the pre-order levels. *See* Mexinox's July 2, 2010, submission at Exhibit 2.A. Therefore, we do not find the market share data to provide a basis for determining in this case that there is no likelihood of a continuation or recurrence of dumping were the antidumping duty order to be revoked.

Separately, even if for the sake of argument one were to assume that the Department calculated *de minimis* margins in prior reviews, the Department would still draw the same conclusion and find a likelihood of dumping based on the significant decline in actual imports volumes over the period of the sunset review. Mexinox's arguments with respect to market share are not persuasive in light of

the significantly declining import volumes in recent years. As the statute specifies, the Department is to examine the volume of imports and while market share is an issue that the Department may consider in its analysis, it is not the determining factor as Mexinox would seem to indicate. This is especially true when the absolute volumes are not steady or increasing. If anything, to the extent that, as Mexinox contends, the U.S. market for the subject merchandise is shrinking in terms of demand, this circumstance tends to increase the downward pressure on prices that increases the likelihood of dumping goods in the United States. This observation is confirmed by the results of the 2008-2009 administrative review, which saw a noted increase in the level of dumping.

Additionally, with respect to the validity of the market share estimate Mexinox put forward, the Department addresses this issue in the “Magnitude of the Margin Likely to Prevail” section below. With respect to Mexinox’s claims that there is no record evidence that U.S. prices are likely to fall and that it is incorrect for the Department to draw conclusions that Mexinox’s export prices have somehow put downward pressure on U.S. market prices in 2009 based on simplistic data points involving volumes and average unit values, the Department finds that these claims mischaracterize our preliminary findings. The source of the pricing pressure in the U.S. market is irrelevant. The point is that downward price pressures in the market increase the likelihood of dumping. While we agree with Mexinox that average unit values represent a broad spectrum of SSSS in coils products, it is undisputed that the subject merchandise is part of the average unit values. Furthermore, the average unit values are based on the same public source⁶ used to examine the levels of imports and as such is a valid source for the Department’s analysis. If average unit values fell while the market share increased in a declining market, as claimed by Mexinox, there is a “downward pressure” on U.S. market prices, which is further confirmed by increased dumping in the 2007-2008 and 2008-2009 administrative reviews.

Finally, with respect to Mexinox’s proclaimed surprise regarding our decision to consider the 2008-2009 amended final results in the context of this sunset review, we believe that the amended final results are directly relevant to our inquiry as to whether dumping continued at any level above *de minimis*. These results are the tenth administrative review (or 2008-2009) results, and as sunset reviews are conducted on a five-year basis, it is appropriate to consider these results during the course of this ongoing review, if such results are final. This is consistent with Departmental practice in other full sunset reviews. *See Shrimp Vietnam Sunset*, 75 FR 75965 and accompanying Issues and Decisions Memorandum at footnote 15. An exporter’s dumping behavior in the most recent administrative review is a relevant consideration for purposes of determining whether dumping is likely to continue or recur if the order is revoked. At the time of the *Preliminary Results* of this sunset review, there were no final results from the 2008-2009 administrative review available. However, once the final results became available, the Department invited the parties to comment in light of the amended final results of the 2008-2009 administrative review on whether dumping is likely to continue or recur if the order is revoked. Both domestic interested parties and Mexinox submitted their comments. With respect to the domestic interested parties’ objection to Mexinox’s comments on the final results of 2008-2009 administrative review and their request to reject the new factual information submitted by Mexinox as untimely, we disagree. Mexinox could not have placed this factual information on the record earlier, because the final results of the 2008-

⁶ See data from ITC dataweb referenced in Memorandum to the File from David Cordell entitled “Import Volumes for the Preliminary Results of the Full Second Sunset Review of the Antidumping Duty Order on Certain Stainless Steel Sheet and Strip (“SSSS”) in Coils from Mexico,” dated December 20, 2010.

2009 administrative review became final after the deadline for parties to submit new factual information in this sunset review. We specifically invited Mexinox and domestic interested parties to comment on the final results of that administrative review. We will not preclude Mexinox from submitting what it deems to be relevant factual information for our determination under these circumstances.

2. Magnitude of the Margin Likely to Prevail

Respondent's Comments:

Respondent argues that the Department is not required to report an antidumping margin for Mexinox to the ITC if the Department concludes that Mexinox is not likely to sell subject merchandise at less than fair value. *See* Mexinox's February 15, 2011, comments at 13. Furthermore, if the Department were to find that dumping is likely to continue or recur, Mexinox believes the margin to be reported to the ITC should be zero percent consistent with the claim that Mexinox has eliminated dumping while maintaining market share. *Id.*

Mexinox acknowledges that the margin of dumping in the investigation is normally provided to the ITC as it reflects the behavior of exporters/producers without the discipline of the order in place but believes the *SAA* allows for a more recently calculated margin to be reported in certain circumstances. *See* Mexinox's February 15, 2011, comments at 13. Mexinox cites to an example of where dumping margins have declined and imports have remained steady or increased as a situation in which the Department may conclude that exporters are likely to continue dumping at a lower margin. *Id.* citing the *SAA* at 890-891. Mexinox believes the original margin is outdated, and that no margin from any of the reviews, even with zeroing, is close to the 30.69 percent calculated rate from the investigation.

Mexinox believes it would be arbitrary and capricious for the Department to adopt previous margins that were published in the *Federal Register*. Moreover, Mexinox believes that there is nothing that prohibits the Department from reconsidering previously calculated margins in a sunset review, especially when such margins are unlawful and the information to determine correct margins is on the record. *See* Mexinox's February 15, 2011, comments at 14 and 15. Mexinox believes that a failure to recalculate such margins would be inconsistent with the United States' WTO obligations and would constitute reversible legal error under U.S. law. *Id.* at 15. Mexinox also states that the all-other's rate is irrelevant as there are no other Mexican exporters subject to such rate. *Id.* Additionally, Mexinox argues that the Department cannot reject its market share claims based on the claim that it is an estimate and may be unreliable. *Id.* Rather, Mexinox claims it has provided such information as identified in the *Policy Bulletin* and that the Department, consistent with the *SAA* and the *Policy Bulletin*, should recognize that the greatly reduced margins and steady market share reflect Mexinox's likely behavior in the absence of the order. *Id.* at 16.

Mexinox also argues that the *Policy Bulletin* is clear that the company's market share is the relevant factor to consider when analyzing whether import volumes remained steady or increased. *See* Mexinox's February 15, 2011 comments, at 16. Accordingly, Mexinox believes that the *SAA*, *Policy Bulletin*, and Departmental precedent, require the reporting of a more recent margin. *Id.* at

17. Citing to *Corrosion-Resistant Carbon Steel Flat Products from Canada*⁷, Mexinox argues that it is clear that its market share has remained steady and all of the criterion for the reporting of an updated margin to the ITC have been met. *Id.* Mexinox also states that such a margin must be reported as zero. *Id.*

Domestic Interested Parties' Rebuttal Comments:

The domestic interested parties contend that the Department correctly found that Mexinox did not qualify for an exception to the Department's normal practice of basing the likely margin on the rate found in the original investigation. *See* the domestic interested parties' February 23, 2011, rebuttal comments at 18. The Department's policy, according to the domestic interested parties, is to report a more recently calculated margin for a respondent only where dumping margins declined or were eliminated and import volumes remained steady or increased. *Id.*, citing the *Policy Bulletin* at 18873. Despite Mexinox's claims that its margins have declined to zero and that its market share has increased over the period of the sunset review, the domestic interested parties, citing to the Department's *Preliminary Results* Issues and Decision Memorandum, argue that the margins have in fact increased from 1.16 percent to 10.13 {sic} percent⁸ and that the Department has no authority to recalculate the dumping margins in the context of a sunset review. *Id.* at 19.

With respect to Mexinox's claims that the Department should examine its relative market share rather than the declining import volumes, the domestic interested parties concur that the data provided by Mexinox is inherently imprecise, and therefore the Department properly concluded that Mexinox's imports have not remained steady or increased. *See* the domestic interested parties' February 23, 2011, rebuttal comments at 20. Thus, the domestic interested parties believe the Department was correct to conclude that the decline in absolute volumes and in average unit values is an important factor in its analysis.

With respect to the age of the investigation rate, the domestic interested parties note that the Department's policy is to normally select a margin from the investigation "because that is the only calculated rate that reflects the behavior of exporters ... without the discipline of an order" in place. *Id.*, citing the *SAA*. Noting that the record shows calculated and published margins did not decline after the order and that import volumes did not remain steady, the domestic interested parties assert that neither criterion needed for the Department not to rely on the original investigation rate have been satisfied. *See* the domestic interested parties' February 23, 2011, rebuttal comments at 20. Therefore, in the domestic interested parties' view, the only rate that can be reported is the 30.69 percent rate, noted in the *Preliminary Results*. *Id.* at 21.

In conclusion, the domestic interested parties believe that the recalculation of dumping margins in this sunset review is not a viable or legal option. *See* the domestic interested parties' February 23, 2011, rebuttal comments at 21. It is not legal, in their view, because the statute requires the use of calculated margins from the investigation or reviews. *Id.* With respect to the margin to be used for

⁷ *See Corrosion-Resistant Carbon Steel Flat Products From Canada; Final Results of Full Sunset Review of Antidumping Duty Order*, 65 FR 47379 (August 2, 2000) ("*Corrosion-Resistant Carbon Steel Flat Products from Canada*").

⁸ The domestic interested parties incorrectly cite a margin of 10.13 percent, when 4.48 percent is the margin referenced in the *Preliminary Results* and accompanying Issues and Decision Memorandum.

the magnitude of dumping, the domestic interested parties claim that the Department has no reason to calculate an alternative margin and that the *SAA* contemplates using margins as published. In terms of the volumes of imports, the domestic interested parties note that the *Policy Bulletin* states the Department will normally consider the company's relative market share, but it does not mean that the Department cannot consider volume. *Id.* at 22. The domestic interested parties believe the Department has given its reasons why volume declines are relevant given the declining consumption and pricing data and that the market share data, in the domestic interested parties' view, do not in any case demonstrate a steady or increasing market share. *Id.*

Department's Position:

In a sunset review, the Department will normally provide to the ITC the margin that was determined in the final determination of the original investigation. *See* section 752(c)(3) of the Act; *Eveready Battery Co., Inc. v. United States*, 77 F. Supp. 2d 1327, 1333 (CIT 1999). For companies not specifically investigated, or for companies that did not begin shipping until after the order was issued, the Department normally will provide a margin based on the "all others" rate from the investigation. The Department's preference for selecting a margin from the investigation is based on the fact that it is the only calculated rate that reflects the behavior of manufactures, producers, and exporters without the discipline of an order or suspension agreement in place. In certain instances, the Department may, in response to arguments from an interested party, provide the ITC a more recently calculated margin for a particular company. In this sunset review, we will report the margin from the original investigation, as modified by the *Section 129 Determination*.

With respect to Mexinox's arguments that the Department is not required to report any margin, the Department disagrees. Consistent with the Department's earlier determination that there is a likelihood of dumping recurring or continuing if the order were revoked, and consistent with the statutory obligations under section 753(c)(3) of the Act, it is incumbent upon the Department to report the magnitude of dumping to the ITC.

In this case, the final determination rate, as amended by the *Section 129 Determination*, is 30.69 percent. While Mexinox claims the Department should report an updated margin and should recalculate the margins from the administrative reviews in the context of this sunset review and report such margins instead of margins determined in the original investigation, the Department disagrees with Mexinox's claims. We also note that the statute is clear what margins may be reported to the ITC as the magnitude of the margin of dumping to prevail. It provides that the Department "shall normally choose a margin that was determined under section 735 of this title or under subsection (a) or (b)(1) of section 751." *See* section 752(c)(3) of the Act. All published margins pursuant to sections 735 or 751(a) or (b)(1) of the Act in this proceeding are above *de minimis*.

Even if the margins in all reviews were zero, the import volumes must have remained steady or increased in order to justify reporting a different rate to the ITC. As part of that consideration, the Department normally considers both the absolute volumes and the company's relative market share. As the record shows, imports from Mexico have declined since 2007, and in recent years are below the level of the base pre-order years. The Department has examined the market share arguments made by Mexinox and has concluded, as it did in the *Preliminary Results*, that the market share data

is imprecise and that it is not as conclusive as Mexinox purports. Market share, at the very least, is a subjective measurement and an imprecise estimate and when taken into account with the actual import volumes, the Department does not agree with Mexinox that a rate other than the investigation rate should be reported to the ITC. While Mexinox claims that its methodology parallels the method used by the ITC in calculating market share, the Department, unlike the ITC, is examining market share in this context to evaluate the relevance of the investigation rate to its determination of the margin likely to prevail if the order were revoked. The Department also notes that, in reviewing these data, Mexinox's claimed market share has fluctuated rather than remained steady or increased over the last five years when compared to pre-order levels. Mexinox's claim that the investigation rate is outdated is unpersuasive in this analysis, as it is the most recent rate that demonstrates Mexinox's behavior without the discipline of the order, and as the Department has consistently held that the investigation rate is the rate that is normally reported for the reasons outlined above.

In conclusion, we find it appropriate to provide the ITC with the amended final determination margins from the LTFV investigation, as amended by the *Section 129 Determination*. These amended margins were determined without zeroing, which obviates Mexinox's objections to the zeroing methodology in other administrative segments. Although administrative reviews have been conducted, imports from Mexico are significantly below pre-order levels in the most recent years covered by this sunset review. These results indicate that the order has imposed a discipline on exports. Apart from the fact that imports have varied greatly since the imposition of the order, the existence of continued dumping margins throughout the life of the order demonstrates that if the order is revoked, it is likely that Mexinox would continue dumping and selling in significant volumes. Thus, the final determination rates from the LTFV investigation (as amended by the *Section 129 Determination*) reflect the behavior of manufacturers, producers, and exporters without the discipline of an order in place.

Section 752(c)(2) of the Act, instructs, "if good cause is shown, the administering authority shall also consider such other price, cost, market, or economic factors as it deems relevant." Furthermore, 19 CFR 351.218(e)(2)(iii) states "the Secretary will consider other factors under section 752(b)(2) (CVD) or section 752(c)(2) (AD) of the Act if the Secretary determines that good cause to consider such other factors exists." Furthermore, 19 CFR 351.218(e)(2)(ii) states that "even where the Department conducts a full sunset review, only under the most extraordinary circumstances will the Secretary rely on a countervailing duty rate or a dumping margin other than those it calculated and published in its prior determinations..."

The Department's position is that there are no extraordinary circumstances present in the instant review that persuade the Department to depart from its well-established procedures which are based upon both the statute and its regulations. Therefore, the Department will report to the ITC the margins listed in the "Final Results of Review" below.

Final Results of Review

After taking into consideration the circumstances of this case, including the history of margins and import volumes, as well as potentially relevant information presented by the respondent and the

domestic interested parties, we determine that revocation of the antidumping duty order on SSSS in coils from Mexico is likely to lead to the continuation of dumping at the margins listed below:

Manufacturer/producer/exporter	Weighted-average margin
Mexinox	30.69 percent
All Others	30.69 percent

Recommendation

Based on our analysis and consideration of the case and rebuttal briefs received, we recommend adopting all of the above positions. If these recommendations are accepted, we will notify the ITC of our determination and publish the final results of this sunset review in the *Federal Register*.

Agree _____

Disagree _____

Paul Piquado
Acting Deputy Assistant Secretary
for Import Administration

Date