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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the 2004-2005 Administrative Review of Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review.

Summary

We have analyzed the case and rebuttal briefs of the interested parties in the 2004-2005 administrative review of the antidumping duty order on stainless steel sheet and strip (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 positions described in the "Discussion of the Issues" section of this 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

Adjustments to Normal Value

Comment 2: Rental Income Received from Home Market Warehouse

Comment 3: Level of Trade

Adjustments to United States Price

Comment 4: U.S. Indirect Selling Expenses

Comment 5: Mexico-Incurred Indirect Selling Expenses

Comment 6: U.S. Inventory Carrying Costs

Cost of Production

Comment 7: General and Administrative Expenses

Comment 8: Financial Expense Calculation

Margin Calculations

Comment 9: Circumstance-of-Sale Adjustment

Comment 10: Offsetting for U.S. Sales that Exceed Normal Value

Background

On June 21, 2006, we published in the Federal Register the preliminary results of the administrative review of stainless steel sheet and strip in coils from Mexico for the period July 1, 2004, through June 30, 2005. See Stainless Steel Sheet and Strip in Coils from Mexico; Preliminary Results of Antidumping Duty Administrative Review, 71 FR 35618 (June 21, 2006) (Preliminary Results).

This review covers one manufacturer/exporter of stainless steel sheet and strip in coils, ThyssenKrupp Mexinox S.A. de C.V. (Mexinox). We invited parties to comment on our Preliminary Results of this review. On July 7, 2006, we received a joint request from the respondent, Mexinox, along with Allegheny Ludlum, North American Stainless, United Auto Workers Local 3303, Zanesville Armco Independent Organization Inc., and the United Steelworkers of America, AFL-CIO/CLC (collectively, petitioners) with respect to a change in the briefing schedule, to file case briefs (and any requests for a hearing) and reply briefs. We agreed to both parties' requests and granted an extension for the briefing period. On August 3, 2006, we received case briefs from Mexinox and petitioners; we received rebuttal briefs from Mexinox and petitioners on August 10, 2006.

Discussion of the Issues

Comment 1: Clerical Errors

Mexinox claims the Department made three clerical errors in the preliminary margin calculation. First, Mexinox argues the Department incorrectly merged product-specific cost test results with home-market sales data and overwrote certain fields related to the transaction-specific sales data. Second, Mexinox argues that the Department improperly omitted Mexinox's U.S. affiliated reseller Ken-Mac, Inc's. (Ken-Mac) alloy surcharge (KASURCHU) from its margin calculation. Mexinox argues this alloy surcharge should have been included as an adjustment to gross unit price (GRSUPRU). Third, Mexinox argues that the Department erred in combining the commission and constructed export price (CEP) offsets because it limited the combined commission and CEP offset to an amount less than total reported home-market indirect selling expenses (ISEs).

Petitioners did not comment on the aforementioned errors, but argued the Department made an error by not converting Ken-Mac rebates (KREBATEU) from a per-pound basis to a per-hundredweight (CWT) basis in the Margin Program. However, Mexinox filed an objection to this claim, stating it was not presented in petitioners' original case brief, but rather in petitioners' rebuttal brief. Citing 19 CFR 351.309(d)(2), Mexinox maintains this new argument was raised in an untimely manner which prevented it the opportunity to submit additional comments on the matter. See Letter from Craig A. Lewis to the Department, dated August 15, 2006.

Department Position: With respect to the first three allegations raised by Mexinox, we agree that these are clerical errors and have corrected them for the final results. Specifically, we corrected the gross unit price to include the adjustment for Ken-Mac's alloy surcharge (KASURCHU). This is consistent with Department practice to account for such adjustments in the calculation of gross unit price. See Stainless Steel Bar from France; Preliminary Results of Antidumping Duty Administrative Review, 71 FR 3463, 3464 (January 23, 2006), remaining unchanged in Stainless Steel Bar from France; Final Results of Antidumping Duty Administrative Review, 71 FR 30873 (May 31, 2006). We also corrected the computer program to prevent transaction-specific home-market data from being overwritten by product-specific cost test results and to allow the combined commission and CEP offsets to equal the full amount of home-market ISEs.

Although by commenting on variable KREBATEU in the rebuttal brief the petitioners did not comply with 19 CFR 351.309(d)(2), we find their comment is essentially a ministerial error allegation. In accordance with 19 CFR 351.224(e), "the Secretary will analyze any comments received and, if appropriate, correct any significant ministerial error by amending the preliminary determination, or correct any ministerial error by amending the final determination, or the final results of review (whichever is applicable)." The Department may correct clerical, methodological and substantiative errors, as well as errors in judgement, if an interested party raises them before the Department issues its final results and adequately proves the need for requested corrections. See Timken U.S. Corp. v. United States, 434 F.3d 1345, 1354-55 (Fed. Cir. 2006). From our analysis of petitioners' comment, we find petitioners alleged this error before the Department issued its final results and adequately proved the need for the requested correction. The Department calculates CEP on the basis of various adjustments made to "starting prices" as required in section 772(b) of the Tariff Act of 1930, as amended (the Tariff Act), and 19 CFR 351.102. Starting prices are net of any price adjustment that is reasonably attributed to the like product and include such things as rebates, which are a factor in determining the price actually paid by the customer. Correction of the alleged error would result in a more accurate dumping margin because the variable in question would be properly converted in the same manner as other rebates used in our calculation of U.S. price. Therefore, consistent with revisions made to the starting price with respect to Ken-Mac's alloy surcharge, we also have converted Ken-Mac's rebate field KREBATEU to appropriately reflect U.S. price.

Adjustments to Normal Value

Comment 2: Rental Income Received from Home Market Warehouse

Petitioners claim that the Department should apply rental income received by Mexinox from its Tlalnepantla warehouse as an offset to home-market warehousing charges. Petitioners highlight that Mexinox owns the Tlalnepantla warehouse, but uses only a portion of it, while it rents the remainder of the warehouse to two other companies. Petitioners argue that Mexinox's reported warehouse costs should reflect the net costs (i.e., net of reimbursements) incurred to operate the warehouse, and urge the Department to allocate the rental income Mexinox received over the reported sales quantity shipped through the Tlalnepantla warehouse.

Mexinox rebuts petitioners' claims that the Department should offset the net costs incurred at the Tlalnepantla warehouse by the income received from renting a portion of the Tlalnepantla warehouse. Mexinox explains that the revenue and expense amounts at issue relate to the portion of the Tlalnepantla warehouse not used by Mexinox for distribution operations. As a result, Mexinox included these amounts in its general and administrative (G&A) expenses calculation and argues the Department has accepted Mexinox's reporting of the income and expenses at issue as part of G&A in previous reviews. See Mexinox's Rebuttal Brief at 4 and 5. Mexinox asserts its reporting of these expenses and income are no different from prior reviews and maintains that petitioners provide no new factual or legal information why the Department should change its practice for these final results. As such, Mexinox contends the Department should continue to accept Mexinox's rental income and expenses as reported for the Tlalnepantla warehouse.

Department Position: We have included the expenses and income related to the rented portion of Mexinox's Tlalnepantla warehouse as reported in G&A for these final results. Consistent with previous segments of this proceeding, the Department does not require G&A expenses to relate only to the production of subject merchandise, but rather considers those expenses related to the general operations of the company as a whole. See Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 70 FR 73444 (December 12, 2005) (POR5 Final Results) and accompanying Issues and Decision Memorandum at Comment 5. In the instant review, the record indicates that Mexinox did not fully utilize its Tlalnepantla warehouse for its own operations and that in order to recover some of the costs incurred at this underutilized warehouse, Mexinox rented the unused portion to other companies. Thus, we have continued to include the expenses and income related to the rented portion of the warehouse as reported in G&A for these final results as we have done in the previous administrative review. See POR5 Final Results. We find that expenses related to Mexinox's own operations have been properly included in Mexinox's reported warehousing expense.

Comment 3: Level of Trade

Petitioners argue a CEP offset should not have been granted in the Preliminary Results, claiming there was no evidence on the record demonstrating significant differences in Mexinox's level of trade (LOT) between the home and U.S. markets. Petitioners state that the Department's LOT analysis was unsupported because it did not cite any quantitative or qualitative factors to substantiate Mexinox's claims. Petitioners note the only data reflecting the expenses related to Mexinox's selling activities are those included in the breakdown of indirect selling expenses (ISEs) allocated across domestic, U.S., or third-country markets. Petitioners assert this ISE breakdown does not provide adequate support for Mexinox's claimed differences in LOT. Further, referring to the Statement of Administrative Action (SAA), H.R. Doc. No. 103-316, vol. 1 (1994) at 829, 831, petitioners argue that Mexinox's statements provided in its questionnaire responses are not sufficient in themselves to determine a CEP offset. See Petitioners' Case Brief at 7 and 8. Rather, petitioners argue the respondent must prove if actual differences occur in selling activities between markets, and petitioners contend Mexinox failed to do this in the current review.

Specifically, petitioners state the Department's analysis finds technical assistance as being performed in the home market, and not for the CEP transaction. See Petitioners' Case Brief at 5. However, petitioners point out that Mexinox did not report technical services expenses in its home-market sales listing because Mexinox claimed it was unable to identify expenses related to technical services on behalf of home-market sales. See Petitioners' Case Brief at 8. Referring to Mexinox's Second Supplemental Questionnaire Response, dated May 23, 2006 (SQR2) petitioners argue that Mexinox's response actually indicates Mexinox USA received support from Mexinox with respect to technical service provided to U.S. customers. See Petitioners' Case Brief at 8 and 9.

Petitioners add that information with respect to Mexinox's selling activities as submitted on the record is in fact contradictory. For example, petitioners argue Mexinox's claims alleging differences in the performance of sample analysis for home-market and U.S. market sales are contradictory. Petitioners again refer to Mexinox's SQR2 which stated sample analysis "was carried out by technical personnel at Mexinox" while also stating "Mexinox USA is not involved in the actual analysis of the product. . .[it] is the point of contact . . . for the U.S. customer in connection with the analysis." See Petitioners' Case Brief at 9. Petitioners argue that these statements indicate that Mexinox actually performs the analysis and then transmits the results to Mexinox USA, the latter of which finally communicates these results to the final customer. Given this, petitioners maintain that sample analysis is in fact performed by Mexinox in San Luis Potosi, Mexico for its U.S. sales. See Petitioners' Case Brief at 9. Petitioners make similar arguments disputing Mexinox's reported performance of customer communication, inventory maintenance, and freight services. See Petitioners' Case Brief at 9 through 11. Petitioners therefore urge the Department to revise its LOT analysis for these final results, maintaining there exists a single LOT for both markets, and there is no evidence to grant a CEP offset.

Mexinox rebuts petitioners' claims, arguing that the Department's LOT determination is correct and supported by the record. Mexinox contends that the Department has appropriately found there to be one LOT in the home market that is at a more advanced stage of marketing and distribution than the LOT of Mexinox's CEP sales. Mexinox argues that petitioners misrepresent the data on the record and base their arguments on a misunderstanding of the Department's LOT analysis and therefore focus on the wrong sales transaction (i.e., the sale from Mexinox USA to the unaffiliated customer, and not the sale from Mexinox to Mexinox USA). Citing to the Preliminary Results, Mexinox explains ". . . the CEP LOT is defined as the level of the constructed sale from the exporter to the importer." See Mexinox's Rebuttal Brief at 7. Mexinox emphasizes that in accordance with the Department's established practice and consistent with previous reviews of this case, the CEP LOT is the constructed transaction between the respondent exporter (i.e., Mexinox) and its affiliated importer (i.e., Mexinox USA). See Mexinox's Rebuttal Brief at 8.

Mexinox claims it has submitted sufficient explanation of its selling activities on the record and provided documentation, including corporate accounting records, flowcharts and tables detailing the activities performed for each type of customer across both markets. Mexinox states the evidence presented demonstrates the following: 1) there is one LOT in the Mexican home market; 2) the LOT in the home market is more advanced in the chain of distribution and involves many selling functions performed at a high degree of intensity; and 3) the LOT for CEP sales made between Mexinox and Mexinox USA reflects a mere transfer of inventory, because substantially all selling functions are performed downstream by Mexinox USA. See Mexinox's Rebuttal Brief at 10.

In response to petitioners' claims alleging inconsistencies in Mexinox's responses, particularly with technical assistance and sample analysis, Mexinox clarifies that its statements were made with respect to the CEP transaction and not the downstream sale. For example, regarding the performance of sample analysis "by technical personnel at Mexinox," Mexinox affirms this in fact refers to support of the downstream sale by Mexinox USA to the U.S. customer, and not the CEP transaction between Mexinox and Mexinox USA. See Mexinox's Rebuttal Brief at 11. Mexinox argues that petitioners' allegations regarding customer communication, inventory maintenance, and freight services were also based on review of the incorrect sales transaction.

Finally, Mexinox claims the circumstances for this POR have not significantly changed relative to prior reviews, and asserts the essential facts of the issue remain the same as do the company's selling and distribution practices for both markets. See Mexinox's Rebuttal Brief at 9. Mexinox emphasizes that petitioners have raised these same arguments in previous reviews, adding the facts relating to its reported LOTs have been repeatedly examined (and verified on occasion) by the Department in previous reviews. Mexinox notes the Department should again find the LOT in the home market to be more advanced than the U.S. market LOT and continue to grant a CEP offset for these final results. See Mexinox's Rebuttal Brief at 12.

Department Position: We have made no changes to our LOT analysis for these final results and continue to find that Mexinox is entitled to a CEP offset adjustment with respect to all sales in the United States. Section 773(a)(7)(A) of the Tariff Act states that normal value (NV) can be increased or decreased if the difference in LOT involves the performance of different selling activities, and is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different LOTs in the country in which NV is determined. Also, 19 CFR 351.412(c)(2) states that the Secretary will determine that sales are made at different LOTs if they are made at different marketing stages (or their equivalent). To make this determination, the Department reviews factors such as selling functions or services, classes of customer, and the level of selling expenses for each type of sale. See, e.g., Notice of Final Results of the Eleventh Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 71 FR 7513 (February 13, 2006) and accompanying Issues and Decision Memorandum at Comment 6.

For the home market, Mexinox identified two channels of distribution which were direct shipments (i.e., products produced to order) and sales from inventory. For these final results, we have evaluated factors such as selling functions or services, customer classes, and the level of selling expenses for home market sales. Consistent with all previous reviews of this case, we find there is only one LOT in the home market. Within each of these channels of distribution, Mexinox made sales to affiliated and unaffiliated distributors/retailers and end-users. See Mexinox's Section A Questionnaire Response, dated September 29, 2005 (AQR) at A-3 and A-22 through A-23. We reviewed the performance intensity of all selling functions with respect to channel of distribution and customer category. Only a few reported functions exhibited differences between channel and customer, including inventory maintenance/just-in-time performance, credit collection, further processing, low volume orders and shipment of small packages. See AQR at Attachment A-4-C. Of these functions, we find further processing is not a selling function, but rather a manufacturer operation. Also, low volume orders and shipment of small packages are variations of the same activity, and our analysis of Mexinox's home market sales listing reveals small volume transactions were made in each customer channel. With regard to Mexinox's affiliated home market reseller, Mexinox Trading, we found only credit collection differed in comparison to Mexinox's performance of this function to unaffiliated distributors/retailers. See Mexinox's First Supplemental Questionnaire Response, dated March 8, 2006 (SQR1) at Attachment A-18. As a result, we have also found no evidence on the record demonstrating any significant differences between the services provided to Mexinox Trading as opposed to those provided to other home market customers and determine there is only one LOT in the home market, the NV LOT.

Regarding the U.S. market, Mexinox's affiliated entity, Mexinox USA, acts as the importer of record for all four channels of distribution for the U.S. market and performs most of the selling functions for Mexinox's U.S. customers. These CEP sales consist of merchandise produced to order that was sold directly to unaffiliated U.S. customers, stock sales of finished goods held at the factory in San Luis Potosi, Mexico to unaffiliated U.S. customers, sales made through Mexinox USA's inventory and downstream sales made through an affiliated reseller, Ken-Mac Metals, Inc. We compared the selling activities performed in each channel and found certain selling functions (e.g., just-in-time performance, warranty services and freight/delivery arrangements) were performed by Mexinox/Mexinox USA or Ken-Mac to the unaffiliated U.S. customer at the same relative level of intensity in all channels of distribution. See Mexinox's AQR at Attachment A-4-C.

Then we compared the NV LOT to the CEP LOT. The CEP LOT is based on the selling activities associated with the transaction between Mexinox and its affiliated importer, Mexinox USA, whereas the NV LOT is based on the selling activities associated with the transactions between Mexinox and its customers in the home market. Our analysis indicates the selling functions performed for home market customers are either performed at a higher degree of intensity, or are in addition to selling functions Mexinox performs for Mexinox USA.
The record does not support petitioners' claims regarding technical assistance, sample analysis, customer communication, inventory maintenance, and freight services. Rather, we find the record shows performance of these selling activities occurs in support of the downstream sale by

Mexinox USA, and not the CEP transaction between Mexinox and Mexinox USA. We conclude that Mexinox performed additional selling activities (e.g., prototypes and trial lots, just-in-time performance, sales calls and visits and warranty services) in the home market, which were not a part of the CEP transaction. See Mexinox's AQR at A-31 through A-35 and Attachments A-4-A through A-4-C; see also Mexinox's SQR1 at Attachment A-18. Based on the foregoing, we conclude that the NV LOT is at a more advanced stage than the CEP LOT.

We determine that home market sales are at a different LOT than the CEP sales and that the difference in LOT between NV and CEP affects price comparability. Since there was only one LOT in the home market, there were no data available to determine the existence of a pattern of price differences. Therefore we do not have information available to compensate for this difference in LOT between NV and CEP sales, and as such we have applied a CEP offset to NV for comparison purposes pursuant to section 773(a)(7)(B) of the Tariff Act.

Comment 4: U.S. Indirect Selling Expenses

Petitioners contend that Mexinox's selling expenses are understated and should be revised. Petitioners maintain the Department should not have accepted the revenue Mexinox USA received from its affiliates ThyssenKrupp Nirosta North America (TKNNA) and ThyssenKrupp Acciai Speciali Terni USA (TKAST USA) as an offset to ISEs. Petitioners state this income relates to selling and administrative services performed by Mexinox USA on behalf of these two affiliates.

Petitoners argue the Department should treat this revenue from affiliates in the same manner as certain other service expenses which were also made in connection with an affiliated party.[1] Petitioners assert these other expenses were excluded from Mexinox's ISEs numerator and maintain that the income Mexinox USA received from TKNNA and TKAST USA should not be recognized as an offset to the ISE numerator. See Petitioners' Case Brief at 14. Petitioners therefore urge the Department to revise its U.S. ISE calculation by not including as an offset the income Mexinox USA received from TKNNA and TKAST USA.

Mexinox disagrees with petitioners and asserts its U.S. ISEs have been correctly reported, inclusive of the income offset. Respondent argues the selling expenses incurred on behalf of these affiliates are embedded in the total reported ISEs and therefore the Department should accept the associated income offset. Mexinox claims the methodology advocated by petitioners would actually result in an overstated ISE ratio for Mexinox USA, as the company would be required to absorb the ISEs of non-subject merchandise (i.e., merchandise of German or Italian origin) in addition to expenses incurred on its own sales.

Mexinox maintains the service fees charged to TKNNA and TKAST USA appropriately reflect the expenses incurred by Mexinox USA to perform these services and are realized in the normal

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[1] The precise nature of these other services is proprietary.

course of business in the financial statements of both TKNNA and TKAST USA. See Mexinox's Case Brief at 18. Mexinox therefore argues the most accurate way to account for these non-subject selling expenses is to offset them with the income received from the affiliates at issue. Specifically, with respect to TKNNA, Mexinox claims the service fee is accepted as a selling expense in the simultaneous review of S4 in coils from Germany in which TKNNA is a respondent. Mexinox therefore maintains that if the Department disregards the reported income amount corresponding to TKNNA's expense, it would double-count actual selling expenses. Mexinox also notes that although TKAST USA is not currently subject to Department review for this period, the Department should be consistent in its treatment of these expenses for both entities. Mexinox concludes that by accepting the revenue as an offset, the Department properly accounted for these selling expenses incurred by Mexinox USA in the Preliminary Results which, Mexinox insists, should be unchanged for these final results.

Department Position: The Department has not accepted the income offset reported in conjunction with the TKNNA and TKAST USA service agreements. Rather, we have recalculated the indirect selling expense ratio reported for Mexinox USA as described below. The Tariff Act does not outline a particular methodology for calculating indirect selling expenses; however, our recalculation is in accordance with the Department's normal practice, which is to calculate indirect selling expenses based on expenses incurred and sales revenue recognized (or cost of goods sold) 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. See also Extended Rubber Thread from Malaysia: Final Results of Antidumping Duty Administrative Review, 64 FR 12967 (March 16, 1999) and accompanying Issues and Decision Memorandum at Comment 4.

The evidence presented on the record of the current review indicates Mexinox USA performed administrative functions on behalf of TKNNA and TKAST USA. The service contracts detail the service charges negotiated and agreed upon by each affiliated entity (TKNNA and TKAST USA) and Mexinox USA. See Mexinox's SQR1 at A-19-A and A-19-B. Additionally, Mexinox provided Mexinox USA's accounting ledger showing the charges that were made with respect to TKNNA, which were then reflected in TKNNA's own trial balance. See Mexinox's SQR2 at Attachment C-38-A-1. Mexinox also showed TKNNA's total expenses in its statement of operation and retained earnings in which the amounts tied to TKNNA's financial statements. See Mexinox's SQR2 at Attachment C-38-A-2. Mexinox submitted similar data in relation to TKAST USA which show Mexinox USA's charges to TKAST USA tied to TKAST USA's trial balance. See Mexinox's SQR2 at Attachment C-38-B.

We find TKNNA's and TKAST USA's payments to Mexinox USA were based on the charges outlined in the service contracts and legitimately relate to the selling and administrative services provided. However, of the total indirect selling expenses incurred by Mexinox USA during the POR, Mexinox USA was 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. It is not appropriate to offset Mexinox USA's ISEs for revenue from the affiliates TKNNA and TKAST USA because there is no evidence on the record to demonstrate that this revenue represents the actual expenses incurred by Mexinox USA. Therefore, we have added the income received from TKNNA and TKAST USA back to Mexinox USA's reported indirect selling expenses, i.e., we have reversed the income offset that Mexinox USA included in the numerator of its indirect selling expense ratio.

We then allocated Mexinox USA's total ISEs incurred to the sales revenue and the service revenue by adding the service revenue to the denominator of the ISE ratio. The service revenue includes income earned by Mexinox USA from performing these administrative services on behalf of TKNNA and TKAST USA. With respect to Mexinox's argument that disregarding the income offset would double-count expenses between the instant review and the companion review of S4 in coils from Germany, we disagree. By Mexinox's own admission, it is unable to segregate the indirect expenses it incurred selling subject merchandise, from expenses incurred as a result of services provided for TKNNA. By our including both the service revenue and the sales revenue in the denominator of the ISE ratio, we have apportioned Mexinox USA's total indirect selling between the two activities and eliminated any double-counting of the same expenses in the two concurrent reviews. For more information regarding the recalculation of Mexinox USA's ISE ratio, see Memorandum to the File, from Maryanne Burke, Case Analyst "Analysis of Data Submitted by ThyssenKrupp Mexinox S.A. de C.V (Mexinox) for the Final Results of Stainless Steel Sheet and Strip in Coils from Mexico (A-201-822)" (Final Analysis Memorandum), dated December 18, 2006.

Furthermore, with respect to petitioners' argument concerning the other service expenses of a proprietary nature, we find no evidence these expenses are related to economic activity in the United States. Accordingly, and consistent with previous reviews of this case, we have excluded these expenses from our calculation of U.S. ISEs. See Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Administrative Review, 70 FR 3677 (January 26, 2005) (POR4 Final Results) and accompanying Issues and Decision Memorandum at Comment 7.

Comment 5: Mexico-Incurred Indirect Selling Expenses

Petitioners urge the Department to recalculate ISEs incurred in Mexico (DINDIRSU and INDIRSH) to reflect a single ratio for all sales, regardless of market. Petitioners maintain that Mexinox incorrectly attributed a smaller portion of its ISE ratio to U.S. sales, arguing many of Mexinox's selling functions, such as sample analysis, providing prototypes and trial lots, customer communications, inventory maintenance and providing warranty services were performed by Mexinox in San Luis Potosi, Mexico for its sales to Mexinox USA. Petitioners assert that although direct expenses can be market specific, indirect expenses must be the same across all sales and therefore the Department should apply a single ratio in both markets. Moreover, the distinction between direct and indirect sales is based on whether the expense varies with the level of sales, or if it is possible to tie expenses to particular sales.

Mexinox states the allocation of Mexican ISEs based on its separate accounts and cost centers is in accordance with the Department's standard policy and practice. In addition, Mexinox maintains that its ISE ratio calculations accurately reflect the differences in the selling expenses and levels of selling activity associated with sales in each market. Mexinox states it carries out only minimal and routine selling functions in Mexico that are related to the U.S. sales to Mexinox USA. In comparison, all the selling activities associated with home market and third country sales are carried out in Mexico. Finally, Mexinox highlights that the Department does not encourage respondents to ignore market-specific differences in accounting for ISEs, and argues the Department should once again reject this argument as has been done in previous segments of this review.

Department Position: We have accepted Mexinox's reported allocation of ISEs for these final results. Section 773(a)(7)(B) of the Tariff Act provides for a reduction of NV by the amount of ISEs incurred in the country in which NV is determined on sales of the foreign like product, but the statute does not outline a particular methodology in calculating ISEs. We find that Mexinox carries out all the selling activities associated with home market sales in Mexico. In comparison, Mexinox USA carries out all the selling functions and bears virtually all the expenses associated with administrative, accounting, logistical and other selling-related personnel in the United States. As stated above with respect to our LOT analysis, the record indicates that more selling functions are performed by Mexinox for sales in the home market than for U.S. sales sold through its affiliate, Mexinox USA. Therefore, it would be reasonable that expenses would reflect different figures for each market. Mexinox provided an itemized list of its indirect selling expenditures for both markets and upon comparing the selling expenses of each market, we find most selling functions correspond to home market sales. See Mexinox's Section B Questionnaire Response, dated November 8, 2005 (BQR) at Attachment B-18. We determine Mexinox USA's selling functions for sales to the United States are less numerous and less advanced than Mexinox's sales to its home market customers, the latter of which include advertising and promotions, handling material, vehicle insurance and vehicle expenses. We find Mexinox's distribution of ISEs between the two markets is reasonable and therefore have concluded that Mexinox performed fewer selling functions for its U.S. sales than it did in the home market. Based upon the foregoing, we have used Mexinox's allocation of ISEs in these final results which is consistent with all previous reviews, notably the most recent segment of this proceeding. See POR5 Final Results and accompanying Issues and Decision Memorandum at Comment 4.

Comment 6: U.S. Inventory Carrying Costs

Petitioners argue that certain inventory expenses related to specific U.S. sales (which include some of business proprietary nature) should be treated as direct selling expenses. Petitioners note that these sales are classified as U.S. consignment sales and involve merchandise produced to customer specifications and warehoused in the United States until the customer decides to release the merchandise. Petitioners argue that all costs incurred to warehouse subject merchandise, including such imputed carrying costs, should be treated as a direct U.S. selling expense. See Petitioners' Case Brief at 3. Citing to the Preamble of the Department's regulations, petitioners contend that, on the basis that these particular expenses relate to merchandise which has been made to the customer's order and "within its control," such expenses should be considered direct. See Petitioners' Case Brief at 4. Petitioners thereby urge the Department to reclassify U.S. inventory carrying costs related to these sales as direct selling expenses.

Respondent maintains that its U.S. inventory expenses are properly treated as indirect expenses and contends petitioners' argument should be rejected. Mexinox asserts that the merchandise at issue, whether stored at a Mexinox USA distribution center or on the customer's premises, always remains the property and inventory of Mexinox USA. Mexinox argues it bears the entire risk of loss until the merchandise is invoiced to the customer. Mexinox also highlights a similar channel of distribution of home market sales which are also made "through inventory" which Mexinox states reflect a similar pattern as the U.S. inventory expenses at issue. See Mexinox's Rebuttal Brief at 2. Mexinox asserts that home market sales "through inventory" are of inventory from San Luis Potosi, Mexico and stored at a remote warehouse or on the customer's premises. Therefore, Mexinox argues that if the Department decides to treat U.S. inventory carrying costs as direct expenses, then it would be obliged to also treat these home-market incurred inventory carrying costs as direct expenses for the sake of consistency. See Mexinox's Rebuttal Brief at 2.

Mexinox affirms it has demonstrated the indirect nature of these U.S. inventory carrying costs in question and that they be treated as such for these final results. Finally, Mexinox cites to Final Determination of Sales at Less Than Fair Value; Generic Cephalexin Capsules from Canada, 54 FR 26820 (June 26, 1989) whereby the Department upheld its practice of treating inventory carrying costs as indirect expenses.

Department Position: We find that these expenses of a proprietary nature were pre-sale expenses related to inventorying subject merchandise. As such, we consider them indirect expenses. Consistent with section 772(d) of the Tariff Act, 19 CFR 351.402(b) states, "the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale of an unaffiliated purchaser, no matter when or where paid. The Secretary will not make an adjustment for any expense that is related solely to the sale to an affiliated importer in the United States, although the Secretary may make an adjustment to NV for such expenses under section 773(a)(6)(C)(iii) of the Tariff Act." Whether Mexinox stores the merchandise in question at a distribution warehouse in the United States or on the customer's premises, we find that Mexinox holds possession of the merchandise until the time of invoicing. As such, we determine these expenses were incurred before the point of sale made to the first unaffiliated customer. We agree with Mexinox's claim that its home market distribution channel "sales through inventory," for which we have considered all home market inventory costs as indirect, follows an arrangement similar to the U.S. sales at issue. Our treatment of the associated U.S. inventory carrying costs as indirect expenses is consistent with previous reviews of this case and overall Department practice. See Micron Technology, Inc. v. United States, 243 F.3d 1301, 1314 (Fed. Cir. 2001).

Comment 7: General and Administrative Expenses

Petitioners claim that the Department understated the profit sharing expense it included in the numerator of Mexinox's general and administrative (G&A) expense rate calculation for the Preliminary Results. Petitioners point out that the profit sharing expense that the Department included in the G&A expense rate calculation reflected an adjustment that occurred after the POR and was not in the 2004 audited financial statements which were used to calculate Mexinox's G&A expense rate. Petitioners argue that accounting changes should be recognized when they occur, and that no adjustment should have been made to the 2004 profit sharing expense that the Department used in Mexinox's G&A expense rate calculation.

Mexinox contends that profit sharing is not a period expense to be included in its G&A expense rate because it is a statutory expense regulated by Mexican laws which is calculated as ten percent of adjusted taxable income. Mexinox asserts that profit sharing expense should be treated like a dividend distribution or an income tax payment, which is excluded from the calculation of cost of production (COP) or constructed value (CV). Mexinox states that the Department practice with regard to dividends and tax payments is to exclude them from the G&A expense rate calculation. See, Final Results of Antidumping Duty Administrative Review; Color Picture Tubes from Japan, 55 FR 37915, 37925 (September 14, 1990) and Final Determination, Rescission of Investigation and Partial Dismissal of Petition; High Information Content Flat Panel Displays and Display Glass Therefor from Japan, 56 FR 32376, 32392 (July 16, 1991). Mexinox continues that if the Department determines that employee profit sharing should be included in its G&A expense rate calculation the adjustment should be limited to only the current amount shown in footnote 14 of its 2004 financial statements.

Department Position: We determine that employee profit sharing was correctly included in the calculation of Mexinox's G&A expense rate calculation. Employee profit sharing is a benefit bestowed on the employees of the company. It is the Department's established practice to include this type of expense in the calculation of COP and CV. As stated in 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) "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..."

We find that employee profit sharing expense should not be treated like a dividend distribution or income tax payment. As outlined by the Department in the POR5 Final Results and accompanying Issues and Decision Memorandum at Comment 5 and Final Results of Antidumping Duty Administrative Review: Porcelain-on-Steel Cookware from Mexico, 61 FR 54616, 54620 (October 21, 1996), employee profit sharing expense is distinct from dividends in two respects. First, employee profit sharing payments are a legal obligation to a productive factor in the manufacturing process. Second, the right to participate in the employee profit sharing does not convey any ownership rights in Mexinox.

We find that the total employee profit sharing expense shown in Mexinox's 2004 financial statements should not be included in Mexinox's G&A expense rate calculation. As stated in Certain Softwood Lumber Products from Canada; Final Results of Antidumping Duty Administrative Review, 70 FR 73437 (December 12, 2005) and accompanying Issues and Decision Memorandum at Comment 8, the Department cannot ignore record evidence that significant facts changed subsequent to the period of investigation or review. The Department considers all the information on the record and makes decisions on a case by case basis using distinct information on the record of each particular case. There is evidence on the record to substantiate Mexinox's claim that the other amount of profit sharing expense for 2004 should be excluded for the reasons claimed. We cannot address the specifics of Mexinox's claim that only the current profit sharing expense should be included in the G&A expense rate calculation in this public forum, because Mexinox has claimed proprietary treatment for that information. Accordingly, we have addressed Mexinox's argument in the proprietary "Cost of Production and Constructed Value Calculation Adjustments for the Final Results - ThyssenKrupp Mexinox S.A. de C.V.," dated December 18, 2006. Therefore, the Department has included Mexinox's current employee profit sharing expense in the G&A expenses rate for the final results.

Comment 8: Financial Expense Calculation

Mexinox contends that the Department incorrectly adjusted its financial expense calculation for the Preliminary Results due to an error in the account title translation in its November 8, 2005, Section D Questionnaire Response. Mexinox now states that as a catch-all "other" account, the account in question may or may not include interest income on accounts receivable.

Mexinox claims that the Department added the entire miscellaneous net financial expenses when only a portion were finance-related expenses. Mexinox asserts that the gains and loss of securitized assets relate to specific sales transactions and not finance transactions because it did not securitize any accounts receivables during the POR.

Lastly, Mexinox takes issue with the way the Department adjusted the financial expense rate to exclude TKAG's packing expense. Mexinox contends that estimating TKAG's packing expenses based on Mexinox's experience is inaccurate because the consolidated entity TKAG is involved in a wide variety of activities and produces very different products from steel manufacturing. Thus, the packing cost in relation to total expenses may also vary from that of a steel manufacturer. Mexinox suggests that the Department apply the financial expense rate to a packing-inclusive COM.

Petitioners argue that the Department correctly adjusted Mexinox's financial expense ratio calculation for the Preliminary Results. Petitioners point out that Mexinox has made these same arguments in past reviews where the Department has adjusted Mexinox's financial expense calculation in the same manner. Petitioners state that Mexinox has provided no information to demonstrate that the claimed interest income is generated from the short-term investment of working capital. Also, petitioners contend that Mexinox attempts to confuse the gains and losses of securitized assets issue by stating that Mexinox did not securitize any accounts receivable during the POR. Petitioners state that the Department normally calculates the financial expense ratio based on the highest level of consolidation rather than at the respondent manufacturer's operating level. Therefore, Mexinox's claim that it did not factor receivables does not address whether other consolidated entities securitized accounts receivable during this period. Lastly, petitioners argue that Mexinox's claim that the Department's methodology to estimate TKAG's packing expenses inappropriately assumes similarity between Mexinox's packing and COGS figures and those of TKAG is simply results driven.

Department Position: We determine that the methodology used in the Preliminary Results for calculating Mexinox's financial expense is appropriate. While Mexinox provided a breakout of the accounts included in its claimed short-term interest income, it did not provide any information other than a description for the other interest income account. In its case brief, Mexinox provides a different translation for the account title and states that it "might (or might not) include interest penalty on accounts receivable." The initial description is the same description that Mexinox has provided in past reviews', therefore, the Department did not question it further. Given that it is the respondent's responsibility to substantiate the adjustments it claimed and Mexinox did not, the Department continued to exclude the other interest income for these final results. This is consistent with the Department's past practice and regulations. As stated in 19 CFR 351.104(b)(1) "{t}he 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 the particular adjustment. . ." See also Canned Pineapple Fruit from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 70948 (December 7, 2006) and accompanying Issues and Decision Memorandum at Comment 1. We therefore exclude interest income from accounts receivable because the Department accounts for this as a selling adjustment and it is not interest income from the short-term investment of working capital.

For the Preliminary Results, the Department adjusted Mexinox's financial expense calculation to include TKAG's miscellaneous net financial expenses. We disagree with Mexinox that the gains and losses from the disposal of securitized assets should be excluded from the miscellaneous net financial expense adjustment used in the numerator of the financial expense calculation. The Department's practice is to calculate the financial expense ratio using the financial statement at the highest level of consolidation. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to Length Carbon Quality Steel Plate Products from France, 64 FR 73143 (December 29, 1999) and accompanying Issues and Decision Memorandum at Comment 14; see also Certain Preserved Mushrooms from India: Final Results of Antidumping Duty Administrative Review, 68 FR 41303 (July 11, 2003) and accompanying Issues and Decision Memorandum at Comment 15. For purposes of this review, we have therefore used the financial expenses of parent company TKAG which represents the highest level of consolidation. Whether Mexinox itself factored receivables is irrelevant because other consolidated entities in the TKAG group did factor receivables. As discussed in the POR5 Final Results and accompanying Issues and Decision Memorandum at Comment 7, the Department considers selling the future cash flows of its receivables as another source of funding operations that is available to a company. Therefore, the gains and losses on the disposal of TKAG's securitized accounts receivables are appropriately considered financing activities.

Finally, regarding packing expenses, it is the Department's normal practice to exclude packing expenses from its financial expense rate calculation. As it has done in past reviews, 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 cost of sales denominator could not be isolated. As outlined in the POR5 Final Results and accompanying Issues and Decision Memorandum at Comment 7: "Consequently, we continue to maintain 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 of any quantification of TKAG's actual experience. We note that this methodology has been consistently applied in the past reviews under this order." See Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 69 FR 6259 (February 10, 2004) and accompanying Issues and Decision Memorandum at Comment 15. See also Stainless Steel Sheet and Strip in Coils from Germany; Final Results of Antidumping Duty Administrative Review, 69 FR 6262 (February 10, 2004) and accompanying Issues and Decision Memorandum at Comment 3. Therefore, the Department has continued to exclude packing expenses from the financial expense rate calculation for the final results.

Comment 9: Circumstance-of-Sale Adjustment

Mexinox maintains that although the Department properly granted a CEP offset pursuant to section 773 of the Tariff Act, it should not have limited the amount of the CEP offset to the amount of indirect selling and inventory carrying expenses deducted from CEP. Mexinox argues this amount, referred to as the "CEP offset cap," prevents the Department from making a fair comparison between the U.S. price and foreign market price. To ensure a fair comparison is made, Mexinox urges the Department grant a circumstance-of-sale adjustment for indirect selling and inventory carrying expenses beyond the CEP offset amount claiming that such an adjustment would account for differences affecting price comparability.

Mexinox argues that granting such an adjustment is in compliance with both the U.S. statute and international law. Citing to Article 2.4 of the World Trade Organization (WTO) Antidumping Agreement to which the United States is a party, "{d}ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." See Mexinox's Case Brief at 17, citing Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 2.4. Mexinox hereby infers the WTO does not limit the amount of the adjustments made to NV in establishing its comparability to the CEP.

Mexinox also maintains the U.S. statute does not restrict a circumstance-of-sale adjustment in this case, claiming such an adjustment is permitted under section 773(a)(6)(C)(iii) of the Tariff Act. Citing the statute, Mexinox claims part of NV "shall be increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and {NV} (other than a difference for which allowance is otherwise provided under this section that is established to the satisfaction of the administering authority to be wholly or partly due to . . . differences in the circumstances of sale." See Mexinox's Case Brief at 18, citing section 773 of the Tariff Act. In support of this, Mexinox refers to the CIT case, Budd Co., Wheel & Brake Div. v. United States 746 F. Supp. 1093, 1100 (CIT 1990) (Budd Co.), where the Department applied a circumstance-of-sale adjustment to NV in accounting for distortions caused by hyperinflation in Brazil's economy which occurred between the date of sale and date of shipment. Mexinox claims the CIT determined a circumstance-of-sale adjustment was necessary to enable a fair comparison. Mexinox argues that under U.S. law, the Department's most important obligation is to establish comparability between the U.S. price and NV, and as a result should use the circumstance-of-sale provision to ensure a fair price comparison is made.

Mexinox acknowledges that the Department often limits such circumstance-of-sale adjustments to direct expenses; however, as the Department argued in Budd Co., it is not required to limit circumstance-of-sale adjustments only to direct expenses. Further, Mexinox highlights the Department's previous decision on this matter in POR5 Final Results where it did not find "significant differences between markets to warrant such an adjustment." See Mexinox's Case Brief at 20. Mexinox states its demonstration of fundamental differences in the level of trade and associated selling activities and expenses are the foundation upon which the Department has granted Mexinox a CEP offset. Therefore, Mexinox claims it is necessary and appropriate for the Department to provide an additional circumstance-of-sale adjustment to NV above the amount of the CEP offset cap.

Petitioners assert that a circumstance-of-sale adjustment is not warranted for the alleged differences in ISEs. They maintain the Department has consistently disagreed with Mexinox on this issue in previous reviews, specifically POR5 Final Results, and urge the Department once again to reject Mexinox's argument. Petitioners cite to the description of CEP offset as stated in section 773 of the Tariff Act, arguing the cap is a statutory requirement that should not be ignored simply because Mexinox contends it prevents the Department from making a fair comparison. Petitioners argue that while Mexinox cites to section 773(a)(6)(C)(iii) of the Tariff Act, Mexinox ignores section 773(a)(7) of the Tariff Act which addresses "additional adjustments" with respect to LOT and the CEP offset. Petitioners maintain that if there were no limits to the adjusting ISEs, "additional adjustments" would not be detailed by the statute in terms of LOT and the CEP offset. See Petitioners' Rebuttal Brief at 5.

With regards to restricting circumstance-of-sale adjustments to direct selling expenses, petitioners urge the Department to uphold its established practice under 19 CFR 351.410(b) and limit circumstance-of-sale adjustments to direct selling expenses. See Petitioners' Rebuttal Brief at 6. Petitioners therefore urge the Department to reject Mexinox's argument for a circumstance-of-sale adjustment to alleged ISE differences.

Department Position: We disagree with Mexinox. Section 773(a)(7)(B) of the Tariff Act establishes that, in making the CEP offset adjustment, the Department will reduce NV "by the amount of indirect selling expenses incurred in the country in which {NV} is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 772(d)(1)(D)." See also 19 CFR 351.412(f)(2). This represents a specific statutory and regulatory limitation on the Department's authority to make adjustments for differences in ISEs, a limitation that is not overridden by the general authority in section 773(a)(6)(C)(iii) of the Tariff Act to make adjustments for differences in circumstances of sale, as Mexinox suggests.

Moreover, 19 CFR 351.410(b) supports our conclusion that section 773(a)(6)(C)(iii) of the Tariff Act cannot be used to circumvent the specific statutory and regulatory limitation with respect to adjustments for differences in ISEs. The Department's regulations at 19 CFR 351.410(b) indicate that adjustments for differences in circumstances of sale under section 773(a)(6)(C)(iii) of the Tariff Act will not be made for anything other than direct selling expenses, assumed expenses, and certain commissions. Specifically, 19 CFR 351.410(b) states that, "with the exception of the allowance described in paragraph (e) of this section concerning commissions paid only in one market, the Secretary will make circumstances of sale adjustments under section 773(a)(6)(C)(iii) of the Tariff Act only for direct selling expenses and assumed expenses."

As defined in 19 CFR 351.410(c), direct selling expenses consist of expenses "such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question." In turn, 19 CFR 351.410(d) defines assumed expenses as "selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses." The Department is treating all other selling expenses as indirect expenses unless Mexinox has established that the expense in question is direct in nature. ISEs and inventory carrying costs are, by their very nature, indirect expenses; they are incurred regardless of whether a sale is made.

The Department's determination in Budd Co. is inapposite because in this case Mexico did not experience hyperinflation over the POR. However, in conjunction with decisions reached in Budd Co., the Department maintains that the use of circumstance-of-sale adjustments should not be used to achieve unfair results. See Budd Co., 746 F. Supp. at 1100. Based on information on the record and in accordance with 19 CFR 351.410, we find Mexinox has not reasonably demonstrated any significant differences between markets to warrant such an adjustment in this review. U.S. law, as implemented through the URAA, is fully consistent with WTO obligations. See SAA at 669. For these final results, we therefore have not made an additional circumstance-of-sale adjustment to NV with respect to ISEs beyond the amount of the CEP offset cap.

Comment 10: Offsetting for U.S. Sales that Exceed Normal Value

Mexinox argues the Department should not have assigned a zero dumping margin for sales to the United States made at or above NV. Mexinox maintains there is no provision in the U.S. statute which requires zeroing and argues that in Timken Co. v. United States, 354 F.3d 1334, 1340-42 (Fed. Cir. 2004) (Timken), the Federal Circuit explicitly stated the statute does not require the Department to assign a margin of zero to non-dumped sales. Mexinox holds that in Timken, the Federal Circuit disagreed that the word "exceeds" (as used in the statutory definition of "dumping margin" in section 771 of the Tariff Act) limited the definition of "dumping margin" to positive numbers. See Mexinox's Case Brief at 23. Mexinox claims the Department has adopted the practice of setting negative margins to zero as a matter of interpretive gap-filling and is obligated to exercise its gap-filling authority in a manner that is consistent with international law.

Mexinox maintains the Department's interpretation of the statute, to the extent it is reasonable, is generally given deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984) (Chevron). However, Mexinox argues, when the Department's interpretation is inconsistent with U.S. international obligations, such deference is inappropriate. Mexinox avers that Hyundai Electronics Co., Ltd. v. United States, 53 F. Supp. 2d 1334 (CIT 1999) (Hyundai Electronics) is instructive on this point. In Hyundai Electronics, Mexinox notes, the CIT contemplated a revocation standard promulgated by the Department that had been rejected by a WTO panel. Mexinox asserts that while the CIT eventually found it was possible to reconcile the Department's revocation standard with the WTO Antidumping Agreement, the CIT stressed that Chevron and Alexander Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64, 118 (1804) (Charming Betsy) must be applied in concert when the latter is implicated. See Mexinox's Case Brief at 24 and 25, citing Hyundai Electronics, 53 F. Supp. 2d at 1344.

Mexinox asserts the same analysis must be applied in this case. Since the statute is silent with respect to setting negative margins to zero and the Department has adopted this practice as an interpretation of the statute, Mexinox claims, the relevant question is whether the Department's interpretation is compatible with the WTO Antidumping Agreement. Mexinox contends the recent WTO Appellate Body's decision in United States - Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/AB/R (April 18, 2006) (US-Zeroing (EC)) states the Department's practice of zeroing "overall" margins of dumping violates Article 9.3 of the WTO Antidumping Agreement and Article VI:2 of the GATT 1994. See Mexinox's Case Brief at 25 and 26. Mexinox maintains US-Zeroing (EC) specifically ruled on the zeroing methodology as applied by the United States in administrative reviews and urges the Department not to ignore its WTO obligations in this case. Furthermore, Mexinox argues, under the Charming Betsy doctrine, the U.S. antidumping statute must, to the extent possible, be interpreted in a manner consistent with the WTO Antidumping Agreement and any interpretation of the antidumping statute which permits zeroing is therefore prohibited as a matter of U.S. law.

Petitioners argue the Department should once again reject Mexinox's arguments concerning the Department's methodology of assigning a margin of zero to non-dumped sales as it has in every segment of this proceeding. Petitioners assert US-Zeroing (EC) was based on "as-applied" findings with respect to the use of zeroing in the context of 16 administrative reviews of certain products from the European Union and only applies to the particular proceedings at issue. As such, petitioners maintain US-Zeroing (EC) does not affect this proceeding. Petitioners assert, however, that even with respect to those reviews at issue, the United States and the European Union agreed to a "reasonable time" of until April 9, 2007 for the United States to implement the Appellate Body's recommendations. See Petitioners' Rebuttal Brief at 8. In light of that, petitioners note the United States' obligation is merely to take action which renders the challenged decisions "not inconsistent with" the Appellate Body's decision.

Petitioners add the issue of zeroing will ultimately be resolved through further negotiations within the WTO, highlighting that US-Zeroing (EC) has negative implications for interpreting and applying the WTO Antidumping Agreement outside the particular context of the United States' practice in administrative reviews. Referring to communications filed by the United States with the WTO in response to US-Zeroing (EC), petitioners argue certain methodologies as authorized by Article 2.4.2 of the WTO Antidumping Agreement would be nullified without zeroing, and therefore petitioners suggest the WTO may have to re-examine its position on zeroing.

Furthermore, petitioners refer to court decisions which have consistently upheld the Department's practice of zeroing despite WTO rulings that zeroing in various applications is contrary to the WTO Antidumping Agreement. Specifically, petitioners cite Timken at 354 F3d. at 1334, 1342-1343 in which the U.S. Court of Appeals for the Federal Circuit upheld previous CIT decisions (including the pre-URAA cases of Serampore Industries PVT. Ltd. v. United States, 675 F. Supp. 1353 (CIT 1987) and Bowe Passat Reinigungs- und Waschereitechnik Gmbh v. United States, 926 F. Supp. 1138 (CIT 1986)) which found the Department's zeroing policy reasonable and in accordance with law. See Petitioners' Rebuttal Brief at 9. Petitioners also highlight the CIT's most recent position on this issue in Corus Staal BV v. United States, Slip Op. 06-112 at 6 (CIT 2006) (citing Corus Staal BV v. United States, 387 F. Supp. 2d 1291, 1298 (CIT 2005), aff'd, Slip Op. 05-1600, 2006 U.S. App. LEXIS 15022 (Federal Circuit June 13, 2006)), in which the CIT rejected the suggestion that recent WTO decisions required the Department to abandon its practice of zeroing, stating "the Federal Circuit {in Timken} has 1) expressly affirmed the reasonableness of Commerce's use of zeroing in an antidumping administrative review, and . . . 2) conclude{d} that WTO decisions are not binding on the U.S. and cannot trump domestic legislation." See Petitioners' Rebuttal Brief at 10.

Petitioners claim the Department's responsibility is to interpret the statute, which often requires the Department to fill gaps Congress has either intentionally or inadvertently left in the statute. 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 (Fed. Cir. 1983) whereby "the Secretary has broad discretion in executing the {antidumping} law." Petitioners also assert that under 19 U.S.C. section 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.

Department Position: Section 771(35)(A) of the Tariff Act defines "dumping margin" as the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise." (Emphasis added). The Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than the EP or CEP. As no dumping margins exist with respect to sales where NV is equal to or less than export or constructed export price, 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 held that this is a reasonable interpretation of the statute. See Timken, 354 F. 3d at 1342; Koyo Seiko Co. v. United States, 543 U.S. 976 (2004); Corus Staal BV v. Department of Commerce, 395 F. 3d 1343, 1347,(Fed. Cir. 2005) cert. denied, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006).

Mexinox's reliance of the WTO settlement report in US – Zeroing (EC) is misplaced. In US – Zeroing (EC), the United States has not yet gone through the statutorily mandated process of determining whether or how to implement the report. See 19 U.S.C. 3533 and 3538. As such, the Appellate Body's report in US – Zeroing (EC) does not have any bearing on whether the Department's denial of offsets in this administrative determination is consistent with U.S. law. See Corus Staal Fed. Cir. 2005, 395 F. 3d at 1347-49; Timken 354 F. 3d at 1342. Accordingly, the Department will continue in this case to deny offsets to dumping based on export transactions that exceed NV.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting the margin calculation accordingly. If these recommendations are accepted, we will publish the final results of the review and the final weighted-average dumping margin for Mexinox in the Federal Register.

AGREE _______ DISAGREE _______

____
David M. Spooner
Assistant Secretary
for Import Administration

____
Date